

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

KEVIN KEITH,

Defendant-Appellant.

: Case No.

11-0443

: Appeal taken from the Crawford
County Court of Appeals
: Third Appellate District
C.A. Case No. 03-10-19

:

:

MEMORANDUM IN SUPPORT OF JURISDICTION

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Assistant County Prosecutor

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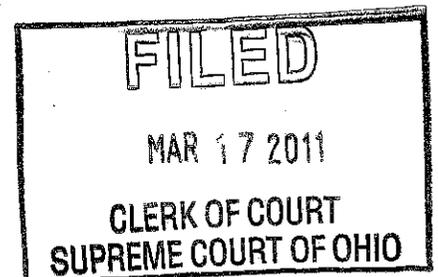


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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Court has upheld the principle that the State may neither suppress nor destroy evidence that may be favorable to the accused. This case raises several substantial constitutional questions about how to properly adjudicate claims arising from that sort of misconduct.

First, when the defendant discovers suppressed *Brady* material piecemeal and files multiple motions for a new trial, that evidence should be examined cumulatively by the trial court. If the evidence as a whole undermines the confidence in the verdict, the State should not be rewarded for suppressing some pieces better and longer than others. The true damage to the defendant's case occurred when the State suppressed the evidence, not when that suppressed evidence was discovered. The defendant should be put on the same footing as if the State had satisfied its constitutional obligation and turned over all the evidence at once. To permit otherwise would allow the State to benefit from its suppression.

Second, when the evidence impeaches a key State's witness, it is material. The cornerstone of the State's case was the surviving witness that picked Keith out of a lineup. The evidence would have been used to impeach the who was put on the stand in an effort to bolster the credibility of the survivor that picked Keith out of the lineup. Because the identity of the shooter was such a critical and contested fact, the defendant's inability to challenge it with this evidence undermines the confidence in the verdict.

Finally, this Court must resolve the question of how the doctrines of *Brady* and *Youngblood* interact. *Youngblood* stands independent from *Brady*, yet the court of appeals declined to adjudicate the *Youngblood* issue because it determined the evidence was not material under *Brady*.

In light of these important questions, this Court should accept jurisdiction over this matter.

STATEMENT OF THE CASE AND FACTS

No physical evidence definitively links Kevin Keith to the shootings, and four alibi witnesses have stated that they were with Keith, miles away from the scene of the crime. To overcome the strength of Keith's alibi and the absence of physical evidence establishing Keith as the shooter, the State relied heavily on Richard Warren, a surviving victim to make its case. The police claimed that Warren had provided a nurse with the name Kevin, which is why they referred to 'Kevin' during their recorded interviews with Warren; why they supplied Warren with the last name 'Keith;' and why Kevin's photo was in the photo array. Thus, it was crucial to the prosecution's case that Warren provide the lead that narrowed the investigation—rather than the police tainting Warren with their belief that Kevin Keith was the shooter.

According to the State's closing argument, "John Foor called the Bucyrus Police Department. That is how the name Kevin found its way into this case." Tr. 835. But litigation in an unrelated suit against the City of Bucyrus revealed, through radio dispatch logs, that Foor never made that call. And these logs showed that a bullet casing allegedly found near where Keith was later that night was actually recovered elsewhere. Because this evidence was wrongfully suppressed, this Court should reverse the lower courts and grant Keith a new trial.

A. Underlying facts

On the evening of February 13, 1994, a gunman entered a Bucyrus Estates' apartment and shot all six people inside. Three were killed: Marichell Chatman; her five-year-old daughter, Marchae; and Marichell's aunt, Linda Chatman. The other three victims survived: Richard Warren, Marichell's boyfriend; and Marichell's young cousins, Quanita and Quinton Reeves.

The surviving adult, Richard Warren, ran from the apartment to a nearby restaurant. There, he told no less than four different witnesses—including a police officer—that he did not know who shot him. *See* Tr. 240, 305, 620, 623. One officer went to the restaurant, and he was the first officer to interview Warren. He reported that Warren was conscious and coherent, and the officer “asked him often who had shot him.” Tr. 305. Warren told him that he did not know who had shot him, and he did not report any first name or last name. *Id.*

On the afternoon of February 15, 1994, Kevin Keith was arrested for the Bucyrus Estates shootings. On February 17, while recovering in the hospital, seven-year-old Quanita Reeves told her nurse that she was shot by “Bruce,” who was “Daddy’s friend.” The social worker assigned to Quanita passed this information along to the Bucyrus Police. The detectives then interviewed Quanita on February 18, and she reiterated that “Daddy’s friend Bruce” was the man who shot her. Tr. 715. She then excluded the picture of Kevin Keith as the person she knew as Bruce.

B. Trial

Keith had four alibi witnesses who could have testified in his defense, although only two testified at Keith’s trial. Judith Rogers lived in the same apartment building as Keith’s girlfriend, Melanie Davison. Davison lived in the apartment above Rogers. Tr. 690. At 8:30 p.m. on the night of the murders, Rogers recalled that she wanted to use the phone so she went upstairs to Melanie’s apartment. *Id.* at 691. Keith let her in. *Id.* Rogers then went back down to her apartment and saw Melanie and Keith leave around 8:45p.m. while she was watching Living Single. *Id.* Rogers recalled that Kevin and Melanie drove away in a blue car. *Id.* at 692.

Grace Keith testified that Keith arrived at her house that night. Tr. 685. She looked at her watch at one point while Keith was there, and it was 9 p.m. *Id.* She also recalled that Keith borrowed \$5 from Roy Price, who was also there. *Id.* at 688.

The State claimed that Warren had reportedly recalled from his hospital bed that the shooter's name was "Kevin." Keith presented evidence to the jury regarding the police influence on Warren. The police had provided Warren with a name array of four "Kevins"; not surprisingly, Warren chose one of the "Kevins" from the list (Kevin Keith). And despite Warren's statements at the scene that he couldn't see the shooter's face because it was masked, the police had presented Warren with a photo lineup. Picture number five, Keith's photograph, was a much closer-up image than other images.

Then Foor testified that Warren wrote down the name "Kevin" before he could even talk. Tr. 778. Foor said this occurred "[s]ometime around 5:00 a.m." on February 14, 1994. *Id.*

C. New evidence discovered in 2010

Lieutenant John Beal is the police officer who reportedly took the call from Foor, but the police station's logs show no call. Although Beal was called as a State's witness, he *never testified* about receiving any call from Foor. His trial testimony (which consisted of less than six pages) was simply about what he saw when he arrived at the crime scene.

Beal's report, however, reads as follows:

At app. 0500 hrs a subj [sic] who identified himself as nurse John Foor of Grant Hospital advised that he had been communicating with Warren in that Warren was able to write his answers to questions. Foor advised that he asked Warren who did this to him and Warren's response was "Kevin." Warren did not know the last name but would know it if he heard the last name.

Exh. 3.

A public records request was made to obtain a record of this phone call, and Beal himself responded: "[t]he recorded phone call from Nurse Foor was not copied for the prosecution or the defense at that time," and the recording has been destroyed. Exh. 4. Beal further maintained that there was no daily phone log that documented incoming phone calls. *Id.*

Keith does not dispute that the recordings of the police station's phone calls have been destroyed. The city of Bucyrus lost a lawsuit in an unrelated case for the police department's destruction of the recordings of the police station's phone calls. *See State of Ohio, ex. rel. Edwin Davila v. City of Bucyrus*, Case No. 09 CV 0303 (Crawford C.P.). In *Davila*, it was deemed admitted that the Bucyrus Police Department violated Ohio's public records laws by destroying these tape recordings. Exh. 5. It appears that any tapes of calls regarding Keith's case were destroyed within 30 days.¹

But there are logs that documented every call that came in to the Bucyrus Police Department: the dispatch radio logs. Exh. 6, p.55. At the time of the crime, it was the practice of the Bucyrus Police Department to prepare a "contemporaneous radio log" that recorded information about the police station's phone calls. Proposed Findings of Fact and Conclusions of Law of Respondents, City of Bucyrus, Daniel F. Ross, and Kenneth Teets, p. 2. "[T]he radio logs memorialize the same information that was recorded." *Id.* at 8. According to David Robertson, the Bucyrus Police Department's records administrator from 1990 to 1996, "the dispatcher would answer the call and then she would put down the time of the call, who called, and who she assigned the call to." *Id.*

The radio logs are "contemporaneous with the call" and could be used as an "index to the tapes." Exh. 6, p. 77. In fact, "the contemporaneous radio logs serve as another medium by which the same information was recorded." Exh. 7, p. 8.

¹ In 1994, the Bucyrus Police Department used reel-to-reel tape recordings to record incoming phone calls to the police station. Exh. 6, pp. 60-1. Two tape recordings were made every 24-hour-period, with different start and stop times, in order to insure that all data was recorded. *Id.* at 62-4. Although there was a way to harvest the information from the reel-to-reel tapes onto a cassette tape recording (*Id.* at 56-7), that apparently was not done in Keith's case. Exh. 4. The evidence on the reel-to-reel tape recordings was destroyed by re-recording. Exh. 6, pp. 55-6.

Because “the contemporaneous radio logs serve as another medium by which the same information was recorded,” then the phone call from Foor to Beal should be indicated on the radio log from February 14, 1994. Exh.7, p. 8. Despite Beal’s report and Foor’s testimony, there is no 5:00 a.m. phone call evidenced on the radio log. Exh. 8, p. 3.

Beal’s police report listed all of his activities from Beal’s part of the investigation on the night of the crime. Beal included the supposed 0500 phone call from Foor as part of the “list of times of my radio traffic in ref [sic] to this complaint.” *Id.* He then listed the other times of his radio traffic. Everything Beal listed in his radio traffic corresponds with the radio dispatch logs except the 5:00 a.m. phone call with Foor.

The State has used a bullet casing, found near the General Electric plant, as evidence that Keith committed the shootings at the Bucyrus Estates. Keith picked his girlfriend up at the General Electric plant at 11 p.m. on the night of the murders. *Id.* at 854-55. Because of the proximity of the casing to the plant, the casing is considered evidence against Keith. *State v. Keith*, 79 Ohio St. 3d 514 (1997).

