

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLEE

-vs-

WILLIE G. WILKS, JR.

DEFENDANT-APPELLANT

CASE NO.: 2014-1035

ON APPEAL FROM MAHONING
COUNTY COURT OF COMMON PLEAS.

TRIAL COURT

Case No. 2013 CR 540

DEATH PENALTY CASE

STATE OF OHIO-APPELLEE'S RESPONSES TO DEFENDANT'S MOTION TO
STRIKE THE COURT'S NOVEMBER 24, 2014 NOTICE OF FILING OF THE
RECORD, AND DEFENDANT'S MOTION TO COMPLETE THE RECORD

LYNN MARO, 0052146

Counsel of Record

JOHN B. JUHASZ, 0023777

7081 WEST BOULEVARD, SUITE 4
YOUNGSTOWN, OH 44512

PH: (330) 758-7700

FX: (330) 758-7757

COUNSEL FOR DEFENDANT-APPELLANT

PAUL J. GAINS, 0020323

MAHONING COUNTY PROSECUTOR

RALPH M. RIVERA, 0082063

ASSISTANT PROSECUTOR

Counsel of Record

OFFICE OF THE MAHONING COUNTY
PROSECUTOR

21 W. BOARDMAN ST., 6TH FL.

YOUNGSTOWN, OH 44503

PH: (330) 740-2330

FX: (330) 740-2008

pgains@mahoningcountyoh.gov

rivera@mahoningcountyoh.gov

COUNSEL FOR PLAINTIFF-APPELLEE

Statements of the Case and Facts

Defendant-Appellant Willie G. Wilks, Jr. was convicted of Aggravated Murder, in violation of R.C. 2903.01(A)(F), with the accompanying Death Specification, in violation of R.C. 2929.04(A)(5), and the accompanying Firearm Specification, in violation of R.C. 2941.145(A). Defendant was further convicted of Murder, in violation of R.C. 2903.02(B)(D), with an accompanying Firearm Specification, in violation of R.C. 2941.145(A); two counts of Attempted Aggravated Murder, in violation of R.C. 2903.01(A) and R.C. 2923.02, with an accompanying Firearm Specification, in violation of R.C. 2941.145(A); two counts of Felonious Assault, in violation of R.C. 2903.11(A)(2)(D), with an accompanying Firearm Specification, in violation of R.C. 2941.145(A); and Improperly Discharging a Firearm at or Into a Habitation, in violation of R.C. 2923.161(A)(1)(C), with an accompanying Firearm Specification, in violation of R.C. 2941.145(A). Defendant was then sentenced to death for the Aggravated Murder.

Defendant timely appealed to this Honorable Court as of right on June 20, 2014. On November 24, 2014, this Court filed a Notice that the complete Record had been filed. The juror questionnaires, however, had not been transmitted to this Court until January 21, 2015.

On April 20, 2015, Defendant filed a Motion to Strike this Court's November 24, 2014 Notice of Filing of the Record, and a Motion to Complete the Record.

The State of Ohio now responds with the following arguments.

Law and Argument

To begin, an issue has arisen concerning whether a *complete* copy of the record has been filed with this Court, and whether a *complete* copy of the Prosecutor's file was previously filed under seal pursuant to the trial court's July 24, 2013 and May 21, 2014 judgment entries. (State's Exhibits A and B.)

First, the State would agree with Defendant that because the juror questionnaires were omitted from the initial filing by the Mahoning County Clerk of Courts, a complete record was not transmitted to this Court until January 21, 2015. Thus, the State would join Defendant's Motion to Strike this Court's November 24, 2014 Notice of Filing of the Record, and request this Court to issue a notice that the complete record was filed on January 21, 2015.

Second, Defendant contends that the State did not submit a *complete* copy of the Prosecutor's file that was previously filed under seal and made part of the appellate record pursuant to the trial court's July 24, 2013 and May 21, 2014 judgment entries. (State's Exhibits A and B.)

As Defendant's motion mentioned, counsel for the parties met on April 15, 2015, to discuss whether the materials filed under seal represented a *complete* copy of the Prosecutor's file pursuant to the trial court's July 24, 2013 and May 21, 2014 judgment entries. (State's Exhibits A and B.) Having reviewed the Prosecutor's file in *State v. Willie Wilks* with Defendant's appellate counsel, it appeared that the Prosecutor's file that was filed under seal did not include any motions, pleadings, and/or judgment entries that were time-stamped and filed with the trial court. It also appeared that the Prosecutor's file did not include the State's juror questionnaires that contained numerous notations on

them. Simply stated, the Prosecutor's file that was filed under seal did not appear to include any materials that had already been filed and made part of the trial court record. Accordingly, the Prosecutor's file that was filed under seal included discoverable materials pursuant to Criminal Rule 16.

Here, Defendant contends that he is entitled to a complete copy of the entire Prosecutor's file *and* the Youngstown Police Department's file, including any and all hand-written notes that were produced by the officers and/or assistant prosecutors during the investigation and/or prosecution. To the contrary, the record is devoid of any judgment entry that ordered the State to submit the Youngstown Police Department's file for review and to be sealed for appellate purposes. As for the Prosecutor's file, the State submitted its file, the trial court found that it complied with its earlier July 24, 2013 judgment entry, and the trial court ordered the file sealed for appellate purposes. (State's Exhibit B.)

