Capital Defense Journal

Volume 15 | Issue 1 Article 13

Fall 9-1-2002

Basden v. Lee 290 F.3d 602 (4th Cir. 2002)

Basden v. Lee
290 F.3d 602 (4th Cir. 2002)

I. Facts

Sylvia White ("Sylvia") unsuccessfully tried to kill her husband, Billy White ("Billy"), for at least a year. First, she tried to poison him with wild berries and poisonous plants. Then, she enlisted the help of Linwood Taylor ("Taylor"), who was Ernest Basden's ("Basden") nephew. Taylor told Basden that he needed a hit man and asked Basden if he wanted the job. Basden refused and told Taylor the idea was crazy. Later, however, Basden ran into financial difficulties. He approached Taylor and said he would agree to kill Billy.[1]

Taylor concocted a plan to lure Billy, an insurance salesman, to a spot where Basden could kill Billy. Taylor pretended to be a wealthy businessman from out of town who wanted to buy insurance for property he recently purchased. Taylor arranged to meet Billy in a wooded rural area at 8:30 p.m. on Sunday, January 20, 1992. That Sunday, Taylor and Basden waited for Billy at the designated spot. When Billy arrived, Taylor, using the alias Tim Connors, introduced himself to Billy while Basden waited in the car. Taylor told Billy he needed to use the bathroom and stepped to the other side of the road. Basden got out of the car and picked up a twelve-gauge shotgun he had placed on the ground by the car. Basden aimed at Billy and pulled the trigger, but because he forgot to cock the hammer, the shotgun did not fire. Basden then cocked the hammer and fired; this time he knocked Billy to the ground. Basden loaded another shell into the shotgun and approached Billy, who was lying face-up on the ground. Basden stood over Billy and shot him again. A pathologist testified at trial that Billy bled to death from massive shotgun wounds to the chest and abdomen. The pathologist also testified that even though the aorta was nearly severed from the heart, Billy did not die instantly, and that Billy would have remained conscious for some time and felt pain.[2]

After the shooting, Basden and Taylor drove back to Taylor's house. Taylor thought he left a map at the crime scene, so they returned there and, in the process, also took a blank check, wallet, and gold ring from Billy's pockets. They then returned to Taylor's house, went to the backyard, and burned all their clothing. They also sawed the shotgun into several pieces, put the pieces into a bucket of cement, and threw the bucket over a bridge into the Neuse River. Taylor then gave Basden three-hundred dollars.[3]

---

1. State v. Basden, 451 S.E.2d 238, 241 (N.C. 1994).
2. *Id.* at 241-42.
3. *Id.* at 242.

Police officers retrieved the metal base portions of two spent shotgun shells from the ashes of the fire in Taylor's backyard. Forensic tests indicated that the recovered shells were consistent with twelve-gauge shotgun shells and that they could have been fired from the same weapon. Officers also went to Basden's repair shop and retrieved a man's gold-tone ring from his pocket.[4]

On February 12, 1992, police arrested Taylor and Sylvia. Basden went to the Sheriff's Department and Taylor told Basden that he confessed. He advised Basden to turn himself in. Basden then gave some preliminary background information to the police officers before telling them that he shot Billy. The officers immediately read Basden his *Miranda* rights and Basden signed a written waiver of his rights. Basden gave a detailed confession in which he stated that he killed Billy because he needed the money.[5]

At trial, Basden presented evidence that he suffered from depression, arthritis, kidney problems, pancreatitis, and drug and alcohol abuse. He stated that he was extremely close to his mother, who was killed in a car accident when he was fourteen years old, and that he never fully recovered from her death. A psychologist also testified that Basden had a dependent personality disorder, which meant that he lacked self-confidence. Basden would cling to stronger people and perform unpleasant tasks to retain their support. The psychologist further testified that Basden had an avoidance personality disorder and a schizotypal personality disorder.[6]

