

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. **13-0685**
Plaintiff-Appellee : On Appeal from the First
vs. : Appellate District
CHAZ MINOR :
Defendant-Appellant : Appeal Case C120424

MEMORANDUM IN SUPPORT OF JURISDICTION

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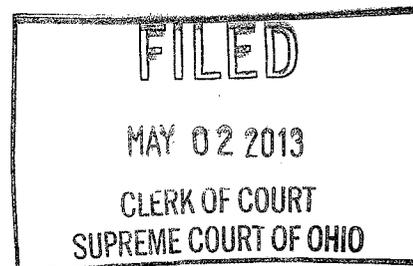
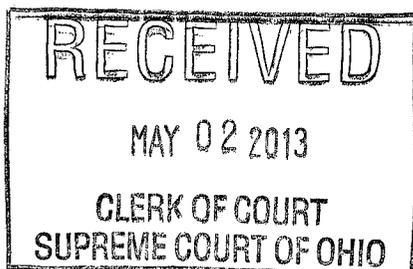


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Judgment Entry of the First District Court of Appeals

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO.
Plaintiff-Appellee :
vs. :
CHAZ MINOR : MEMORANDUM IN SUPPORT
Defendant-Appellant : OF JURISDICTION

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

The Ohio Innocence Project recently assisted the 10th exoneree to be released from an Ohio Prison. The releases are the result of hard work, new evidence and uncovered evidence not tendered to the defense at the time of the trial.¹ The causes of innocent men and women being convicted of crimes they did not commit are numerous. Newly discovered evidence as well as information not tendered by prosecutors account for a significant number of exonerations across this country.² Every day courts are presented with claims of innocence where defendants demonstrate they are not responsible for the crime originally brought in a criminal case. The public needs to be confident those claims are reviewed applying the correct legal tests.

There are television shows, movies, books, college and law school classes dedicated to the subject of innocence, wrongfully convicted and exonerations. The subject has captured the

¹ <http://www.law.uc.edu/institutes-centers/ohio-innocence-project/significant-cases>

² <http://www.innocenceproject.org/understand>

attention of the media, Hollywood and the public at large. Anytime a person presents a credible case for his/her wrongful incarceration, it is a matter of great general interest. The interest is heightened when the crime is Murder. When it involves issues of due process or suppressed information in a prosecutor's file, it is an issue of constitutional magnitude.

This case involves evidence uncovered which demonstrates the State of Ohio withheld information its only "eyewitness" had a juvenile adjudication for falsely accusing another man of rape the year before. A fact the State of Ohio does not deny. It also involves the discovery of a witness who was too afraid to step forward and tell police who was the real killer until that killer's death occurred. The issues presented to this Court concern the proper procedures to engage when presented with such evidence and the proper test applicable to each claim.

When there are allegations of favorable evidence withheld, lying prosecution witnesses and new evidence suggesting an innocent man was convicted, the public expects and is entitled to know this evidence will be reviewed under the proper procedures.

STATEMENT OF THE CASE AND FACTS

Kevin Berry was killed in a dangerous neighborhood of Cincinnati on April 1, 2005. When Cincinnati police began to investigate the shooting, no one stepped up to claim being a witness. Eventually charges were filed against Chaz Minor and Larry Lewis for the homicide.

The prosecution's case against Minor was based entirely on one alleged eyewitness; Jamita Weaver. Jamita Weaver was the only witness who claimed to have seen Minor shoot Berry.³ She claimed she heard Lewis complaining about Berry selling drugs and stealing his customers. She testified while she was speaking to Berry she saw Lewis and Minor walk up and

³ Other witnesses identified Lewis as being involved, but none identified or claimed Minor was with Lewis.

Minor had a limp. The limp indicated to her Minor was carrying a long gun in his pants. She said the two then shot Berry. She later saw Minor hand his gun to her brother Dante Graves.

Weaver did not report her information to the police until much later. She claimed she was scared to do so. She told the jury it was after a fight with her brother in which he put a gun to her head that she got angry and decided to tell the police what she knew about the shooting.

Minor surrendered to the police and told them he was with his girlfriend, Kimyatta Halbert and a friend playing video games in Halbert's apartment at the time of the shooting. He and Halbert testified to his whereabouts at the time of the shooting. Despite the evidence Minor was convicted.

