

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

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Appeal from Oconee County

AUG 28 2019

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R. Lawton McIntosh, Circuit Court Judge

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

STEVEN DEONTAE HOOVER,

APPELLANT

APPELLATE CASE NO. 2018-002040

\_\_\_\_\_  
INITIAL BRIEF OF APPELLANT  
\_\_\_\_\_

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred in refusing to give an adverse inference instruction with regard to spoliation of evidence when the state deliberately failed to preserve video evidence of the incident which may have been favorable to Appellant?

## STATEMENT OF THE CASE

Appellant was indicted for shoplifting less than \$2,000, enhancement under S.C. Code §16-1-57, by the Oconee County grand jury. R. \*. Appellant's jury trial was held before the Honorable R. Lawton McIntosh on November 7, 2018. Tr. 1.

Appellant was represented by Suzanne Earle and the state was represented by Brian Livingston. Tr. 1. The jury found Appellant guilty as charged and he was sentenced to ten years imprisonment suspended upon the service of seven years followed by five years of probation.

This appeal follows.

## ARGUMENT

The trial court erred in refusing to give an adverse inference instruction with regard to spoliation of evidence because the state deliberately failed to preserve video evidence of the incident which may have been favorable to Appellant.

### **Standard of Review**

“In criminal cases, the appellate court sits to review errors of law only.” State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 619, 621 (Ct. App. 2008). “Thus, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous.” State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

### **Relevant Facts**

Appellant was confronted by Josh Haney, a loss prevention officer, at Walmart on February 10, 2017. Tr. 80, l. 18 – 83, l. 7. Appellant was accused of attempting to leave Walmart with merchandise that he had not paid for. Tr. 80, l. 18 – 83, l. 7. Haney asked Appellant to come to the loss prevention room to talk, and Appellant complied. Tr. 83, ll. 8 – 11. Haney contacted law enforcement to come to the scene to assist. Tr. 85, ll. 4 – 10.

Appellant told Haney and the officer that he purchased the item, which was a grill, from a different Walmart three months earlier. Tr. 85, l. 23 – 86, l. 3; tr. 97, l. 20 – 98, l. 12. Appellant then told them that he tried to return the grill to the Oconee County Walmart where Haney worked and was unable to complete the return because he did not have his ID. Tr. 86, ll. 6 – 16; tr. 97, l. 20 – 98, l. 12. Appellant said he was told by someone in customer service to leave the grill with them and he could come back the following day with his ID, get a new grill off the shelf, and then bring it to the customer service desk to complete the return. Tr. 84, ll. 16 – 24; tr. 97, l. 20 – 98, l. 12.

Appellant then stated that he was “covering for Billy” who he described as an “elderly white gentleman.” Tr. 99, ll. 17 – 100, l. 10. After Appellant made this statement he was arrested for shoplifting based on the incident. Tr. 100, ll. 6 – 10.

Haney testified at trial that he observed Appellant enter the store without anything in his cart, place merchandise from a shelf in his cart and then take it to the customer service desk to attempt a return. Tr. 88, ll. 9 – 20. Haney admitted that he did not observe Appellant in person but rather through Walmart’s video surveillance. Tr. 88, ll. 9 – 20.

Haney did not request a copy of the video footage even though he knew Appellant was being arrested. Tr. 89, ll. 2 – 10. The video footage on the Walmart security cameras would generally only be preserved for sixty days. Tr. 91, ll. 13 – 24. Officer James Earle, the arresting officer in this case, also testified at trial that he did not ask Walmart to make a copy of the video of the incident and therefore, the video footage from the incident was not preserved and unavailable at trial. Tr. 100, ll. 15 – 24.

At the close of trial, defense counsel requested the court to give an adverse inference instruction to the jury based on the state’s failure to preserve the video of the incident for trial. Tr. 120, ll. 9 – 13; R. \* (Court’s Ex. 2). Specifically, counsel requested the following instruction:

In this case there are allegations of spoliation or destruction of evidence. The State not only has the burden of proof of guilt but it also has the burden of producing evidence which could establish the innocence of the defendant.

When evidence is lost or destroyed by a party, you may infer that the evidence which was lost or destroyed by that party would have been adverse to that party. If you find first that evidence was spoiled or destroyed and, if you further find that the evidence could help establish the innocence of the defendant, you then may consider those facts in deciding whether or not the State has met its

burden of proof beyond a reasonable doubt on each and every element of the offense charged.

R. \*(Court's Ex. 2) (citing State v. Reaves, 414 S.C. 118, 777 S.E.2d 213 (2015)). Counsel argued that the state failed to produce evidence that was only available to it and it may have shown something that contradicted what Haney and Earle testified to. Tr. 120, l. 14 – 121, l. 6.

The court denied Appellant's request for the adverse inference instruction ruling that Earle testified that he did not get a copy of the video because "[Appellant] admitted it and so [he] didn't need it." Tr. 121, ll. 7 – 14. The trial court further ruled that because the video footage at Walmart was not destroyed for sixty days that the video was equally accessible to Appellant through subpoena. Tr. 121, ll. 15 – 22.

### **Discussion**

The Fourteenth Amendment to the United States Constitution guarantees a defendant the right to a fair trial. U.S. Const. Amend. XIV. This has been interpreted by the Supreme Court of the United States to "require that criminal defendants be afforded a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485 (1984). This right includes a right to access evidence. Id. In Arizona v. Youngblood, 488 U.S. 51 (1988) the Supreme Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Youngblood, 488 U.S. at 58.

In order for a defendant to establish a due process violation on the basis of lost or destroyed evidence he must demonstrate the following: "(1) that the state destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001).

In this case, the state's failure to preserve the Walmart security video was in bad faith. Both Haney and Earle knew that Appellant was going to be arrested for shoplifting and that the video showed the conduct in question. Although Earle testified that the video was not necessary because "[Appellant] admitted to what he did," this was a misleading characterization of Appellant's statements. Tr. 100, ll. 17 – 24; State's Ex. 1, part 2 at 10:00.

Appellant did not admit to shoplifting but only said that he was "covering for Billy." State's Ex. 1, part 2 at 10:00. However, immediately after this vague statement, Appellant went back to denying criminal liability for the shoplifting. State's Ex. 1, part 2 at 11:00. Because Appellant's conduct was in dispute and Earle and Haney were both aware that Appellant was disputing the allegations, their failure to preserve a copy of the security video was in bad faith. The state's failure to preserve the video resulted in Appellant not being able to present a complete defense and therefore an adverse inference instruction was warranted.

The trial court erred by refusing to charge the jury Appellant's requested adverse inference instruction. Therefore, Appellant's conviction should be reversed and this case remanded for a new trial. See State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001).

**CONCLUSION**

By reason of the foregoing argument, Appellant's conviction should be reversed, and this case remanded to the Oconee County Court of General Sessions for a new trial.



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Adam Sinclair Ruffin  
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of August, 2019.

STATE OF SOUTH CAROLINA  
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Steven Deontae Hoover, 296309, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 28th day of August, 2019.



Adam Sinclair Ruffin  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 28th day of August, 2019.

 (L.S)  
Notary Public for South Carolina

My Commission Expires: September 27, 2028.

