

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

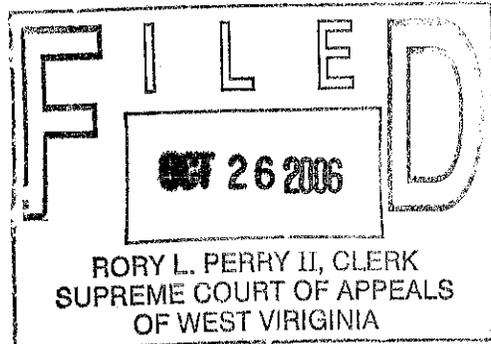
STATE OF WEST VIRGINIA,
Appellee,

v.

Supreme Court No. 33171

Circuit Court No. 92-F-73
(Kanawha)

JULIAN RUDOLPH SMITH,
Appellant/Defendant Below.



BRIEF OF THE APPELLANT

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Pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, Appellant/Defendant Below, Julian Rudolf Smith (hereinafter 'Smith') files the instant brief in support of his appeal from the January 21, 1993 Order of the Circuit Court of Kanawha County, West Virginia.

Smith further hereby adopts and incorporates by reference all material contained in his Petition for Appeal previously filed with this Court.

Proceedings And Rulings Below

During the early morning hours of August 24, 1991, Smith was questioned about a robbery that occurred at the Taco Bell in South Charleston. A man later identified as Harold Jones had been found sitting in a car rented by Smith's uncle near Taco Bell while two masked men entered the establishment and ordered all the employees, except the manager, into the freezer. Then, the manager, Beverly Pauley, opened the safe where the money was kept and the two masked men took it and fled the scene.

Ultimately, Smith, Harold Jones, Freeman Caffee and Beverly Pauley were named as co-defendants in an indictment for aggravated robbery.

Harold Jones, a co-defendant who was not listed on the State's witness list, testified for the State during its rebuttal case. At the time Jones was called to testify the State provided defense counsel with a copy of a statement made by Jones about the night of the incident. In his statement, Jones explained that he had been drinking with Smith earlier that night, but had taken him home and pulled over to sleep off the affects of the alcohol near the Taco Bell in South Charleston. This was in direct conflict with the testimony he provided at Smith's trial where he indicated Smith had participated in the robbery and was the one who had obtained the gun used.

When defense counsel was provided with Jones' prior statement, he objected and moved for a mistrial because the State failed to provide the defense with exculpatory information. That motion was denied.

Upon Smith's conviction, he was never advised of his right to appeal. Therefore, on June 24, 2004, Smith filed a pro se Writ of Habeas Corpus alleging four claims. On April 4, 2005, the circuit court issued an order summarily dismissing three of the four claims, and ordering the State to respond to the issue of a denial of an appeal. On May 9, 2005, the State responded to Smith's pro se habeas admitting that he was not informed of his right to an appeal as required by Rule 32 of West Virginia Rules of Criminal Procedure. On May 25, 2005, the circuit court entered an Order granting Smith habeas relief and appointing the Kanawha County Public Defender's Office for the purpose of resentencing and to perfect an appeal from the 1993 conviction for aggravated robbery.

On January 17, 2006, Smith timely filed a Petition for Appeal with this Court which heard oral argument on the Petition on September 6, 2006. Smith's Petition was granted as to his first assignment of error only. Smith files the instant brief pursuant to the briefing schedule.

Statement of Facts

Julian Smith was tried for the crime of Aggravated Robbery in January of 1993. After the defendant rested his case, the State called Harold Jones, a co-defendant, to testify as a rebuttal witness. (Trial Volume II, pg. 253). Defense counsel immediately lodged an objection, explaining that this witness was not on the State's witness list. However, the trial judge allowed him to testify. (Tr. Vol. II, 253-254). On direct, Jones testified that he and Smith went out to a bar called the Warehouse that evening. (Tr. Vol. II, 254). After that, he testified that he, Smith, and Freeman Caffee, went to the Taco Bell in South Charleston where Beverly Pauley, Smith's girlfriend and another co-defendant and the store manager to rob the establishment. (Tr. Vol. II, 259). Jones testified that Smith and Caffee went into Taco Bell with guns. (Tr. Vol. II, 260).

Immediately prior to Jones' direct testimony, trial counsel was handed a transcribed statement that Jones made to police on August 27, 1991. (Tr. Vol. II, 262). In that statement, Jones told law enforcement officers that he and Smith went to the Warehouse and met Freeman Caffee. They all partied together and then early in the morning, Jones took Smith home and then he took Caffee home. Jones then explained that he was tired and pulled over near Taco Bell to rest.

