SHANNON D. MCGEE, SR., v. JOSEPH MCFADDEN, WARDEN

BRIEF IN OPPOSITION

APPENDIX "C"

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
	)	
State of South Carolina,	)	ORDER
Plaintiff	)	
v.	)	
	)	Case Number: 06-GS-22-0581,
	)	06-GS-22-0582, 06-22-0580
Shannon D. McGee,	)	
Defendant.	)	

THIS MATTER COMES BEFORE THE UNDERSIGNED, on Motion of Stuart Axelrod, Esquire, seeking reconsideration by this Court of the conviction of Shannon D. McGee for the offenses of Criminal Sexual Conduct with a Minor, 2nd degree and Lewd Act on a Minor and the granting of a new trial. This motion for reconsideration is based upon new evidence obtained after trial and alleged Brady violations on the part of the Solicitor.

The Defendant takes the position that he was not made aware by the prosecution of a pending charge against Aaron Kinloch. Mr. Kinloch was a witness at the Defendant's trial and testified as to several conversations that he had with the Defendant in which the Defendant discussed having committed sexual acts with the victim. On September 22, 2006, the day after a guilty verdict was returned against the Defendant, Kinloch was brought before this judge for a plea regarding a charge of Receiving Stolen Goods. Mr. Axelrod states that he was not made aware of this witness's pending charge of receiving stolen goods by Solicitor Bryan. In addition, Mr. Kinloch had been previously charged and served with an arrest warrant for burglary (in a separate case) on March 31, 2006. The burglary charge had been dismissed on July 28, 2006 as part of a guilty plea by Mr. Kinloch to receiving stolen goods. Mr. Axelrod asserts that although the burglary charges were discussed during the proffer of Mr. Kinloch, Solicitor Bryan did not

make him aware that a burglary charge had been dismissed. Finally, Mr. Axelrod states that a letter from Mr. Kinloch to Solicitor Bryan, dated August 4, 2006, and filed with the clerk on August 9, 2006, was not disclosed to Mr. Axelrod until after the conclusion of the trial. In this letter, Mr. Kinloch explained that he knew what happened between the defendant and the victim and stated "if you wish to speak to me, I'm willing to help, if you are cause I do need your help" Mr. Axelrod argues that this evidence made available to him after the trial is a violation of the Solicitor's duties as defined by Brady v. Maryland, as well as a violation of the defendant's right to cross-examine a witness concerning bias under the Confrontation Clause. As result, Mr. Axelrod moves for a new trial on behalf of the defendant.

Although a motion for a new trial on after discovered evidenced in the sound discretion of the trial judge, a party requesting the new trial based on after-discovered evidence must show that the evidence: (1) would probably change the result if a new trial was granted; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material; and (5) is not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999); State v. Freeman, 319 S.C. 110, 459 S.E.2d 867, 874-75 (Ct.App. 1995). An individual asserting a Brady violation must demonstrate evidence favorable to the defendant in the possession of or known by the prosecution was suppressed by the State and was material to the defendant's guilt or innocence or was impeaching. Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006). Evidence is material under Brady if there is a "reasonable probability" that the result of the proceeding would have been different had the information been disclosed. The question is not whether, with this evidence, the defendant would have likely been acquitted, but whether, without this impeachment evidence, the defendant received a fair trial "resulting in a verdict worthy of confidence." Id.

Here, the defense counsel has not shown (1) that the evidence could not have been discovered using due diligence prior to trial, (2) that the new evidence would change the outcome of the trial, and (3) that the defendant did not receive a fair trial "resulting in a verdict worthy of confidence."

Upon review of the testimony, it is clear that the defense counsel knew of the pending charge against Mr. Kinloch for receiving stolen goods. During a pre-trial motion on the admissibility of Mr. Kinloch's record, Solicitor Bryan informed Mr. Axelrod that the witness had a charge pending for receiving stolen goods valued at more than $1,000, which was being prosecuted by Solicitor Matthew Modica. Mr. Axelrod requested, and was granted, permission to question Solicitor Modica and Mr. Kinloch about the pending charge. During the proffer of Mr. Kinloch for the purposes of inquiring into his record, Mr. Axelrod failed to question Mr. Kinloch about the pending charge. As to the dismissed burglary charge, Solicitor Bryan asked Mr. Kinloch during the proffer about his recent convictions. He responded that he had a receiving stolen property conviction, but he was originally charged with burglary. Although the dismissal of the burglary charge was not specifically mentioned, Mr. Axelrod was told about the original charge of burglary and the subsequent conviction for receiving stolen property. The evidence here could have been discovered by a review of the public records before the trial, and in fact, the defense was on notice that this evidence did exist and was given an opportunity to question the witness and the solicitor as to the past and pending charges. The defense counsel did not pursue this information.

In addition, Mr. Axelrod asserts that Solicitor Bryan's failure to turn over Mr. Kinloch's letter to the defense constituted a Brady violation.

> "The overriding theme of the Brady cases is the emphasis the Supreme Court has placed on the prosecutor's responsibility for fair play. In close cases, 'the prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative...of sovereignty...whose interest...in a criminal prosecution is not that it shall win a cause, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.'"

Riddle at 46, citing Kyles v. Whitley, 514 U.S. at 438-40, 115 S.Ct. 1555.

The Solicitor's actions of failing to disclose the contents of the letter in question were a clear disregard for his responsibility as a prosecutor to seek justice in any case which he is prosecuting. A letter from a witness that demonstrates the willingness to make a deal in exchange for his testimony should be given to the defendant regardless of the actual existence of a deal. However, while this evidence could have been favorable to the defendant, it did not indicate that in fact a deal for the testimony had been reached. In light of all the evidence and testimony, and in particular, the lack of any facts indicating any deal struck between the witness and the Solicitor, it is this court's finding that the defendant received "a fair trial resulting in a verdict worthy of confidence." Riddle.

After a review of the record in this case, there is no evidence that any type of deal existed between the State and Kinloch for his testimony in this matter. The Solicitor met with Mr. Kinloch the day before the trial, which was after all of the charges against Mr. Kinloch had been

resolved, except for the charge of receiving stolen goods. That charge came before this judge the day after the trial, but Mr. Kinloch's plea was taken without recommendations or negotiations as to sentencing. In addition, the dismissed burglary charge was dismissed on July 28, 2006. The letter from Kinloch, in which he asks for some help in exchange for his testimony, was dated August 4, 2006, which was after the burglary charge had been dismissed. The dismissed burglary charge would have very little probative value, if any, as to a deal between Solicitor Bryan and Mr. Kinloch. Thus, Solicitor Bryan's actions do not rise to the level of bring the trustworthiness of the verdict into question and thereby requiring the granting of a new trial.

THEREFORE, it is the Order of this Court that Defendant's Motion for a New Trial is denied.

IT IS SO ORDERED.

Spartanburg, South Carolina
November 9, 2006

Roger L. Couch
Presiding Judge