

IN THE SUPREME COURT OF OHIO

State of Ohio,

Appellee,)

CASE NO. **09-0552**

vs.)

On Appeal from the Mercer
County Court of Appeals

Jamison D. Godfrey, Defendant-Appellant.)

Court of Appeals
Case No. 10-08-08

)

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JAMISON D. GODFREY

James A. Tesno, Reg. #0007416
(Counsel of Record)
P. O. Box 485
Celina, OH 45822
Phone: 419-586-6481
Fax: 419-586-2629
Counsel for Appellant, Jamison D. Godfrey

Andrew J. Hinders, Reg. #0006254
Prosecuting Attorney
Matthew K. Fox, Reg. #0056112
(Counsel of Record)
119 N. Walnut St.
Celina, OH 45822
Phone: 419-586-8677
Counsel for Appellee, State of Ohio

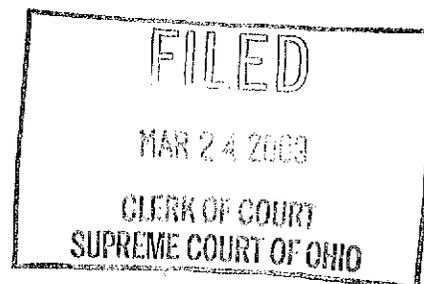


TABLE OF CONTENTS

EXPLANATION OF WHY THIS FELONY CASE IS A CASE OF GREAT PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.	1
STATEMENT OF THE CASE AND FACTS	5
ARGUMENT	9
PROPOSITION OF LAW NO. 1	9
It is within the Province of the Trial Court to determine whether transcripts of grand jury transcripts should be made available to a defendant.	
PROPOSITION OF LAW NO. 2	11
It is a violation of the Defendant's due process rights to require him to go through a trial to test the sufficiency of the State's case.	
PROPOSITION OF LAW NO. 3	13
Not every motion must be submitted to an Evidentiary hearing. A Trial Court does not abuse its discretion when it determines discovery matters on the statements of counsel.	
CERTIFICATE OF SERVICE.	15
APPENDIX	
Trial Court Judgment Entry dated August 13, 2008.	A-1
Opinion of the Third District Court of Appeals, <u>State v. Godfrey</u> (journalized February 9, 2009) Mercer App. No. 10-08-08.	A-4

EXPLANATION WHY THIS FELONY CASE RAISES SUBSTANTIAL
CONSTITUTIONAL QUESTIONS AND IS A MATTER OF GREAT
PUBLIC AND GENERAL INTEREST

The facts and applicable law of this case address both the issue of Grand Jury access and discovery in a criminal context.

There are certain undisputed propositions of law applicable to this case.

1. As a general rule a Defendant in a criminal case does not have access to Grand Jury testimony.
2. The Grand Jury is a function of the Common Pleas Court. The Prosecutor is permitted to have access to the Grand Jury to present cases and obtain indictments. The Defendant may obtain access to recorded Grand Jury proceedings only upon application to the Common Pleas Court.
3. In order to obtain access to Grand Jury testimony, a Defendant must convince the Trial Court that the Defendant has a particularized need to the requested Grand Jury testimony.

PROPOSITION OF LAW #1

IT IS WITHIN THE PROVINCE OF THE TRIAL COURT TO DETERMINE
WHETHER TRANSCRIPTS OF GRAND JURY TRANSCRIPTS SHOULD BE
MADE AVAILABLE TO A DEFENDANT

In this case, the Appellant asks the Court to define a Defendant's right to obtain access to Grand Jury proceedings as a means of discovering the Prosecution's theory of a case when the Prosecution has otherwise failed to disclose this information and the information sought is crucial to the defense.

The Appellant submits that under the Due Process Clause of the United States (V and XIV Amendments) and Ohio (I Section 16) Constitutions, he is entitled to access of information critical to his defense that was submitted to the Grand Jury. The Prosecution should not be permitted to use the historical secrecy of the Grand Jury to hide information critical to the defense, forcing the Appellant to go to trial without an opportunity to prepare for the trial.

In the instant matter, the Appellant is charged with numerous offenses, centering around the Prosecution's claim that the Appellant struck Jessica Reynolds and somehow her pregnancy was terminated. As was submitted in the Appellant's Motion for Grand Jury Testimony filed on June 6, 2008, a review of all discovery provided by the Prosecution shows no evidence, statements or records relative to the causation of death. Obviously, to obtain an indictment, there must have been evidence presented to the Grand Jury as to the cause of death. The question of the ability of a prosecution to hide critical evidence behind the shield of Grand Jury secrecy would be of great public interest.

The Appellant submits that the general public would be shocked if they were aware that Defendant's in Ohio have to go to trial without knowing all the critical evidence the prosecution has against that Defendant.

PROPOSITION OF LAW NO. 2

IT IS A VIOLATION OF THE APPELLANT'S DUE PROCESS RIGHTS UNDER THE UNITED STATES AND OHIO CONSTITUTIONS TO REQUIRE HIM TO GO THROUGH A TRIAL TO TEST THE SUFFICIENCY OF THE STATE'S CASE

In its decision, the Court of Appeals stated that the Appellant was not prejudiced by denying him access to the requested Grand Jury testimony because he can always

go to trial and move for a Criminal Rule 29 Motion for Acquittal at the close of the State's case if the State's case is weak.

A criminal defendant should have the right to challenge the sufficiency of the State's case before trial in those cases where the State's evidence is so weak that no jury would convict the Defendant. In this matter, the Defendant is facing life imprisonment. A Defendant should not have to go through the entire pre-trial and trial processes in every case where the State's case is so weak that a conviction would not happen.

In a civil litigation context, a party may move for Summary Judgment pursuant to Civil Rule 56 when upon submission of the appropriate evidence, it is apparent that only one conclusion could be reached. The Due Process and the Equal Protection Clauses of the United States and Ohio Constitutions demand that a criminal defendant should have an equal pre-trial right to a determination when the prosecution's case is so weak that conviction is an impossibility.