The State of North Carolina established the details of the crime through the testimony of police officers and through cross-examination of Basden. Two officers testified to the contents of several detailed confessions by Basden and Taylor. Basden himself, through cross-examination, admitted that he was the person who shot Billy White, that he agreed to do it on the Friday before the Sunday shooting, and that he did it for money.[7]

The jury found Basden guilty and then deliberated for nine hours on sentencing. The jury found one aggravating factor, two statutory mitigating factors, and five nonstatutory mitigating factors. The jury recommended a death sentence and the trial judge subsequently sentenced Basden to death. Basden appealed his convictions and sentence to the Supreme Court of North Carolina; the court affirmed the verdict. The United States Supreme Court denied certiorari.[8]

Basden then filed a Motion for Appropriate Relief, which the state post-conviction court denied. Basden eventually won an order for post-conviction discovery in 1999. Basden then found that a number of documents, including additional statements to the police from Taylor and a person named Timothy

4. *Id.*
5. *Id.*
6. *Id.*
7. Basden v. Lee, 290 F.3d 602, 607-08 (4th Cir. 2002).
8. *Id.* at 608.

Jones ("Jones"), described the facts concerning Billy's death and the plan to kill him. Basden filed an amended Motion for Appropriate Relief, but the state post-conviction court rejected his motion. The Supreme Court of North Carolina and the United States Supreme Court denied review. Basden then filed a petition for a writ of habeas corpus with the United States District Court for the Eastern District of North Carolina. The court rejected some of Basden's claims as procedurally defaulted and found the remaining claims meritless. The court also refused to grant Basden an evidentiary hearing. Basden filed an appeal to the United States Court of Appeals for the Fourth Circuit and raised several claims of due process violations.[9]

II. Holding

The Fourth Circuit unanimously affirmed the district court's denial of all habeas relief. The court affirmed because it held that: (1) no reasonable probability existed that prior disclosure of allegedly inculpatory materials, even assuming that the State actually withheld them, would have resulted in a different outcome during the guilt or sentencing phase; (2) the state court made reasonable findings that the State did not present false testimony in bad faith and did not destroy evidence; and (3) Basden could not sufficiently overcome procedural default of his ineffective assistance of counsel claims.[10]

III. Analysis

A. False Testimony in Bad Faith and Destruction of Evidence

Basden argued that the State denied him due process by: (1) knowingly offering or failing to correct false testimony;[11] and (2) destroying evidence that might have assisted his defense.[12]

1. False Testimony

Basden asserted that the State violated his due process rights by presenting the testimony of Special Agent Smith ("Agent Smith"), who testified at trial, under oath, that he did not know Jones.[13] Post-conviction discovery actually showed that Smith not only knew Jones, but that he knew him as a police informant and that he met with Jones more than once while investigating Billy's

9. *Id.*

10. *Id.* at 608-19. The ineffective assistance of counsel claims are not further discussed in this note.

11. *Id.* at 614.

12. *Id.* at 615.

13. *Basden*, 290 F.3d at 614.

murder.[14] Basden alleged that the State knowingly offered or failed to correct the false testimony.[15]

The Fourth Circuit found that the state post-conviction court had assumed, in making its decision, that Agent Smith's testimony was false.[16] The state court did not find that Agent Smith's testimony was material because the jury did not hear the testimony, Agent Smith's credibility was not an issue at trial, and Basden confessed before trial and in court.[17] For these reasons, the court rejected Basden's claim.[18]

2. *Destruction of Evidence*

Basden argued that the State denied him due process under *Arizona v Youngblood*[19] by destroying evidence that might have assisted his defense.[20] Basden alleged that the State violated two state court orders by destroying certain evidence that included handwritten notes of police interviews, tapes of conversations, and a map drawn by Basden.[21] The state post-conviction court rejected Basden's *Youngblood* claim on the merits alone.[22]

