

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

STATE OF OHIO, : Case No. 13CA969
Plaintiff-Appellee, :
v. : DECISION AND
 : JUDGMENT ENTRY
ROSCOE CAMPBELL, :
Defendant-Appellant. : **RELEASED: 8/26/14**

APPEARANCES:

Timothy Young, Ohio Public Defender, and Francisco E. Luttecke, Ohio Assistant Public Defender, Columbus, Ohio, for appellant.

C. David Kelley, Adams County Prosecuting Attorney, and Kris D. Blanton, Adams County Assistant Prosecuting Attorney, West Union, Ohio, for appellee.

Harsha, J.

{¶1} A jury convicted Roscoe T. Campbell of two counts of rape of a minor child less than thirteen years of age and sentenced him accordingly. On appeal Campbell asserts he was denied his right to a fair trial and due process of law when the state failed to disclose exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). He also asserts the court erred in failing to grant him a new trial on this basis.

{¶2} Campbell claims that the state violated *Brady* by failing to disclose that an Adams County Children Services investigation determined another of the victim's claims of sexual abuse by Campbell was "unsubstantiated." Campbell is correct that the state's *Brady* obligation extends to information held by state or local agencies involved in the investigation or prosecution at issue. But it does not impose a duty on the

prosecutor's office to discover and disclose that unrelated allegations were not pursued. The materials and sealed records that Campbell contends contain *Brady* material address claims by the child that are different from the ones supporting this prosecution. Therefore, the state did not violate *Brady* by refusing to disclose these materials, nor did the court err in refusing to grant a new trial. We overrule Campbell's first and second assignments of error.

{¶3} In his third assignment of error Campbell claims that the trial court's imposition of consecutive sentences for his two rape convictions was clearly and convincingly contrary to law. Because a review of the transcript of the sentencing hearing and the trial court's sentencing entry reveals that the trial court did not make the findings required by R.C. 2929.14(C)(4) in imposing consecutive sentences, we sustain Campbell's third assignment of error, reverse that portion of the judgment entered by the trial court, and remand the cause for resentencing in accordance with R.C. 2929.14(C)(4). We affirm the remainder of the judgment.

I. FACTS

{¶4} An Adams County grand jury returned an indictment charging Campbell with two counts of rape of a minor child (DOB 4/4/96) less than thirteen years of age, with the first count including a specification that the child was less than ten years of age at the time of the offense. The indictment alleged that the first offense occurred between February 1, 2004 and August 15, 2005, and that the second offense occurred between November 15, 2007 and May 1, 2009. Campbell entered a plea of not guilty and received appointed counsel.

{¶15} Campbell personally sought records from Adams County Children Services relating in any matter to him and the minor child, who is his daughter. When the agency refused, he requested the clerk of the trial court to prepare and serve a subpoena ordering a representative of the agency to appear and produce the records at trial. The agency filed a motion to quash the subpoena because the requested records were confidential and not available for inspection. See R.C. 5153.17.

{¶16} Before the commencement of the jury trial the trial court indicated that it would conduct an in camera inspection of the subpoenaed children services records to determine whether they included any *Brady* material. Campbell's counsel represented to the trial court that Campbell believed that the records contained findings that he was investigated by the agency, but was not charged with anything. The trial court reviewed the subpoenaed agency records, determined that there was no *Brady* material, and declined to order their disclosure to Campbell for use at trial:

In relation to the in camera inspection of the Children Services records the Court has had an opportunity to review those records. The matters in there involve the two alleged perpetrators, one of which being Roscoe Campbell, and one of which being Beau Campbell. The Court notes that the matters within there are in essence issues of hearsay, that it was unsubstantiated, which there was no charge, it doesn't say unsubstantiated, it just shuts off the investigation, this being back in 2010. So, the Court finds at this time there is no *Brady* material that would be available within, and it will be sealed for further review by the Fourth Appellate District.

