

In the Supreme Court of Ohio

State of Ohio,

Plaintiff-Appellee,

v.

Wayne S. Powell,

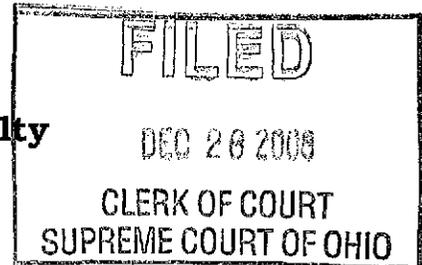
Defendant-Appellant.

Case No. 2007-2027

On Appeal from the
Court of Common Pleas
Lucas County, Ohio
Case No. CR06-3581

Reply Brief of Wayne S. Powell

**The Case Involves the
Affirmance of the Death Penalty**



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Argument

Reply for Proposition of Law No. One

In this proposition of law, Mr. Powell argues that the jurors were not properly instructed about the use of a witness's prior consistent statement. The State responds by ignoring the argument and asserting that the admission was correct and that it was harmless.

The State cites two cases from this Court in support of its argument: *State v. Dever*, 64 Ohio St.3d 401, 410, 596 N.E.2d 436, 444 (1992); and *State v. Finnerty*, 45 Ohio St.3d 104, 107, 543 N.E.2d 1233, 1236-37 (1989). *Dever* stands for the proposition that a trial court did not abuse its discretion in permitting the introduction of an absent child's statements made for medical diagnosis pursuant to OHIO EVID. R. 803(4) and that such statements did not violate the defendant's right to confront the witness. *Finnerty* stands for the proposition that a judge does not abuse his discretion in permitting the State to use a rebuttal witness whose name has not been given to the defense before the witness's usefulness becomes apparent.¹ One of the factors in determining that the admission was reasonable was that the jurors were instructed to limit the use of the testimony.² Here the Court abused its discretion by permitting the jurors to hear the testimony without an instruction limiting its use to determining the credibility of the witness.

¹ *State v. Finnerty*, 45 Ohio St. 3d 104,.

² *State v. Finnerty*, 45 Ohio St. 3d 104.

The State also cites an intermediate appellate decision, *State v. Bock*, 16 Ohio App.3d 146,148, 474 N. E.2d 1228, 1230-31 (1984). In that case the order of the prior consistent statement followed the cross-examination of the witness. The witness testified, was impeached on cross-examination with a prior inconsistent statement, and then testified about an even earlier consistent statement. Here the prior consistent statement was first paraded before the jurors during the direct testimony, albeit under the ruse of refreshing the witness's recollection.

The State argues that the evidence was harmless. The State baldly asserts that evidence of guilt was overwhelming. The State's first point, and presumably its strongest one, in support of this assertion was not to refer to any testimony but rather to imply that Powell has a burden of proof: "Defendant never made a serious attempt to suggest that he was not the perpetrator or that some other, identifiable person started the fire."³ The State had overwhelming evidence of the arson and the homicides. It had very little evidence of Mr. Powell's involvement in the actual criminal acts. At no point does the State discuss its most difficult problem establishing Mr. Powell as the perpetrator, namely that the overwhelming evidence was that the fire started on the landing inside the house and that Powell never was in the house that evening.

The cases cited by the State do not support the unlimited use of the evidence of prior consistent statements nor has the State established that the unrestricted use was harmless by beyond a reasonable doubt.

³ Merit Brief of Appellee, p. 22.

The admission of this evidence violated Mr. Powell's rights under the Ohio rules of evidence. In addition the admission of these statements and not enforcing the rules of evidence also violated Mr. Powell's rights under the OHIO CONST. art. I, §§ 9, 10, and 16, and U.S. CONST. amend. V, VI, and XIV.