An officer testified that, on February 14, 1994, he was dispatched to “1221 South Walnut Street,” which was “right across the street from General Electric.” Tr. 438. The officer testified that he was told that the casing was “found on the sidewalk in front of her house.” *Id.* at 440. When asked if he investigated, took any pictures, or looked around for an “imprint” in the snow where it was found, he said no. *Id.*

The newly discovered radio logs, however, indicate that the bullet casing at issue was found elsewhere. The log reads: “1221 S. Walnut. Woman found casing. Thinks she may have picked it up in the McDonald’s area.” Exh. 8, p. 3. The McDonald’s area was over a mile away.

On May 11, 2010, Keith filed his Motion for Leave to File a Delayed Motion for a New Trial and his Motion for a New Trial Based on Newly Discovered Evidence under Ohio Crim. R. 33(A)(6). On August 9, 2010, the trial court denied Keith's Motions, and on January 31, 2011, the Third District Court of Appeals affirmed the trial court. Keith's appeal is timely.

ARGUMENT

PROPOSITION OF LAW I

When a defendant uncovers favorable evidence that had been suppressed by the State, the court's materiality analysis should include all pieces of suppressed evidence, despite that the pieces were uncovered at separate times and raised in separate proceedings. A sufficiency of the evidence analysis is inappropriate.

In the past seven years, Keith has uncovered several items of evidence favorable to him that had been suppressed by the State. As the United States Supreme Court has mandated, to determine materiality, "suppressed evidence [must be] considered collectively, not item by item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995).

The matter currently before this Court involves the Bucyrus Police Department's logs documenting the station's incoming calls and the evidence those logs contain. Specifically, the logs show that no 5:00 a.m. phone call from nurse Foor came into the station, despite the State's assertion that "John Foor called the Bucyrus Police Department. That is how the name Kevin found its way into this case." Tr. 835. The logs further show that the bullet casing purportedly linking Keith to the crime scene may have actually been found in the McDonald's area, as opposed to the area in which Keith picked up his girlfriend.

The logs are the most recent evidence Keith has uncovered, but they are not the only evidence that was suppressed by the State. In April 2004, a public records request led Keith to

the handwritten notes that, according to the sworn testimony of John Foor, had supposedly been destroyed years ago. The note were from Warren's hospital stay, and the name "Kevin" was written down on the paper in a handwriting different than the other handwritten notes that are clearly attributable to Warren. Although Warren's handwriting was nearly illegible, included misspelled words, and the words he wrote were haphazardly strewn across the pages, "Kevin" was written clearly – and was written in what appears to be the same handwriting as the words "Captain Stanley" and "Bucyrus Police."

In 2007, Keith uncovered documents from an investigation spearheaded by the Ohio Pharmacy Board. In these documents, Keith learned that Rodney Melton not only had motive to injure the victims of the Bucyrus Estates shootings, but Melton also told a confidential informant two weeks before the Bucyrus Estates shootings that he had been paid to "cripple" Rudel Chatman, whose actions as a police informant were the motive behind the shootings. *See tr. 830.* The Melton brothers also had "spread the word that anybody that snitches on them would be killed."

There were several other documents in the Pharmacy Board files that implicated Rodney Melton. It was Rodney's habit to wear a mask that covers his mouth because he has a gap between his front teeth. Exh. 2, pp. 7, 8. Significantly, Quanita Reeves and Richard Warren both recalled that the man who shot them wore a mask that covered his mouth. T.p. at 348, 716. Also, after Keith was arrested for the Bucyrus Estates murders, Melton's accomplice in the pharmacy burglary ring told the police that Melton was paid to kill Chatman. .

None of the information detailed above was disclosed to Keith by the State. The lower court made no findings regarding suppression; it simply denied the appeal on materiality

grounds. But the court failed to conduct the appropriate materiality analysis, because it did not take into consideration all of the suppressed evidence.

All of the suppressed evidence – from 2004, 2007, and 2010 – must be considered collectively, not item by item. *See Kyles*, 514 U.S. at 436. *See also Jells v. Mitchell*, 538 F.3d 478, 521 (6th Cir. 2008); *Joseph v. Coyle*, 469 F.3d 441, 471 (6th Cir. 2006). Keith’s case “is ‘admittedly rare’ in that it involves additional *Brady* violations that were not considered by this court” in previous filings. *Schledwitz v. United States*, 169 F.3d 1003, 1012 (6th Cir. 1999). But Keith has no control over when he finds the evidence hidden by the State.

In *Schledwitz*, the Sixth Circuit addressed whether the determination on the first *Brady* claim had preclusive effect on a second *Brady* claim encompassing both newly uncovered evidence and the evidence submitted in support of the first petition. 169 F.3d at 1012. The Sixth concluded that *Brady* was an exception to the res judicata doctrine. *Id.* The court reached this conclusion because this was the only way to satisfy the mandate of *Kyles* to consider all the *Brady* evidence in the aggregate. *Id.*

Again, the lower courts erred in applying a sufficiency of the evidence analysis to the materiality determination. It “reiterate[d] this Court’s prior finding that, ‘a jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals.’” The Supreme Court of the United States has repeatedly admonished is improper to rely on the sufficiency of evidence at trial when assessing whether evidence discovered after the trial requires reversal. *See Kyles*, 514 U.S. at 435, fn. 8 (“none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone”); *Strickler v. Greene*, 527 U.S. 263, 291 (1999).

The material value of this suppressed evidence is significant. There is no question that it would make a difference at a new trial for Keith. It led Governor Ted Strickland to commute to life the death sentence of Keith, based on his doubts about Keith's guilt.

PROPOSITION OF LAW II

Impeachment evidence is material impeachment evidence when it affects the testimony of a key witness.

The Bucyrus Police Department's radio logs contain information that is at-odds with testimony adduced at Keith's trial. Keith was unable to use the logs to cross-examine witnesses John Foor and Farnelle Graham because the State did not disclose the logs to him. "The usual standards for new trial are not controlling because the fact that such evidence was available to the prosecution and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial." *State v. Johnston*, 39 Ohio St. 3d 48, 60, 529 N.E.2d 898, 911 (1988). *See also United States v. Agurs*, 427 U.S. 97, 111 (1976). Because the phone logs were in the State's possession and suppressed from Keith, he need only demonstrate that they were material to his case. *Id.*

A. The logs are impeaching because they contradict the testimony of the State's witnesses.

The phone call from Foor to Beal should be indicated on the radio log from February 14, 1994. But there is no 5:00 a.m. phone call evidenced on the radio log. NTM Exh. 8, p. 3.

The radio logs also indicate that a bullet casing—the location of which was used to implicate Keith—was reportedly found elsewhere. The prosecutor stated in his closing argument, "[the casing] was right across the street from where the Defendant picked up his girlfriend that night." Tr. 854. The log reads: "1221 S. Walnut. Woman found casing. Thinks

she may have picked it up in the McDonald's area." Exh. 8, p. 3. The McDonald's area was right next to the crime scene and over a mile away from the GE plant.

The lower court erroneously found the logs immaterial because State's witnesses testified in a manner that was contrary to the information in the logs. "Keith's argument ignores the fact that both Lieutenant Beal and Nurse Foor testified at trial regarding the phone call and were subject to cross-examination on the matter, making the mere absence of the phone call on the station's radio log immaterial." *State v. Keith*, 2011 Ohio 407, P45 (Ohio Ct. App., Crawford County Jan. 31, 2011). The lower court made an erroneous factual finding regarding Beal's testimony; Beal never testified regarding the purported phone call. Even if he had, however, the point of impeachment evidence is that it can be used to challenge a witness's testimony.

Foor's trial testimony about the phone call did not make the absence of the phone call on the log immaterial. Instead, just the opposite is true. The logs contradict Foor's testimony, and thus they call into question Foor's veracity.

The same logic applies to the testimony regarding the bullet casing. Again, the lower court faulted Keith because the trial testimony was inconsistent with what was reported on the logs. See *Keith*, 2011 Ohio 407, P46. But that is precisely the point.

Had defense counsel been informed of the initial report, he would have had the opportunity to inquire into this inconsistency. The report that Graham's daughter made to the police undermined the State's version of events. It was inconsistent with the testimony, and it could have been used as impeachment evidence. "Impeachment evidence ... as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985).

B. The logs are *material* impeachment evidence because the witnesses they impeach were crucial to the State's case.

Impeachment evidence, “if disclosed and used effectively, it may make the difference between conviction and acquittal.” *Id.* (internal citations omitted). *See also Napue v. Illinois*, 360 U.S. 264, 269 (1959). Foor’s testimony was critical for the State to show that Warren independently identified Keith. Graham’s testimony about the location of bullet casing provided the State with a purported link between Keith and the crime scene.

Despite Foor’s testimony that he called the police at 5:00 a.m, the police captain testified that he didn’t know the name “Kevin” until around noon. The detectives investigating the shootings didn’t appear to know the name “Kevin” until after that. In a case in which there is an emergency manhunt for the perpetrator who shot three children and three adults, it is puzzling that Foor’s information about the shooter was not passed along sooner.

Another puzzling aspect is the fact that Beal, the officer who purportedly took the call from Foor, never testified about receiving that call. Beal did testify, but his testimony consisted of a description of what he saw upon arriving at the crime scene. His testimony was drastically less important to the case against Keith than the testimony he could have given, had he truly taken that identifying call from Foor. This makes Foor’s testimony all the more important.

The lower court dismissed the importance of this call because Warren testified in person. But the court discounted the defense’s theory that Warren was influenced by police into naming Keith. Because Foor testified that he began questioning Warren immediately after Warren woke up from the anesthesia, the implication is that the police couldn’t have yet influenced Warren. *Id.* at 777. Foor’s importance is evident by “the stress placed by the prosecution on this part of [the] testimony, uncorroborated by any other witness.” *Banks v. Dretke*, 540 U.S. 668, 700 (2004).

Additionally, the State used the location of the stray bullet casing to implicate Keith. Keith picked his girlfriend up from the GE plant at 11 p.m. that night. Tr. 410. As the prosecutor stated in his closing argument, “[the casing] was right across the street from where the Defendant picked up his girlfriend that night.” Tr. 854. Graham’s testimony about the location of casing provided the State with that link, but her initial report to the police did not.

PROPOSITION OF LAW III

When the State suppresses evidence from the defense, the defendant is unavoidably prevented from discovering the evidence within the time limit for a new trial motion.