Charay Hicks saw the shooting. She looked out her apartment window and saw Diamond Johnson and Larry Lewis shoot and kill Berry. She stayed in her apartment and did not answer the police knocks on her door. She feared Diamond Johnson and possible reprisals if she let it be known what she saw. Johnson's reputation for violence and intimidation was well known and Hicks did not feel safe talking to police. It was not until well after Minor had been convicted and sentenced that Hicks let it be known she was a witness.

In an affidavit to the trial court, she spoke of what she saw. Upon learning of Diamond Johnson's death, she let friends and neighbors know what she saw and who was truly responsible for Kevin Berry's death. Diamond Johnson and not Chaz Minor shot Kevin Berry. This evidence was not discovered until well after Chaz Minor had been tried and convicted.

During a search for witnesses to the shooting family members of Jamita Weaver acknowledged Jamita was not credible and pointed to her juvenile past. A past they claimed to have told police investigators when interviewed. Minor submitted the affidavits of Weaver's mother and brother who offered support for the conclusion Weaver is a liar.

In his Motion for Leave to File a Motion for a New Trial, Minor presented evidence Weaver had on a previous occasion falsely claimed a man raped her. She was eventually charged with the offense of Falsification, entered an admission and adjudicated delinquent.

Minor also presented the affidavits of John Huff confirming the location of Chaz Minor at Ms. Halbert's apartment at the time Kevin Berry was killed.

Following the conviction and sentence in this case the First District Court of Appeals overruled Mr. Minor's assignments of error and affirmed the trial court's judgment. *see C-60043* (First Dist 2007) This Court denied Mr. Minor's leave to appeal "as not involving any substantial constitutional question." *State v. Minor*, 114 Ohio St.3d 1412, 2007-Ohio-2632 (2007) On August 28, 2008, Mr. Minor filed a petition for writ of habeas corpus. In Federal Court one of Minor's claims related to a discovery violation which was uncovered while investigating his federal habeas claims. Because the discovery violation matter had not been presented in state court the United States District Court for the Southern District of Ohio, Western Division granted Mr. Minor's motion to stay and hold the case in abeyance pending his exhaustion of state remedies.

Minor filed a Motion for Leave to File a Motion for New Trial. The trial court entered an order overruling Minor's Motion. The order dismissing the motion was affirmed by the First District Court of Appeals. *See C-120424* (Apx) This action now follows.

Proposition of Law Where a defendant learns of a discovery violation post trial the test applicable is not the same as applied to other newly discovered evidence. A defendant is required to demonstrate the evidence not tendered to the defense reasonably undermines the verdict. The applicable test is determined by the substance of the claim and not the caption of the motion. The failure of a court to apply the correct test violates a defendant's right to Due Process of Law as guaranteed by the United States Constitution.

ARGUMENT IN SUPPORT OF APPELLANT'S PROPOSITION OF LAW

Minor filed a request for discovery and alternative motion for discovery and a request for disclosure of favorable evidence pursuant to rule 16(B)(1)(f) of the Ohio Rules of Criminal Procedure. The State's responses to these motions did not include the favorable information Ms. Weaver, its intended witness, had falsely claimed a man raped her, that there were witnesses who told the police she was not a believable person and Ms. Weaver had been adjudicated a delinquent child by committing the offense of falsification.

The State of Ohio does not dispute it had knowledge Jamita Weaver had lied to police in the past claiming a man raped her. The State of Ohio does not deny it had knowledge Ms. Weaver was prosecuted for Falsification and adjudicated a Delinquent Child as a result. In fact, Weaver was prosecuted by the same prosecutor's office. Instead, it has argued it had no obligation to tender the information because it was not admissible evidence.

The believability of Ms. Weaver was central to the States's case against Minor. She was the only person to claim seeing Minor involved in the shooting. As the State asked in closing arguments: "what about Jamita Weaver? What does she have to gain or lose as a result of coming forward and doing the right thing" (Tp. 801) "Even her own mother kicked her out of the residence because her mother is afraid there's going to be retribution.." (Tp. 802) This was argued to the jury even though the prosecutor knew Jamita Weaver had lied about a man raping

her. Even though Ms. Weaver's family told police she could not be trusted to tell the truth. If Jamita Weaver was not believed, there is no evidence to support a conviction against Minor.

