

ORIGINAL

NO. 2013-1731

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 99025

STATE OF OHIO

Plaintiff-Appellant

-vs-

THOMAS M. KEENAN

Defendants-Appellee

REPLY BRIEF OF PLAINTIFF-APPELLANT

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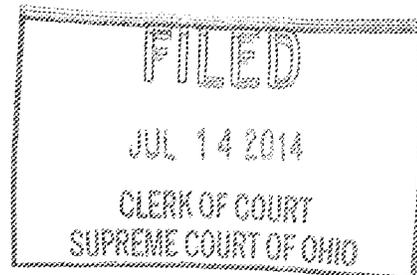


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INTRODUCTION AND SUMMARY OF ARGUMENT

Dismissal with prejudice is undoubtedly the most severe sanction a trial court can impose for a discovery sanction against the state. Before making such a dispositive ruling, a trial court is required to consider whether any lesser sanctions are adequate. That was not done here. In fact, the trial court had already imposed a sanction-preclusion of former testimony-as a result of the discovery violations. Without determining the effectiveness of this sanction, and without consideration of the additional proposal(s) by the prosecution, the trial court granted Keenan's motion and has forever barred his prosecution.

There are two questions before this Court: (1) can a trial court dismiss a case with prejudice as a result of a discovery violation without considering less severe sanctions? And (2) whether a defendant must establish prejudice to warrant dismissal as a due process violation? The answer to the first question is no. This was resolved in *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971. The answer to the second question is yes.

Contrary to Keenan's claim, there is no requirement that he be "restored to the position that he should have been in at the time of the first trial." (Appellee Br., pg 30.) This erroneous language comes from the Eight District in a prior decision, *State v. Larkins*, 8th Dist. Cuyahoga No. 85877, 2006-Ohio-90. The majority below adopted this language and created an entirely unworkable standard. *State v. Keenan*, 8th Dist. Cuyahoga No. 99025, 2013-Ohio-4029, ¶53 (Gallagher, J. dissenting). No defendant is restored to exactly the same position when retrial is necessary.

Keenan would ask this Court to adopt a standard that always prohibits retrial after a discovery violation. This is clearly his goal as he has not presented any court with evidence that the remaining witnesses are unable to recall the events surrounding the victim's kidnapping and

death. Keenan cannot demonstrate prejudice, as he is required to do to obtain dismissal. Because he fails to meet this standard, he instead proposes that this Court adopt the Eighth District's analysis which is clearly contrary to prior precedent.

Therefore, the State of Ohio requests this Honorable Court adopt the State's propositions of law, and hold that trial courts must not presume prejudice when a retrial is necessary and that the courts must impose the least severe sanction that is consistent with the purpose of the rules of discovery rather than compound discovery sanctions for the same violation.

LAW AND ARGUMENT

PROPOSITION OF LAW I: A TRIAL COURT IS REQUIRED TO IMPOSE THE LEAST SEVERE SANCTION THAT IS CONSISTENT WITH THE PURPOSE OF THE RULES OF DISCOVERY AFTER AN INQUIRY INTO THE CIRCUMSTANCES PRODUCING AN ALLEGED VIOLATION OF CRIM. R. 16. A PARTY SHOULD NOT BE SANCTIONED MULTIPLE TIMES FOR THE SAME DISCOVERY VIOLATION.

I. The State has not waived this argument and the record reflects that the rulings were made as a result of the prior discovery violations.

The State's position in both lower courts was always the same-dismissal with prejudice was inappropriate. While the State recognized that the trial court retained the inherent authority to dismiss the case, it was always the State's position that dismissal was unwarranted. In the State's brief in opposition, the State argued that dismissal was wrong for the following reasons: (1) res judicata and issue preclusion, (2) lack of prejudice, (3) not required by "interests of justice," (4) the strength of the state's case and, (5) not required under Due Process, Double Jeopardy, comity, or federalism principles.