PROPOSITION OF LAW #3

NOT EVERY MOTION MUST BE SUBMITTED TO AN EVIDENTIARY HEARING. A TRIAL COURT DOES NOT ABUSE ITS DISCRETION WHEN IT DETERMINES DISCOVERY MATTERS ON THE STATEMENTS OF COUNSEL.

In the instant matter, the question of access to Grand Jury proceedings was submitted to the Trial Court on the Motion filed on behalf of the Appellant, stating the factual allegation that the discovery did not provide any documentation setting forth the medical cause of death. The Motion was signed by counsel for the Defendant. The prosecution responded to the Appellant's Motion but never disputed or challenged the Appellant's allegations.

The Trial Court ruled on the Motion without an evidentiary hearing, relying on the Motion and responses.

This case gives the Court the opportunity to define and clarify the motion pleadings question as to when may a Court rule on a motion without an evidentiary hearing; when may a Court rely on the statements of counsel, etc.

STATEMENT OF THE CASE AND FACTS

On May 6, 2008, the State filed a Complaint against the Defendant-Appellant alleging, amongst other crimes, Murder, Felonious Assault and Domestic Violence. In addition to the Complaint, the State filed an Affidavit of Detective Chris Hamberg of the Mercer County, Ohio, Sheriff's Department. The Hamberg Affidavit summarized the State's allegations as follows:

Shortly after 11:0 p.m. on Sunday, April 27, 2008, the Mercer County Sheriff's Office received a call for service indicating that an individual, Jessica Reynolds, was enroute to Joint Township District Memorial Hospital in St. Marys, Ohio, for injuries to herself and her unborn child that she allegedly received from Jamison Godfrey.

As the investigation commenced it determined that Jessica Reynolds and Jamison Godfrey are live-in boyfriend and girlfriend residing at 5781 Monroe Rd., Celina, Mercer County, Ohio. Ms. Reynolds claimed she was ten weeks pregnant with Godfrey's child. Earlier the evening of April 27th a domestic dispute began between the parties. That dispute included Godfrey choking and punching Reynolds. Reynolds expressed her concern to Godfrey for her unborn child. He continued to assault her including punching her in the stomach. Eventually she was able to free herself from him and flee. She was assisted by Godfrey's aunt, Teresa Embry, and taken to Reynold's mother's residence in St. Marys, Ohio, and then taken to the hospital. At the hospital they were unable to find a heartbeat for the unborn child, and it is anticipated the child will be stillborn in the near future. Godfrey was arrested and the investigation is ongoing.

On May 15, 2008, prior to the scheduled Preliminary Examination, the Mercer County Grand Jury issued a nine court indictment against the Appellant. As a result of the indictments, the Preliminary Examination was cancelled. The counts of the indictments are as follows:

Count One - Murder, ORC 2093.02(A), punishable as provided in 2929.02 of the Revised Code

Count Two - Murder, ORC 2903.02(B), punishable as provided in 2929.02 of the Revised Code

Count Three - Involuntary Manslaughter, ORC 2903.04(A), a Felony of the First (F-1) degree

Count Four - Involuntary Manslaughter, ORC 2903.04(B), a Felony of the Third (F-3) degree

Count Five - Reckless Homicide, ORC 2903.041(A)(1), a Felony of the Third (F-3) degree

Count Six - Felonious Assault, ORC 2903.11(A)(1), a Felony of the Second (F-2) degree

Count Seven - Assault, ORC 2903.13(A), a Misdemeanor of the First (M-1) degree

Count Eight - Assault, ORC 2903.13(B), a Misdemeanor of the First (M-1) degree

Count Nine - Domestic Violence, ORC 2919.25(A), a Felony of the Fourth (F-4) degree

On June 6, 2008 the Appellant filed a Motion for a Bill of Particulars and a Motion for Transcripts of certain Grand Jury Testimony. In the Motion for Grand Jury Transcripts, counsel for the Appellant set forth two claims of particularized need for these transcripts. First, that Appellant alleged that the discovery that the prosecution provided set forth no medical records, summarizations or statements that set forth the alleged cause of death. The Appellant claimed that in order to obtain an indictment, the State must have presented medical testimony as to the cause of death and the Appellant needed to know the State's theory as to the cause of death so that he could have his experts review the discovery and medical records relative to the State's theory. Without knowing this information, the Appellant could not prepare his defense to these serious charges.

The second branch of the Appellant's Motion for certain Grand Jury Transcripts was that Jessica Reynolds, the purported victim, had advised that she had recanted her prior statement and at the Grand Jury had testified that the Appellant had not struck or harmed her. The Appellant set forth his claimed particularized need in that since this exculpatory evidence was presented at the Grand Jury and the State did not divulge this, the Appellant should be able to review this testimony and there may have been other exculpatory evidence presented that the State also did not divulge and to which the Appellant would be entitled.

In response to the Appellant's two-prong Motion, the State filed its response on July 23, 2008. The State never disputed the Appellant's allegations, nor did it respond that there was no medical testimony presented as to causation or that there was no exculpatory evidence presented at the Grand Jury. The State's sole argument was that the Appellant's allegations did not set forth a particularized need. The State rested its arguments on the definition of "particularized need" and never disputed the Appellant's allegations.

At no time did the State ever dispute the factual allegations made by Appellant.

On August 13, 2008 the Trial Court issued its order granting the Appellant's Motion, without hearing. The Court found that the Appellant had established a particularized need in that the Defendant was entitled to know the theory of causation of death upon which the State intended to rely at trial. Further, the Court found a particularized need based on the recanted testimony of Jessica Reynolds.

On August 25, 2008 the State moved the Third District Court of Appeals for leave to file an Interlocutory Appeal of the Trial Court's decision relative to Grand Jury

transcripts. The State also moved the Trial Court for a stay of all proceedings pending resolution of the Appellate's issue which was granted by the Trial Court. On November 13, 2008 the Appeals Court refused to grant the Appellee's Motion to lift the Trial Court's stay of all proceedings pending resolution of the Appellate case.

