[Cite as *State v. Russell*, 2011-Ohio-592.]

[Please see 2010-Ohio-5778.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94345

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN RUSSELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED; CONVICTION VACATED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-458679

BEFORE: Jones, J., Kilbane, A.J., and Gallagher, P.J.

RELEASED AND JOURNALIZED: February 10, 2011

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ON RECONSIDERATION[1]

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, John Russell ("Russell"), appeals the judgment of the trial court denying his motion for a new trial. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm in part, reverse in part, vacate appellant's convictions and remand for a new trial.

[1]The original announcement of decision, *State v. Russell*, Cuyahoga App. No. 94345, 2010-Ohio-5778, released November 24, 2010, is hereby vacated. This opinion is the court's journalized decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. 2.2(A)(1).

STATEMENT OF THE CASE AND FACTS

{¶ 2} Russell was indicted on November 10, 2004 on 23 counts of rape, in violation of R.C. 2907.02; 27 counts of gross sexual imposition, in violation of R.C. 2907.05; and seven counts of kidnapping in violation of R.C. 2905.01. All of the counts included a sexually violent predator specification. The state dismissed the sexually violent predator specification during trial. Russell filed a motion for discovery and a bill of particulars. The state responded to discovery.

{¶ 3} The state summarized the victim's statement and provided copies of the following documents: Children and Family Services report, Alpha Clinic at Metro Health Hospital report, Care Clinic at Rainbow Babies and Children's Hospital report, Maureen Riley-Behringer's treatment notes, Windsor Hospital records, and the expert report of Dr. Steven Neuhaus. The state also responded to the request for a bill of particulars. On January 24, 2006, Russell filed a motion for more specific bill of particulars and a motion for production of the transcript of the grand jury proceedings. The state responded to both motions. The court denied the motions. Russell elected to waive a jury trial and try all counts to the bench. Trial commenced on February 6, 2006.

{¶ 4} After the bench trial, Russell was convicted of 8 counts of gross sexual imposition. Russell was convicted as follows: Counts 2 and 3, November 1997 - November 1998; Count 6, November 1998 - November 1999; Counts 22 and 23, November 2001 - November 2002; Count 39, November 2002 - November 2003; Counts 54 and 55, November 2003 - August 2004.

{¶ 5} Following Russell's convictions, the trial court conducted a H.B. 180 hearing and found Russell to be a sexually oriented offender. Thereafter, he was sentenced to one year in prison on Counts 2, 3, 6, 22, 23, 39, 54, and 55. Counts 2 and 3 merged, 22 and 23 merged, and 54 and 55 merged for a total of five years. Five years of postrelease control was also ordered as part of Russell's sentence.

{¶ 6} Russell appealed his conviction and sentence through the Ohio Supreme Court. In addition, Russell filed a Petition for a Writ of Habeas Corpus in U.S. District Court. He has been denied all relief sought.

{¶ 7} Russell's defense attorney made three written Ohio Public records requests to the Lakewood Police Department. The requests were made on March 24, 2009, April 21, 2009, and May 20, 2009. On July 29, 2009, after finally receiving all of the information that consisted of dates and two poems written in the victim's handwriting, Russell filed a motion for leave to file for new trial based on newly found evidence.

{¶ 8} On November 17, 2009, the trial court issued its judgment denying defendant's motion for leave to file a motion for new trial. Russell now appeals the trial court's denial of his motion for leave to file motion for new trial.

ASSIGNMENTS OF ERROR

{¶ 9} Russell assigns three assignments of error on appeal:

{¶ 10} "[1.] The trial court's finding that the undisclosed evidence was not material is contrary to *Kyles* and well established U.S. Supreme Court precedent.

{¶ 11} "[2.] The trial court improperly shifted the burden and relieved the prosecutor from its duty to disclose favorable evidence in violation of *Brady* and its progeny.

{¶ 12} "[3.] Double Jeopardy under the federal Constitution bars retrial when the State has committed *Brady* violations and allowed false testimony to be used to convict appellant."

LEGAL ANALYSIS

{¶ 13} Russell argues in his first assignment of error that the trial court's finding that the undisclosed evidence was not material is contrary to *Kyles* and well established precedent.

{¶ 14} This court reviews both aspects of Crim.R. 33, permission for leave to file a motion for a new trial and the substantive ruling on the motion for a new trial, under an abuse of discretion standard. *State v. Gray*, Cuyahoga App. No. 92646, 2010-Ohio-11 at paragraph 19, citing *State v. Bates*, Franklin App. No. 08AP-753, 2008-Ohio-1422, paragraph 9. "An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." Id., citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 15} "Leave from the trial court is granted only when the defendant has proven, by clear and convincing evidence, that he was unavoidably prevented from filing a timely motion or discovering the new evidence within the period provided pursuant to Crim.R. 33." *State v. Muntaser*, Cuyahoga App. No. 84951, 2005-Ohio-1309, at ¶6.

{¶ 16} Review of the evidence in the record demonstrates that in the exercise of reasonable diligence, Russell was unavoidably prevented from discovering the new evidence.