In the lower court, defense counsel argued that the old *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) violations should prohibit the state from using prior testimony and should serve as the basis to dismiss the indictment. Specifically, Keenan argued

that his prior testimony was (1) compelled and (2) inadmissible because of the Brady violations and prosecutorial misconduct. (Defendant's Opp. to State's Intent to Introduce Keenan's Prior Testimony, pg. 19). Keenan argued that Espinoza's prior testimony was inadmissible because (1) law of the case/collateral estoppel applied because a different judge found Espinoza's testimony inadmissible in his co-defendant's scheduled retrial and (2) of the *Brady* violations. (Defendant's Opp. to State's Intent to Introduce Espinoza's Prior Testimony, pg. 1-2). Keenan also argued that D'Ambrosio's prior testimony and statements were inadmissible because (1) Keenan was available, (2) the testimony did not fit under the evidentiary rules, and (3) confrontation would be denied and his waiver can't be enforced because of the Brady violations and prosecutorial misconduct. (Defendant's Opp. to State's Intent to Introduce D'Ambrosio's Prior Testimony, pg. 1-2).

In Keenan's motion to dismiss, he argued that dismissal with prejudice was appropriate pursuant to Crim. R. 16, Crim. R. 48, and other constitutional principles. (Defendant's Motion to Dismiss, pg. 14-19). In granting the motion to dismiss, the trial court specifically relied on Crim. R. 16:

"Pursuant to Criminal Rule 48(B), a hearing on defendant Thomas Michael Keenan's motion to **dismiss** the indictment with prejudice was held in open court on 9/5/12. The court issued [its] findings of fact & conclusions of law on the record. The court finds in the interest of justice and fairness, the harm done to the defendant Keenan has been so egregious that this is the extraordinary case where the court has no other option but to grant the motion to **dismiss**. Defendant's motion to **dismiss** the indictment against him with prejudice is granted. See Crim.R. 48(B); Criminal Rule 16(L)(1); *State v. Larkins*, 8th Dist. No. 85877, 2006-Ohio-90 [2006 WL 60778]."

Journal Entry of Dismissal.

In deciding this issue below, the Eighth District also analyzed this issue in the context of a discovery violation. *State v. Keenan*, 8th Dist. Cuyahoga No. 99025, 2013-Ohio-4029, ¶17, 46.

In addition to the new trial granted by the federal court, the trial court had already imposed a sanction for the prior violations-preclusion of prior testimony-before dismissing the indictment. This was done without consideration of the availability of less severe sanctions, including whether the ones already imposed would be effective. Because the trial court was required to conduct this review, this issue has not been waived.

II. Keenan fails to satisfy the Parson factors

Keenan also argues that dismissal is appropriate because he satisfies the factors announced in *State v. Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689, (1983). In *Parson*, this Court reviewed a state discovery violation. In that case, the state inadvertently failed to provide defense with a statement made by a co-defendant. Applying an abuse of discretion standard, this Court noted that a trial court is “not bound to exclude [nondisclosed discoverable material] at trial although it may do so at its option. Alternatively, the court may order the noncomplying party to disclose the material, grant a continuance in the case or make such other order as it deems just under the circumstances.” *Id.* at 445. This Court then considered whether the trial court abused its discretion. In doing so, this Court considered whether or not the violation was willful and if the defendant was prejudiced as a result of the nondisclosure.

The *Brady* violations that occurred in this case happened in advance of Keenan’s upcoming trial and, despite having the option to do so, the federal court found that the appropriate remedy was retrial. *Keenan v. Bagley*, N.D.Ohio, No. No. 1:01 CV 2139, 2012 WL 1424751 (April 24, 2012). There was no violation going forward. The trial court imposed additional sanctions against the state for the old violations despite the fact that the old violations were already the basis for the retrial. Therefore, there was no basis for the trial court to impose additional sanctions. While the State is not attempting to re-litigate the decision of the federal

court, it was necessary for the trial court to make appropriate findings before repeatedly sanctioning the state. That did not happen.