On October 1, 2008 the Third District Court of Appeals issued an Entry accepting the State's appeal.

After briefing and oral arguments the Court of Appeals issued its decision on February 9, 2009. In its decision, the Court failed to consider all of the Appellant's arguments relative to the testimony of Jessica Reynolds. The Appellate Court analyzed whether the Appellant should be given access to her Grand Jury testimony but did not address the issue that was also before the Trial Court being whether the Appellant should be given access to other exculpatory testimony.

The Appeals Court also determined that the Appellant was not entitled to "causation" Grand Jury testimony that would establish the State's evidence as to the cause of death. The Appellate Court opined that the Appellant could use other discovery procedures to obtain access to the "causation" evidence being sought. Further, the Court of Appeals ruled that the Appellant was not prejudiced in that he always has the right to go to trial to put the State's evidence to the test.

ARGUMENT

PROPOSITION OF LAW #1

IT IS WITHIN THE PROVINCE OF THE TRIAL COURT TO DETERMINE WHETHER TRANSCRIPTS OF GRAND JURY TRANSCRIPTS SHOULD BE MADE AVAILABLE TO A DEFENDANT.

The Appellant is currently facing a possible life imprisonment for murder. After the prosecution delivered discovery to counsel for the Appellant, he (Appellant's counsel) filed a motion for access to Grand Jury transcripts for (1) any exculpatory evidence (2) specific evidence as to the cause of death. In the Motion, counsel argued that he had become aware that at the Grand Jury the "victim/complaining witness" had testified that the Appellant had not struck her or otherwise assaulted her, which was in direct contradiction to her prior statements, upon which the prosecution was based. Since the prosecution had not notified the Court or counsel of this exculpatory testimony, the Appellant also moved the Court for Grand Jury transcripts as to any other exculpatory evidence.

In the second branch of the Appellant's Motion for Grand Jury testimony, counsel for the Appellant advised the Court that there was nothing in the discovery as to the cause of death. As the prosecution was able to obtain an indictment against the Defendant for murder, (2 counts), Involuntary Manslaughter (2 counts), and Reckless Homicide (2 counts), counsel submitted that there must have been medical evidence as to the cause of death submitted to the Grand Jury. In the Motion, counsel asked the Court for an order that the Defendant be granted access to the Grand Jury transcript as to the cause of death.

A. INCONSISTENT TESTIMONY

The Court of Appeals mis-read the Motion in question and the Appellant's brief before the Court of Appeals. The Appellant was not requesting only the Grand Jury testimony of Jessica Reynolds. The Appellant also requested any other Grand Jury testimony that would be exculpatory.

B. DISCOVERY OF MEDICAL TESTIMONY

Prior to going to trial, the Appellant requested any Grand Jury Testimony that would establish the cause of death. The Appellant's argument was that since there was no causation records in the discovery, he could not know the prosecutions theory as to the medical cause of death. To prepare for trial, the Appellant needed this information. As the prosecution was able to obtain an indictment on various counts relative to the death, the Appellant requested to see what testimony was presented to the Grand Jury to establish the cause of death.

It is undisputed that historically the Grand Jury meets and acts in secret. To that end, generally a defendant is not permitted access to the Grand Jury proceedings. To obtain access to the Grand Jury testimony, a Defendant must establish a particularized need for this testimony. State v. Greer (1981) 66 Ohio St.2d 139

In its decision, the Trial Court found particularized need in:

"The Court finds that based upon the allegations contained in the motion, the defendant has established a particularized need for a transcript of certain of the grand jury proceedings, specifically for the reason that the State of Ohio has not demonstrated to defendant what medical evidence it intends to submit to establish that the defendant caused the death of a fetus."
Trial Court Entry filed August 13, 2008.

The Court of Appeals postulated that the Appellant's remedy is to pursue further discovery rather than to obtain the requested Grand Jury transcripts. Contrary to the

opinion of the Appellate Court (paragraph 24) the Appellant wasn't seeking to challenge the sufficiency of the indictment. The Court mentions subpoenas and depositions as possible discovery techniques available. Without expending a great deal of time herein in discussing the lack of discovery techniques in a criminal case, there must be a hearing to which one could subpoena medical testimony. Theoretically, the Appellant should draft a motion for some type of sham hearing in order to issue subpoenas. No doubt the prosecution would challenge that. The use of depositions is severely limited under the Criminal Rules. (Criminal Rule 15)

The Court of Appeals relied on this Court's opinion in State v Luskey (1970) 21 Ohio St.2d 187 that access to the Grand Jury is not to be used as a discovery technique. The Court ignored this Court's pronouncement, at page 191, where it was stated:

"Generally, proceedings before a Grand jury are strict and an accused is not entitled to inspect Grand Jury minutes before trial for the purpose of preparation or for purposes of discovery in general. This rule is relaxed only when the ends of justice require it, such as when the defense shows that a particularized need exists for the minutes which outweighs the policy of secrecy. (underlining added)

In this case, the Appellant established a particularized need for the Grand Jury transcripts. The Trial Court accepted the Appellant's position and found this particularized need. The Trial Court did not abuse its discretion in permitting access.

PROPOSITION OF LAW #2

IT IS A VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHTS TO REQUIRE HIM TO GO THROUGH A TRIAL TO TEST THE SUFFICIENCY OF THE STATE'S CASE.

The Trial Court made its determination on the Motion of the Appellant, the Response filed by the Assistant Prosecutor and the Reply of the Appellant.

The Appellant alleged factual issues (1) Jessica Reynolds recanted her prior statements when she testified before the Grand Jury; (2) the prosecution did not make the Appellant aware of this exculpatory testimony; (3) there was no statement in the discovery that would establish the medical cause of death.

In its response, the prosecution never contested any of the factual allegations of the Appellant.