The First District Court of Appeals failed to properly review this claim. It applied the general test applicable to newly discovered evidence citing *State v. Schiebel*, 55 Ohi St. 3d 71, 564 N.E.2d 54 (1990). (See Minor Judgment Entry Apx.) It treated the discovery violation as simply "newly discovered impeachment evidence" pursuant to Rule 33. This is the wrong test. The correct test is whether the information not disclosed would "reasonably undermine the confidence in the verdict." See *Kyles infra*.

This Court has recognized claims of withheld evidence by a prosecutor may be brought together with new evidence discovered post trial pursuant to Rule 33 when the issues are intertwined. See *State v. Johnson*, 39 Ohio St. 3d 48; 529 N.E.2d 898 (1998) "Furthermore, we see no profit in requiring appellee [defendant'] to have filed two separate motions where one was clearly sufficient." *Johnson*, footnote 16. That does not change the test applicable when a prosecutor admits to withholding material evidence from the defense.

The law under *Brady* follows common sense proposition the State **must** disclose the "material exculpatory evidence **before** trial" not afterward. See *Dist Attorney's Office for the Third Jud. Dist. V. Osbourne*, 129 S.Ct. 2308, 174 L.Ed. 2d 38 (2009)(emphasis added). There is no condition of admissibility precedent to the obligation for disclosure. The constitutional obligation is triggered by its potential impact. *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555 (1995). The State's failure to disclose favorable evidence in a criminal proceeding violates the Due Process Clause, where the evidence is material either to guilt or to sentencing, regardless of the good or bad faith of the prosecutor. *Brady v Maryland*, 272 U.S. 83, 87 (1963). The duty includes impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). In order to

comply with *Brady*, “the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in this case, including the police.” *Kyles* at 437.

Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. *Bagley*, supra at 685. In determining materiality, the relevant question "is not whether the defendant would more likely than not have received a 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." *State v. Ketterer*, 126 Ohio St. 3d 448; 2010 Ohio 3831; 935 N.E.2d 9 (2010) citing *Kyles* at 434.

This is where the First District Court of Appeals lost its way. It treated the disclosure concerning Jamita Weaver as just new evidence discovered post trial. Instead the evidence was admittedly withheld from the defense. The test is different in this case. This Court is asked to provide clear guidance of what is the applicable test to apply to claims of suppressed favorable evidence.

Those in possession of the information Jamita Weaver had falsely claimed a man raped her understood its import on the case when they failed to tender the information. Those who possessed the information Jamita Weaver’s family doubted her credibility knew the impact this information might have on a jury when it was **not** tendered to the defense. This evidence clearly undermines Weaver’s credibility. This evidence undermines the confidence of the verdicts in this case. Applying the correct test to the violation is necessary to achieve the due process required in all criminal cases.

Admissibility of the evidence is not an issue

Admissibility of evidence is not the determining factor when considering the obligation to tender evidence which is helpful to the defense. The Sixth Circuit has addressed the State's argument concerning admissibility playing a role in determining disclosure obligations. "The State's argument that the withheld police report is not "evidence" under Brady because it was not admissible hearsay is not well taken. The police report would have been inadmissible because it was hearsay, but "evidence affecting credibility falls within the general rule requiring disclosure. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763 (1972)" *Montgomery v. Bagley*, 581 F.3d 440 (6th Cir. 2009).

Even if the Rules of Evidence could be used as a screening tool for the State's obligation to tender evidence material to the defense, it fails here. Prior bad act evidence under Ohio Rules of Evidence 608(B)(specific instances of conduct) clearly support the admission of evidence that Jamita Weaver had falsely accused another man of an infamous crime, specifically Rape even if the Adjudication itself were inadmissible. But it is admissible despite the State's assertion Rule 609 bars it.