Reply for Proposition of Law No. Two

In this proposition, Powell challenges the testimony about his character that was introduced. In response the State cites *State v. Brinkley*, 105 Ohio St.3d 231, 245-46, 824 N. E.2d 959, 978 (2005); *State v. Apanovitch*, 33 Ohio St.3d 19, 21-22, 514 N. E.2d 394, 397-98 (1987); *State v. Frazier*, 73 Ohio St.3d 323, 337-38, 652 N.E.2d 1000, 1013 (1995). These cases all stand for the proposition that a victim's state of mind can be relevant, although these cases do not discuss arson. More importantly, the only testimony permitted is that the victim was scared—no inquiry is allowed into the reasons for any fear. Here the State was permitted to go into not just the fear but the underlying facts. Furthermore, the victim's state of mind in arson murder is of much more limited relevance. The availability of the victim's-state-of-mind evidence is not as broad as the State asserts. In fact in *State v. Greer*, 39 Ohio St.3d 236, 244, 530 N.E.2d 382, 394 (1988), this Court prevented the introduction of evidence of the victim's state of mind, namely that the victim feared someone other than the defendant.

Thus, the relevancy of the victim's state of mind is of limited influence, and the testimony should have been excluded from consideration by the jurors.

Allowing jurors unrestricted access to Isaac Powell's testimony about a statement allegedly made to him by Mr. Powell violates the statutory and evidentiary provisions outlined above. In addition not enforcing these rules violates the OHIO CONST., art. I, §§ 10 and 16, and the U.S. CONST., amend. V, VI, VIII and XIV.

Reply for Proposition of Law No. Three

In this proposition, Mr. Powell challenges the failure of the detectives to advise him of his constitutional rights when they interviewed him pursuant to a search warrant.

Most of the cases cited by the State do not apply to Mr. Powell. In *Wyrick v. Fields*, 459 U. S. 42, 48-49 (1982) the defendant had met with both his private defense counsel and his military-provided counsel before the questioning. In *Biddy v. Diamond*, 516 F.2d 118, 122 (5th Cir. 1975), the petitioner had met with counsel between the two interrogations. Mr. Powell had not talked with an attorney between the first interrogation and the second one, more than a day later. Nor did the interrogators remind of his rights by referring to any earlier explanations of his rights.

Mr. Powell was not reminded about the earlier warnings but was faced with a court order to comply with a subpoena. Most of the cases cited by the State involve interrogations where the custodians call the prisoner's attention to the earlier warnings: *State v. Barnes*, 25 Ohio St.3d 203, 208, 495 N. E.2d 922, 926 (1986) ("Appellant had received and waived his *Miranda* warnings less than twenty-four hours prior to the instant conversation as well as having been told on this occasion that his rights still applied."); *State v. Fairchilds*, 1998 WL 310740, 3, 1998 Ohio App. Lexis 2647 (Ohio App.) ("When, one week later, Officer Hendricks asked Fairchilds if he remembered those rights and understood them, Fairchilds' affirmative response to both question demonstrates the awareness of his right to remain silent that *Miranda* requires."); *State v. Brewer*, 48 Ohio St.3d 50, 58-59, 549 N. E.2d 491, 500-501 (1990) ("Officer Koenig,

who sat with appellant on the ride to the crime scene, testified that appellant indicated awareness of his *Miranda* rights when he gave his second statement. Given appellant's willingness to talk, and his admitted knowledge of his rights, another full *Miranda* warning was not required."); and *State v. Mack*, 73 Ohio St. 3d 502, 513-14. 653 N. E.2d 329, 338 (1995) ("When Detective Qualey and Lt. James sought to resume questioning they asked appellant, again, if he understood his rights, and again appellant answered in the affirmative and voluntarily answered questions.").

The State cites a Ninth Circuit case, *United States v. Andaverde*, 64 F.3d 1305, 1312 (9th Cir. 1995), for the proposition that a thirty hour delay is reasonable. However, there was not the change in the basis for the interview. Here the second interview was initiated for the purpose of compelling Mr. Powell to cooperate with authorities by providing hair, blood, and saliva. Compliance was mandatory; Mr. Powell had no right to refuse. The interview segued into a custodial interrogation, a segue without any reminders or warnings about his right to refuse his custodians.