The Fourth Circuit first rejected Basden's asserted evidence of bad faith that the State violated state court orders.[23] The state post-conviction court ruled that the State did not violate court orders, and the Fourth Circuit found no authority to review the state law ruling.[24] The Fourth Circuit also did not find the bad faith necessary for a *Youngblood* claim.[25] The court considered Agent Smith's testimony, assuming it to be false, irrelevant for establishing "bad faith in the destruction of the largely unrelated evidence" on which Basden relied because only one item, a taped conversation between Jones and Taylor, "was even tangentially

---

14. *Id.*

15. *Id.*; *see* Napue v. Illinois, 360 U.S. 264, 269 (1959) (holding that conviction obtained through State's knowing use of false evidence violates due process under Fourteenth Amendment). Agent Smith and the prosecutors actually asserted in an affidavit that the court reporter incorrectly transcribed the name "Tim Jones," and that Agent Smith actually was asked if he knew "Tim Conners," the phony name Taylor used in luring Billy to the murder scene. *Basden*, 290 F.3d at 614. Defense counsel asserted that the trial transcript was correct. *Basden*, 290 F.3d at 614.

16. *Basden*, 290 F.3d at 614.

17. *Id.*

18. *Id.*

19. 488 U.S. 51 (1988).

20. *Basden*, 290 F.3d at 615; *see* Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (holding that criminal defendant may prove denial of due process by showing that police failed to preserve potentially useful evidence in bad faith).

21. *Basden*, 290 F.3d at 615.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

related to the subject of Agent Smith's assertedly false testimony."[26] The court also found that most of the destroyed evidence was "memorialized" in written summaries and that a written description of the taped conversation still survived.[27] Furthermore, the state court ruled that almost all of the alleged destruction complied with state law and police procedures.[28] Because Basden failed to challenge those rulings or the constitutionality of the underlying state laws and police procedures, the Fourth Circuit found no bad faith and no reason to find error in the state court's rejection of Basden's *Youngblood* claim.[29]

B. The Brady *Claims*

The Fourth Circuit divided Basden's challenge to the outcome into two parts: (1) a challenge to the conviction; and (2) a challenge to the sentence.

1. Challenge to the Conviction

Basden argued that, under *Brady v Maryland*,[30] the State violated his due process rights by suppressing the documents found during the 1999 post-conviction discovery.[31] Basden specifically referred to seven documents: (1) a statement by Jones, who was a confidential informant for the police; (2) a report of surveillance activities involving Jones; (3) a "snitch" file containing a long list of informant contacts between the police and Taylor only a few months before the murder; (4) a polygraph document and statement from Taylor dated February 12, 1992; and statements made by Taylor to the police dated (5) June 10, 1992, (6) June 26, 1992, and (7) June 30, 1992.[32] The Jones documents revealed that Jones was a police informant who was also solicited by Taylor to kill Billy, that Taylor approached Jones shortly after the murder, that he confessed without mentioning Basden, that he killed Billy for twenty-thousand dollars and a van, and that he detailed the entire story of luring Billy to his murder.[33] The "snitch" file reflected Taylor's extensive work as a confidential informant for the police in the months preceding the murder.[34] The Taylor statements contained much of the same

---

26. *Id.*
27. *Basden*, 290 F.3d at 615.
28. *Id.*
29. *Id.* at 615-16.
30. 373 U.S. 83 (1963).
31. *Basden*, 290 F.3d at 609; *see* Brady v. Maryland, 373 U.S. 83, 87-88 (1963) (holding that State violates defendant's due process rights when it fails to disclose to defendant, prior to trial, evidence favorable to accused); *see also* Strickler v. Greene, 527 U.S. 263, 280 (1999) (stating that suppression of evidence is material and violates due process if reasonable probability exists that different result would have occurred if prosecution disclosed such evidence to defendant before trial).
32. *Basden*, 290 F.3d at 609.
33. *Id.*
34. *Id.*

information as the two other Taylor confessions the prosecution provided to Basden on the first morning of trial, but the undisclosed statements also contained more details about Taylor's plot with Sylvia and an acknowledgment by Taylor that he lied about some facts in another of the undisclosed statements.[35] When defense counsel received the Jones documents, they located Jones, who attested that Taylor dominated Basden and that Basden "was not himself" at the time of Billy's murder.[36]