{¶17} During the jury trial Campbell's daughter, T.C., who was 17 years old at that time, testified that when she was less than 10 years old, Campbell visited her at her mother's home in Adams County, and he raped her in a nearby shed. T.C. further testified that Campbell later forced her to perform oral sex on him in her bedroom in her house. Kenneth Dick, an investigator for the Adams County Prosecutor's office and a

certified polygraphist, testified that he performed a polygraph test on Campbell with his consent, and Dick concluded that Campbell lied when he stated that he never put his penis in his daughter's vagina or mouth. Campbell denied that he had ever raped his daughter, and two of his witnesses testified that his daughter was generally untruthful.

{¶8} The jury returned verdicts finding Campbell guilty as charged. Before sentencing Campbell filed a motion for a new trial under Crim.R. 33(A)(1) and (5), in which he claimed that the trial court had erred in not ordering disclosure of the subpoenaed children services records. He attached a copy of a letter dated April 6, 2010, from Adams County Children Services to Campbell in which an intake investigator for the agency found the child's sexual abuse claim against him to be “unsubstantiated/no evidence” and determined that there was “no occurrence of child abuse or neglect.” The trial court heard argument on the motion and denied it after reiterating its prior ruling that “there was no Brady material for that issue [in the children services records] based upon the allegations made in the indictment[.]” The trial court then held a sentencing hearing and sentenced Campbell to consecutive terms of life imprisonment with eligibility for parole after ten years for the first charge of rape and specification and eight years in prison for the second charge of rape.

II. ASSIGNMENTS OF ERROR

{¶9} Campbell assigns the following errors for our review:

I. Mr. Campbell was denied his right to a fair trial and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Section 16 of Article I of the Ohio Constitution, when the State withheld evidence favorable to the defense. (Trial Tr. at 2-8, 224-225; New Trial Hr'g at 14:22).

II. The trial court denied Mr. Campbell his right to a fair trial and due process of law as guaranteed by the Fifth and Fourteenth Amendments to

the United States Constitution and Section 16, Article I of the Ohio Constitution when it determined there were no Brady materials in the sealed records, and denied his motion for a new trial. (Trial Tr. at 224-225; New Trial Hr'g at 14-22)

III. The trial court committed reversible error when it imposed consecutive prison sentences against Mr. Campbell without making statutorily mandated findings in support of consecutive sentences, in violation of Mr. Campbell's rights under the Fourteenth Amendment to the United States Constitution, and Article I, Section 16 of the Ohio Constitution.

III. LAW AND ANALYSIS

A. *Brady* & Exculpatory Evidence

{¶10} In his first assignment of error, Campbell claims he was denied his right to a fair trial and due process of law when the state withheld favorable evidence from him. In his second assignment of error, Campbell contends that the trial court denied him his right to a fair trial and due process of law when it determined that there were no *Brady* materials in the sealed records and denied his motion for new trial. Because these assignments are interrelated and raise similar issues of law, we consider them jointly. See, e.g., *State v. Fox*, 2012-Ohio-4805, 985 N.E.2d 532, ¶ 28 (4th Dist.) (“Whether evidence is materially exculpatory is a question of law”); *State v. Ogle*, 4th Dist. Hocking Nos. 11CA29, 11CA32, 12CA2, 12CA11, 12CA12, and 12CA19, 2013-Ohio-3420, ¶ 61-63 (although the abuse-of-discretion standard of review is generally used in reviewing a trial court's ruling denying a motion for new trial, it is inapplicable when material, exculpatory evidence is withheld by the prosecution in a criminal proceeding).

{¶11} “Due process requires that the prosecution provide defendants with any evidence that is favorable to them whenever that evidence is material either to their guilt or punishment.” *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶ 30, citing *Brady*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215; *Fox* at ¶ 25 (“A

criminal defendant's due process right to a fair trial is violated when the prosecution withholds materially exculpatory evidence"). "Evidence is considered material when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Brown* at ¶ 40, quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

{¶12} The state claims that the prosecution had no duty under *Brady* to disclose the subpoenaed materials from the Adams County Children Services because it never possessed these confidential records. As Campbell counters, however, "[p]rosecutors have 'a duty to learn of any favorable evidence known to *the others acting on the government's behalf in the case*, including the police.'" (Emphasis sic.) *State v. Sanders*, 92 Ohio St.3d 245, 261, 750 N.E.2d 90 (2001), quoting *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Consequently, "[t]he *Brady* obligation thus extends to information held by state or local agencies involved in the investigation or prosecution at issue." *Id.*, citing *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir.1996); *State v. Cunningham*, 10th Dist. Franklin No. 06AP-145, 2006-Ohio-6373, ¶ 8.