As the factual allegations were uncontested, the Trial Court had the ability to rely on those allegations in rendering its decision. There was no need for a hearing on the facts as they were uncontroverted.

Criminal Rule 47 provides for Motion practice in a criminal context. Relative to Motions, the rule provides:

“It shall state with particularity the grounds upon which it is made . . . It shall be supported by a memorandum containing citations of authority. and may also be supported by an affidavit. (underlining added)

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.”

Counsel are officers of the Court, having taken an oath as attorneys that each will support the Constitutions and Laws of the United States and Ohio and abide by the Code of Professional Responsibility (Rules for the Government of the Bar - Rule I Section 8).

The Court has the right, should it wish to do so, to rely on statements made by counsel. A Trial Court does not abuse its discretion in relying on the statements of counsel when it renders a decision, especially when opposing counsel does not dispute those allegations.

PROPOSITION OF LAW #3

NOT EVERY MOTION MUST BE SUBMITTED TO AN EVIDENTIARY HEARING. A TRIAL COURT DOES NOT ABUSE ITS DISCRETION WHEN IT DETERMINES DISCOVERY MATTERS ON THE STATEMENTS OF COUNSEL.

In the context of Civil Court Proceedings, a party may submit issues to the Court for a pre-trial determination via Summary Judgment Proceedings, (Civil Rule 56). In such a context, that party may submit verification of uncontested facts and ask the Court to determine that the case, or certain facts, should be resolved before trial because reasonable minds could only reach one decision, that being propounded.

Likewise, in a Civil Proceeding, Defendant has the ability to submit Interrogatories, Request for Production of Documents and to take the deposition of fact witnesses and experts to discover their knowledge and opinions.

These rules apply regardless of whether the amount in controversy is 5 cents or 5 million dollars.

However, in a criminal proceeding where the Appellant is facing life imprisonment, he does not have any of those rights. As the Court of Appeals stated in this matter:

"In the meantime, Godfrey is not prejudiced because in the final analysis, he can assert all his claims at trial in a Criminal R, 29 Motion at the conclusion of the state's case. We know of no authority establishing a particularized need for the pre-trial release of Grand Jury testimony in order to prevent a defendant from having to proceed to trial, based solely on defense counsel's professional assessment that the State does not seem to have the evidence to support the indictment. (Paragraph 28)

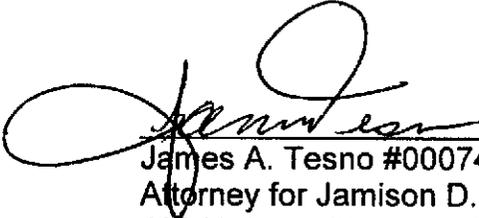
Defense counsel never claimed the prosecution didn't have the evidence to support the indictment. Defense counsel's Motion is based on the belief the State has this evidence. The State has never denied it had this knowledge. The Defense has a

right to know what the evidence is. The Defendant should not be required to go to trial to learn what the State's theory of the cause of death is.

The defense has obtained permission from the Trial Court to hire an expert coroner and obstetrician. They have analyzed the records submitted through discovery but can only guess and speculate what opinions are held by the prosecution's witnesses as to cause of death. It is possible that the Defendant will go to Trial where his experts learn that the State's theory of causation is different than that which they assumed. In such an instance, the Defendant's witnesses would be unprepared to challenge the State's expert(s) theory.

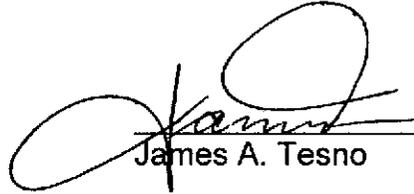
While the Court of Appeals is of the belief that there is no authority to order the release of these records, in addition to the particularized need standard of State v. Greer 66 Ohio St.2d 139, the Appellant submits that he is entitled to these records under the Due Process clauses of the United States (V and XIV Amendments) and Ohio (I Section 16) Constitutions.

Further, as a Civil Litigant would be entitled to discover all of the records requested herein, the Appellant submits that he should be entitled to discover the Grand Jury testimony as to the cause of death under the Equal Protection clauses of the United States (XIV Amendment) and Ohio (I Section 2) Constitutions.


James A. Tesno #0007416
Attorney for Jamison D. Godfrey
100 N. Main St., P. O. Box 485
Celina, OH 45822
Phone: 419-586-6481
Fax: 419-586-2629

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served on Andrew Hinders, Mercer County Prosecuting Attorney, and Matthew K. Fox, Assistant Prosecuting Attorney, 119 N. Walnut St., Celina, OH 45822, by regular U. S. Mail, this 23 day of March, 2009.


James A. Tesno

IN THE COURT OF COMMON PLEAS, MERCER COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO

Case No. 08-CRM-034

Plaintiff

vs.

JAMISON GODFREY

Defendant

JUDGMENT ENTRY ON
DEFENDANT'S MOTION FOR
TRANSCRIPT OF GRAND JURY
PROCEEDINGS

This matter is before the court on defendant's motion for transcript of grand jury proceedings filed June 6, 2008. The State of Ohio filed its response on July 23, 2008. Defendant filed his reply on July 31, 2008.

The court finds that based upon the allegations contained in the motion, the defendant has established a particularized need for a transcript of certain of the grand jury proceedings, specifically for the reason that the State of Ohio has not demonstrated to defendant what medical evidence it intends to submit to establish that the defendant caused the death of a fetus. Further, defendant has represented that the mother of the fetus, Jessica Reynolds, allegedly recanted her grand jury testimony, and therefore, said grand jury testimony is crucial to the defendant to present a defense to the charge.

Based upon the foregoing, the Mercer County Prosecutor shall direct the official court reporter who recorded the grand jury testimony that gave rise to the grand jury's issuance of an indictment in this cause to transcribe and deliver to defendant through counsel the transcript of the testimony of any witness whose testimony related to the cause of death of the fetus of Jessica Reynolds, including but not limited to the testimony of Jessica Reynolds and thereafter certify to the court that he has complied with this order.