Basden argued that he never would have taken the stand at trial and confessed to the murder if he had timely received the undisclosed Taylor and Jones documents.[37] The court, however, found that none of the undisclosed documents affected the admissibility of Basden's pretrial confession.[38] The court also found that the State presented "overwhelming evidence of his guilt," based on Basden's pretrial confession, its consistency with the Taylor confessions which the State disclosed to Basden, and Basden's possession of Billy's ring.[39] Basden also argued that the state post-conviction court's decision was an unreasonable application of *Brady* and its progeny.[40] The court found that the state post-conviction court's ruling was not unreasonable because Basden did not show that there was a reasonable probability that "either his conviction or sentence would have been different had the suppressed material been disclosed."[41] The court, therefore, found that Basden's *Brady* challenge to his conviction could not succeed.[42]

2. *Challenge to the Sentence*

The State argued that *Brady* could not be applied to Basden's sentencing.[43] The Fourth Circuit explicitly rejected this argument because the United States Supreme Court clearly stated, including in *Brady* itself, that *Brady*'s holding applies

35. *Id.* The Fourth Circuit also stated that it was troubled by the State's failure to provide Basden with any of the Taylor confessions until the first morning of trial. *Id.* at 613 n.4. The court stated that it considered this untimeliness in reviewing Basden's arguments on prejudice. *Id.*

36. *Id.* at 609.

37. *Id.* at 610.

38. *Basden*, 290 F.3d at 610; *see* Boggs v. Bair, 892 F.2d 1193, 1198-99 (4th Cir. 1989) (discussing level of intoxication or drug inducement necessary to determine if confession is voluntary). Basden stated in a post-conviction affidavit that he smoked marijuana the morning of his confession, but the Fourth Circuit relied on the police officers' testimonies that Basden did not appear to be under the influence, and on the fact that Basden did not claim that marijuana affected his judgment, to find that the state court was not unreasonable in its conclusions. *Basden*, 290 F.3d at 610.

39. *Basden*, 290 F.3d at 610.

40. *Id.* at 609; *see* 28 U.S.C. § 2254(d) (2000) (stating that federal court may not grant writ of habeas corpus involving decision of state court unless adjudication on merits was contrary to or involved unreasonable application of federal law as determined by United States Supreme Court).

41. *Basden*, 290 F.3d at 609.

42. *Id.* at 610.

43. *Id.* at 610-11.

to both the penalty phase and the guilt phase of trial.[44] The court then stated that it would consider the cumulative effect of the undisclosed documents "'collectively, not item by item.'"[45]

Basden argued that he could have presented the sentencing jury with a more powerful argument identifying Sylvia as the most culpable party, Taylor next in the hierarchy, and Basden as the "mentally ill, clinically depressed, intoxicated, manipulated, [sic] rube."[46] The state court rejected Basden's claim on the same ground that it rejected his *Brady* attack on his conviction.[47] The Fourth Circuit found that the undisclosed documents could support Basden's theory regarding the jury's finding of culpability.[48] The court, however, also found that Basden knew almost all of the details available in the asserted *Brady* materials, that he presented most of those details to the jury, and that even a more powerful argument regarding culpability would not have affected the State's argument that Billy died because Basden "[wa]s willing to take the money."[49] The court concluded, therefore, that it could not grant a writ of habeas corpus because it did not find the state post-conviction court's conclusion to be an unreasonable application of the *Brady* test for materiality.[50]

IV. Application in Virginia

A. Content of Brady *Motions*

Prosecutors may argue that *Brady* does not apply at the penalty phase of trial.[51] When prosecutors make this argument, defense counsel should always be prepared to assert that *Brady* and its progeny firmly establish its applicability to the penalty phase. All *Brady* motions, therefore, should explicitly state whether the material sought is for the guilt or penalty phase of trial. At the penalty phase,

---

44. *Id.* at 611; *see Brady*, 373 U.S. at 87 (holding that "the 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*" (emphasis added)); *see also* Giles v. Maryland, 386 U.S. 66, 74 (1967) (finding that trial court's denial of defense's motion to produce police reports during post-conviction proceeding justified remand for reconsideration); *Strickler*, 527 U.S. at 296 (applying *Brady* test to conviction and sentencing phase).