{¶13} Nevertheless, "*Brady* and its prodigy do not 'impos[e] a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue.'" *Goff v. Bagley*, 601 F.3d 445, 476 (6th Cir.2010), quoting *Morris* at 1169. Consequently, investigations by other agencies on other potential offenses are not subject to disclosure in an unrelated criminal investigation and prosecution of a case. See *Goff* (petitioner "has pointed to no federal authority requiring a state prosecutor to inquire into the federal prosecution of a

witness that is unrelated to the state case and that does not involve any persons acting on behalf of the state prosecutor”); *State v. Lacey*, 7th Dist. Mahoning No. 11 MA 68, 2012-Ohio-1697, ¶ 29 (no *Brady* violation in failing to disclose an incident report from a township bordering the county in which the criminal investigation and prosecution occurred); *State v. Hessler*, 10th Dist. Franklin No. 01AP-1011, 2002-Ohio-3321, ¶ 62 (“the state’s failure to contact the involved mental health agencies and the National Guard in order to obtain exculpatory evidence did not violate *Brady* because the agencies in possession of the challenged evidence are independent agencies who were not acting on the government’s behalf in the investigation or prosecution of defendant’s case”); *Cloud v. United States*, N.D. Ohio Nos. 1:03CR486 and 1:07CV3704, 2012 WL 1252957 (Apr. 13, 2012), *2 (memorandum prepared by FBI special agent does not constitute *Brady* material because it was not possessed by the prosecution or other government agencies involved in the investigation or prosecution at issue).

{¶14} At oral argument Campbell’s counsel contended that the sealed Adams County Children Services records contain evidence of the same incidents for which he was convicted and sentenced in this case. However, a review of the sealed subpoenaed records from the Adams County Children Services indicates that they are not related to the investigation of the rape incidents, which occurred between February 2004 – August 2005 and November 2009- May 2009, that form the basis of this prosecution.

{¶15} Instead, these sealed records primarily relate to a separate incident involving the child, her father, Campbell, and her stepfather, Beau Campbell, that allegedly occurred at her father’s house after the rapes at her mother’s house at issue in

this case. Campbell's reliance on the agency's April 2010 dispositional letter, which he attached to his motion for new trial, is misplaced. That letter relates to the investigation of a sexual abuse incident involving Campbell and Beau Campbell that allegedly occurred in the fall of 2009 at Campbell's home, i.e. after the incidents for which he was indicted and tried.

{¶16} The sealed records also contain summary pages concerning other allegations made by the child against other individuals, but not specifically against appellant, who appears to be designated by his full name of Roscoe Timothy Campbell by the agency for the allegation concerning him and Beau Campbell. Even assuming that the agency's summary lists appellant by the shorter name of "Tim Campbell," it lists only neglect allegations against that person, not sexual abuse allegations. In addition the summary in the sealed records indicates other allegations of sexual abuse involving the child, with the agency's disposition that most of them were "substantiated" or that the sexual abuse was "indicated"; but there is one against another individual that was "unsubstantiated." Thus, we do not determine the potential relevance of a series of multiple prior false allegations of sexual misconduct because the sealed records do not contain such information. However, that situation could raise more complex issues concerning the state's obligations under *Brady* and the applicable provisions of the rape-shield law. Because Campbell does not specifically request an expansion of *Kyles*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490, and *Sanders*, 92 Ohio St.3d 245, 261, 750 N.E.2d 90, to require the disclosure of information held by state or local agencies that are not related to the investigation and prosecution of the crimes that are the subject of the specific case, we do not address that issue either.

{¶17} Because the records at issue are unrelated to the state's investigation or prosecution of the rape charges at issue in this case, the trial court correctly ruled that Campbell was not entitled to these confidential records pursuant to *Brady*; and the trial court also properly denied his motion for new trial based on this claim.

