

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Supreme Court #: 11-0443
APPELLEE,	:	On Appeal from the Crawford
vs.	:	County Court of Appeals, Third
KEVIN KEITH,	:	Appellate District
APPELLANT.	:	Court of Appeals No. 03-10-19

MEMORANDUM OPPOSING JURISDICTION

STANLEY FLEGM 0006846
PROSECUTING ATTORNEY
 CLIFFORD J. MURPHY 0063519
 (Counsel of Record)
 Assistant County Prosecutor
 Crawford County Prosecutor's Office
 Crawford County Courthouse
 112 E. Mansfield Street, Suite 305
 Bucyrus, Ohio 44820
 (419)562-9782

OFFICE OF THE OHIO PUBLIC DEFENDER

RACHEL TROUTMAN 0076741
 Assistant Public Defender
 (Counsel of Record)

TYSON FLEMING 0073135
 Assistant Public Defender
 250 East Broad Street Suite 1400
 Columbus Ohio 43215
 (614)-466-5394

COUNSEL FOR APPELLEE
STATE OF OHIO

COUNSEL FOR APPELLANT
KEVIN KEITH

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EXPLANATION AS TO WHY THIS CASE IS NOT OF PUBLIC OR GENERAL INTEREST AND DOES NOT INVOLVE ANY SUBSTANTIAL CONSTITUTIONAL QUESTION.

This is a yet another Appeal on a denial of yet another “New Trial” Motion by appellant, Kevin Keith (hereinafter referred to as “appellant” or as “Keith”). This time, appellant alleges that two lay witnesses perjured themselves. First, Keith presents a public records request by a friend he obtained 2 years prior to filing this motion for the effect that the Bucyrus City Police Department has a telephone entry log for a call in by Nurse John Foor of Grant Medical Center. The call was not preserved on the reel to reel recording system used by the Bucyrus Police Department. Keith believes that the Nurse never called in to the Bucyrus Police Department, despite the testimony by Nurse John Foor that he did. Therefore (per Keith), Nurse John Foor at the very least was mistaken when he testified at Trial that he called the Bucyrus Police Department. Keith’s prior Appellate Brief does acknowledge the Finding by the Trial Court (on Page 14) that this issue has been known to Keith’s Attorneys for more than a year before filing his New Trial Motion.

Keith’s second claim is that the Bucyrus Police Department’s telephone log has a written entry that a bullet casing was recovered in an area other than testified to at Trial by Ms. Farnella Graham. The Trial Testimony established that Ms Graham’s daughter actually called in to the Bucyrus Police Department to report that her mother had found a shell casing. Keith claims that a recording of this call would have been useful hearsay to impeach Farnella Graham. Neither of these issues are worthy of review and neither issue creates a Constitutional Question worthy of review or a present a Question of Great or Substantial Public Interest.

A. Procedural Posture

The Appellant, Kevin Keith, was tried and convicted by a Crawford County Jury on May 26, 1994 on three counts of aggravated murder all of which contained death penalty

specifications. Keith's conviction and sentence of death were affirmed by the Ohio Third Appellate District Court of Appeals in an opinion filed on April 5, 1996. *See State v. Keith* (April 5, 1996) Crawford Appellate # 3-94-14, unreported.

The Ohio Supreme Court unanimously affirmed both Keith's conviction and sentence of death upon the direct appeal to the Ohio Supreme Court by decision rendered on October 1, 1997. *See State v. Keith*, 684 N.E.2d 47 (Ohio 1997). Keith's motion for reconsideration of this unanimous decision was overruled by the Ohio Supreme Court on November 12, 1997. *See State v. Keith*, 686 N.E.2d 276 (Ohio 1997). Execution of the death sentence was stayed pending the exhaustion of Keith's state post conviction litigation. *See State v. Keith*, 686 N.E.2d 524 (Ohio 1997).

Keith thereafter filed for post conviction relief pursuant to Ohio Revised Code Section 2953.21. By Judgment Entry of February 4, 1998 the Trial Court denied this Petition without an evidentiary hearing. Keith appealed this Judgment Entry through appeal to all levels without success. Keith also appealed his conviction collaterally through the Federal Courts without success.