Keenan would not have been prejudiced. As the state argued in the lower courts, the majority of witnesses were located and able to testify for both parties. See chart below:

Witnesses Alive, Located and Able to Testify	
State's Core Witnesses	Defense Core Alibi/Impeachment Witness
Det. Leo Allen	Det. Ernest Hayes
Paul Lewis	Det. Melvin Goldstein
Carolyn Rossell	Joe D'Ambrosio
Mimsel Dendak	Therese Farinacci
Adam Flanik	Robert Doyle
Dr. Elizabeth Balraj	Michelle Fertal
Robert Winlock	Nancy Somers
	Alicia Tichar
	Alex Somers
	Ren Keller
	Francine Davis
	Steven Gaines
	David Oliver
	Cindy Calire
	Janice Kline
	Fr. Neil Kookoothe

	David Keenan
	Brenda Jacobs
	Det. Horvol* *is deceased but provided testimony in the evidentiary hearings in Federal Court in <i>D'Ambrosio v. Bagley</i> and had no knowledge of any tape or of Crimi providing exculpatory information

These witnesses had relevant information that clearly implicated Keenan in the crimes. For instance, Flanik was located and willing to testify that he saw Keenan and Espinoza kick Lewis's door in and cross the threshold. He is also willing to testify that he saw D'Ambrosio with a knife to Klann's throat in Keenan's truck. He is willing to further testify that he saw Keenan, D'Ambrosio and Espinoza drive away with Klann in the truck. Lewis, Dendak and Rossell have also been located and are willing to testify to the events leading up to Klann's death. Dendak is willing to testify that she was awakened by someone screaming I want my "dope" or "coke" back and that she sent Flanik down to investigate. Rossell is willing to testify that she was awakened when Keenan, Espinoza and D'Ambrosio were pounding at her door. She would further testify that D'Ambrosio had a knife, Espinoza a bat and that the men said that Lewis was "dead meat" and that "Anthony [is] in the truck and we're gonna do him and drop him off."

Lewis is willing to testify about allegedly raping Longnecker. Lewis would have explained that he had consensual sex with Longnecker. He would further explain that Klann was actually his witness on that issue. Lewis would further testify that he was in Keenan's truck outside the Saloon and that Keenan paid him in drugs. He is willing to testify that he saw

Espinoza and Klann arguing at the Saloon. He would further be willing to testify that when he next arrived home that his door was kicked in and that he did not give anyone permission to do so.

The state provided the lower court with a table that reviewed all of the withheld material, what witnesses were available to testify, and how Keenan could use the material. This table has been included below and clearly demonstrates that Keenan is unable to prove prejudice:

Newly Discovered <i>Brady</i> material per Judge Katz	Available and Appropriate Witness	Use
That before Klann's murder, Paul Lewis was indicted for the rape of Christopher Longnecker. That Anthony Klann may have been a witness to the rape. That Paul Lewis referred to himself as the "star witness" against in the murder of Anthony Klann asked the police for help with a DUI case. That days after the murder Paul Lewis was the anonymous caller to the police that identified Klann, had non-public information about the murder and led the police to the suspects.	Paul Lewis Chris. Longnecker Det. Leo Allen Det. Kudo Det. Kovasic Det. Allen	The State intended to call Lewis Allen, Kudo and Kovasic to the witness stand. Keenan could have could have cross-examined them on any of these points to suggest that Lewis had a motive to testify vs. him or to develop the Lewis as the real killer theory. Keenan could have also called Longnecker to establish that he was raped by Lewis and that Klann was a witness thereby giving Lewis a motive to eliminate Klann.
That after the murder, witnesses James Lighfoot Rusell and Carolyn Rossell asked to be relocated.	Carolyn Rossell Det. Allen Stipulation of Police Report stating this.	The plaintiff-appellee intended to call Rossell and Allen in its case-in-chief. Keenan could have cross examined about this to suggest that the witnesses had a motive to testify vs. him.
That an inmate, Anthony Crimi, told an informant of Det. Horval, that others were involved in the murder and that a cassette tape of this conversation existed.	Det. Horval* Stipulation of police report stating this.	Det. Horval testified in Federal Court in <i>D'Ambrosio v. Bagley</i> and the State of Ohio was prepared to stipulate to his testimony and the contents of the tape—that "others were involved."