An analysis using the factors set forth in *State v. Roberts*, 32 Ohio St.3d 225, 232, 513 N.E.2d 720, 725 (1987), shows that Mr. Powell is entitled to suppression of his second statement.

The use of the second statement violated Mr. Powell's rights OHIO CONST. art. I, §§ 9, 10, and 16, and U.S. CONST. amend. V, VI, and XIV.

In this proportion of law Mr. Powell alleges that the trial court made a number of errors in its first phase jury instructions. Mr. Powell pointed to two instances: first, the impact of the instruction regarding causation, and second, and the instruction regarding transferred intent. Only the instruction addressing causation will be the object of a reply.

The State, in opposition, argues that the instructions are not error, when read in their entirety, and it is certain that the jury could not have been misled as to purpose. In support the State directs this Court to its decision in *State v. Thompson*, 33 Ohio St.3d 1, 12-13, 514 N.E.2d 407, 418-18 (1987).

The difficulty with the State's reply is that it does not address Mr. Powell's main assertion: that *State v. Burchfield*, 66 Ohio St.3d 261, 611 N.E.2d 819 (1993), and *State v. Getsy*, 84 Ohio St.3d 180, 195-97, 702 N.E.2d 866, 883-84 (1998), militate against the use of such an instruction. Mr. Powell argued that the instruction confused the jury and that the State's burden of proof would be reduced as a result. Mr. Powell also argued in his Merit Brief, as did trial counsel, that this Court, in *Burchfield*, had cautioned courts from issuing the instruction in a murder case where specific intent was an issue.

The State's Merit Brief does not explain how a case from 1987—*Thompson*—can justify the use of an instruction that cases from 1993 (*Burchfield*) and 1997 (*Getsy*) specifically cautioned trial courts from using in homicide cases. The reason it does not explain this anomaly is that there is no explanation that can satisfy this Court, given the state of the case law. It cannot be disputed that the instruction was used in Mr. Powell's trial.

In short, the State's brief does not undertake any analysis nor offer compelling reasons to suggest why this Court should condone the trial court's ignorance of clear Ohio Supreme Court precedent and advice. This proposition of law should be sustained and the matter remanded to the trial court for a new trial. This relief is necessary to protect Mr. Powell's due process rights as guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Ohio Constitution.

In these two propositions of law, Mr. Powell argues that the jurors should not have been exposed to the vast victim-impact testimony of not only the persons that survived the fire but also those police officers and fire fighters that subdued the blaze.

Mr. Powell argued these two propositions together, but the State separated them. It argues that the first proposition should be evaluated under the plain-error standard.⁴ When arguing the second proposition regarding the failure of trial counsel, the State argued that because the state prevailed on the first proposition under the plain-error standard, Mr. Powell's trial counsel was not ineffective for failing to object.

The State cites *State v. Hartman*, 93 Ohio St. 3d 274, 292, 754 N. E.2d 1150, 1172 (2001), and *State v. Reynolds*, 80 Ohio St. 3d 670, 679-80, 687 N. E.2d 1358, 1369-70 (1998), as support for the presentation of victim-impact evidence. The State forgets that, unlike the choices by the State in those cases, it chose to introduce the evidence, not during the sentencing phase but during the liability phase. *Hartman* and *Reynolds* do not support use of victim-impact testimony during the liability phase, which happened here.

State v. Jackson, 107 Ohio St. 3d 53, 68, 836 N. E.2d 1173, 1194-95 (2005), stands for the proposition that intent in the use of a gun can be inferred from the injuries of the victim. *State v. Gaines*, 2007 WL 4443400 (Ohio App.), stands for a similar inference in an assault with a bottle in a bar. No such inference exists from arson. The State argues that it needed to prove a

⁴ State Merit Brief, p. 38.

substantial risk of physical harm but provides no support for the testimony considerable emotional problems that arose and were emphasized in the trial testimony.