Keith was unavoidably prevented from discovering the evidence on which he relies because the police destroyed the recordings of the station’s phone calls. Beal further maintained that there was no daily phone log that documented incoming phone calls. Exh. 4. Without access to the recordings or a log describing the calls, Keith could not have discovered the evidence. It was because of the proceedings in *Davila* that Keith learned about the radio logs. Keith learned that the contemporaneous radio logs contain the same information as was recorded on the tape recordings from the station.

Without access to the recordings or a log describing the calls, Keith could not have discovered that the call from Foor never occurred or that the bullet casing was reportedly found elsewhere. Keith cannot be faulted for failing to uncover the truth of these radio logs earlier. “Ordinarily, we presume that public officials have properly discharged their official duties.” *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (internal citations omitted.) See also *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (the Supreme Court rejected “a rule thus declaring prosecutor may hide, defendant must seek,” as it is “not tenable in a system constitutionally bound to accord defendants due process”) (internal citations omitted).

PROPOSITION OF LAW IV

When the police destroy potentially useful evidence in bad faith, a finding that the evidence was not material under *Brady v. Maryland* does not obviate the court's need to adjudicate a properly-raised claim under *Arizona v. Youngblood*.

“A clear distinction is drawn by [*Arizona v. Youngblood*, 488 U.S. 51 (1988)] between materially exculpatory evidence and potentially useful evidence.” *State v. Geeslin*, 116 Ohio St. 3d 252, 254 (2007). The lower court, however, conflated the two standards. It declined to rule on Keith's claim under *Youngblood*, because it had denied his *Brady* claim on the basis of materiality. *Keith*, 2011 Ohio 407, P51.

The tape recordings would have, at the least, been “useful evidence” for Keith. *Youngblood*, 488 U.S. at 58. Keith could have used the actual calls (or lack of calls) to impeach the State's witnesses.

Keith filed a demand for discovery on February 28, 1994—well within the time necessary to stop the Bucyrus Police Station from destroying the tape recordings of the incoming calls concerning the Bucyrus Estates murders. The police station operated on a 30-day cycle with its tapes; at the end of the 30-day time period, a tape was reused and written over. Exh. 6, pp. 53-55. At the time of Keith's discovery request, only two weeks had elapsed. The information on the tapes from February 14 would still have existed and could've been extracted. *Id.* at 53-58.

The lower court erred in finding that Keith's *Youngblood* claim was rendered moot by its ruling on his *Brady* claim. The Court of Appeals should have remanded the case to the trial court with instructions to grant a new trial.

CONCLUSION

Keith presented newly discovered favorable evidence material to his defense, which he could not with reasonable diligence have discovered and produced at trial. *See* Ohio. R. Crim.

P. 33(A)(6), O.R.C. § 2945.79(F). This evidence was suppressed by the State, in violation of Keith's constitutional rights under *Brady* and *Youngblood*. This Court should therefore accept jurisdiction and resolve these important issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the forgoing Memorandum in Support of Jurisdiction was served by regular U.S. Mail to Clifford J. Murphy, Assistant County Prosecutor, Crawford County Courthouse, 112 East Mansfield Street, Room 305, Bucyrus, Ohio 44820 on this the 17th day of March, 2011.



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COUNSEL FOR DEFENDANT

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

JAN 31 2011

SUE SEEVERS
CRAWFORD COUNTY CLERK

STATE OF OHIO,

CASE NO. 3-10-19

PLAINTIFF-APPELLEE,

v.

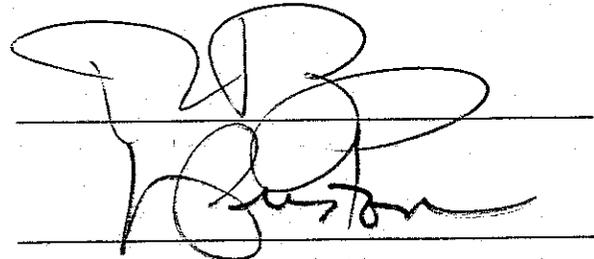
KEVIN KEITH,

JUDGMENT
ENTRY

DEFENDANT-APPELLANT.

For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court 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.



John B. Villanovoli
JUDGES

DATED: January 31, 2011
/jnc

JAN 31 2011

SUE SEEVERS
CRAWFORD COUNTY CLERK

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

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 3-10-19

v.

KEVIN KEITH,

OPINION

DEFENDANT-APPELLANT.

Appeal from Crawford County Common Pleas Court
Trial Court No. 94 CR 0042

Judgment Affirmed

Date of Decision: January 31, 2011

APPEARANCES:

Tyson Fleming and Rachel Troutman for Appellant

Clifford J. Murphy for Appellee

ROGERS, P.J.

{¶1} Defendant-Appellant, Kevin Keith, appeals the judgment of the Court of Common Pleas of Crawford County denying his motion for leave to file a delayed motion for a new trial, as well as the underlying motion for a new trial. On appeal, Keith argues that the trial court erred when it abused its discretion in denying his motion without holding a hearing; when it evaluated and denied his motion under the wrong standards for a new trial; when it applied the doctrine of res judicata to his claims; and, when it failed to rule on his claims under *Arizona v. Youngblood* (1988), 488 U.S. 51. Based upon the following, we affirm the judgment of the trial court.

{¶2} In February 1994, the Crawford County Grand Jury indicted Keith on three counts of aggravated murder in violation of R.C. 2929.02, with capital-offense specifications, and on three counts of attempted aggravated murder in violation of R.C. 2903.01 and 2923.02, felonies of the first degree. The indictment arose from an event during which Marichell D. Chatman, her seven-year-old daughter, Marchae D. Chatman, her cousins, Quanita M. Reeves and Quinton M. Reeves, her aunt, Linda Chatman, and Richard Warren were shot in Marichell's apartment. Marichell, Marchae, and Linda died as a result of the shooting, and Quanita, Quinton, and Richard were seriously injured.

{¶3} In March 1994, Keith entered a plea of not guilty to all counts in the indictment.

{¶4} In May 1994, Keith filed a notice of alibi. Additionally, the case proceeded to a jury trial, at which the jury convicted Keith on all six counts of the indictment as charged and recommended the death penalty for the aggravated murder convictions. Among the evidence presented at trial was evidence pertinent to this appeal that, approximately eight hours after the shooting, victim Richard Warren, while recovering in the hospital, wrote the name "Kevin" on a piece of paper, and, thereafter, selected Keith from a photo array; that investigators recovered twenty-four bullet casings from the scene of the shooting, which had all been fired from the same gun; and, that investigators discovered another matched bullet casing at the entrance to the General Electric plant in Bucyrus, where Keith had picked up his girlfriend after the shooting.

{¶5} In June 1994, the trial court sentenced Keith to death on the aggravated murder convictions and to a seven to twenty-five-year prison term on each of the attempted aggravated murder convictions, to be served consecutively. Subsequently, Keith appealed his conviction and sentence.

{¶6} In April 1996, this Court affirmed Keith's conviction and sentence, *State v. Keith*, 3d Dist. No. 3-94-14, 1996 WL 156710, and also issued a separate opinion regarding Keith's death sentence in conformity with R.C. 2929.05(A).

State v. Keith, 3d Dist. No. 3-94-14, 1996 WL 156716. Subsequently, Keith appealed to the Supreme Court of Ohio.

{¶7} In September 1996, while his direct appeal was pending, Keith filed his first petition for postconviction relief in the trial court, alleging that he had been denied effective assistance of counsel and attaching numerous exhibits that were not part of the trial record.

{¶8} In December 1996, Keith filed a supplemental petition for postconviction relief, in which he alleged ineffective assistance of counsel and requested an evidentiary hearing.

{¶9} In October 1997, the Supreme Court of Ohio unanimously affirmed Keith's conviction. *State v. Keith* (1997), 79 Ohio St.3d 514, reconsideration denied (1997), 80 Ohio St.3d 1450, certiorari denied (1998), 523 U.S. 1063.

{¶10} In February 1998, the trial court denied Keith's first petition for postconviction relief, without granting an evidentiary hearing, in a sixteen-page opinion in which it addressed all of his arguments, as well as each of his attached exhibits.

{¶11} In March 1998, Keith appealed the trial court's denial of his first petition for postconviction relief.

{¶12} In August 1998, this Court affirmed the trial court's denial of Keith's first petition for postconviction relief. *State v. Keith*, 3d Dist. No. 3-98-05, 1998 WL 487044.

{¶13} In September 1999, Keith filed a habeas corpus petition in the United States District Court, presenting eight grounds for relief.

{¶14} In June 2001, the United States District Court denied Keith's petition for habeas corpus. Thereafter, Keith appealed the denial and sought a certificate of appealability.

{¶15} In March 2003, the United States Court of Appeals granted a certificate of appealability on six of Keith's grounds for relief.

{¶16} In August 2004, Keith filed a second petition for postconviction relief with the trial court.

{¶17} In July 2006, the United States Court of Appeals denied Keith's writ of habeas corpus. *Keith v. Mitchell* (C.A.6, 2006), 455 F.3d 662, petition for rehearing denied en banc (C.A.6, 2006), 466 F.3d 540, certiorari denied (2007), 549 U.S. 1308.

{¶18} In February 2007, the trial court dismissed Keith's second petition for postconviction relief.¹

¹ The lengthy delay between Keith's second petition for postconviction relief and the trial court's judgment entry resulted from a stipulation between Keith and the State that the state petition should be suspended pending a decision by the United States Court of Appeals on the writ of habeas corpus.

{¶19} In March 2007, Keith appealed the trial court's dismissal of his second petition for postconviction relief to this Court.

{¶20} In August 2007, while his appeal to this Court was pending, Keith filed a motion for leave to file a delayed motion for new trial and a motion for a new trial in the trial court, as well as a motion to re-open his direct appeal pursuant to App.R. 26(B) with this Court, which this Court denied.

{¶21} In February 2008, this Court affirmed the trial court's denial of Keith's second petition for postconviction relief. *State v. Keith*, 176 Ohio App.3d 260, 2008-Ohio-741. Thereafter, Keith appealed this Court's denial to the Supreme Court of Ohio.

{¶22} In March 2008, Keith filed a motion for an evidentiary hearing for his motion for new trial.

{¶23} In April 2008, the Supreme Court of Ohio affirmed this Court's denial of Keith's August 2007 motion to re-open pursuant to App.R. 26(B). *State v. Keith*, 119 Ohio St.3d 161, 2008-Ohio-3866.

