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Jan 26 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Travis Hines, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002632

ON WRIT OF CERTIORARI
Appeal From York County

Opinion No. 5877

Heard April 13, 2021 – Filed December 8, 2021

Reply to Return for Rehearing

In his Brief to this Court and in the Petition for Rehearing, Travis Hines has constantly stated this case is not about a violation of *Brady v. Maryland,* 373 U.S. 83 (1963). As was stated in his rehearing petition, "Mr. Hines has never argued the failure to permit him to watch the video violated *Brady*." In the Reply Brief before this Court, Mr. Hines stated, "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." As a result of these two statements, counsel for Mr. Hines is at a total loss to understand why the State argues this case is about a *Brady* violation. Now, in its return to the Petition for Rehearing, the State established strawman,

has risen his matted head of silage in an attempt to refute that which was never argued. So, Mr. Hines, again, has to assert this case is not about *Brady* and never has been about *Brady*. Mr. Hines, not being clairvoyant, is unable to say what is in the video that he has not seen.

This case is about Rule 5 of the South Carolina Rules of Criminal Procedures and its requirement that the State produce, prior to trial or plea, tangible objects, in this case the video of the alleged sale, pursuant to section (C) of the Rule. Under no theory has the State provided to Mr. Hines, as the defendant, the video of the alleged drug sale as required by the Rule. Rule 5(C) specifically states, "Upon the request of the defendant the prosecution shall permit the *defendant* to inspect and copy. . . ."(emphasis added). The record in this case is devoid of any evidence Mr. Hines saw the video.

The State in its return has not argued Mr. Hines saw the video. They do argue that Christopher Wellborn, watching what the state determined to be the "relevant portions" of the video, complies with Rule 5. App. at 39, ll 5-8. Mr. Wellborn's viewing of the portion of the video the State deems relevant is not and never will be, complying with the rule without some order from a judge. The State alleges in its Return, "[T]he record is clear that Mr. Wellborn was allowed to view the entire video of the controlled buy." Ret. at 2. Mr. Wellborn's testimony, as noted above, is contrary to this statement.

The State has also argued, "Despite Petition's assertion, he has failed to present any evidence to suggest that Mr. Wellborn was not allowed to view the entire video." Ret. at 3. This statement is contradicted by Mr. Wellborn's testimony. Mr. Wellborn stated, "I received an email from Mr. Newkirk saying pursuant to our conversation this week I'll prepare *relevant portions* of the video for you to watch on Tuesday November 17th." App. at 39, ll 6-8. (Emphasis

added) No one should ever claim "relevant portions" means the entire video. Mr. Wellborn stated, "Allegedly they were searched." App. at 40, l 18. This shows Mr. Wellborn did not see a video of them being searched. This also establishes there was apparently more than one informant.

The State has raised the issue of a copy of the video not being provided to the Court for review. Counsel for Mr. Hines, neither Mr. Wellborn nor present counsel, have ever had a copy of the video to provide to this court. But again, this case is not about whether the video contains exculpatory or inculpatory evidence. The case is about whether Mr. Hines, as the defendant, was deprived of this opportunity to review the evidence as required by Rule 5(C). He has not.

The State has also argued, "Petitioner merely speculates that the State edited the video to remove favorable evidence prior to Mr. Wellborn's review of the video." Ret. at 4. Never, at the hearing below, in the Petition for writ of certiorari, in the briefs filed after certiorari was granted, at oral argument or in his Petition for Rehearing, has Mr. Hines ever argued the tape was edited to remove favorable evidence. Again, as Mr. Hines has never seen the tape he would not be in the position to even make such an argument. This "edited" argument is just another strawman created by the State to divert attention from the failure of the State to comply with the clear mandate of Rule 5(C).