45. *Basden*, 290 F.3d at 611 (quoting Kyles v. Whitley, 514 U.S. 419, 436 (1995)).

46. *Id.* at 612.

47. *See id.* at 610 (finding that Basden had not shown reasonable probability that result would have been different if prosecutors timely disclosed suppressed materials).

48. *Id.* at 612-13.

49. *Id.* at 613-14. The State also argued that *Brady* could not be applied to Basden's sentencing. *Id.* at 610-11. The Fourth Circuit found that the United States Supreme Court in *Brady* expressly stated that its holding also applied at the punishment phase. *Id.* at 611; *see also Strickler*, 527 U.S. at 296 (applying *Brady* test to conviction and sentencing phase). The Fourth Circuit then stated that it would consider the cumulative effect of the undisclosed documents collectively rather than item by item. *Basden*, 290 F.3d at 611.

50. *Basden*, 290 F.3d at 613.

51. *See id.* at 610-11; *supra* Part III.B.2 (discussing court's rejection of State's argument that *Brady* is not applicable to sentencing hearing).

exculpatory evidence can be very important to establishing mitigation evidence. Defense counsel must assert that the Commonwealth is required to produce any favorable evidence it or its agencies have.[52] Counsel must also emphasize that the prosecutor does not need to be aware of the existence or exculpatory nature of the evidence to require disclosure.[53]

B. Procedural Default

Defense counsel should take all steps necessary to avoid any procedural default of *Brady* claims by showing diligence in obtaining *Brady* material.[54] Defense counsel can guard against procedural default by sending a simple request for all exculpatory evidence to any agency of the prosecution that may be involved. The court clerk should also receive a courtesy file regarding the requests. Although the requests may not immediately produce exculpatory evidence, defense counsel can avoid procedural default of any potential *Brady* claims.

V. Conclusion

Defense counsel should be aware that *Brady* applies at both the guilt and penalty phases at trial. All *Brady* motions should state specifically to which phase the motions apply. Defense counsel also needs to identify all potential agencies of the prosecution that have even the slightest possibility of possessing exculpatory evidence. Defense attorneys are strongly urged to contact the Virginia Capital Case Clearinghouse for *Brady* motions.

Philip H. Yoon

---

52. *See* Giglio v. United States, 405 U.S. 150, 154 (1972) (holding that promise made to defendant by different attorney from prosecutor's office was attributable to government because prosecutor's office was agency of government).

53. *See Strickler*, 527 U.S. at 280-81 (finding that prosecutor has duty to learn of any favorable evidence known to others acting on government's behalf in particular case). As an example, an agency of the government may possess evidence of a defendant's good behavior during a prior term of incarceration. This evidence could act as a mitigating factor because it may show that the defendant responds well to confinement and an isolated, regimented lifestyle. *See* Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (holding that exclusion of evidence of defendant's positive response to prior incarceration was reversible error because evidence was relevant to future behavior in prison and may have affected jury's decision to impose sentence of death).

54. *See* Williams v. Taylor, 529 U.S. 420, 435 (2000) (holding that defendant must show due diligence in discovering potential *Brady* evidence); *see also Strickler*, 527 U.S. at 279 (stating that United States Court of Appeals found that Strickler's *Brady* claims were procedurally defaulted because factual basis for claim was available to him when he filed state habeas petition). The Fourth Circuit opinion was unpublished, but the per curiam opinion can be found on the electronic databases. Strickler v. Pruett, No. CA-95-924-3, 1998 WL 340420, at *1 (4th Cir. June 17, 1998).