On August 19, 2004 Keith filed a second petition for post conviction relief. The State responded by filing a motion for summary judgment. The Court set the motion for an Oral hearing on November 2, 2006. On February 13, 2007 the Court issued an Opinion in excess of thirty five pages granting the State's motion for summary judgment and dismissing the second petition for post-conviction relief. Keith thereafter filed an Appeal to the Third District Court of Appeals. Contemporaneously, Keith obtained new counsel from the Ohio Public Defender's Office. Multiple filings thereafter proceeded to reopen his direct appeal to the Third District

Court of Appeals, all of which were denied. Keith filed a Motion for a New Trial and leave to file for a New Trial in March of 1998 which was denied by the Trial Court in July 2008. The Court of Appeals affirmed the Trial Court's Decision in December 2008. In May of 2010 Keith file the instant Second Motion For a New Trial and Leave, which the Trial Court denied in August 2010. The Parole Board unanimously denied a Clemency Request by Keith which the former Governor over-ruled and commuted Keith's sentence to Life without Parole. Keith appealed the Trial Court's Decision of August 2010 to the Third District Court of Appeals, which affirmed the Trial Court's Decision in January 2011. The instant Appeal followed.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

This case has been well vetted. The Propositions of Law brought before the Court have already been reviewed by State and Federal Courts all of whom opined that the case against Keith is strong. The law as it pertains to Criminal Rule 33 has been well developed in Ohio and this case does not present any area that requires further review. As opined by the United States Sixth Circuit Court of Appeals "Finally we note that this is not an extraordinary case where a Constitutional violation has probably resulted in the conviction of one who is actually innocent."

RESPONSE TO PROPOSITION OF LAW NO. I-IV:

UNTIMELY REPETITIVE APPEALS THAT MERELY RE-CIRCULATE PREVIOUSLY REVIEWED ISSUES ARE SUBJECT TO RES JUDICATA.

Keith believes the Trial Court and the Court of Appeals incorrectly denied him leave to proceed with his Second Filed Motion for a new Trial. As previously stated, Keith raised two issues under the title of "new evidence" that he claims supports leave to file for a new Trial:

1. Keith first claims a public records request by a friend in 2007 revealed that the Bucyrus City Police Department does not have a telephone entry log or a recorded call from Nurse John Foor. Keith believes

that the lack of this recording would have allowed him to impeach the testimony of Nurse Foor at Trial.

2. Keith's second claim is that the Bucyrus Police Department's telephone log has a written entry that a bullet casing was recovered in an area other than testified to at Trial. Keith claims that the destruction of the caller's recording and the entry in the Bucyrus Police Department telephone log justifies a new trial.

At the outset, Ohio Rule of Criminal Procedure 33 governs the legal standard for seeking both leave to file for a new trial and the standard of proof needed by Keith to be granted such relief as interpreted under the applicable case law. Keith must establish all of the following:

- (1) That he was unavoidably delayed in timely filing a motion for a new trial;
- (2) That Keith has clear and convincing evidence that he was unavoidably delayed in obtaining this new evidence;
- (3) that the evidence is of such weight that it creates a strong probability that a different result would be reached at the second trial;
- (4) has been discovered since trial;
- (5) could not in the exercise of due diligence have been discovered before the trial;
- (6) is material to the issues;
- (7) is not merely cumulative to former evidence;
- (8) does not merely impeach or contradict the former evidence.

See **State v. Hawkins** (1993), 66 Ohio St. 3d 339, 350, 612 N.E.2d 1227 (quoting **State v. Petro** [1947], 148 Ohio St. 505, 76 N.E.2d 370); **Dayton v. Martin** (1987), 43 Ohio App. 3d 87, 539 N.E.2d 646. Keith fails to meet this burden.

Ohio Rule of Criminal Procedure 33(B), requires that a defendant file a motion for a new trial based on newly discovered evidence within 120 days of the jury's verdict or court's decision. Outside of 120 days, a defendant must seek leave from the trial court to file a delayed motion. To

obtain such leave, the defendant must demonstrate by clear and convincing proof that he or she was unavoidably prevented from discovering the evidence within the 120 days. 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; State v. Carr, 10th Dist. No. 02AP-1240, 2003 Ohio 2947, citing State v. Walden (1984), 19 Ohio App.3d 141, 145-146, 19 OBR 230, 483 N.E.2d 859.

It appears from Keith's filings with the Trial Court that Keith obtained this information in 2007 from a public records request made by a friend of his on the Bucyrus Police Department. Thus, the first issue Keith must explain is why these claims would not be subject to res-judicata in his successive New Trial Motion. No such explanation is apparent from his filing. It also appears that this information, at best, could only be used for impeachment purposes as both witnesses testified at Trial as discussed infra.

A. NURSE FOOR TESTIFIED

Keith's first claim is that the Bucyrus Police telephone log fails to contain a notation that Nurse John Foor called the Police Department on the morning of February 14, 1994. Keith further states that the Bucyrus Police Department recycled the "reel to reel tape system" used to record incoming telephone calls without making a copy of the call by Nurse Foor. Keith implies that this routine practice of reuse of the reel to reel recordings by the Bucyrus Police Department deprived Keith of the opportunity to obtain the actual recording of Nurse John Foor for use at Trial and leaves the rest to the reader's imagination as to the nefarious reasons why this occurred.