{¶24} In July 2008, the trial court denied Keith's motion for leave to file a delayed motion for new trial, motion for evidentiary hearing, motion for new trial, and all ancillary motions. Thereafter, Keith appealed the trial court's denial of his motions to this Court.

{¶25} In December 2008, this Court affirmed the trial court's judgment denying his motions. *State v. Keith*, 3d Dist. No. 3-08-15, 2008-Ohio-6187.

{¶26} In May 2010, Keith filed a motion for leave to file a delayed motion for a new trial pursuant to Crim.R. 33(B), arguing that the State improperly suppressed evidence, causing him to be unavoidably prevented from discovering the evidence upon which he relied, and that the State violated his constitutional rights when it failed to disclose evidence favorable to him. Specifically, Keith argued that pending litigation in an unrelated suit against the Bucyrus Police Department revealed that a phone call made by witness Nurse John Foor to the police department stating that victim Richard Warren had written the name "Keith" on a piece of paper never occurred, and that a bullet casing allegedly found by witness Farnella Graham near the General Electric plant, where Keith had picked up his girlfriend following the shooting, was not actually found at that location.

{¶27} Concerning the phone call, Keith argued that Lieutenant John Beal of the Bucyrus Police Department testified that he took the phone call from Nurse Foor at 5:00 a.m.; that a public records request had been made to obtain a record of the phone call, but Lieutenant Beal responded that "[t]he recorded phone call from Nurse Foor was not copied for the prosecution or the defense at that time," that the recording had been destroyed, and that there was no daily phone log

documenting incoming calls; that the city of Bucyrus had since been sued in an unrelated case for the police department's destruction of the recordings of the police department's phone calls in *State ex rel. Davila v. Bucyrus*, Case No. 09 CV 0303; that, due to the *Davila* case, Keith's counsel became aware of the existence of contemporaneous radio logs, which recorded information about the police department's phone calls; and, that there was no 5:00 a.m. phone call evidenced on the radio log, despite Lieutenant Beal's and Nurse Foor's testimony.

{¶28} Concerning the bullet casing, Keith argued that, at trial, the State linked him to the murders because he had picked up his girlfriend at the General Electric plant at 11:00 p.m. on the night of the murders; that, at trial, a police officer testified that he was dispatched to an address "right across the street from General Electric," where a witness stated she found a bullet casing on the sidewalk in front of her house; and, that the newly discovered radio logs, however, indicate that the witness stated she found the casing "in the McDonald's area," which was over one mile away from the General Electric plant.

{¶29} Keith concluded that, because the Bucyrus Police Department destroyed the recordings of the station's phone calls, and because Lieutenant Beal maintained that there was no daily phone log that documented incoming calls, he was unavoidably prevented from discovering the evidence regarding Nurse Foor's phone call and the phone call regarding the bullet casing; that he only learned of

the existence of the radio logs due to the proceedings in the *Davila* case; and, that the State misled him and failed to disclose this evidence that was favorable to him.

{¶30} Contemporaneously, Keith filed an underlying motion for a new trial based on newly discovered evidence pursuant to Crim.R. 33(A)(6), setting forth the same argument as in his motion for leave to file a delayed motion for a new trial. However, Keith additionally argued that, because the State allegedly suppressed evidence favorable to his defense, he needed only demonstrate that the evidence was material to his case, citing *State v. Johnston* (1988), 39 Ohio St.3d 48, 60 (“the usual standards for new trial are not controlling because the fact that such evidence was available to the prosecution and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial”). Keith contended that, accordingly, he did not need to demonstrate “the usual standards,” or that the newly discovered evidence probably would have resulted in acquittal.

{¶31} Thereafter, the State filed a motion in opposition to Keith’s motion for leave to file a delayed motion for a new trial, as well as the underlying motion for a new trial. The State argued that Keith’s motions indicated that he had been in possession of the information at issue since 2007, and had not explained why the claims were not subject to res judicata in his successive new trial motion; that the information, at best, could only be used for impeachment purposes, as both

witnesses at issue testified at trial; and, that the information was not material and was a corollary matter as both witnesses testified at trial, Nurse Foor testifying that he contacted the police department and informed them that Warren had written "Kevin" on a piece of paper, and Farnella Graham testifying that she discovered a bullet casing on the sidewalk in front of her house, across the street from the General Electric plant, and that her daughter had called the police department.

{¶32} In August 2010, the trial court denied Keith's motion for leave, as well as the underlying motion for a new trial in a thorough fifteen-page judgment entry. The trial court noted the extensive history of the case, emphasizing that many courts and judges had evaluated the evidence in the case and had concluded that the evidence strongly supported Keith's guilt and the jury's verdict. Additionally, the trial court found that Keith's claims regarding Nurse Foor's testimony were "remote and collateral to the plain fact that Richard Warren, although shot once in the jaw, twice in the back, and finally once in the buttocks, survived to testify in court and to positively identify Kevin Keith" (Aug. 2010 Judgment Entry, p. 11). Further, the trial court stated that twenty-five bullet casings were recovered; that experts testified that all twenty-five bullet casings were fired from the same weapon; that all of the bullet casings were recovered at or near the location of the shootings, except for one; that the one remaining bullet casing was discovered near the entrance to the General Electric plant in Bucyrus;

that the Bucyrus Police Department radio log included an entry reading "1221 S. Walnut. Woman found casing. Thinks she may have picked it up in the McDonald's area"; that, at trial, Officer John Seif testified that Farnella Graham told him, face to face, that she recovered the casing "on the sidewalk that morning"; that, at trial, Farnella Graham testified that she found the casing on the sidewalk in front of her house the morning of February 14 while cleaning fast food litter from her front walk, that she lived across the street from the General Electric plant, and that her daughter had called the police about the casing; that the bullet was linked to Keith because he had picked up his girlfriend at the General Electric plant on the evening of February 13; and, that the discrepancy in the log concerning the location of the casing was likely explained by Farnella Graham's testimony at trial that she initially assumed the fast food litter she found by the casing was from McDonald's, but then noticed it was from Wendy's.

{¶33} The trial court then enumerated the following findings of fact and conclusions of law:

1. Notwithstanding repeated collateral attacks upon the capital convictions of Kevin Keith, the evidence of his guilt beyond a reasonable doubt is compelling, persuasive and overwhelming.
2. The defendant has failed to establish, by any standard of proof, that the so-called newly discovered evidence regarding Nurse John Foor would produce a strong probability for a change in the jury verdict of guilty.
3. The issue of whether Nurse John Foor did or did not telephone BPD [Bucyrus Police Department] on a date and time

certain is only remotely material to the issues in this case, and unlikely to impact the credibility of the witness Richard Warren.

4. The issue of whether Nurse John Foor did or did not telephone the BPD on a date and time certain does not impeach or contradict Richard Warren's identification of the Defendant, much less does it contradict the constellation of evidence, both direct and circumstantial, connecting Kevin Keith to the events in question.

5. The issue of John Foor's testimony has been so thoroughly explored and dissected as to be foreclosed and resolved as res judicata. This most recent issue appears to have been known to Keith's attorneys for more than a year.

6. The Defendant has failed to establish, by any standard of proof, that the so-called newly discovered evidence regarding State's Exhibit 43 [the bullet casing] and the police log would produce a strong probability for a change in the jury verdict of guilty.

7. The police log, regarding the discovery of State's Exhibit 43, on its face, merely contradicts the testimony of Farnella Graham; however, the log entry is patently erroneous and unworthy of belief.

8. The combination of both direct and circumstantial evidence in this case supports the finding that even were this court to grant a motion for new trial, the result—a verdict of guilty—would remain the same.

(Aug. 2010 Judgment Entry, pp. 13-15).

{¶34} It is from this judgment that Keith appeals, presenting the following assignments of error for our review.²

Assignment of Error No. I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR LEAVE TO FILE A MOTION FOR NEW TRIAL AND FOR FAILING TO HOLD A HEARING.

² We note that, in September 2010, Governor Ted Strickland granted clemency to Keith, commuting his death sentence to life without parole.

Assignment of Error No. II

THE TRIAL COURT ERRED IN EVALUATING AND DENYING APPELLANT'S MOTION FOR NEW TRIAL UNDER THE WRONG STANDARDS FOR NEW TRIAL, WHEN THE NEWLY DISCOVERED EVIDENCE WAS AVAILABLE TO THE PROSECUTION AND NOT SUBMITTED TO THE DEFENSE.

Assignment of Error No. III

THE TRIAL COURT ERRED IN APPLYING THE DOCTRINE OF RES JUDICATA TO APPELLANT'S CLAIMS.

Assignment of Error No. IV

THE TRIAL COURT ERRED IN FAILING TO RULE ON APPELLANT'S CLAIMED [SIC] UNDER *ARIZONA V. YOUNGBLOOD*.

Assignments of Error Nos. I and II

{¶35} In his first assignment of error, Keith argues that the trial court abused its discretion when it denied his motion for leave to file a motion for a new trial and failed to hold a hearing on the motion. Specifically, Keith contends that he was entitled to file his motion for a new trial because he was unavoidably prevented from discovering certain evidence relied upon in his motion for a new trial. The State responds that Keith failed to meet his burden under Crim.R. 33 because he failed to file his motion within 120 days of the jury's verdict and failed to demonstrate by clear and convincing proof that he was unavoidably prevented

from filing a motion for a new trial, as evidence demonstrated that Keith obtained the radio log at issue in 2007; that Nurse John Foor testified at trial that he called the police department; that Lieutenant Beal testified at trial, corroborating Nurse Foor's testimony; and, that, consequently, the radio log was not material evidence. Further, the State responds that, because Farnella Graham testified at trial that she located the bullet casing across the street from the General Electric plant, and Officer Seif testified at trial, corroborating her testimony, the radio log was not material evidence.

{¶36} In his second assignment of error, Keith argues that the trial court erred in evaluating and denying his motion for a new trial under the wrong standards, given that the newly discovered evidence was available to the prosecution and not submitted to the defense. Specifically, Keith contends that he presented a *Brady v. Maryland* (1963), 373 U.S. 83, claim, which was not subject to the usual standard for a motion for a new trial, and that the trial court should not have weighed the sufficiency of the evidence, but should have considered the evidence in the aggregate. The State responds that *Brady* requires a "reasonable probability" of a different outcome with the exculpatory evidence, or an "undermined confidence in the trial result obtained without exculpatory evidence," which Keith failed to demonstrate.