The Sate's argument as to *Hyman v. State*, 397 S.C. 35, 723 S.E.2d 375 (2012) reflects a very selective reading of the case. In *Hyman,* the Court said:

> [D]efense counsel testified that her notes from conversations with Petitioner during this time reveal that she spoke to Petitioner on August 9, 2007, and again on September 7, 2007, and during both conversations, Petitioner stated he wanted her to watch the videotape. Consequently, defense

> counsel testified, she watched the videotape on September 14, 2007, and testified the videotape "clearly" depicted Petitioner engaged in a drug transaction. *Id.* at 40, 723 S.E.2d at 377(emphasis in original)

In the present case, Mr. Hines wanted to personally watch the video. Under Rules 5 (C) he was entitled to watch the video. The *Hyman* Court further noted, "[T]he PCR judge found defense counsel more credible than Petitioner." *Id.* at 41, 723 S.E.2d at 378. The PCR judge, in *Hyman*, determined that Mr. Hyman got exactly what he wanted – for his trial counsel to view the video. That fact alone makes this case distinguishable from *Hyman.* Noting in *Hyman* suggests that Mr. Hyman's trial counsel saw less then the entire video. In addition, Mr. Wellborn did not testify the video clearly showed Mr. Hines conducting a drug transaction. As *Hyman* is factually very different, the State incorrectly argues this Court did not err in following *Hyman.* Following *Hyman* was error.

The State has claimed, "As an initial matter, Petitioner has failed to establish how the State withheld any evidence it was required to disclose." Ret. at 6. The State in every criminal case is required to disclose the videos of a defendant involved in an alleged drug transaction. Rule 5(C) further requires that the video be disclosed to the defendant and not just his counsel. When the video is not disclosed to the defendant as required by the rule, then full disclosure has not been made. Those are the facts of this case.

The State has also said, "Petitioner pursued Assistant Solicitor Newkirk and entered into plea negotiations immediately following the hearing to relieve Mr. Wellborn." Ret. at 7. The record does not support this claim. Mr. Newkirk ordered Mr. Hines to return to court the next day. App. 25, ll 1-2. Being told by the solicitor to return to court is not pursuing the solicitor.

The State further argues, "Petitioner's actions show he was focused on pleading guilty and receiving the best possible plea deal before the State's offer expired, Petitioner cannot show he would have proceeded to trial if he were allowed to view a copy of the video prior to pleading guilty. Ret. at 8. When Mr. Hines entered the plea he knew he would not be able to see the video. He may have made the same decision or he may have made a different one if he had seen the video. The answer to this question is unknown as he never had the opportunity to see the video.

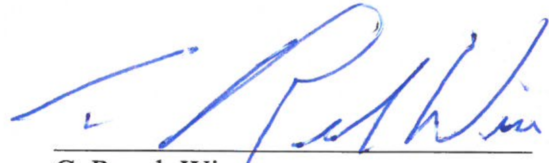
To argue that Mr. Wellborn "shared or discussed all the evidence he received with Petitioner," (Ret. at 10) is disingenuous to the basic question here – did the State comply with Rule 5? Sharing what is received is not the same as the State supplying all the evidence they are required to supply to the defendant and his counsel.

The fact that Mr. Hines had two or even more attorneys does not solve the question of whether he was warned and understood the dangers of self representation. Nor does it say he freely waived his right to counsel at the plea. 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. Hine 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. Simply telling a defendant, "Its dangerous for you to proceed without an attorney since you're not one and there is a benefit in having an attorney represent you." (App, at 102, ll 9-13) could hardly be considered a waning to a defendant as to the dangers of self representation.

As mentioned in the briefs, the State knew the background to the plea. The State knew Mr. Hines wanted to see the video. If the state had simply urged the plea judge to ask about the discovery issues, this case would not be on appeal on this issue. The warnings given were inadequate to inform Mr. Hines of the dangers of self representation.

For the forgoing reasons and for the reason set forth in the Petition for Rehearing, this Court should rehear this matter and reverse the conviction and sentence of Travis Hines.

January 26, 2022



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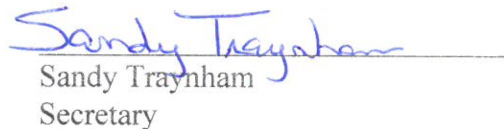
CERTIFICATE OF SERVICE

I, Sandy Traynham, hereby Certify that I am the Secretary for Attorney for the Petitioner in the above entitled case. That on January 26, 2022, I did send via e-mail, a copy of the Petition for Rehearing to Michael michaelneubauer@scag.gov at the South Carolina Attorney General Office.

January 26, 2022



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Re: Travis Hines vs. State of South Carolina, Appellate Case No. 2017-002632

Dear Ms. Kitchings:

I am enclosing herewith for filing the Reply to Return for Rehearing together with the Certificate of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt
Enclosure

cc Michael Jacob Neubauer