Essentially, Keith implies that Nurse Foor never called the Bucyrus Police Department, despite Nurse Foor's testimony to the contrary. Keith offers no explanation as to why Nurse Foor's testimony of placing the call to the Bucyrus Police Department is false or for that matter any motivation of Nurse Foor to testify falsely under oath.

The Trial Testimony of Nurse John Foor is contained in the Trial Transcript between Pages 776-783. Nurse Foor testified at the Trial that he was a critical care Nurse working at Grant Medical Center the evening of February 13, 1994 through the morning of February 14, 1994. Nurse Foor testified that Richard Warren was a patient in the Grant Medical Center Critical Care Center during this time frame. Nurse Foor did not know who Richard Warren was prior to February 13, 1994. T.R. Page 777 lines 18-22. Nurse Foor testified that he contacted the Bucyrus Police Department by telephone and advised them that Richard Warren had wrote the name "Kevin" on a piece of paper. T.R. Page 781 lines 3-14. Nurse Foor did not identify the person he talked to at the Bucyrus Police Department.¹

The law seems rather clear on this matter. Keith was aware of this material (per his filing with the Trial Court) in 2007 and waited for three years and multiple filings later to raise this matter. The recording is not material and is a corollary matter as this nurse testified at Trial and the information provided by the Nurse is verified by the Police Report of then Lt. John Beal. Even as impeachment material, this line of questioning does not alter the outcome as the Nurse had/has no reason to make up a call to the Bucyrus Police Department — which is what Keith is claiming.

¹ Noteworthy is that this is a separate nurse "call" to the Bucyrus Police Department. The Bucyrus Police Department has preserved the Nurse call that Captain John Stanley testified at Trial.

B. THE RECOVERED SHELL CASING

The second issue raised by Keith involves the location of the shell casing recovered by Farnella Graham (State's Exhibit 43). Patrolman John Seif testified that Farnella Graham told him that she recovered the shell casing "on the sidewalk that morning" T.R. Page 438 lines 18-20; T.R. Page 439 lines 1-13. On cross-examination, Keith Trial Attorney confirmed that the shell was found by Farnella Graham "on the sidewalk in front of her house" T.R. Page 440 lines 8-9. Farnella Graham testified that she lives right across the street from the GE Plant and that on February 14, 1994 she found a spent shell casing (identified as State's Exhibit 43) on her front walk. T.R. Page 436 lines 12-17. Ms. Graham's testimony starts on Page 426 of the transcript and accounts solely on the finding of this shell. Ms. Graham is a long term Bucyrus Resident and a Senior Citizen who testified that her daughter called the Bucyrus Police Department. T.R. Page 429 lines 1-4.

This call was apparently re-recorded over on the reel to reel system used by the Bucyrus Police Department without a recording made to preserve the same. Keith points to a police phone log entry that states that the bullet was picked up in the McDonald's area and posits that if the tape was not reused this "issue" would have been available by Keith at Trial for some unspecified purpose. The recording is not material as both the Officer and the Ms Graham testified to the location of the bullet casing.

On both points, Keith has failed to establish all of the following:

- (1) That he was unavoidably delayed in timely filing a motion for a new trial as the material was available through a simple public records request in 2007;

- (2) That Keith has clear and convincing evidence that he was unavoidably delayed in obtaining this new evidence;
- (3) that the evidence is of such weight that it creates a strong probability that a different result would be reached at the second trial as both witnesses testified at trial.;
- (4) has been discovered since trial;
- (5) could not in the exercise of due diligence have been discovered before the trial;
- (6) is material to the issues;
- (7) is not merely cumulative to former evidence;
- (8) does not merely impeach or contradict the former evidence.

Keith also claims that the Trial Court failed to analyze the motion under the correct standard of “materiality”. The Trial Court issued a specific finding that “The Defendant has failed to establish, by any standard of proof, that the so-called newly discovered evidence regarding John Foor would produce a strong probability for a change in the jury verdict of guilty” (Judgment Entry Finding # 2 Page 14); “The issue of whether Nurse Foor did or did not telephone the BPD (Bucyrus Police Department) 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” (Judgment Entry Finding # 4 Page 14); “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 a strong probability for a change in the jury verdict of guilt” (Judgment Entry Finding #4 Page 14).

Keith believes that Nurse Foor perjured himself at Trial² and that Ms. Farnam likewise

² Keith apparently claims that the Nurse never called the Bucyrus Police Department to

perjured herself when testifying where she found the shell casing. In an effort to bolster his claims, Keith's cites to a public records case, wherein the City Law Director defaulted to Factual Findings (in that case) by failing to timely answer Request for Admissions and failing to Request Leave to File Answers to those Admissions is not probative in the instant case.

