

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO YORK COUNTY
In the Court of Common Pleas
Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No.2017-002632

Travis Hines Petitioner,

vs

The State Respondent.

REPLY BRIEF

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Index

Table of Authorities	ii
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Argument:

Question I: Did the Post Conviction Relief Judge err in failing to find that the sentencing judge failed to establish that Travis Hines was adequately informed of the dangers of self representation and the advantages of having an attorney represent him at the time of the plea hearing when the record established that such issues were only dealt with in a pro forma fashion?	1
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Question II: Did the Post Conviction Relief Judge err in failing to find the State committed misconduct when Travis Hines was required to plea without having the opportunity to review the video and did not obtain from the plea judge a waiver to his right to review the video?	2
---	---

Conclusion	5
------------------	---

Table of Authorities

Cases:

Page:

<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	2, 3
<i>Carnley v. Cochran</i> , 369 U.S. 506 (1962)	2
<i>Hyman v. State</i> , 397 S.C. 35, 723 S.E.2d 375 (2012)	3
<i>Osbey v. State</i> , 425 S.C. 615, 825 S.E.2d 48 (2019)	1
<i>State v. Cash</i> , 309 S.C. 40, 419 S.E. 2d 811 (Ct. App. 1992)	2

Rules:

Rule 5 of the South Carolina Rules of Criminal Procedure	3
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Argument

Question I

Did the Post Conviction Relief Judge err in failing to find that the Sentencing Judge failed to establish that Travis Hines was adequately informed of the dangers of self representation and the advantages of having an attorney represent him at the time of the plea hearing when the record established that such issues were only dealt with in a *pro forma* fashion?

The State argues that “Petitioner was adequately informed by two separate judges of the dangers of proceeding *pro se* and Petitioner knowingly and intelligently waived his right to counsel.” Br. of Resp. at 6. As noted in the Opening Brief, Mr. Hines told Judge Hall he was going to hire an attorney. Judge Hall never discussed the dangers of self representation with Mr. Hines. After being told by the State that Mr. Hines understood the proceedings, Judge Hayes did not conduct a detailed discussion of self representation.

The State attempts to distinguish *Osbey v. State*, 425 S.C. 615, 825 S.E.2d 48 (2019) on the ground that Mr. Osbey never had an attorney and Mr. Hines had the services of two attorneys. This is a distinction without a difference. The issue in this case was whether Mr. Hines was adequately warned of the dangers of self representation. The issue is not did he know of his right to have an attorney. Knowing one has the right to counsel is not the same as knowing the dangers of self representation. Neither attorney testified they advised Mr. Hines of the dangers of self representation. This Court cannot assume, based on a silent record, that either attorney explained to Mr. Hines the dangers of self representation. “Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence

which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.” *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

The State has also contended that Mr. Hines “[W]as aware of the possible defenses he could raise at trial.” Br. of Resp. at 10. The record in this case does not show Mr. Hines was aware of any defenses as the subject of defenses is virtually non-existent in the record. In addition, as neither Mr. Hines nor Mr. Welborn had seen the entire video, neither would be in a position to say whether there were defenses available to Mr. Hines based upon a review of all the discovery.

The State has cited *State v. Cash*, 309 S.C. 40, 419 S.E. 2d 811 (Ct. App. 1992) for the proposition that Mr. Hines was intelligent enough and experienced enough to understand the dangers of self representation. An important difference between *Cash* and this case is the Court in *Cash* stated, “His testimony at the remand hearing demonstrates he believed he could do a better job of preparing his defense than the public defender could.” *Id.* at 44, 419 S.E.2d at 814. No such testimony exists in this case. In fact nothing in this record even suggests that Mr. Hines ever wanted to proceed in any fashion other than with an attorney, until the day of the plea.

Question II

Did the Post Conviction Relief Judge err in failing to find the State committed misconduct when Travis Hines was required to plea without having the opportunity to review the video and did not obtain from the plea judge a waiver to his right to review the video?

In discussing this issue, the State has set up the strawman of a violation of *Brady v.*

Maryland, 373 U.S. 83 (1963). In the opening brief, *Brady* or any similar case is not cited. No attorney who has ever represented Travis Hines knows if a violation of *Brady* has occurred. The reason for this statement is that no attorney who has ever represented Mr. Hines has ever seen the complete video of the alleged drug deal. The second argument in this petition is the failure of the State to comply with its basic obligation under Rule 5 of the South Carolina Rules of Criminal Procedure.

This case is not controlled by *Hyman v. State*, 397 S.C. 35, 723 S.E.2d 375 (2012). First, unlike this case, Mr. Hyman was represented by an attorney through the guilty plea. Second, the attorney for Mr. Hyman had seen the entire video. He saw the entire video before the plea offer expired. The Court found that the defense counsel testified the video “‘clearly’ depicted Petitioner engaged in a drug transaction.” *Id.* at 40, 397 S.E.2d at 377. Further, the Post Conviction Relief judge in *Hyman* found that Mr. Hyman had told his attorney that “he wanted her to watch the video tape.” *Id.* As the Post Conviction Relief judge found Mr. Hyman got what he asked for in having his lawyer review the tape and the entire video was seen in the manner requested by Mr. Hyman prior to the expiration of the original plea offer, there was no ineffective assistance of counsel.

The State in its brief notes that Christopher Welborn “testified the discovery included still photos from the CI drug buy.” Br. of Resp at 15. The State has contended that “Newkirk complied with Brady and the holding in *Hyman* in providing that information to Welborn at that time.” *Id.* The fact is undisputed that Mr. Welborn never had the opportunity to review the entire video. The entire video is part of the discovery in this case. The State simply cannot claim they complied with Rule 5 and *Hyman* when all the discovery which would have been introduced at

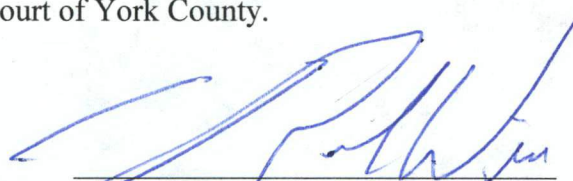
trial was never shown to either Mr. Welborn or Mr. Hines. No principle of law permits the State to decline to turn over all the evidence in a case. And the State has cited no such authority.

Here, as noted in the opening brief, Mr. Welborn was not allowed to see the entire video. He saw only that portion which the State elected to show him. Only the State knows what is on the rest of the video. Prosecutorial misconduct was committed when the solicitor refused to let the counsel he did retain view the entire tape. One can assume the State did not let Mr. Welborn look at the entire tape for a reason. That reason remains unknown.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the opening brief, this Court should reverse the decision of the Post Conviction Relief judge, reverse the conviction of Travis Hines and remand the matter to the General Session Court of York County.

December 16, 2019



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