

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Appellant,

Supreme Court Case No. 2007-1611

vs.

On Appeal from the Greene County Court of Appeals, Second District

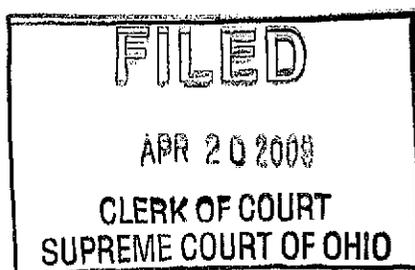
JOSE A. RIVAS, Appellee.

Court of Appeals Case No. 05-CA-147

MEMORANDUM OF APPELLEE - STATE OF OHIO IN OPPOSITION OF RECONSIDERATION

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**MEMORANDUM OF APPELLEE - STATE OF OHIO IN OPPOSITION OF
RECONSIDERATION**

For the following reasons, the appellant respectfully submits that this Court's decision rendered herein was both properly and fully considered and the Motion for Reconsideration should be denied.

A party cannot use a motion for reconsideration to argue its case. The test generally employed when considering a motion for reconsideration is that is proper only when it seeks to call to the attention of the court an obvious error in its decision, or raises an issue that was wither not considered at all or was not fully considered by the court when it should have been. *See State v. Black* (1991), 78 Ohio App. 3d 130, 640 N.E. 2d 171, *qtc. Matthews v. Matthews*(1981), 5 Ohio App. 3d 140, 450 N.E. 2d 278. Further, S.Ct.Prac.R. XI(2)(A) provides that a motion for reconsideration shall be confined to the grounds urged for reconsideration and "shall not constitute a reargument of the case."

The State respectfully submits that the issues raised in Appellee's Motion for Reconsideration were already considered by this Court, and this motion is just an attempt to reargue the case. The two issues now raised by the Appellee are: 1.) whether this Court properly considered the materiality standard as it relates to the rules of discovery and 2.) whether the majority's decision in the instant case is in conflict with *State v. Brady*, 119 Ohio St. 375, 2008-Ohio-4493.

Despite Appellee's assertions to the contrary, the majority's opinion that when a prosecutor has provided a written transcript that purports to accurately reflect data stored on a computer hard drive, a court may not order an examination of the hard drive unless

the defense makes a prima facie showing that the state has provided false, incomplete, adulterated, or spoliated evidence is consistent with Ohio's rules of discovery. Further, the State submits that this Court's opinion in the instant case does not conflict with *State v. Brady*, 119 Ohio St. 375, 2008-Ohio-4493.

I. Where evidence sought is not intended for introduction at trial, and is not the property of the Defendant, a Defendant must establish a prima facie case that the evidence is material to his defense. *Crim. R. 16(B)(1)(c) construed.*

The Appellee argues that the majority improperly conflates the standard for materiality in discovery and for proving a due process violation, however the Appellee overlooks that materiality is required by Crim. R. 16 when the item the Defendant is seeking to obtain is not introduced against the defendant or is not belonging to or obtained from the defendant. Crim. R. 16(B)(1)(c) provides that upon motion of the defendant, the trial court shall order the prosecuting attorney to permit the defendant to inspect or copy or photograph books, papers, documents, photographs, tangible objects, buildings or places or copies or portions thereof, available to or within the possession, custody, or control of the state, *and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant. (emphasis added).*

Here, the State never introduced the hard drive at the trial. The State introduced the testimony of Detective Wilson, and a copy of the transcript of the chat, which he printed 24 minutes after speaking with the Defendant and which he authenticated under oath. The State also provided an electronic copy of the file on compact disc. Thus, the State provided all evidence it sought to use at trial to the Defendant. Under Evid. R. 1001(3), if data are

stored in a computer or similar device, any print out or other output readable by sight, shown to reflect the data accurately, is an original. The State complied with both Evid. R. 1001, by providing a print out of the transcript, along with the Detective's testimony that print out accurately reflects the conversation, and with Crim. R. 16 by providing the original evidence that the State used at trial.