Despite Keith's contention otherwise, the Trial Court is required to weigh the evidence in order to determine the issue of materiality encompassed in Criminal Rule 33. In **Brady v. Maryland** (1963), 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." **Id.** at 87. To demonstrate that the prosecution violated **Brady**, a defendant must prove the following: "(1) the prosecution failed to disclose evidence upon request; (2) the evidence was favorable to the defense; and (3) the evidence was material." **State v. West** (Oct. 27, 2000), 11th Dist. No. 98-P-0132, 2000 Ohio App. LEXIS 5014, 2000 WL 1616802, at 3, citing **Moore v. Illinois** (1972), 408 U.S. 786, 33 L. Ed. 2d 706, 92 S. Ct. 2562. The withholding of exculpatory or impeachment evidence constitutes a **Brady** violation only if it is "material." **Id.**, citing **United States v. Bagley** (1985), 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375. With respect to the materiality prong, the Supreme Court has noted that "**Bagley's** touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important.

The question is not whether the defendant would more likely than not have received a

advise them of Richard Warren's status. Keith also continues to fail to understand the difference between a radio log and a telephone log. They are not the same.

different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines the confidence in the outcome of the trial.' Kyles v. Whitley (1995), 514 U.S. 419, 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555. The mere possibility that a piece of undisclosed information might have aided the defense or might have affected the outcome of the trial does not establish "materiality" in the constitutional sense. State v Holder, 2002 Ohio 7124, at P49.

The Supreme Court of Ohio has recognized that due process is violated when material evidence, favorable to the accused, is suppressed. State v. Jackson (1991), 57 Ohio St.3d 29, 33, 565 N.E.2d 549. However, undisclosed information that might have affected the outcome of the trial or helped the defense does not establish "materiality" in the constitutional sense. *Id.* "*Brady* requires a 'reasonable probability' of a different outcome with the exculpatory evidence, that is, an undermined confidence in the trial result obtained without the exculpatory evidence." *Id.* Furthermore, the defense must prove a *Brady* violation and the subsequent denial of due process. *Id.* Finally, any undisclosed information must be evaluated in the context of the entire record in order to determine if there would be a reasonable doubt about the guilt.

In the present case, the State provided Keith's Trial Counsel and his Previous Appellate Counsel the Police Report and access to the Bucyrus Police Department evidence; the Trial Court found that Keith had this specific information for more than a year (See Finding Number 5); that any information was impeachment value only (See Finding Number 4); and that this information is not material. Keith has failed to show any rationale basis of how this information was material.

The Trial Court issued 8 separate Findings in the Court's fifteen page decision. The Findings are supported by the Record and the history of the numerous appeals filed by the

appellant over the last 16 years. The Court found that the appellant was aware of the current John

Foor testimony issue for over a year and applied Res Judicata.³ This is but one of the reasons that the Court granted the State Judgment and the finding is supported by the record.

Keith claims that the Trial Court failed to consider his claim that the Bucyrus Police Department destroyed logs. The analysis commences with the fact that the State allowed the defendant (both Trial Counsel and previous Appellate Counsel) full access to the Prosecutors files and as seen in the Police Reports full access to the evidence held by the Bucyrus Police Department.⁴ Therefore, the choice of what evidence to review was actually left to Keith.

Assuming arguendo that Keith had no obligation to review that which he had access to or to request preservation of that which he had access to, the State believes that the Ohio Supreme Court's decision in State v. Geeslin (2007), 116 Ohio St.3d 252 is still contrary to the position offered by Keith herein. In Geeslin, the Supreme Court held that a defendant was required to establish that the State acted in bad faith when the evidence is only potentially useful and not material. Keith fails to offer any rationale basis for any bad faith in the present case.

In Geeslin, the Supreme Court drew a clear distinction between materially exculpatory evidence and evidence that is only potentially useful.⁵ The Trial Court (as written supra) found

³“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” Trial Court finding #5.

⁴ The issue of ineffective assistance of Trial Counsel has already been litigated and is res judicata.

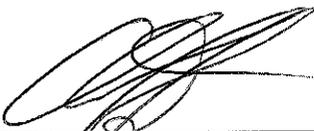
⁵ The evidence sought must challenge the substance of the allegations against the defendant.

that Keith has failed to establish by any standard of proof the so called evidence would change the verdict in this case.

CONCLUSION

For these reasons, the State of Ohio respectfully requests that this Court deny Keith's request for Jurisdiction in this matter.

Respectfully submitted,

By: 

Clifford Murphy (COUNSEL OF
RECORD)
COUNSEL FOR APPELLEE
STATE OF OHIO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of the foregoing opposition for Jurisdiction by the Appellee has been served via Ordinary U.S. Mail, postage pre-paid, this 8th day of April 2011 upon Appellant's Counsel at their address listed in the cover page.


Clifford Murphy
COUNSEL FOR APPELLEE,
STATE OF OHIO