{¶ 17} Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution. *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

{¶ 18} There are three situations in which a *Brady* claim might arise despite a defendant's failure to request favorable evidence:

> **{¶ 19}** Where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured;
>
> **{¶ 20}** Where the government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence; or
>
> **{¶ 21}** Where the government failed to volunteer exculpatory evidence never requested or requested only in general way, if the suppression of the evidence would be of sufficient significance to result in the denial of defendant's right to a fair trial.

{¶ 22} *Kyles v. Whitley* (1995), 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490; U.S.C.A. Const.Amends. 5, 14.

{¶ 23} Review of the evidence demonstrates the government failed to volunteer exculpatory evidence requested. Moreover, the suppression of evidence regarding the more specific dates is of sufficient significance to deny Russell's right to a fair trial. This information only came to light as a direct result of defense counsel's three written requests for public information.

{¶ 24} The undisclosed dates and details in this case are indeed material and should have been disclosed. If this evidence had been disclosed to the defense there is a reasonable probability of a different outcome regarding various counts.

{¶ 25} The prosecutor stated in open court that the alleged victim did not keep specific dates of the alleged offenses. Moreover, the prosecutor stated that she did not possess all of the information concerning the date in question:

> Ms. Skutnik: "I do not have all of the documentation, all of the paperwork, all of the Court Orders as to what date.
>
> "And it wouldn't be very useful to me because my understanding in speaking with this witness is that on a multitude of occasions those dates were not honored, were discouraged, or were missed.
>
> "*So it is not like I could give them a list of dates that the visitations occurred* because that likewise would not be useful to determine when these events occurred.
>
> "I will say, in response to Mr. Stanton's comments about the events at the Around the Corner Bar, I am mistaken. It is two events at the Around the Corner Bar.
>
> "I am mistaken, and I will, on the record, amend that statement in my motion."[2]

(Emphasis added.)

{¶ 26} Accordingly, defense counsel was trying to narrow down the dates as much as possible. The dates are very important in this situation because the indictment was vague and encompassed a very wide date range, consisting of an entire year. If defense counsel knew the specific dates in question then counsel could have provided documented proof of Russell's whereabouts on the specific days in question.

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[2]See June 26, 2006 tr. at 38-39.

{¶ 27} Now, because of information in the public records request, specific dates are known. Therefore, defense counsel can now provide information regarding Russell's whereabouts for several of the particular dates in question. These specific dates were exactly the information defense counsel was seeking in discovery and exactly what the prosecutor denied having.

{¶ 28} Just as important, the dates, poems, and papers that were received by defense counsel were in the alleged victim's own handwriting. The newly discovered poems and notes can therefore now be used to judge the victim's credibility and accuracy regarding the events that transpired.

{¶ 29} For example, one of the specific dates listed was June 2, 2003. On June 2, 2003, Russell has documentary proof that he and his daughter were at the chiropractor's office that day. The June 2, 2003 date fits into the time frame given in Counts 22 and 23 for which Russell was convicted. Another newly discovered date is March 30, 2004. This date also fits into the time frame in Counts 54 and 55. Russell has documented proof that he was at the chiropractor on this date as well.

{¶ 30} June 19, 2004 is another newly discovered date. This date fits into the time frame given in Counts 54 and 55. On this date, Russell, his wife, and the alleged victim were together until Russell had to go to work. Defense counsel states that there is a credit card receipt for lunch at the Rocky River Brewing Company in Rocky River, Ohio at 12:54 p.m. on June 19, 2004.

{¶ 31} Additional dates include August 31, 2004 when Russell attended a party with his daughter hosted by his boss at Clifton Beach; January 26, 2004, when Russell did

not have visitation with his daughter; November 27, 2003 and December 25, 2003, when Russell was with his wife and sister-in-law all day; February 3, 2003 and July 16, 2003 when Russell did not have custody or visitation; and other dates as well.

{¶ 32} 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. *Brady* at 87. Evidence is 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." *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481. We find that this newly discovered evidence was indeed material and could not have been discovered with reasonable diligence on the part of Russell. The specific dates, which are now known by defense counsel, are material and are of sufficient significance to affect Russell's right to fair trial.

{¶ 33} The state must disclose evidence favorable to the defendant and material either to guilt or punishment, even if it is not requested, and the state's good or bad faith in meeting this standard is irrelevant. Crim.R. 16(B)(1)(f). *State v. Chaney*, 169 Ohio App.3d 246, 2006-Ohio-5288, 862 N.E.2d 559, appeal not allowed, 112 Ohio St.3d 1493, 2007-Ohio-724, 862 N.E.2d 118.

{¶ 34} In the case at bar, the state argues that defense counsel did not ask the right questions. However, obtaining the evidence from the state is not a game of asking the right questions of the prosecution. If the prosecution is aware that material exculpatory evidence exists it must provide it to defense counsel.