IT IS SO ORDERED.

Jeffrey R. Ingram
Jeffrey R. Ingram, Judge

SEAL

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing judgment entry was issued to Matthew K. Fox, Esq. (Assistant Prosecuting Attorney) and James A. Tesno, Esq. (Defense Counsel), at their respective addresses on this 14th day of August, 2008.

Betty Klosterman

Betty Klosterman, Deputy Clerk

ck

XC: COURT

Judgment Entry
on Defendant's Motion For
Transcript of Grand Jury Proceedings

3:55

AUG 13 2008

FILED

172
1070
AUG 25 2008

MERCER CO. COURT OF APPEAL
James J. Highley, Clerk

25 August 08

Kell J. Jones

A-1

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MERCER COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLANT,

CASE NO. 10-08-08

v.

JAMISON D. GODFREY,

J U D G M E N T
E N T R Y

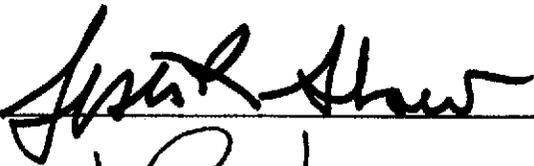
DEFENDANT-APPELLEE.

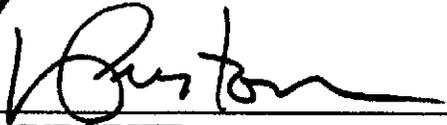
For the reasons stated in the opinion of this Court, the assignments of error are sustained and it is the judgment and order of this Court that the judgment of the trial court is reversed with costs assessed to Appellee for which judgment is hereby rendered. The cause is hereby remanded to the trial court for further proceedings and for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

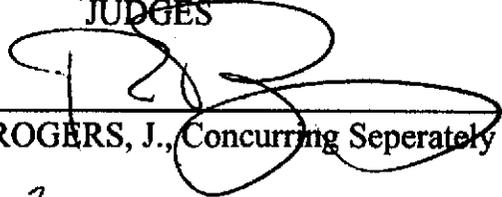
FILED
10:00 S
FEB 09 2009 942

MERCER CO. COURT OF APPEALS
James J. Highley, Clerk





JUDGES

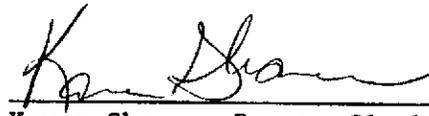


ROGERS, J., Concurring Separately

DATED: February 9, 2009

CERTIFICATE OF SERVICE

This is certify that time-stamped copies of the foregoing Judgment Entry have been issued by regular US mail and/or by hand to Matthew K. Fox, James A. Tesno and Honorable Jeffrey R. Ingraham; certified copy of same issued to Mercer County Common Pleas Court Case File # 08-CRM-034, this 9th day of February, 2009.



Karen Shaner, Deputy Clerk

FILED

FEB 09 2009

**MERCER CO. COURT OF APPEALS
JAMES J. HIGHLEY, CLERK**

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MERCER COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLANT,

CASE NO. 10-08-08

v.

JAMISON D. GODFREY,

OPINION

DEFENDANT-APPELLEE.

Appeal from Mercer County Common Pleas Court
Trial Court No. 08-CRM-034

Judgment Reversed and Cause Remanded

Date of Decision: February 9, 2009

APPEARANCES:

Matthew K. Fox for Appellant

James A. Tesno for Appellee

FILED
10:00
FEB 09 2009

MERCER CO. COURT OF APPEALS
James J. Highley, Clerk

SHAW, J.

{¶1} Appellant, the State of Ohio (“the State”) appeals from the August 13, 2008 Judgment Entry of the Court of Common Pleas, Mercer County, Ohio finding that the Defendant-Appellee Jamison Godfrey (“Godfrey”) established a particularized need for the release of certain grand jury proceedings.

{¶2} On May 15, 2008 Godfrey was indicted on one count of Murder, in violation of R.C. 2903.02(A), punishable as provided in R.C. 2929.02; one count of Murder, in violation of R.C. 2903.02(B), punishable as provided in R.C. 2929.02; one count of Involuntary Manslaughter, in violation of R.C. 2903.04(A), a felony of the first degree; one count of Involuntary Manslaughter, in violation of R.C. 2903.04(B), a felony of the third degree; one count of Reckless Homicide, in violation of R.C. 2903.041(A)(1), a felony of the third degree; one count of felonious Assault, in violation of R.C. 2903.11(A)(1), a felony of the second degree; one count of Assault, in violation of R.C. 2903.13(A), a misdemeanor of the first degree; one count of Assault, in violation of R.C. 2903.13(B), a misdemeanor of the first degree; and one count of Domestic Violence, in violation of R.C. 2919.25(A), a felony of the fourth degree. On May 29, 2008 Godfrey pled not guilty to all of the charges.

{¶3} These charges stem from an altercation occurring between Godfrey and his live-in girlfriend, J.R. At the time of the altercation, J.R.

FILED

FEB 09 2009

MERCER CO. COURT OF APPEALS
James J. Highley, Clerk

pregnant. Allegedly, Godfrey choked and punched J.R., resulting in the termination of her pregnancy.

{¶4} In addition to other various motions, on June 6, 2008 Godfrey filed a motion for a transcript of the grand jury proceedings, arguing that he needed a copy of the transcript to investigate possible witness inconsistencies and undisclosed medical evidence. The State responded to Godfrey's motion for a transcript of the grand jury proceedings on July 23, 2008. Godfrey filed a response on July 31, 2008. On August 13, 2008 the trial court issued a Judgment Entry granting Godfrey's motion for a transcript of the grand jury proceedings as follows:

{¶5} In granting Godfrey's motion, the trial court reasoned:

The court finds that based upon the allegations contained in the motion, the defendant has established a particularized need for a transcript of certain of the grand jury proceedings, specifically for the reason that the State of Ohio has not demonstrated to defendant what medical evidence it intends to submit to establish that the defendant caused the death of a fetus. Further, defendant has represented that the mother of the fetus [J.R.], allegedly recanted her grand jury testimony, and therefore, said grand jury testimony is crucial to the defendant to present a defense to the charge.