Further, the hard drive seeking to be examined in this case is not the property of the Defendant, but the property of the State. Therefore, the majority correctly opined that the accused bears the initial burden of establishing a prima facie case of materiality before Crim. R. 16 requires the State to turn over tangible evidence. *State v. Rivas*, Slip. Op. No. 2009-Ohio-1354, ¶ 12, *qtg. Chillicothe v. Knight* (1992), 75 Ohio App. 3d 544, 550.

Additionally, the Defendant is not seeking to discover only the evidence in his case, but he is also seeking to discover evidence in other cases, including those that are ongoing. Thus, the majority properly placed a burden on the accused to establish that the evidence turned over in discovery has been false, incomplete, adulterated, or spoliated. As the State stated at oral argument, it should not be difficult at all for an accused to obtain another copy of the chat transcript, as there will always be two copies of the transcript: one on the computer used by law enforcement, and one on the computer the accused used.

Moreover, this argument is not new, and was argued in section (C)(2) of Appellee's merit brief. Accordingly, the majority's opinion is founded solely in the ordinary language of Crim. R. 16, and thus, the Appellee has failed to establish proper grounds for reconsideration.

II. There is no error in fact

Appellee also argues that the majority based its opinion upon an error of fact that Rivas did not present a prima facie showing that the evidence the State provided was false, incomplete, adulterated or spoliated. This is based upon a fact found by the trial court, who was in the best position to judge the credibility of the evidence. The trial court wrote, "Defendant offers no evidence, testimony, or otherwise to indicate that the compact disc is not authentic and complete, and when defense counsel was asked why the content of the compact disc could not be compared to Defendant's own hard drive to which they would have access. Apparently destroyed or disposed of his own hard drive." *State v. Rivas*, Greene County Common Pleas Case No. 2005 CR 33, Judgment Entry 7/12/2005. The Defendant offers no other support for his proposition than his own self-serving statements and the fact that Detective Wilson was 41 at the time of the hearing. The trial court correctly found that Defendant's assertions were not credible, and thus, he failed to establish a prima facie case that the discovery already provided was not accurate. Therefore, the majority's opinion is not based upon an error of fact.

III. *State v. Rivas* is consistent with *State v. Brady*.

First, the holding in the instant case is clearly not applicable to the facts in *Brady*. Presumably, the computer containing the child pornography that formed the basis for the indictment in *Brady* is the computer of Brady. Although it is not clear from the opinion, most defendants charged with pandering obscenity/sexually oriented material involving minors do so from the privacy of their homes. Thus, under Crim. R. 16, there is no

materiality requirement for Brady to establish before the State must allow his expert to examine the data in question in the confines of law enforcement offices.

Secondly, Rivas never requested to have his expert examine the hard drive of the computer under the supervision of the Xenia Police or the Miami Valley Regional Crime Lab. His expert asked for a “mirror image” of the hard drive in order to ensure that the compact disc and [print out] provided by the State, was not compromised in any way. *State v. Rivas*, Greene County Common Pleas Case No. 2005 CR 33, Judgment Entry 7/12/2005. Actually, in this respect, the instant case is much like *Brady*. In *Brady*, Boland, the expert/attorney, maintained that he could not review the evidence in the confines of the prosecutor’s office because analyze all of the images in one sitting, did not believe the State had the software he needed for his analysis, and would have to testify about the images from memory. *Brady, supra* at ¶47. However, at argument before the Court, Boland conceded that he could analyze the evidence at the prosecutor’s office.

The State submits that in the instant case, the alternative of viewing the State’s hard drive under the supervision of law enforcement, was never raised until oral argument in this case. When, at the approximately the 10th minute of oral argument, the undersigned counsel for the State, raised an example about a pending case, where a defendant made a showing through his computer print out that there was a potential discrepancy in the transcript provided by the State, the appropriate remedy would be inspection in the crime lab or law enforcement office of the police department’s hard drive. The State submits that the Appellee never requested below to inspect the law enforcement hard drive under the supervision of the police; his expert, like Boland, wanted to be able to possess a mirror image of the hard drive.