{¶37} Motions for a new trial are governed by Crim.R. 33(A), which provides that:

A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

* * *

(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

{¶38} Additionally, Crim.R. 33(B) sets forth timing requirements for new trial motions and provides that:

Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court

where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

{¶39} Accordingly, a party may not seek a new trial on the basis of newly discovered evidence after the one hundred and twenty day time limit unless he can demonstrate that he was unavoidably prevented from discovering the new evidence within the time limit. App.R. 33(B). “A party is ‘unavoidably prevented’ from filing a motion for a new trial if the party had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence.” *State v. Lee*, 10th Dist. No. 05AP-229, 2005-Ohio-6374, ¶8.

{¶40} In order to be able to file a motion for a new trial based on newly discovered evidence beyond the one hundred and twenty days prescribed in the above rule, a petitioner must first file a motion for leave, showing by “clear and convincing proof that he has been unavoidably prevented from filing a motion in a timely fashion.” *State v. Graham*, 3d Dist. No. 5-05-13, 2006-Ohio-352, ¶10, quoting *State v. Neace*, 3d Dist. No. 10-99-07, 2000-Ohio-1649. The standard of “clear and convincing evidence” utilized in Crim.R. 33(B) means “that measure or

degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶41} Generally, a trial court's decision to deny a motion for a new trial will not be disturbed on appeal absent an abuse of discretion. *State v. Ray*, 3d Dist. No. 14-05-39, 2006-Ohio-5640, ¶53, citing *State v. Farley*, 10th Dist. No. 03AP-555, 2004-Ohio-1781, ¶¶6-7. However, in cases where the appellant has alleged that the prosecution suppressed evidence, the appellate court does not review under the abuse of discretion standard, but is required to conduct a due process analysis to determine "whether a defendant's substantial rights have been materially affected." *State v. Johnston* (1988), 39 Ohio St.3d 48, 59. In cases where the appellant has alleged the prosecution suppressed evidence, he is not subject to the usual burden required to obtain a new trial—demonstrating that the newly discovered evidence *probably* would have resulted in acquittal. *Id.* at 60, citing *United States v. Agurs* (1976), 427 U.S. 97, 111.

{¶42} A prosecutor's suppression of evidence favorable to an accused violates due process rights where the evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87. However, "[i]n order to constitute a violation of due

process, the evidence withheld from Defendant must be (1) favorable to the defendant and (2) material to guilt or innocence.” *State v. Coleman*, 2d Dist. Nos. 04CA43, 04CA44, 2005-Ohio-3874, ¶36, citing *Brady*, supra. Accordingly, the Supreme Court of Ohio has held that, “the key issue in a case where exculpatory evidence is alleged to have been withheld is whether the evidence is material.” *Johnston*, 39 Ohio St.3d at 60. “Evidence is deemed “material” only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; a “reasonable probability” is a probability sufficient to undermine confidence in the outcome.” *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶129, quoting *U.S. v. Bagley* (1985), 473 U.S. 667, 682. Finally, the United States Supreme Court has held that “[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish “materiality” in the constitutional sense.” *Agurs*, 427 U.S. at 109-110.

{¶43} Here, we find that Keith’s argument fails under the due process analysis, as he has failed to demonstrate materiality. Thus, we need not determine whether he was unavoidably prevented from filing his motion in a timely fashion or whether he demonstrated that the State suppressed the radio log.

{¶44} Initially, we reiterate this Court’s prior finding that, “a jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict

has stood the test of time and an exhaustive series of both state and federal appeals.” *Keith*, 2008-Ohio-6187, at ¶35.

{¶45} Concerning the phone call from Nurse Foor, Keith argued that Lieutenant Beal testified at trial that he took the phone call from Nurse Foor at 5:00 a.m., but that, in newly discovered radio logs which recorded information about the police station’s phone calls, there was no 5:00 a.m. phone call evidenced on the radio log. However, Keith’s argument ignores the fact that both Lieutenant Beal and Nurse Foor testified at trial regarding the phone call and were subject to cross-examination on the matter, making the mere absence of the phone call on the station’s radio log immaterial. Further, as the trial court found, victim Richard Warren survived the shooting and testified in court that Keith was the shooter. In light of the preceding, we cannot find that the absence of the phone call at issue from the radio logs is even remotely sufficient to undermine confidence in the outcome of the trial.

{¶46} We further find the offered evidence concerning the radio log entry about the bullet casing to be immaterial. Keith argued that testimony the State presented at trial indicated that a bullet casing was discovered right across the street from the General Electric plant, but that the newly discovered radio logs contained an entry indicating that the caller indicated the casing was discovered “in the McDonald’s area,” which was over one mile away from the General

Electric plant. However, Keith's argument again ignores the testimony that was heard at trial on the matter. At trial, Officer John Seif testified that Farnella Graham told him, face to face, that she recovered the casing "on the sidewalk that morning," and that, at trial, Farnella Graham testified that she found the bullet casing on the sidewalk in front of her house while cleaning fast food litter from her front walk; that she lived across the street from the General Electric plant; and, that her daughter had called the police about the bullet casing. We agree with the trial court that the discrepancy in the log concerning the location of the bullet casing was likely explained by Graham's testimony at trial that she initially assumed the fast food litter she found by the bullet casing was from McDonald's, but then noticed it was from Wendy's, and that, not she, but her daughter called the police. In light of the clear testimony heard at trial, as well as the obvious explanation for the discrepancy in the radio log entry, we do not find that this evidence is even remotely sufficient to undermine confidence in the outcome of the trial. Consequently, we find that the trial court did not err in overruling Keith's motion for leave to file a motion for a new trial.

{¶47} Accordingly, we overrule the first and second assignments of error.

Assignment of Error No. III

{¶48} In his third assignment of error, Keith argues that the trial court erred in applying the doctrine of res judicata to his claims. Specifically, Keith contends

that a trial court must grant a new trial where the defendant presents newly discovered evidence material to his defense which could not have been discovered with reasonable diligence and produced at trial. The State responds that Keith was aware of the issue concerning Nurse Foor's testimony for over one year, making his argument barred by res judicata, and, further, that this was not the only basis on which the trial court denied Keith's motions.

{¶49} Having found in our analysis of Keith's first and second assignments of error that he failed to demonstrate grounds for a new trial, we find the third assignment of error to be moot, and we decline to address it. App.R. 12(A)(1)(c).

Assignment of Error No. IV

{¶50} In his fourth assignment of error, Keith argues that the trial court erred in failing to rule on his claims under *Arizona v. Youngblood*, supra. Specifically, Keith contends that the trial court was required to grant a new trial because his due process rights were violated when the police acted in bad faith and failed to preserve potentially useful evidence. The State responds that, according to the Supreme Court of Ohio's decision in *State v. Geeslin* (2007), 116 Ohio St.3d 252, a defendant is required to establish that the State acted in bad faith when the evidence is only potentially useful and not material, and that Keith failed to offer any rational basis for bad faith.

Case No. 3-10-19

{¶51} Having found in our analysis of Keith's first and second assignments of error that he failed to demonstrate grounds for a new trial, we find the fourth assignment of error to be moot, and we decline to address it. App.R. 12(A)(1)(c).

{¶52} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

PRESTON and WILLAMOWSKI, J.J., concur.

/jnc

IN THE COURT OF COMMON PLEAS
CRAWFORD COUNTY, OHIO

STATE OF OHIO

Plaintiff—

vs.

KEVIN KEITH

Defendant—

CASE NO.: 94—CR—0042

JUDGE: THOMAS PATRICK CURRAN
On Assignment, Art. IV, Section 6
Ohio Constitution

OPINION AND JUDGMENT ENTRY
DENYING DEFENDANT KEVIN
KEITH'S MOTION FOR LEAVE TO
FILE A DELAYED MOTION FOR NEW
TRIAL AND ALSO DENYING
UNDERLYING MOTION FOR NEW
TRIAL

This is a Death Penalty Case.

THIS IS A FINAL JUDGMENT

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CRAWFORD COUNTY

I. INTRODUCTION

In this most recent post conviction filing, death row Defendant Kevin Keith seeks leave to file a delayed motion for new trial on the ground of newly discovered evidence. For the reasons that follow, this court, once again, is denying both the Motion for Leave, as well as the underlying Motion for New Trial.

II. PROCEDURAL HISTORY

A. Trial and Direct Appeals—1994 to 1998.

For the execution style murders of three individuals (including a seven-year old), a Crawford County jury convicted Defendant-Petitioner Kevin Keith of three counts of aggravated murder in violation of R.C. 2903.01. The murder charges carried death penalty specifications pursuant to R.C. 2929.04(A)(5).¹ The jury also found Keith guilty of three counts of attempted aggravated murder in violation of R.C. 2929.02 for attempting to kill three more persons, including a four-year old and a seven-year old. All of these crimes were committed at an apartment dwelling on the night of February 13, 1994. Jury verdicts of guilty were returned on May 26, 1994. Following a brief penalty phase, the jury recommended death. After independently weighing the aggravating factors against the mitigating factors, the trial court sentenced the defendant to death, plus consecutive terms of seven to twenty-five years for three counts of attempted aggravated murder. From the judgments of the Crawford County Court of Common Pleas, Kevin Keith prosecuted a direct appeal to the Ohio Court of Appeals for the Third District, which affirmed the convictions and the sentences.²

From the adverse decision of the Court of Appeals, Keith pursued an appeal to the Supreme Court of Ohio. The conviction was unanimously affirmed on October 1, 1997.³ The

¹ Part of a "course of conduct" involving the purposeful killing of, or attempt to kill, two or more persons.

² *State v. Keith*, No. 3-94-14 (1996 C.A.3), unreported, except 1996 WL 156710. Sections 2 and 3 of Article IV of the Ohio Constitution were amended on November 8, 1994 to provide for direct appeals to the Supreme Court for capital convictions of offenses committed on and after January 1, 1995. These multiple murders were committed February 13, 1994, and, thus, were reviewable by the Ohio Court of Appeals on direct appeal. However, for collateral litigation, such as PCR cases and delayed motions for new trial, the Ohio Court of Appeals continues to possess appellate jurisdiction of capital cases.

³ *State v. Keith* (1997), 79 Ohio St.3d 514, opinion by Justice Cook.