Based upon the foregoing, the Mercer County Prosecutor shall direct the official court reporter who recorded the grand jury testimony that gave rise to the grand jury's issuance of an indictment in this cause to transcribe and deliver to defendant through counsel the transcript of the testimony of any witness whose testimony related to the cause of death of the fetus of [J.R.], including but not limited to the testimony of [J.R.] and

FILED

FEB 09 2009

MERCER CO. COURT OF APPEALS
James J. Highley, Clerk

thereafter certify to the court that he has complied with this order.

{¶6} The State now appeals, asserting two assignments of error.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONCLUDED THE DEFENDANT ESTABLISH [SIC] A PARTICULARIZED NEED FOR PROTECTED GRAND JURY TRANSCRIPTS BASED SOLELY UPON SPECULATION.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONDUCT AN IN-CAMERA INSPECTION.

{¶7} For ease of discussion, we will address the State's assignments of error together. As an initial matter, we recognize that the trial court relied on two distinct rationales for providing Godfrey with a copy of the grand jury proceedings: 1) to allow Godfrey to review any alleged inconsistencies between J.R.'s current version of events, her grand jury testimony, and her prior statement to law enforcement; and 2) to allow Godfrey access to medical information that his counsel surmises must be part of the grand jury testimony, but that he has not received in discovery. These distinct rationales will be discussed separately.

Release of Grand Jury Testimony Generally

{¶8} Disclosure of grand jury testimony, other than that of the defendant and co-defendant, is controlled by Crim.R. 6(E). *State v. Greer* (1981), 66 Ohio

FILED

FEB 09 2009

St.2d 139, 420 N.E.2d 982, paragraph one of the syllabus. Crim. R. 6(E) provides, in pertinent part, as follows:

Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

{¶9} In Ohio, the long-standing tradition of grand jury secrecy is well pronounced in case law. *Greer*, 66 Ohio St.2d at 146. Typically, “[g]rand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy.” *Greer*, 66 Ohio St.2d 139 at paragraph two of syllabus, citing and approving *State v. Patterson* (1971), 28 Ohio St.2d 181, 277 N.E.2d 201. See also, *State v. CECOS Intern. Inc.* (1988), 38 Ohio St.3d 120, 526 N.E.2d 807.

{¶10} To demonstrate a particularized need for the disclosure of grand jury testimony a defendant must show whether “it is probable that the failure to

FILED

FEB 09 2009

MERCER CO. COURT OF APPEALS
James J. Highley, Clerk

disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness' trial testimony." *Greer*, 66 Ohio St.2d 139 at paragraph three of syllabus.

{¶11} Additionally, this Court has previously held that "[a] particularized need is one in which the grand jury transcript is necessary to impeach a witness, refresh his recollection, or to test his credibility and these purposes outweigh the continued need for secrecy." *State v. Spears*, 3rd Dist. No. 1-01-93, 2002-Ohio-6621 at ¶ 22.

{¶12} In *Greer*, the Ohio Supreme Court concluded that the release of grand jury transcripts was within the sound discretion of the trial court. *Greer*, 66 Ohio St.2d 139, at paragraph one of syllabus. Accordingly, we will not reverse the judgment of the trial court, regarding the release of grand jury transcripts, absent an abuse of discretion. An abuse of discretion constitutes more than an error of law or judgment and implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

Inconsistent Witness Testimony

{¶13} Godfrey argues that he is entitled to a transcript of J.R.'s testimony before the grand jury to determine if her testimony is inconsistent with her current version of events or inconsistent with her prior statements to law enforcement.

FILED

FEB 09 2009

MERCER CO. COURT OF APPEALS
Jamai J. Higley, Clerk

{¶14} In his motion, Godfrey stated the following, in pertinent part, as demonstrating a particularized need for the transcripts:

Counsel is of the belief that the complaining witness, [J.R.], recanted in her Grand Jury testimony the statement she made to police officers at the start of this matter. Counsel is of the belief that this was under oath before the Grand Jury. This testimony is crucial to the defense. Further, the Defendant questions if there was other exculpatory evidence given to the Grand Jury that was not provided to the Defendant.

{¶15} The release of grand jury testimony requires a showing of a particularized need, which cannot be established on the basis of speculative pretrial allegations of potentially inconsistent testimony. See *State v. CECOS Intern. Inc.*, 38 Ohio St.3d 120. The Ohio Supreme Court has held that the determination of prejudice “can be made only after the witness testified at trial, and, generally, cannot be used by an accused for ascertaining the evidence of the prosecution for the purpose of trial preparation.” *State v. Laskey* (1970), 21 Ohio St.2d 187, 191, 257 N.E.2d 65, vacated in part on other grounds (1972), 408 U.S. 936, 92 S.Ct. 2861, 33 L.Ed.2d 753. See also, *State v. Coley*, 93 Ohio St.3d 253, 754 N.E.2d 1129, 2001-Ohio-1340.

{¶16} Trial has not yet commenced in the present case. In sum, we do not believe a particularized need can be established for the pre-trial release of grand jury testimony of a witness based upon “anticipated” inconsistencies with trial testimony that has not yet taken place – or based upon undisclosed inconsistencies

FILED

FEB 09 2009

MERCER CO. COURT OF APPEALS
James J. Hightley, Clerk

with prior statements allegedly made by the witness to law enforcement.. Therefore, we find that Godfrey is not presently entitled to J.R.'s grand jury testimony.