<p>That in the early hours of Saturday morning, Therese Farniacci, who lived near Paul Lewis on Fairview Court, heard a commotion and saw a black pick-up truck and that at the same time an elderly couple who resided near Paul Lewis and Edward Espinoza heard someone say "let's dump the body in the basement."</p>	<p>Therese Farinacci Carmen Pinzone</p>	<p>The State planned to call Therese Farinacci in its case-in-chief. The defendant-appellant could have cross-examined her to develop his theory that the murder occurred Friday night when he was elsewhere and that because the commotion occurred near Lewis' and Espinoza's apartments, one or both was the real killer. The State planned to call Carmen Pinzone to the stand in its case-in-chief. He owned the building in which the older couple lived. The older couple reported hearing this to Carmen Pinzone. The plaintiff-appellee was prepared to stipulate to the statements overheard by the elderly couple. Keenan could have cross-examined Carmen Pinzone to develop his theory that that the murder happened on Friday night when he was elsewhere and that because the statement was heard near Lewis' and Espinoza's apartments, one or both of them were the real killers.</p>
<p>That Cleveland Police Homicide Detective s Hayes and Goldstein, who first responded to Doan's Creek, the alleged murder scene, opined that Klann was murdered elsewhere and that his body was dumped in Doan's creek.</p>	<p>Det. Hayes Det. Goldstein</p>	<p>Keenan was free to call either or both detectives to develop the theory that Klann was dumped in Doan's Creek and killed elsewhere thereby undermining Espinoza's account and/or the State's theory.</p>

Keenan argues that he is prejudiced because of Espinoza's death. But this is illogical. The trial court had already precluded the use of Espinoza's prior testimony before it granted the

motion to dismiss. Therefore, there was no need to cross-examine Espinoza with the undisclosed evidence—he was not going to be part of the case at all. That makes this case distinguishable from the one which Keenan strongly relies upon, *U.S. v. Fitzgerald*, 615 F.Supp.2d 1156 (S.D. Cal, 2009). In *Fitzgerald*, the California district court found that the defendant would be prejudiced because he could no longer adequately confront a deceased witness. The prosecution in *Fitzgerald* proposed alternatives which would still allow them to use the witnesses' prior testimony. Here, the prior testimony was removed from the equation so it cannot be said to cause prejudice to Keenan.

Keenan also claims that he was entitled to relief because the witnesses' memory was degraded due to the passage of time, yet he presented no affidavits or other evidence to support this claim. To the contrary, the state located nearly every witness in the case and the witnesses were willing to testify. But Keenan argued, and the Eighth District improperly presumed, that the memory was degraded. *Keenan*, 2013-Ohio-4029, ¶58. This has never been the law for the obvious reasons pointed out by the dissenting judge: “[s]uch a presumption would automatically entitle a defendant to a finding of prejudice that warrants a dismissal of the indictment in all cases where a retrial is granted based on any type of *Brady* violation made years after the original trial.” *Id.*

Keenan was unable to demonstrate any prejudice that he would suffer in his upcoming trial. Despite his lack of evidence, both the trial court and the Eighth District improperly assumed it was there. In doing so, they have precluded the state from prosecuting Keenan for his crimes. The federal court found that the appropriate remedy was a new trial, which is consistent with the vast majority of *Brady* reversals. Adopting a standard of presumed prejudice, and not

requiring the least restrictive sanction for a violation, would make dismissal the preferred remedy.

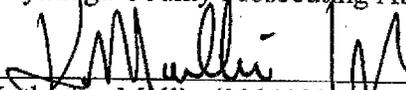
Keenan failed to present evidence to sustain a due process claim. The state was ready to proceed to trial and was willing to stipulate to ordinarily inadmissible evidence to overcome any alleged difficulties. Despite this, the trial court imposed multiple discovery sanctions and prohibited trial. This was contrary to *Darmond* and contrary to well-established precedent which requires a defendant to demonstrate prejudice. There were no discovery issues going into Keenan's retrial and dismissing the indictment as a result of the prior violations while presuming prejudice was improper.

CONCLUSION

The State respectfully requests this Honorable Court adopt the State's propositions of law and allow the state the opportunity to proceed to trial against Keenan.

Respectfully submitted,

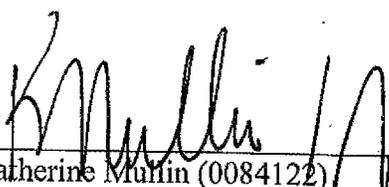
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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant was sent by regular U.S. mail this 14th
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