{¶ 35} In *State v. Larkins*, Cuyahoga App. No. 82325, 2003-Ohio-5928,[3] this court held that: (1) police records obtained by a third party could be the basis for a new trial; (2) the state did not show that exculpatory evidence in records was provided to defense counsel at the time of trial; and (3) the cumulative effect of the exculpatory evidence was sufficiently material to warrant a new trial.

{¶ 36} Prosecutors have a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. *State v. Sanders*, 92 Ohio St.3d 245, 2001-Ohio-189, 750 N.E.2d 90. The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation, for purposes of determining whether a *Brady* violation occurred. *State v. Iacona*, 93 Ohio St.3d 83, 2001-Ohio-1292, 752 N.E.2d 937.

{¶ 37} Accordingly, it is not good enough that the prosecution argues that it did not have access to the police files concerning Russell in this situation. The prosecution is held responsible for knowing what is in the police file.

{¶ 38} Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt

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[3]Although neither party mentioned the following case, for the sake of providing additional clarity, this court notes that we find *State v. Broom*, 123 Ohio St.3d 114, 2009-Ohio-4778, 914 N.E.2d 392, to be distinguishable from the case at bar. *Broom* involved a postconviction petitioner in a death penalty case who was trying to introduce police reports already obtained via R.C. 149.43 in his postconviction proceeding. This court also notes that we find *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 639 N.E.2d 83, to be distinguishable. In *Steckman* the information was not clearly discoverable; however, in the case at bar the information is clearly discoverable.

about a defendant's guilt. *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1.

{¶ 39} The defendant has only Crim.R. 16 and the Constitution to discover evidence in question. The defense does not have pretrial access to the police or prosecutor's files.[4]

{¶ 40} Accordingly, we find that the trial court's decision that the undisclosed evidence was not material is contrary to *Kyles* and well established U.S. Supreme Court precedent.

{¶ 41} Accordingly, appellant's first assignment of error is sustained.

{¶ 42} Appellant's second assignment of error is moot given our resolution of appellant's first assignment of error. See App.R. 12(A)(1)(c).

{¶ 43} Russell argues in his third assignment of error that double jeopardy under the federal constitution bars retrial when the state has committed *Brady* violations and allowed false testimony to be used to convict appellant.

{¶ 44} The *Brady* and *Kyles* violations previously mentioned substantially and significantly affect the substance of Russell's defense. Although these violations are notable, they are not enough to completely bar retrial in this case.

{¶ 45} We find the violations mentioned are significant enough to merit Russell a new trial. However, we do not find that double jeopardy bars retrial in this situation.

{¶ 46} Accordingly, Russell's third assignment of error is overruled.

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[4]This case was tried under the old discovery rules.

{¶ 47} Accordingly, we affirm in part, reverse in part, vacate appellant's convictions, and remand for a new trial.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, A.J., CONCURS;
SEAN C. GALLAGHER, P.J., CONCURS WITH
WITH SEPARATE OPINION

SEAN C. GALLAGHER, P.J., CONCURRING:

{¶ 48} I write separately to note at the outset that there is nothing in this record indicating that the Cuyahoga County Prosecutor's office, or the original trial prosecutor involved in this case, engaged in any improper activity. Simply put, they were as much in the dark about the existence of these documents as was the defense. The uncontroverted fact is the notes and poems were never turned over to the prosecutor's office by the Lakewood Police. While the individual prosecutor and prosecutor's office did nothing wrong, they are held accountable for the failures of a police agency to disclose information in these instances.

{¶ 49} As a point of reference, it is important to note that the discovery in this case was conducted under the former Crim.R. 16. That rule has been repealed with the adoption of the new "open discovery" Crim.R. 16, effective July 1, 2010. Nevertheless, this case points out the dilemma all prosecutors continue to face even with the passage of Ohio's new "open discovery" provision mandating the open exchange of information. If a prosecutor does not receive it, they cannot disclose it. This is a problem that cannot be directly resolved by a written rule. The rule can only afford an "after-the-fact" sanction. This issue requires never ending vigilance and education of police and investigative agencies by prosecutors throughout the state.

{¶ 50} In any event, I agree with the majority analysis because the undisclosed evidence was sufficient to undermine confidence in the outcome of the trial. See *State v. Kalejs*, 150 Ohio App.3d 465, 2002-Ohio-6657, 782 N.E.2d 112. The notes and poems in question were clearly material to the case. While there is no guarantee of a certain outcome, there is a reasonable probability that the outcome could have been different had the evidence been disclosed or, absent that evidence, that the defendant did not receive a fair trial. The ability to cross-examine the victim on specific events and claims was thwarted by the absence of these documents on cross-examination.

{¶ 51} This is particularly true in cases, like here, where the indictment alleges a broad, open-ended period encapsulating nearly a year of time in most of the 57 counts charged. While the defendant references conflicting events on some specific dates, those events alone do not absolve him of responsibility. Nevertheless, the existence of notes compiled by the victim in her own handwriting referencing some of these specific

dates would have provided the defendant with the opportunity to at least cross-examine her on specific dates or times. There is therefore a reasonable probability that the outcome could have been different, and the failure to disclose this evidence deprived the defendant of an opportunity for a fair trial.