The United States Supreme Court and the Ohio Supreme Court have both addressed the issue of admitting a juvenile adjudication in the face of a rule or statute which seems to prohibit such evidence. In *Davis v. Alaska*, the issue was an Alaska statute similar to Ohio law could be used to prohibit cross examination of a prosecution witness concerning possible bias by use of a juvenile adjudication. The Court balanced the state policy interest in protecting the confidentiality of a juvenile's record and the defendant's right to a fair trial and determined the rule must yield to such "vital a constitutional right as cross examination for bias of an adverse

witness.” Further, the juvenile’s interest in “must fall before the right of petitioner to seek out the truth in the process of defending himself.” *Davis v. Alaska*, 415 U.S. 308 (1974)

This same issue was before this Court in *State v. Cox*, 42 Ohio St.2d 200, 377 N.E.2d 639 (1975). With a statute similar to that in *Davis*, this Court found “although the General Assembly may enact legislation to effectuate its policy of protecting the confidentiality of juvenile records, such enactment may not impinge upon the right of a defendant in a criminal case to present all available, relevant and probative evidence which is pertinent to a specific and material aspect of his defense.”

Applying the correct test to the issue of a discovery violation is of significant import. Making it clear there is a distinction in tests to apply in cases involving newly discovered evidence is necessary for all future claims of innocence. Discovery violations uncovered after a trial has occurred are subjected to a different test from all other tests applied to newly discovered evidence.

Proposition of Law: A Court of Appeals should not engage in a credibility determination when reviewing a claim of newly discovered evidence. That determination must be made at a hearing in the trial court.

ARGUMENT IN SUPPORT OF APPELLANT'S PROPOSITION OF LAW

The First District determined Minor had sustained his burden when presenting the affidavit of Charay Hicks as newly discovered. It then made a determination Ms. Hicks' information was not persuasive enough to warrant a new trial. Ms. Hicks' proposed testimony stands in opposition to Jamita Weaver. Ms. Hicks confirms the defense assertion Diamond Johnson and not Chaz Minor killed Kevin Berry. Ms. Hicks' if believed, demonstrates a "strong possibility [her testimony] would have changed the outcome if a new trial had been granted." *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947). The Court of Appeals should not be making such a credibility determination absent a hearing having been held.

The Court of Appeals found Minor sustained his burden in demonstrating Ms. Hicks affidavit was "newly discovered" evidence. The analysis should have terminated at this point and the matter remanded for a hearing where the trial court could consider her testimony and make the determination on the affect it would have on the jury verdict.

A hearing in such cases is necessary. The standard under Ohio Rule 33 is once a movant offers evidence that if believed, would create a strong probability that a jury would find him innocence, the trial court cannot simply discredit the evidence offered without providing a meaningful hearing. *State v. Wright*, 67 Ohio App.3d 827, 588 N.E.2d 930 (2nd Dist. 1990)

In *Wright* the appellate court noted there was other evidence in the record to support guilt but the trial court was not within it authority to discredit affidavits on their face and deny a hearing. Absent internal inconsistencies in the affidavits sufficient to destroy their credibility,

the “trial court must afford movant an opportunity to present evidence at the hearing in support of the motion and affidavits before electing whether to grant or to deny the motion on the full record before it...” *Wright* at 831, 588 N.E.2d at 932.

In *State v. Monk*, 2002-Ohio-6602, 02CA0026 (5th Dist) three juveniles testified at a trial in which led to their father’s girlfriend being convicted of rape, felonious sexual penetration and gross sexual imposition. Six years later the three recanted in affidavits. The trial court denied the motion for a new trial finding the trial testimony more credible than the recantations contained in the affidavits. The appellate court reversed this stating:

“While the trial court found their trial testimony was more credible than the affidavits, it is difficult to compare written and live testimony. Therefore, we find that the trial court abused its discretion in failing to hold an evidentiary hearing on the motion for new trial in order to more accurately assess the credibility of the witnesses in determining whether the girls were telling the truth at trial or in their recent recantations of their testimony.” *State v. Monk*, 2002-Ohio-6602, 02CA0026 (5th Dist).

The Courts of Appeals should not be making determinations of credibility which are best left to the trial courts. A hearing should be held.