Upon receipt of this statement, defense counsel moved for a mistrial arguing that Jones' statement should have been provided prior to trial as it contained exculpatory information. (Tr. Vol. II, 262) and that Smith should have been called as a witness in the State's case in chief. (Tr. Vol. II, 263). During the bench conference, the State also represented that there was no plea agreement with respect to Jones. (Tr. Vol. II, 272). However, on cross examination, Jones admitted that he had been offered a plea, but had not yet accepted. (Tr. Vol. II, 278). Jones was

also cross examined with respect to the statement he had provided the police the evening of the incident.

On January 21, 1993, Smith was convicted of Aggravated Robbery.

Pauley and Caffee pleaded guilty to unaggravated robbery and were sentenced to thirty-six (36) months of probation. Jones pleaded guilty to grand larceny and was placed on thirty (30) months probation.

Smith was sentenced to the penitentiary for a determinate term of forty (40) years. It is from this conviction that he now appeals.

Assignment of Error

- I. The Trial Court Denied Smith His Right To Due Process And A Fair Trial When It Denied His Motion For A Mistrial Based On The State's Failure To Provide The Defense With Harold Jones's Statement Prior To Trial When That Statement Contained Exculpatory Information In Violation Of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

I. The Trial Court Denied Smith His Right To Due Process And A Fair Trial When It Denied His Motion For A Mistrial Based On The State's Failure To Provide The Defense With Harold Jones's Statement Prior To Trial When That Statement Contained Exculpatory Information In Violation Of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

On August 27, 1991, a South Charleston detective took a tape recorded statement from Harold Jones, a man found sitting in a car near the Taco Bell when it was robbed a few days before. Jones explained in the statement that he had spent the evening drinking and pulled over to try and get his head together before he went home. Jones explained that Julian Smith's uncle had rented the car he was driving that evening. He then told the officer that on August 24, 1991, he had been with Julian Smith at the Warehouse. While there, he said he ran into some friends of his, and they left the Warehouse between 3:00 a.m. and 3:30 a.m. Jones explained that he drove Julian Smith home and then took Freeman Caffee to his house in St. Albans. As he was traveling to his own home, Jones pulled the car over to help clear his head, as he was intoxicated. Jones specifically told officers that to his knowledge Smith did not go to Taco Bell on August 24, 1991, anytime. This statement was not provided to the defense prior to trial. Smith, Jones, Caffee and Brenda Pauley, the store manger were indicated for aggravated robbery in April of 1992.

On June 24th, 1992 defense counsel filed twenty-four separate pre-trial discovery motions including:

Motion For a Bill of Particulars with Motion To Compel Disclosure of All Evidence Favorable to the Defendant

Memorandum In Support of Motion To Compel Disclosure of All Evidence Favorable To Defendant

Motion to Produce Transcript and Minutes of the Grand Jury and Permit Inspection Thereof

Motion of Defendant, Julian Rudolph Smith, To Produce Minutes of Grand Jury Proceedings and Transcript of Any Evidence Adduced Before The Grand Jury And Copies Of Evidence Exhibited Thereto

Request That The State Serve Notice Of Intention To Offer Evidence

Motion To Produce, Inspect and Copy Police Reports and Sheriff's Reports

Motion To Produce, Inspect And Copy Certain Documents, Tangible Objects And Scientific Reports

Motion For Production Of Interview Reports With Individuals Who Will Not Be Witnesses At Trial

Motion To Furnish Defendant With List Of Witnesses

Motion To Require State To Provide "Rap Sheets" And List of Witnesses

Motion To Compel State To Provide Any Statements Of Any Witness In This Case

Motion For Disclosure Of Impeaching Information

On December 29, 1992 the State selectively answered some motions routinely using boilerplate objections and refusals but in specific answer to the Motion To Compel Disclosure Of All Evidence Favorable To The Defendant, Julian Rudolph Smith, the State answered the motion by stating that it was unaware of any evidence favorable to the defendant. Furthermore, the State did not list Jones as a witness or make any reference to his statement even though the statement had been transcribed into written form.

On January 19, 1993 the jury trial began. Smith took the stand in his own defense and he was the sole witness in his case-in-chief.

Immediately thereafter, the State began its rebuttal case by calling Harold Jones. As the direct examination of the Jones began, the State handed defense counsel the five (5) page statement he made on August 27th, 1992. At the end of the direct examination, the defense made a motion for a mistrial, explaining that the State withheld this exculpatory information. The

Court improperly denied that motion ruling that the statement did not become exculpatory material until the witness took the stand and testified inconsistently. The Court also ruled there was no prejudice to the defendant because counsel now had the statement in their possession and could cross examine as to its contents. Ironically, the State also represented to both the trial court and defense counsel that there was no plea agreement with Jones. However, during subsequent cross examination, defense counsel asked Jones if he had been offered a plea by the State, and he responded that an offer had been made. (Tr. Vol. II, 278). Jones then explained that the offer was a recommendation by the State that he get probation in exchange for telling the truth. (Tr. Vol. II, 279).