Defendant-Petitioner then sought review by The United States Supreme Court, which denied his petition for writ of certiorari in 1998. See, *Keith v. Ohio*, 523 U.S. 1063, 118 S.Ct. 1393, 140 L.Ed. 2d 652.

B. Collateral Litigation—State Court—1996 to 1999 (Post Conviction Relief Petition #1).

Well before the direct appeal process had neared its end, Kevin Keith embarked on collateral attacks on his conviction and death sentence. On September 20, 1996, Keith filed his first Post Conviction Relief Petition before the trial court, which dismissed the petition without a hearing, coupled with an opinion outlining findings of fact and conclusions of law.⁴ The Court of Appeals affirmed the trial court's action on August 19, 1998, supported by an additional formal opinion, and devoted principally to the issue of ineffective assistance of trial counsel, which it rejected.⁵ The Ohio Supreme Court declined jurisdiction on December 23, 1998. 84 Ohio St. 3d 1447. Rehearing denied February 3, 1999. 84 Ohio St. 3d 1489, 705 N.E.2d 368 (1999). The United States Supreme Court again denied certiorari on June 21, 1999. *Keith v. Ohio*, __U.S.__, 119 S.Ct. 2378 (1999).

C. Collateral Litigation—Federal Court—1999 to 2006 (Federal Habeas Corpus Petition #1)

The state court remedies having been exhausted, Kevin Keith commenced his pursuit of federal habeas corpus, when, on September 3, 1999, he filed his initial action pursuant to 28 USC 2254, to be followed by an amended petition in the spring of 2000. In June 2001 the district court dismissed the action. Thereafter, with appeal to the Sixth Circuit, followed by remand on the issue of appealability, the District Judge issued a Certificate of Appealability (COA) on several issues and the Court of Appeals added several more issues. The case was

⁴ *State v. Keith*, Crawford Cty. C.P. 94-CR-0042.

⁵ See 1998 WL 487044 (C.A. 3)

finally argued to the Sixth Circuit on a number of issues all devoted to the mitigation phase of the trial. The Court of Appeals affirmed the District court's denial of the writ of habeas corpus in an opinion dated July 10, 2006. *Keith v. Mitchell*, 455 F.3d 662. In doing so, the Sixth Circuit noted: "[T]his is not an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent. Keith does not claim that he is actually innocent." (Emphasis added.), *supra*, 455 F.3d at 675. Petition for rehearing en banc denied. 466 F.3d 540 (2006).

D. Collateral Litigation—State Court—2004 to 2008 (PCR Petition #2, and Motion for Leave to File Delayed Motion for New Trial #1 and Motion for New Trial #1).

In August 2004, Keith filed a second petition for postconviction relief with the trial court, setting forth three grounds for relief: (1) that the trial prosecutors did not timely provide defense counsel with all relevant exculpatory evidence, (2) that new information received after the trial indicated that two persons were involved in the homicides and that there was another possible suspect, and (3) that the cumulative effects of these errors deprived him of fundamental fairness, resulting in his conviction and sentence being void or voidable. In February 2007, this court of common pleas granted summary judgment in favor of the State and against Keith on his second petition for postconviction relief and, alternatively, dismissed Keith's petition in a 35-page opinion, without permitting discovery or an evidentiary hearing. The Ohio Court of Appeals for the Third District affirmed this court in a detailed analysis filed on February 25, 2008. On August 1, 2007, while that appeal to the Ohio Court of Appeals was pending, Keith filed with this court of common pleas a motion for leave to file a delayed motion for new trial and a motion for a new trial itself. Once again, this court authored an extensive opinion and order denying both motions. The Ohio Court of Appeals affirmed that decision. See *State v.*

Keith, 2008-Ohio-6187 (12-01-2008). This pattern of multiple filings in both state and federal courts has persisted.

E. Collateral Litigation—Federal Court—2008 to current (Federal Habeas Corpus Petition #2).

On August 25, 2008, Keith filed an application with the Sixth Circuit for an order authorizing the district court to consider a second or successive habeas corpus petition under 28 USC 2254. On January 13, 2009, the Sixth Circuit denied the motion.⁶ That motion—filed as it was in August of 2008—took place while Keith's most recent appeal to the 3d District Ohio Court of Appeals was pending. As noted, the 3d District did not decide that appeal until December 1, 2008. And, more importantly, the most recent federal filing of August 2008 has preceded the pending motion in this court of common pleas by nearly two years.⁷ See *Keith v. Bobby*, 551 F.3d 555 (6th Cir. 1-13-2009)

F. Collateral Litigation—State Court—2010 (Delayed Motion for New Trial #2, and Motion for New Trial #2).

On May 11, 2010, Kevin Keith filed the two pleadings that are the subject of this court's Opinion and Judgment Entry herein: a so-called motion for leave to file a delayed motion for new trial, together with an underlying motion for new trial itself.

⁶ Citing 28 USC 2244(b)(2)(B), the Sixth Circuit ruled that Keith was unable to make a prima facie showing that "no reasonable factfinder would have found the applicant guilty of the underlying offense."

⁷ Criminal Rule 33 sets forth a 120-day timeline for the filing of such a motion for new trial based upon newly discovered evidence.

III. DELAYED MOTIONS FOR NEW TRIAL—CRIMINAL RULE 33.

Motions for new trial, generally speaking, are held to strict timetables, and usually are the product of irregularities perceived contemporaneously with the trial itself. Thus, it is not surprising that the movant in such situations is typically held to a fourteen-day timeline "after the verdict was rendered." Crim. R. 33(B). However, in the context of "newly discovered evidence," additional time is granted a convicted defendant— not, however, without additional burdens. For a complete understanding of the burdens placed upon a convicted defendant pursuing a "delayed" motion for a new trial, one must look to long-standing case law in Ohio. In this respect, see *State v. Petro*, 148 Ohio St. 505 (1947), syllabus:

To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. (*State v. Lopa*, 96 Ohio St. 410, 117 N.E. 319, approved and followed.) [Cited with approval in *State v. Grinnell*, 2010-Ohio-3028 (CA10, June 30, 2010.)]

As of July 2010, some 112 reported Ohio cases have cited with approval the *Petro* decision. In *State v. Grinnell*, supra, the 10th District Court of Appeals observed:

{¶11} If a defendant fails, under Crim.R. 33(B), "to file a motion for a new trial based on newly discovered evidence within 120 days of the jury's verdict or court's decision, then he or she must seek leave from the trial court to file a 'delayed motion.' " [Citing authority.] In order to obtain such leave, a defendant "must demonstrate by clear and convincing proof that he or she was unavoidably prevented from discovering the evidence within the 120 days." [Citing authority.] A defendant is "unavoidably prevented" from filing a motion for new trial if he or she "had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence."

(¶12) In addition to the requirement that a defendant show he or she was unavoidably prevented from discovering the evidence relied upon to support a motion for new trial, a defendant "also must show that he filed his motion for leave within a reasonable time after discovering the evidence relied upon to support the motion for new trial. [Citing authority.] [Although] Crim.R. 33(B) "does not provide a specific time limit for the filing of a motion for leave to file a delayed motion for new trial, '[a] trial court may require a defendant to file his motion for leave to file within a reasonable time after he discovers the evidence' ". [Citing authority.] In the event there has "been an 'undue delay' between the time that the evidence was discovered and the filing of the motion for new trial, the trial court must determine whether the delay was reasonable under the circumstances or whether the defendant has adequately explained the reason for the delay." [Citing authority.]

(¶13) If a defendant "has been allowed to file a motion for new trial, the decision whether to actually grant the new trial is left to the sound discretion of the trial court, and will not be reversed absent an abuse of that discretion." *State v. Neguse*, 10th Dist. No. 09AP-843, 2010-Ohio-1387, ¶8. In *State v. Petro* (1947), 148 Ohio.St. 505, syllabus, the Supreme Court of Ohio held that a motion for new trial based upon newly discovered evidence requires a showing that the new evidence:

- (1) [D]iscloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. (*State v. Lopa*, 96 Ohio St., 410, approved and followed.)

IV. KEVIN KEITH AND THE QUANTUM OF EVIDENCE—STANDING THE TEST OF TIME

Sixteen years have passed since Kevin Keith was convicted of the capital murders of Marichell Chatman, 24, her aunt Linda Chatman, 39, and Marichell Chatman's daughter Marchae, 7. Three more were seriously wounded: siblings Quanita Reeves 7, and Quinton

Reeves, 4, (Chatman cousins) and Marichell's boyfriend Rick Warren.⁸ Over the years, a number of courts and a number of judges have evaluated the evidence in this case. Here is what they have said about the quantum of proof:

- The Ohio Court of Appeals (3d District, 4-5-1996). In an unpublished opinion, the 3d District recited extensive evidence, both direct and circumstantial, supporting the defendant's conviction. However, the appellant did not raise any issues testing the measure of proof of the convictions. It should be noted that new and experienced counsel listed some nine assignments of error, many devoted to the issue of ineffective assistance of trial counsel, and all of which were rejected. *State v. Keith* (3d Dist. Ct. App., No.3-94-14, April 5, 1996, unpublished, 1996 WL156710).
- The Supreme Court of Ohio, 79 Ohio St.3d 514 (10-1-1997). The Supreme Court, addressing Kevin Keith's appeal as of right, was confronted with eight assignments of error, none of which addressed actual innocence. Pursuant to R.C. 2929.05, the Supreme Court independently weighed the aggravating circumstances against the mitigating factors in order to determine whether Keith's sentence is disproportionate to sentences in similar cases. The Court began its analysis with this observation: "The evidence supports beyond a reasonable doubt that appellant murdered Marichell, Marchae and Linda Chatman, and attempted to kill Richard Warren and Quanita and Quinton Reeves as part of a course of conduct involving the purposeful

⁸ Rick Warren sustained four gunshot wounds, but survived. Linda Chatman died from multiple gunshot wounds to the neck and body. Seven year-old Marchae Chatman was found with two gunshot wounds to the back and although alive at the scene, she died shortly thereafter en route to the hospital. Marichell Chatman was found dead of multiple gunshot wounds to the body and two gunshot wounds to the neck. Quanita Reeves and Quinton Reeves along with Richard Warren all sustained multiple gunshot wounds and survived the shooting with serious injuries.

killing or attempt to kill two or more persons. R.C. 2929.04(A)(5)." 79 Ohio St.3d at 537.