Where the new evidence is a witness who assert the defendant did not commit a murder and where there is no physical evidence tying the defendant to the crime, no motive for the defendant to commit the offense and only one eyewitness the trial court and appellate should have been moved by the affidavit. Its confidence in the verdict should have been undermined just as this Court expressed when confronting similar issues as the present case in *State v.*

Johnson, 39 Ohio St. 3d 48; 529 N.E.2d 898 (1988):

“Having reviewed the evidence alleged to have been suppressed, we conclude that there is a reasonable probability that the outcome of the trial would have been different had some of the evidence been disclosed to the defense. In particular, we find our confidence in the trial court's verdict to be undermined by the state's failure to disclose evidence concerning (1) the possibility that the murders may have occurred at a location other than

appellee's farm, and (2) the possibility that another person may have been responsible for the victims' deaths." at *footnote 22*

CONCLUSION

Mr. Minor presents a newly discovered witness who exonerates him from this offense and proof of evidence withheld, admittedly, by the prosecution. A hearing is required and an application of the correct test when reviewing the evidence presented in support of his innocence. Jurisdiction should be granted and a briefing scheduled issued on both propositions of law presented.

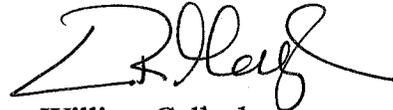
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify I have served a copy of this Memorandum in Support of Jurisdiction by US mail to the Philip Cummings Assistant Prosecuting Attorney, Hamilton County Prosecutor's Office this 1st day of May 2013.



William Gallagher
Attorney for Chaz Minor

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-120424
	:	TRIAL NO. B-0508102
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
CHAZ MINOR,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Chaz Minor presents on appeal a single assignment of error, challenging the Hamilton County Common Pleas Court’s judgment overruling his “Motion for Leave to File a Motion for New Trial.” We affirm the court’s judgment.

Minor was convicted in 2006 upon a jury verdict finding him guilty of murder. He unsuccessfully challenged his conviction in direct appeals to this court and the Ohio Supreme Court, *State v. Minor*, 1st Dist. No. C-060043 (Jan. 26, 2007), *appeal not accepted*, 114 Ohio St.3d 1412, 2007-Ohio-2632, 867 N.E.2d 845, and collaterally, in the January 2010 motion from which this appeal derives.

Although Minor styled his motion, “Motion for Leave to File a Motion for New Trial,” he sought by his motion both leave under Crim.R. 33(B) to file a new-trial motion and a new trial under Crim. R. 33(A)(6) on the ground of newly discovered evidence. The common pleas court, without elaboration, entered judgment overruling the motion. We hold that the court properly denied the relief sought in the motion.

APPENDIX

OHIO FIRST DISTRICT COURT OF APPEALS

To the extent that he sought leave to move for a new trial on the ground of newly discovered evidence, Minor bore the burden of proving by clear and convincing evidence that, within 120 days of the return of the verdict in his case, he did not know of the existence of the proposed ground for a new trial, and that he could not, in the exercise of reasonable diligence, have learned of its existence. See *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990); *State v. Hawkins*, 1st Dist. No. C-110291, 2011-Ohio-5645, ¶ 14. He failed to sustain this burden with respect to the proposed impeachment and alibi evidence, but he succeeded with respect to the proposed exculpatory evidence offered by Charay Hicks.

Nevertheless, we cannot say that Minor was prejudiced. Even if he had been granted leave to seek a new trial based on Hicks's proposed testimony, the common pleas court cannot be said to have abused its discretion in not granting Minor a new trial, because the record does not disclose a strong probability that her testimony would have changed the outcome if a new trial had been granted. See Crim.R. 33(A)(6); *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus (holding that "newly discovered evidence" must, inter alia, "disclose[] a strong probability that it will change the result if a new trial is granted"); see also *State v. Williams*, 43 Ohio St.2d 88, 330 N.E.2d 891 (1975), paragraph two of the syllabus (holding that a ruling on a Crim.R. 33[A][6] motion will not be disturbed on appeal in the absence of an abuse of discretion).

We, therefore, overrule the assignment of error and affirm the judgment of the court below.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., DINKELACKER and FISCHER, JJ.

To the clerk:

Enter upon the court's journal on March 27, 2013
per order of the court _____.

Presiding Judge