At the ensuing lengthy bench conference, the trial court ultimately surpassed its authority and did not grant a mistrial.

As a part of the rationalization of its failure to disclose the co-defendant's statement, the prosecutor stated:

"Judge, just for the record, if I might, I would like to put on the record why the statement was not turned over. I did not intend not to act in compliance with your Order of yesterday. He is a rebuttal witness; we didn't know that we were definitely going to call him until the defendant took the stand.

And secondly, Judge, it wasn't turned over in discovery because I didn't consider the fact Harold Jones, even if you assume that this statement was true, letting the Defendant out at 3:00 o'clock in the morning when the robbery happened two hours earlier, was exculpatory. And I would just like that on the record as to why I didn't turn it over. Whether anybody agrees with me or not, it didn't appear to me to be exculpatory to the robbery when it happened two hours before." (Tr. Vol. II 271).

Whether to grant a mistrial is discretionary with the trial court, and a mistrial may be granted where there is a "manifest necessity." *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983). Withholding both the statement Jones made to police officers, along with the information that an offer had been made whereby he would get a recommendation of probation

amounts to the State failing to provide defense counsel with all exculpatory material prior to trial and creates a manifest necessity required for a mistrial. "A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution." Syl. Pt. 4, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998) (citing Syl. Pt. 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982)).

The United States Supreme Court addressed this issue in its landmark decision of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), when it held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 1196-1197. The Court subsequently clarified its holding in *Brady*, and in *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985), explained that the issue is "whether, in the absence of the evidence, the defendant received a fair trial." *Salmons*, 203 W.Va. at 573. In another step to clarify its meaning the Court held, a *Brady* violation does not come from "demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555 (1994).

Smith's appeal is the first petition this court accepted after the United States Supreme Court handed down a *per curiam* decision in *Youngblood v. West Virginia*, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). Smith seeks redress from the *Brady* violations that occurred in 1992. Smith is aggrieved by the State of West Virginia intentionally suppressing exculpatory and impeachment evidence.

Chief Justice Davis in her well-reasoned dissent in *State v. Youngblood*, 217 W.Va. 535, 549, 618 S.E.2d 544, 558 (2005) set out the time honored principles of Anglo-American criminal jurisprudence. In the instant case, the trial court's response was to equivocate rather than order a mistrial.

Harold Jones's statement was clearly favorable evidence that should have been divulged to the defense prior to trial. "When a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation of the defendant's case." *State v. Graham*, 208 W.Va. 463, 541 S.E.2d 341, 2000 WL 1673096 (W.Va.).

The State's decision to withhold the statement to Smith was prejudicial. Harold Jones was not listed on the State's witness list. Smith's trial counsel had no idea that Jones had made a statement that clearly exonerated Smith, and instead of providing it to the defense prior to trial, the State conducted trial by ambush. It waited until the defense had closed its case, after Smith testified, and then ambushed the defense with this witness. Knowledge of the statement prior to trial would have likely changed the defense's theory at trial and would have been a factor for Smith to consider when deciding whether to testify.

Also, the defense was not privy to the specifics of the plea offer that had been extended to Jones. The State even went so far as to misrepresent the status of plea negotiations with Harold Jones. Jones testified that he had been offered a plea. The specific details should have been disclosed to the defense attorney so as to permit an effective cross-examination of Jones. Failure to provide this amounts to a *Brady* violation because if trial counsel had the specifics at her

disposal, the whole case could have been placed in a different light. This also shows that there was manifest necessity that required a mistrial. Smith had a right to prepare a defense and prepare for an effective cross-examination, both of which were compromised based on the State's failure to disclose the pertinent information.

The State's failure to disclose both Harold Jones' statement and the offer that was extended to him, when taken as a whole, undermines the confidence of the verdict in this case.

Request for Relief

Smith respectfully requests that his conviction and sentence be reversed and the case against him either be dismissed or remanded to the circuit court for a new trial.

Respectfully Submitted,

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

At Charleston

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Appelle,

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Appeal No. 33171

JULIAN R. SMITH,

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CERTIFICATE OF SERVICE

I, Paula M. Cunningham, counsel for the Appellant, do hereby certify that I have served a true copy of the "Brief of Appellant" on:

Dawn E. Warfield
Deputy Attorney General
The State Capitol
Building 1, Room E-26
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Charleston, WV 25305

By postage-paid, first-class, U.S. Mail, this 25th day of October, 2006.


Paula M. Cunningham