{¶17} We note, however, that our ruling on this issue is confined to the trial court's ruling on Godfrey's *pre-trial* motion for a grand jury transcript. Should Godfrey demonstrate a particularized need for access to the transcripts of the grand jury proceedings to obtain impeaching testimony after J.R. testifies at trial, the trial court is required to conduct an *in camera* review to determine if material inconsistencies exist. Accordingly, Godfrey is not prejudiced by a pre-trial denial of his request.

{¶18} Specifically, we note that "in a criminal case, the defendant has a right to an *in camera* inspection by the trial court, with counsel for the state and the defendant, to determine the existence of inconsistencies between the testimony of the prosecution's witnesses and their prior statements." *State v. White* (1968), 15 Ohio St.2d 146, 239 N.E.2d 65, at paragraph four of syllabus.

{¶19} The *Greer* Court explains the process in the following terms:

Coming now to the application of the appropriate rule here, we hold that Crim.R. 6(E) would require the trial court, upon proper motion, to consider the basis of the particularized need advanced by the defendant. This may be accomplished by an *in camera* inspection of the grand jury minutes by the trial court assisted by counsel. Next, we conclude that there is soundness in the procedure to be followed by the trial court as set forth in *Dennis*, *supra*, to the effect that once the particularized need for

FILED

FEB 09 2009

MERCER CO. COURT OF APPEALS
James J. Highley, Clerk

the grand jury material is shown, the necessity of preserving grand jury secrecy is lessened, largely because the witness, *in testifying at trial*, has given up any anonymity he might have had and has made public the events which are the subject of the grand jury testimony being sought. Under such circumstances, when there is a balancing of the often minimal need to preserve secrecy against the need for the defendant to review certain portions of the grand jury testimony, we conclude that all relevant portions of the transcript should be produced, with the trial court deleting extraneous matters, and issuing protective orders where necessary.

Greer, 66 Ohio St.2d at 150-151 (emphasis added).

{¶20} For these reasons, we find that the trial court erred in ordering the immediate release of J.R.'s grand jury testimony directly to Godfrey, based solely upon defense counsel's representations that said testimony may be inconsistent with prior undisclosed statement of the witness or that said testimony may be inconsistent with the anticipated testimony of the witness at an upcoming trial.

Discovery of Medical Testimony

{¶21} Godfrey also argues that he is entitled to all grand jury testimony relating to the cause of death of the fetus. In pertinent part, Godfrey's motion for grand jury transcripts provides as follows:

The Defendant has been indicted for the murder/homicide of the fetus carried by [J.R.]. A review of the discovery and pleadings to date set forth the apparent theory that the Defendant assaulted [J.R.] on April 27, 2008 causing the death of her fetus. A review of the discovery shows various statements from medical personnel to the effect that the fetus had no detectible heartbeat on April 27, 2008 but they could not state this was the result of an assault.

FILED

FEB 09 2009

MERCER CO. COURT OF APPEALS
James J. Highley, Clerk

Obviously, the prosecution was able to obtain an indictment for the charges herein. It must have presented evidence to the Grand Jury as to the cause of death.

In order to prepare the defense of this case, the Defendant needs to know the claimed factual basis of the prosecution claims. The Defendant anticipates the need to obtain expert medical assistance to review the records and provide assistance and advice in preparation for trial. Without knowing what medical claims have been presented in order to obtain an indictment, the Defendant cannot prepare for trial.

When inquiry was made of the Prosecutor's Office, counsel was advised that the Defendant had been provided with all the records the Prosecutor's Office has. When asked about the lack of a medical causation in the records, counsel was advised that it was the purpose of a trial and Motion of Acquittal at the close of the State's case to sort out these issues.

The Defendant should not be forced to go to trial blind. Counsel has been advised that exculpatory evidence was presented in the Grand Jury ***

{¶22} Godfrey's motion is based solely on defense counsel's pre-trial assessment of the State's case. Specifically, Godfrey argues that there must be additional evidence in the grand jury transcripts because, in his counsel's opinion, there has been insufficient evidence disclosed by the State in discovery to support an indictment.

{¶23} At the outset, we note that the record does not contain any record of exactly what discovery has been furnished by either side in this case. We recognize that this is apparently due to a commendable aspect of collegiality

FILED

FEB 09 2009

MERCER CO. COURT OF APPEALS
James J. Hightley, Clerk

within the local bar that evidently follows an informal and so-called “open file” discovery policy between the State and defense counsel in criminal cases. Nevertheless, because nothing has been filed or otherwise made part of the record in this case, the result is that this Court has no ability to independently evaluate either Godfrey's claim or the trial court’s apparent finding that the medical information supplied by the State, thus far, to Godfrey is not sufficient as a matter of law to establish a cause of death as alleged in the indictment.

{¶24} However, even if we were to agree with Godfrey on this point, it is our opinion that his first remedy would be to seek more particular discovery as opposed to the pre-trial release of grand jury testimony. The Ohio Supreme Court has specifically rejected the notion that a particularized need is established when a defendant challenges whether the evidence against him was sufficient to support the indictment. See *State v. Brown* (1998), 38 Ohio St.3d 305, 528 N.E.2d 523; *State v. Davis* (1988), 38 Ohio St.3d 361, 365, 528 N.E.2d 925, 929-930 (claims that indictment was based on “illegal and incompetent evidence” did not establish particularized need); *State v. Mack* (1995), 73 Ohio St.3d 502, 508, 653 N.E.2d 329, 334, 1995-Ohio-273 (claims that a witness “fabricated his story to conceal his own involvement” were not sufficient).

{¶25} Moreover, the *Laskey* Court specifically held that grand jury transcripts “can not be used by an accused for ascertaining the evidence of the

FILED

FEB 09 2009

prosecution for the purpose of trial preparation. It is a discovery device only for the purposes of impeachment upon cross-examination.” *Laskey*, 21 Ohio St.2d at 191.

Generally, proceedings before a grand jury are secret and an accused is not entitled to inspect grand jury minutes before trial for the purpose of preparation or for purposes of discovery in general. This rule is relaxed only when the ends of justice require it, such as when the defense shows that a particularized need exists for the minutes which outweighs the policy of secrecy.