- The Ohio Court of Appeals, 1998 WL 487044 (3d Dist. 8-19-1998). On September 20, 1996, Appellant filed a Petition to Vacate or Set Aside Judgment and Sentence in the trial court pursuant to R.C. 2953.21 wherein he argued, *inter alia*, that his conviction and sentence was void or voidable because he was denied the right to effective assistance of counsel due to the trial attorney's failure to investigate and present important mitigation evidence during the penalty phase of the trial. This, the first of two petitions for post conviction relief, fairly well conceded that there was abundant evidence of guilt.
- The United States Court of Appeals for the Sixth Circuit. See *Keith v. Mitchell*, 455 F.3d 662 (7-10-2006). In its analysis of Kevin Keith's first habeas corpus petition, the U.S. Court of Appeals had this to say about the petitioner's innocence: "[T]his is not "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). **Keith does not claim that he is actually innocent. The aggravating circumstances in this case were extremely compelling ***[.] Moreover, the Ohio Supreme Court's independent review of the case mirrored the jury's finding that the aggravating circumstances clearly outweighed any mitigating circumstances and warranted the death penalty."** (Emphasis in bold.) 455 F.3d at 675.
- The Ohio Court of Appeals, 2008-Ohio-741 (3d Dist. 2-25-2008), affirming this court's opinion denying Kevin Keith's second petition for post conviction relief,

remarked: “{¶48} *** [T]he trial court was entitled to rely upon the overwhelming evidence set forth by the United States Court of Appeals, as well as the Supreme Court of Ohio, in making its determination that the newly asserted evidence was insufficient to call the jury's verdict into question.”

And again:

- *The Ohio Court of Appeals*, 2008-Ohio-6187 (3d Dist. 12-1-2008), affirming this court's denial of Kevin Keith's first delayed motion for new trial, stated bluntly: “{¶34} *** [A] jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals. This case was before this Court as recently as February 25, 2008 on Keith's second post-conviction petition. We were not persuaded then, nor are we now, that Keith has suffered prejudice”

And finally:

- The United States Court of Appeals for the Sixth Circuit. See *Keith v. Bobby* 551 F.3d 555, 559 (1-13-2009). And in rebuffing Kevin Keith's attack on the quantum of evidence against him, the 6th Circuit remarked: “[Richard] Warren's in-court eyewitness testimony still strongly supports Keith's guilt.”

V. THE PENDING MOTIONS:

The Defendant Kevin Keith has now filed yet another motion for new trial, and, as before, in obedience to the dictates of Criminal Rule 33, his attorneys understand that the

Defendant must first obtain leave of this court to file such a motion. These two motions—first for leave, and second for new trial—were filed jointly on May 11, 2010.

The arguments advanced by the Defendant cover only two topics: first, whether a hospital nurse, by the name of John Foor, was truthful when he testified that he placed a telephone call to the Bucyrus Police Department (BPD) regarding the hospital patient Richard Warren; and second, whether a spent shell casing was recovered at a location other than near the GE Plant.

A. The testimony of John Foor

The Defendant's first claim is that the BPD telephone logs (discovered as long ago as 2007) fail to contain a notation that Nurse John Foor called the Police Department on a particular date. According to the Defendant, this means that Foor gave totally false testimony regarding Richard Warren's condition, as well as Warren's communication (while in extremis) of the name "Kevin" as the perpetrator of these murders and attempted murders. This current non-sequitur, once again connected with nurse issues, are but variations of the same oft-repeated theme, repeatedly rejected at numerous times by numerous courts. In fact, these are remote and collateral to the plain fact that Richard Warren, although shot once in the jaw, twice in the back, and finally once in the buttocks, survived to testify in court and to positively identify Kevin Keith.

B. State's Exhibit 43

It will be recalled that 25 spent shell casings were recovered, all but one at or near the location of the shootings. Importantly, according to the testimony of the BCI ballistics expert, all 25 casings were fired from the same weapon. This tended to corroborate the testimony of Warren that a lone gunman committed these crimes. Equally significant was the testimony surrounding State's

Exhibit 43—the 25th shell casing, a perfect match—discovered near the entrance to the GE factory in Bucyrus. The BPD radio logs suggest that Exhibit 43 was recovered at a McDonald's. The log reads as follows: "1221 S. Walnut. Woman found casing. Thinks she may have picked it up in the McDonald's area."

Against this log entry are the following points of note:

- According to the testimony of Police Officer John Seif, Farnella Graham, face to face, told him she recovered the shell casing "on the sidewalk that morning."
- Farnella Graham, herself, testified that she found the casing on her front walk on the morning of February 14; that she lives across the street from the GE Plant; and that she discovered the casing as she was cleaning fast food litter from her front walk.
- Farnella Graham's daughter, upon hearing of the crimes the night before, decided herself to call the police.

The connection between Exhibit 43 and the Defendant is that Kevin Keith picked up his girl friend Zina Scott at the GE Plant on the evening of February 13. The significance of this combination of events is admittedly probative—as is the apparent explanation for the reference to McDonalds as the location where State's Exhibit was discovered. This court has concluded that a complete reading of Farnella Graham's testimony will benefit the reader's understanding of the potential validity of this singular issue. The testimony of Farnella Graham is contained in Volume III of V., pages 426 through 437.

Ms. Graham has a habit of looking out her front window before retiring for the evening. On the evening of February 13, the night of the murders, Ms. Graham noticed "a tremendous

amount of trash on the curb and on my sidewalk and out into the street." Hoping the wind would blow it away, she waited until the next morning to clean the yard. While picking up the litter the next morning, she discovered the spent cartridge. She then threw the litter and the cartridge in the trash bin in her kitchen (from which it was retrieved by the police). The direct examination of Farnella Graham by Prosecutor Wiseman made no reference to the identity of the trash. It was not until the cross examination that the following took place:

Q. Now in relation to that, you found some trash, McDonald's trash bag; wasn't it?

A. I assumed it was but later on I noticed it was from Wendy's.

One has a right to wonder if trial counsel were then aware of the miscommunication of the location of the cartridge. In any event, a logical explanation for the log's mistaken reference to McDonalds as the place where the cartridge was retrieved is patently evident. When all is said and done Farnella Graham certainly knew where she discovered exhibit 43—in her front yard. Noteworthy also is that Trial Prosecutor Wiseman pursued open discovery with the defense.⁹

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. Notwithstanding repeated collateral attacks upon the capital convictions of Kevin Keith, the evidence of his guilt beyond a reasonable doubt is compelling, persuasive and overwhelming.

⁹ During the oral argument on June 10, 2010, Assistant County Prosecutor Clifford Murphy emphasized the matter of open discovery and Assistant State Public Defender Rachel Troutman fairly well conceded this fact from the standpoint of the County Prosecutor's office. In fact, the trial transcripts confirm that Prosecutor Wiseman had openly shared with Keith's trial counsel many pages of police reports reciting hour by hour and day by day investigations. See trial transcripts Volume V of V, page 824.

2. The Defendant has failed to establish, by any standard of proof, that the so-called newly discovered evidence regarding Nurse John Foor would produce a strong probability for a change in the jury verdict of guilty.
3. The issue of whether Nurse John Foor did or did not telephone the BPD on a date and time certain is only remotely material to the issues in this case, and unlikely to impact the credibility of the witness Richard Warren.
4. The issue of whether Nurse John Foor did or did not telephone the BPD on a date and time certain does not impeach or contradict Richard Warren's identification of the Defendant, much less does it contradict the constellation of evidence, both direct and circumstantial, connecting Kevin Keith to the events in question.
5. The issue of John Foor's testimony has been so thoroughly explored and dissected as to be foreclosed and resolved as res judicata. This most recent issue appears to have been known to Keith's attorneys for more than a year.
6. The Defendant has failed to establish, by any standard of proof, that the so-called newly discovered evidence regarding State's Exhibit 43 and the police log would produce a strong probability for a change in the jury verdict of guilty.
7. The police log, regarding the discovery of State's Exhibit 43, on its face, merely contradicts the testimony of Farnella Graham; however, the log entry is patently erroneous and unworthy of belief.

8. The combination of both direct and circumstantial evidence in this case supports the finding that even were this court to grant a motion for new trial, the result—a verdict of guilty—would remain the same.

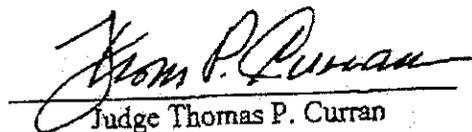
VII. ORDERS

1. The Defendant's second Motion For Leave to File a Delayed Motion for New Trial, under Criminal Rule 33 is denied. **Final.**
2. The Defendant's second Motion for New Trial, pursuant to Criminal Rule 33, is denied. **Final.**
3. Any and all ancillary motions of the Defendant are hereby denied. **Final.**

IT IS SO ORDERED, this 9th day of August 2010.


JUDGE THOMAS P. CURRAN
On Assignment, Art. IV, Section 6
Ohio Constitution

To the Clerk of Courts: YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT UPON ALL COUNSEL OF RECORD BY ORDINARY MAIL.


Judge Thomas P. Curran

SEE NEXT PAGE FOR APPENDIX

IN THE COURT OF COMMON PLEAS

CRAWFORD COUNTY, OHIO

STATE OF OHIO

Plaintiff—

vs.

KEVIN KEITH

Defendant—

>

CASE NO.: 94—CR—0042

JUDGE: THOMAS PATRICK CURRAN
On Assignment, Art. IV, Section 6
Ohio Constitution

APPENDIX

Testimony of Farnella Graham

1 THE COURT: There is no objection to
2 photographs being taken of this witness.

3 FARNELLA EVELYN GRAHAM

4 Called as a witness for the State of Ohio, being
5 first duly sworn in according to law by the Bailiff, was
6 examined and testified as follows:

7 DIRECT-EXAMINATION

8 BY - MR. WISEMAN:

9 Q Good morning.

10 A Good morning. I am rather hard of hearing.

11 Q Okay. Can you hear me from here?

12 A Yes.

13 Q Would you please state your full name and address?

14 A My name is Farnella Evelyn Graham and I live at 1221
15 South Walnut Street.

16 Q Here in Bucyrus, Ohio?

17 A Bucyrus, Ohio.

18 Q And is there any major building near you? Do you
19 live near the G.E. Plant?

20 A I'm sorry?

21 Q I will move up.

22 Do you live in the General Electric Plant area?

23 A I live right across from the the drive out and drive
24 in.

25 Q How long have you lived there Mrs. Graham?

1 A Oh, about 24 years.

2 Q Were you living there then on the 14th of February
3 of 1994?

4 A Yes, I was.

5 Q Did you have occasion to clean up your yard that
6 morning of February 14th, Monday?

7 A Well, the night before, I went to bed which would
8 have been Sunday night. I was preparing to go to bed and I
9 always go to the front window and looked out. Just a habit
10 I have. And I saw a tremendous amount of trash on the curb
11 and on my sidewalk and out into the street.