Moreover, Brady is easily distinguishable from the case at bar. While both cases involve experts analyzing computerized data, the cases actually answer two very different questions. In *Rivas*, the question asked is when does law enforcement have the right to obtain a copy of a law enforcement hard drive, which contains evidence of other open and pending investigations. The majority answered that question by holding that when the State has complied with discovery and the rules of evidence, in order to obtain additional evidence that is otherwise non-discoverable, the accused must make a prima facie showing that the State's evidence has been false, incomplete, adulterated, or spoliated.

In *Brady*, the expert claimed that he could not possibly provide an effective defense for the Defendant without putting himself at risk for federal prosecution, because the federal statutes which prohibit the possession of child pornography, because those statutes did not allow a "proper person" exception, like the Ohio statutes. This Court opined, and the expert conceded, that the expert could determine whether the pornography was virtual or morphed if he did it in the confines of the law enforcement offices. So, the Court held that because it is possible for Brady's expert to examine and analyze the state's evidence at the prosecutor's office or other government facility, the trial court abused its discretion in determining, prior to trial, that the federal child pornography laws deprived Brady of the assistance of an expert and the ability to receive a fair trial.

Appellee and his amici curiae now urge reconsideration based upon requests that were not made below, and therefore are not proper grounds for reconsideration. The Defendant's original motion to compel was not a request to view the hard drive in the confinements of the prosecutor's office or under the control of law enforcement. It was a request to compel the State to provide the Defendant a "mirror image" of the hard drive.

State v. Rivas, Greene County Common Pleas Case No. 2005 CR 33, Judgment Entry 7/12/2005.

The holding of the *Rivas* opinion is narrowly tailored and will not deprive a defendant of the opportunity to examine the evidence against him, because in cases like the instant case, there will always be two copies of the chat transcript: one on the State's computer and one on the computer which the defendant used. Moreover, this is not a situation like that in the *Brady* case because the hard drive the defendant is requesting to access is not his own, but a dedicated hard drive of the Xenia Police Department used solely to conduct investigations.

Reconsideration is not appropriate because, as previously mentioned, at approximately the 10th minute of oral argument, the undersigned discussed the option of having a defendant's expert view the evidence under the supervision of law enforcement and Justice Stratton discussed the *Brady* decision. Therefore, the majority was mindful of the *Brady* case, which was decided just 5 days before oral argument, when it considered the case at bar. Appellee's complaint that this Court's holding somehow deprives the Defendant of a fair trial is certainly not new, and thus, is not the proper subject for a motion for reconsideration.

IV. The majority's disposition of the case is proper and need not be reconsidered.

App. R. 12(A) is inapplicable to this Court. This Court is governed by the Rules of Practice of the Ohio Supreme Court. Furthermore, the Defendant did not establish a prima facie case that the evidence presented in discovery was spoliated, and his motion to suppress was premised upon the fact that he needed access to the mirror image to verify

that the discovery provided was authentic. However, in light of the majority's opinion, the Defendant's motion to suppress would have no merit. Accordingly, this Court was right to reinstate the conviction in the trial court.

CONCLUSION

The Appellee has failed to demonstrate that the trial court committed error, and failed to show that this Court failed to properly consider the issues. This Court and the trial court have correctly applied the appropriate legal standard and considered all relevant facts, and have all reached the same conclusion. Thus, this Court properly and fully considered all issues raised herein. Therefore, the motion for reconsideration must be denied as it does not call the attention of this Court to an obvious error in its decision or to an issue that was not considered by this Court when it should have been.

Respectfully submitted,

OFFICE OF THE GREENE COUNTY
PROSECUTING ATTORNEY

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by regular U. S. Mail the date same as filed of record above to Marc Mezibov and Stacy Hinnens, 401 E. Court Street, St. 600, Cincinnati, Ohio 45202; David Bodiker and Jason A. Macke, State Public Defender, 250 East Broad st., Suite 1400, Columbus, Ohio 43215; and Rhys Cartwright-Jones, 100 Federal Pl. East, Suite 101, Youngstown, Ohio 44503.

A handwritten signature in cursive script, appearing to read "Elizabeth Harris", is written over a horizontal line.