Under OHIO EVID R. 403, the trial judge must determine if the probative value of evidence is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury or if the probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence. Because of his trial counsel's inattention, the trial judge never made these determinations regarding the victim-impact evidence. Such rulings would have been apt on the repeated detail about the various injuries of the victims, which the State asserts was necessary to prove that there was a substantial risk of serious physical harm. The burden was met with the proof that the first victim died and was reiterated by the proof of the other three victims. The victim-impact testimony was merely cumulative on this point and unnecessary.

The failure of the trial court to ban the use of victim-impact testimony, particularly focusing on those surviving rather than on the deceased, during the trial phase denied Mr. Powell his right to a fair trial and all attendant due process rights, as guaranteed under OHIO CONST. art. I, §§ 1, 2, 5, 9, 10, 16, and 20, and U.S. CONST. amend. V, VI, VIII and XIV. For these reasons, it is respectfully requested that the verdict against Mr. Powell and resultant death sentence be vacated and the entire cause remanded to the trial court for a new trial.

In this proposition of law Mr. Powell argued that this Court's decision in *State v. Brown*, 115 Ohio St.3d 55, 873 N.E.2d 858 (2007), compels this Court to find that a trial court must grant a death penalty defendant's motion to have a complete copy of the prosecutor's file sealed for appellate review.

The State opposes this proposition of law, arguing that this Court has repeatedly ruled against such a request. The State's brief ignores the fact that the cases cited in response to Mr. Powell's argument all predate this Court's decision in *Brown*. As a result, the State's reliance on those cases is suspect. Moreover, the State also ignores the thrust of Mr. Powell's argument: The prosecutor's file is necessary to determine whether the State has complied with defense counsel's requests for disclosure that was filed at the trial court level. Without a copy of the prosecutor's file for review, this Court's ability to ensure that all procedures and rights under *Brady* and its progeny are protected is compromised.

For these reasons, as well as those expressed in the Merit Brief, Mr. Powell requests, under the authority of *Brown*, that this matter to be remanded to the trial court for a new trial or, in the alternative, for a limited remand so that the prosecutor's file be copied and transferred to this Court for its review. This relief is necessary to his right to protect Mr. Powell's right to due process under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

In this proposition, Mr. Powell asserts that the trial court interfered with the attorney-client relationship. The State argues that *State v. Bey*, 85 Ohio St.3d 487, 709 N.E.2d 484 (1999), does not apply because the, “trial judge carefully avoided any attempt to counsel defendant or his attorneys as to how they should proceed.”⁵ The State misses the point. *Bey* rejected inquiry by the trial for two reasons, that it is unnecessary and that it is harmful.⁶

Client satisfaction is not something that the trial court should be monitoring. There are certain decisions that are made by the client in a criminal case: the decision to go to trial, the decision to waive a jury, the decision to testify. And the Court has an obligation to make sure that waivers of such rights are made by the client. There are other decision that are made by the attorneys: what investigations to pursue, what motions to file, what witnesses to cross-examine and what questions to ask, what witnesses to call, and what arguments to make to the trier of fact. The client may be dissatisfied with counsel’s pursuing these matters. However, the client’s constitutional right to adequate counsel is violated when counsel fails to investigate and pursue such matters, even in the fact of client dissatisfaction.

These continued inquiries placed the Court between Mr. Powell and his attorneys. This violated Mr. Powell’s rights under OHIO CONST. art. I, §§ 9, 10, and 16, and U.S. CONST. amend. VI and XIV.

⁵ State Merit Brief, p. 65.

⁶ *Bey*, 85 Ohio St.3d 487, 499, 709 N.E.2d at 497.

Conclusion

For all of the reasons set forth above, Mr. Powell's rights under the Constitution of the United States and the Ohio Constitution were violated and he was denied a fair trial and sentencing proceeding. Accordingly, this Court should adopt his Propositions of Law, vacate his death sentence, and either impose a life sentence, or remand the case to the trial court for a new sentencing proceeding or a new trial.

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Certificate of Service

I, counsel for Wayne S. Powell, certify that on December 26, 2008, I served a copy of this Reply Brief on the State by depositing it in the United States mail, first class postage prepaid, addressed to:

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