{¶18} Finally, even if we assume the state's nondisclosure of the alleged *Brady* evidence was improper, we conclude that this constitutional error was harmless beyond a reasonable doubt. "A constitutional error can be held harmless if we determine that it was harmless beyond a reasonable doubt." *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 123, quoting *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 78.

{¶19} Ordinarily, in cases in which the appellant complains about the erroneous admission of evidence, the dispositive issue is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. See *State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181, ¶ 46. Here, however, appellant complains that he was not given access to exculpatory evidence. For these contentions, a "reviewing court may overlook an error where the admissible evidence comprises 'overwhelming' proof of a defendant's guilt." See *State v. Saunders*, 4th Dist. Ross No. 1896, 1993 WL 524968, *10 (Dec. 1, 1993) (any error caused by the non-disclosure of witness's testimony pursuant to *Brady* was harmless error); see also *State v. Hood*, 135 Ohio St.3d 137, 2012-Ohio-6208, 984 N.E.2d 1057, ¶ 43, quoting *State v. Williams*, 6 Ohio St.3d 281, 452 N.E.2d 1323 (1983), paragraph six of the syllabus ("Where constitutional error *** is extant, such error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of [the]

defendant's guilt"); see generally Katz, Martin, Giannelli, and Crocker, *Baldwin's Ohio Practice Criminal Law*, Section 80:18 (2013).

{¶20} Here the evidence included the testimony of the certified polygraphist who concluded that Campbell lied when he stated that he had never put his penis in his daughter's vagina or mouth¹, and Campbell's daughter's compelling recitation of the facts of the crimes. Given this evidence as well as the fact that the withheld evidence was, at best, only minimally helpful to Campbell's defense, we conclude that the remaining admissible evidence constituted overwhelming evidence of his guilt. Therefore, any error concerning the sealed evidence is harmless beyond a reasonable doubt.

{¶21} Campbell's claims are meritless, and we overrule his first and second assignments of error.

B. Consecutive Sentences

{¶22} In his third assignment of error, Campbell asserts that the trial court clearly and convincingly violated R.C. 2929.14(C)(4) by imposing consecutive sentences without making the required statutory findings.

{¶23} After the enactment of Am.Sub.H.B. No. 86, any sentence must be served concurrently with any other prison term unless the court makes the three findings required by R.C. 2929.14(C)(4), which provides:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that

¹ Even though polygraph evidence normally is not admissible due to concerns about its reliability, Campbell stipulated to the admissibility of the test results in return for the state's offer to dismiss the charges if he "passed." He cannot now attack the weight of the test having invited the jury to consider the evidence without attacking its reliability at trial.

consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶24} To impose consecutive sentences under the tripartite procedure set forth in R.C. 2929.14(C)(4), the trial court had to find that (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) as applicable here, at least two offenses were committed, and the harm caused by multiple offenses was so great or unusual that no single prison term for any of the offenses committed adequately reflects the seriousness of the offender's conduct. *State v. Swayne*, 4th Dist. Adams Nos. 12CA952, 12CA953, and 12CA954, 2013-Ohio-3747, ¶ 42.

{¶25} The trial court need not use talismanic words to comply with R.C. 2929.14(C)(4), but it must be clear from the record that the trial court actually made the required findings. *State v. Clay*, 4th Dist. Lawrence No. 11CA23, 2013-Ohio-4649, ¶ 64, citing *State v. Alexander*, 1st Dist. Hamilton Nos. C-110828 and C-10829, 2012-Ohio-3349, ¶ 16. In this case, neither the transcript of the sentencing hearing nor the

sentencing entry contains any indication that the court considered the factors in R.C. 2929.14(C)(4) before imposing consecutive sentences.

{¶26} As the state candidly concedes, the trial court did not make the findings required by R.C. 2929.14(C)(4). Therefore, Campbell has established that the trial court's imposition of consecutive sentences was clearly and convincingly contrary to law. We sustain Campbell's third assignment of error.

IV. CONCLUSION

{¶27} Having overruled Campbell's first and second assignments of error, we affirm Campbell's convictions. Having sustained Campbell's third assignment of error, we reverse the imposition of consecutive sentences and remand the cause for resentencing in accordance with R.C. 2929.14(C)(4).

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART, AND
CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.