Id.

{¶26} Nor does it appear that any of the provisions applicable to the release of grand jury transcripts for the impeachment of a trial witness are applicable for pre-trial discovery-related purposes. On the contrary, the *Laskey* Court specifically noted:

[t]he rule announced in the fourth and fifth paragraphs of the syllabus of *White* is not applicable to appellant's pre-trial motion for production of the grand [sic] jury transcript. The *White* rule contemplates a limited investigation for the purpose of determining whether inconsistencies exist between a witness' prior statements and his testimony at trial. Such investigation can be made only after the witness testified at trial, and, generally, can not be used by an accused for ascertaining the evidence of the prosecution for the purpose of trial preparation. It is a discovery device only for the purposes of impeachment upon cross-examination.

In this case, appellant sought discovery of the grand jury transcript before trial for purposes of preparation. Generally, proceedings before a grand jury are secret and an accused is not entitled to inspect grand jury minutes before trial for the purpose of preparation or for purposes of discovery in general.

FILED

FEB 09 2009

GENERAL COUNCIL CO. COURT OF APPEALS
James J. Highley, Clerk

This rule is relaxed only when the ends of justice require it, such as when the defense shows that a particularized need exists for the minutes which outweighs the policy of secrecy. *Pittsburgh Plate Glass Co. v. United States* (1959), 360 U.S. 395, 400, 79 S.Ct. 1237, 3 L.Ed.2d 1323.

Laskey, 21 Ohio St.2d at 191.

{¶27} In fact, we note that there appear to be several such discovery motions in the record that have not been ruled on by the trial court. If the results of the rulings on these motions begin to convince the trial court of the merits of Godfrey's claims or otherwise cast doubt upon the merits of the state's indictment, Godfrey is free to request or move to compel additional discovery. Subpoenas can be requested if the State's witnesses are unwilling to cooperate with Godfrey's preparation of a defense and depositions or other extraordinary disclosure measures within the trial court's discretion might be available.

{¶28} In the meantime, Godfrey is not prejudiced because in the final analysis, he can assert all of his claims at trial in a Crim. R. 29 motion at the conclusion of the state's case. We know of no authority establishing a particularized need for the pre-trial release of grand jury testimony in order to prevent a defendant from having to proceed to trial, based solely on defense counsel's professional assessment that the State does not seem to have the evidence to support the indictment.

FILED

FEB 09 2009

MERCER CO. COURT OF APPEALS
James J. Highley, Clerk

{¶29} In sum, we do not believe pre-trial discovery difficulties (or pre-trial discovery evaluations) rise to the level of a particularized need for the release of grand jury testimony. However, even if it could be argued in a given case that the ends of justice require the disclosure of a grand jury transcript to deal with a discovery problem, it is our view that the proper procedure for the release of the grand jury transcripts would still begin with an *in camera* review of the transcripts as mandated in *Greer*, and not the immediate and unilateral release of all testimony pertaining to the issue as was done in this case.

{¶30} Therefore, for all these reasons, we find that pursuant to the rules articulated in *Laskey* and *Brown*, the trial court erred in ordering the pre-trial release, directly to Godfrey, of a copy of the grand jury transcripts at issue, based solely on defense counsel's pre-trial assessment of the anticipated evidence to be presented by the State at trial.

{¶31} Accordingly, the State's first and second assignments of error are sustained. Based on the foregoing, the August 13, 2008 Judgment Entry of the Court of Common Pleas, Mercer County, Ohio is reversed and the matter is remanded to the trial court for further proceedings according to law.

*Judgment Reversed and
Cause Remanded*

FILED

FEB 09 2009

PRESTON, P.J., concurs.

/jlr

MERCER CO. COURT OF APPEALS
James J. Highley, Clerk

ROGERS, J., Concurring Separately.

{¶32} I concur with the opinion of the majority. However, the majority appears to lament the fact that discovery was not filed with the court, and therefore, is not a part of the record. I think this is the correct state of affairs. Discovery is controlled pursuant to Crim.R. 16. A requirement of filing discovery with the court is conspicuous by its absence from Crim.R. 16.

{¶33} I believe the better practice is an exchange of information, with each party maintaining a copy of everything that has been provided to the opposing party in case a question arises as to what has or has not been disclosed. While this procedure may depend to some extent on the credibility of the attorneys responsible for discovery, we should remember that attorneys are officers of the court and are subject to sanctions and disciplinary action if it is determined that they have failed to comply with discovery orders.

{¶34} I further believe that requiring discovery to be filed with the clerk would have several negative consequences. First is the voluminous nature of discovery in some cases and the practical problem of storage space, and also transportation to reviewing courts. This in itself should be enough to prohibit the practice.

{¶35} However, I believe the greater problem to be the public disclosure of matters and exhibits that may not be admissible at trial. We are all aware that the

FILED

FEB 09 2009

MERCER CO. COURT OF APPEALS
James J. Highley, Clerk

Case No. 10-08-08

media will attempt to obtain any information available in most criminal cases, especially in a high profile case. Exposure of some materials may well prejudice a party, unnecessarily expose facts or information about non-parties, possibly endangering them, and could well contaminate the pool of potential jurors to the extent that a change of venue would be required.

{¶36} Again, I believe that discovery materials should not be filed with the clerk. If such materials are to be filed, they should be sealed and maintained separately from the public record.

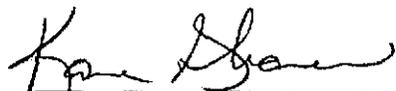
/jlr

FILED

FEB 09 2009

MERCER CO. COURT OF APPEALS
James J. Highley, Clerk

2-9-09 Time-stamped copies issued by regular US mail and/or by hand to Matthew K. Fox, James A. Tesno and Honorable Jeffrey R. Ingraham; certified copy of same issued to Mercer County Common Pleas Court Case File # 08-CRM-034.



Karen Shaner, Deputy Clerk