12 Q And what did you do about that?

13 A Well, I didn't go out that night. I decided to wait
14 until the next morning, hoping some of it would blow away,
15 but it didn't.

16 Q And so the next morning I take it, it was still
17 there?

18 A It was still there. I went outside as soon as I got
19 dressed, and put it in the trash can. And my daughter
20 called me and she was telling me what had happened. I knew
21 nothing about this.

22 Q Let's go back a second. When you picked up the
23 trash, did you find anything unusual that morning?

24 A Well, I had the trash all picked up and was walking
25 back to the house and looked down. There was a bullet, a

1 spent shell, to my left.

2 Q Mrs. Graham I am going to show you what we have
3 marked as Exhibit 43 for identification. Take a look at
4 that and tell us if that is the item you found or an item
5 similar to--

6 A I believe it is.

7 Q Thank you.

8 A I didn't pay a whole lot of attention to it at that
9 time.

10 Q What did you do with it after you--

11 First off, let me back up. Where did you find this
12 item?

13 A On the big sidewalk just before I stepped over on my
14 walk.

15 Q And what did you do with it?

16 A I threw everything in the trash. I didn't know the
17 significance of anything. I threw it all away.

18 Q When did you find out there might be a significance?

19 A My daughter called and she was telling me what
20 happened and this all surprised me. I didn't know anything
21 about it, about what happened. And I said, "That's strange,
22 because I found a lot of trash out in front of my house last
23 night and I started in to take it in the house and I looked
24 down and there was a spent shell."

25 And she said, "Oh, my gosh, you should call the

1 police." And I said, "I don't think so." And she said,
2 "Well, I will."

3 Q And did the police show up at your house?

4 A He came right out.

5 Q And what happened when he got there?

6 A Well, I rummaged through my trash and got what I
7 thought was everything and, but he called me later on and
8 said that he had spilled coffee on his report and didn't
9 have my last name plain enough to make out.

10 Q And did you give it to him?

11 A Well, I told him then we had missed a little piece
12 of evidence or whatever you want to call it. It was a
13 french fry container.

14 Q Did you give him this item, or an item like this the
15 first time he was there?

16 A Yes.

17 Q Do you recall the officer's name who came to your
18 house?

19 A His tag said Joe I think. He's a young fellow.

20 Q Now when you had that item in your possession, did
21 you tamper with it in anyway?

22 A (No audible answer)

23 Q When you had the item in your possession, did you
24 tamper with it in anyway?

25 A No, I just put it with the rest of the trash and

1 threw it away.

2 MR. WISEMAN: Thank you very much,
3 Mrs. Graham. I appreciate your testimony.

4 THE COURT: You may inquire.

5 CROSS-EXAMINATION

6 BY - MR. BANKS:

7 Q Mrs. Graham, approximately, if you can remember,
8 approximately what time did you look out that night?

9 A Oh, I would say about quarter to 10:00.

10 Q Did you look out any other time that night?

11 A No, I went to bed right directly after that.

12 Q Did you at any time that evening, see the gentleman
13 that is sitting right here, in that vicinity?

14 A No. I'm not in the habit of looking at people, no.
15 I saw no one.

16 Q Now. (Writing on the blackboard) Is there anyway you
17 can show us where your house is -- how it would be set in
18 relation to the drive in and drive out?

19 A Right directly across from the drive in and drive
20 out.

21 Q Does your street run this way?

22 A Like this. (Indicating)

23 Q Where would your house be then in relation to the
24 street?

25 A My house sits back about 15 feet I would say from

1 the street.

2 Q On this side of the street let's say?

3 A Yes.

4 Q And then where would the plant drive in and out be?

5 A Right straight across the street.

6 Q Right straight across?

7 A Yes.

8 Q This is where they go in the plant and park when
9 picking people up?

10 A Yes.

11 Q You have seen that map before?

12 A Yes, I have seen it before.

13 Q Now in relation to that you found some trash,
14 McDonald's trash bag; wasn't it?

15 A I assumed it was but later on I noticed it was from
16 Wendy's.

17 Q Now could you tell me approximately where it was in
18 proportion to your house -- directly in front or on the
19 side?

20 A It was directly in front.

21 Q Do you have a sidewalk?

22 A It was on the sidewalk leading out to the curb and
23 some was right on the curbing and some was threw out almost
24 in the middle of the street.

25 Q You have a curb that comes from your house?

1 A A sidewalk.

2 Q I'm sorry. You have a sidewalk that comes from your
3 house?

4 A Yes.

5 Q And then do you have another sidewalk?

6 A Yes.

7 Q And so you are saying that some of it was besides
8 the sidewalk coming from your house?

9 A No, it was on the sidewalk, the big sidewalk, not
10 the walk out to the house.

11 Q So some was on the big sidewalk?

12 A Yes.

13 Q How many items would you say there was?

14 A Oh, there was quite a lot. I couldn't really say, I
15 was just interested in getting rid of it.

16 Q Was there more than just things from Wendy's? Were
17 there cans of pop?

18 A There was a bottle out in the middle of the street
19 or almost.

20 Q Almost to the middle of the street?

21 A Yes.

22 Q Like maybe there? (Indicating on diagram)

23 A And there was also a large brown sack near there.

24 Q Was there anything in the sack?

25 A No, it was empty.

1 Q Was it like a Kroger sack or a smaller one?

2 A It was like a shopping sack except it was thin;
3 wasn't a heavy regular paper--

4 Q It was paper?

5 A Yes.

6 Q It didn't have straps on it like a shopping bag or
7 did it?

8 A No, it didn't have straps.

9 Q And it was close to the bottle in the street?

10 A Yes.

11 Q Now, approximately where did you find the shell
12 casing?

13 A Well, it was on the big sidewalk just as I was
14 getting ready to step onto my walk.

15 Q Over here?

16 A Yes. It was right close to where I stepped up to go
17 to my house.

18 Q Which would be right here? (Indicating)

19 A Closer to there, yes.

20 Q And was it on the walk?

21 A It was on the sidewalk.

22 Q And I assume that there is grass on both sides of
23 your walk leading up to your house?

24 A Yes.

25 MR. BANKS: May I approach the witness, Your

1 Honor?

2 THE COURT: Sure.

3 Q (Mr. Banks) When you picked this up, did you handle
4 it yourself?

5 A No, I just picked it up and put it with the rest of
6 the trash I had.

7 Q Was it laying by itself?

8 A It was laying by itself.

9 Q No other debris was around?

10 A Not in that particular spot.

11 Q And again, this is a drop-off area, and an entrance
12 way is what you said?

13 A Yes. That's the entrance where people go into the
14 plant and pick up employees and drop them off.

15 Q Is there a drive here that you drive in and come
16 back out the other side one way?

17 A It is one way in, just goes like that in the same
18 entrance.

19 Q Now, there's a curb on your side of the street?

20 A Yes.

21 Q And how high would you say that curb was?

22 A Oh, not very high, only about three or four inches
23 high. Some of it is crumbled away even.

24 Q So if in fact, well, was it windy that night?

25 A No, there wasn't any wind that I could notice.

1 Q So in other words, in your estimate if somebody
2 dropped someone off here and that casing fell out of the car
3 for whatever reason, you don't believe it could have blown
4 across the street over to your--

5 MR. WISEMAN: Objection, Your Honor. That
6 obviously calls for speculation. There is no way she could
7 know that.

8 THE COURT: Objection is sustained.

9 Q (Mr. Banks) Let me ask you this: You didn't see
10 anyone on your curb area that night?

11 A No.

12 Q That could have placed that right there on your
13 sidewalk?

14 A No, but going up to my living room is rather low and
15 unless I would stand up, I can't see anyone in the street.

16 Q Now, where is your trash located at your house:
17 behind your house or on the side?

18 A Pardon me.

19 Q When you policed up your area, you put your findings
20 in the trash?

21 A Yes. I dumped everything.

22 Q And was that on the side of your house?

23 A No, inside.

24 Q On the inside?

25 A I dumped the trash on the inside of my house.

1 Q Did you look around after you had found the casing
2 to see if there were any other casings there?

3 A No, I didn't.

4 Q That particular evening did you hear any type of
5 shots fired or anything that sounded like shots being fired?

6 A No.

7 MR. BANKS: Thank you very much, ma'am.

8 THE COURT: Russ.

9 REDIRECT-EXAMINATION

10 BY - MR. WISEMAN:

11 Q Just a couple of questions.

12 Do you have any idea how the item we have been
13 discussing, State's Exhibit 43, got on your front walk?

14 A Pardon me?

15 Q Do you have any idea how that item got on your front
16 walk?

17 A I have no idea at all.

18 Q From the time you picked it up the morning of the
19 14th until the time you gave it to the police officer, where
20 was it?

21 A You mean when I gave it to the police officer?

22 Q Between the time you picked it up and the time you
23 gave it to the police officer, where was it?

24 A It was in my trash.

25 Q And where was your trash located?

1 A In my kitchen.

2 MR. WISEMAN: Okay, thank you Mrs. Graham.

3 MR. BANKS: Thank you very much, we have
4 nothing further.

5 THE COURT: You are excused, thank you very
6 much.

7 Call your next witness.

8 MR. WISEMAN: Patrolman Seif.

9 THE BAILIFF: There is an objection made to
10 photographs of this witness.

11 THE COURT: Pictures will not be taken.

12 JOHN SEIF

13 Called as a witness for the State of Ohio, being
14 first duly sworn in according to law by the Bailiff, was
15 examined and testified as follows:

16 DIRECT-EXAMINATION

17 BY - MR. WISEMAN:

18 Q State your name and occupation please?

19 A John Seif, police officer for the city of Bucyrus.

20 Q How long have you been a police officer, Officer
21 Seif?

22 A One year.

23 Q And that has been straight time with Bucyrus here?

24 A Yes, sir.

25 Q Were you so employed on February 14, 1994, a Monday?