On May 31, 2014, Defendant's trial counsel filed a boiler-plate "Motion for an Order Directing that a Complete Copy of the Prosecutor's File Be Made and Turned Over to the Court for Review and to Be Sealed for Appellate Review, if Necessary." (State's Exhibit C.) Trial counsel concluded this motion by requesting "a complete copy of the *prosecuting attorney's file* as well as the *police file*, be copied and turned over to the Court for review and if necessary, be sealed for appellate review." (State's Exhibit C.)

The trial court's July 24, 2013 judgment entry, however, made no mention of the State's obligation to include the "*police file*" in the Prosecutor's file that was to be sealed for appellate purposes. (State's Exhibit A.) The trial court July 24, 2013 judgment entry

mentions only that the “Prosecutor’s File” is to be filed under seal for appellate purposes (should it be necessary). (State’s Exhibit A.)

The trial court’s May 21, 2014 judgment entry demonstrates that the State complied with the trial court’s July 24, 2013 judgment entry. (State’s Exhibit B.) On May 20, 2014, the State filed a motion directing the trial court to review the submitted Prosecutor’s file to determine if it complied with the trial court’s July 24, 2013 judgment entry. (State’s Exhibit D.) The State’s motion specifically states, “in compliance with prior order of the Court, requesting the attached file be reviewed, made part of the record, and the contents be sealed for purposes of appellate review.” (State’s Exhibit F.)

In response to the State’s motion and submitted file, the trial court “reviewed the items and hereby orders that the contents be filed under seal for appellate review.” (State’s Exhibit B.) The trial court’s May 21, 2014 unambiguously indicates that it reviewed the submitted Prosecutor’s file, found that it complied with its earlier July 24, 2013 judgment entry (State’s Exhibit A.), and ordered the file sealed for appellate purposes. (State’s Exhibit B.) Thus, the trial court *reviewed* the Prosecutor’s file and found that it *complied* with its July 24, 2013 judgment entry. (State’s Exhibit A.)

Furthermore, the trial court ordered the State to submit a copy of its file despite the fact that this Court has “consistently rejected the argument that a trial court must ‘examine the prosecutor’s file to determine the prosecutor’s truthfulness or seal the prosecutor’s file for purposes of appellate review’ on the basis of speculation that the prosecutor *may* have withheld exculpatory evidence.” (Emphasis sic.) *State v. Hancock*, 108 Ohio St.3d 57, 2006 Ohio 160, 840 N.E.2d 1032, ¶ 64, quoting *State v. Hanna*, 95 Ohio St.3d 285, 2002 Ohio 2221, 767 N.E.2d 678, ¶ 60, citing *State v. Chinn*, 85 Ohio

St.3d 548, 569, 709 N.E.2d 1166 (1999); *accord State v. Hunter*, 131 Ohio St.3d 67, 2011 Ohio 6524, 960 N.E.2d 955, ¶ 136.

Therefore, the trial court did not order the State to submit the Youngstown Police Department's file for review and to be sealed for appellate purposes, as it did the Prosecutor's file, and the trial court found the State's file *complied* with its earlier July 24, 2013 judgment entry that ordered the file sealed for appellate purposes. (State's Exhibit B.) The record before this Court is *complete*, because Prosecutor's file, as previously reviewed and ordered sealed for appellate purposes, is on record with this Court.

Here, Defendant further contends that it is entitled to any and all "work product," which would include any and all hand-written notes that were produced by the officers and/or assistant prosecutors during the investigation and/or prosecution. This would also include the State's copies of the juror questionnaires, because they contain numerous notations from the assistant prosecutors made during voir dire.

As stated above, this Court has "consistently rejected the argument that a trial court must 'examine the prosecutor's file to determine the prosecutor's truthfulness or seal the prosecutor's file for purposes of appellate review' on the basis of speculation that the prosecutor *may* have withheld exculpatory evidence." (Emphasis sic.) *Hancock*, supra at ¶ 64.

Criminal Rule 16(J)(1) specifically provides that work-product materials are not subject to disclosure. "Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their

agents in connection with the investigation or prosecution or defense of the case[.]”
Crim.R. 16(J)(1).

This Court previously recognized in *State v. Jenkins* that a police officer’s notes, which recite matters beyond the witness’s personal observations, regarding the officer’s investigative decisions and interpretations, were privileged and excluded from discovery under former Criminal Rule 16(B)(2). *See State v. Jenkins*, 15 Ohio St.3d 164, 225, 473 N.E.2d 264 (1984); *accord State v. Cunningham*, 105 Ohio St.3d 197, 2004 Ohio 7007, 824 N.E.2d 504, ¶ 43; *State v. Rich*, 12th Dist. No. CA2012-03-044, 2013 Ohio 857, ¶ 67 (recognizing that police-related work product is privileged and excluded from discovery); *State v. Inman*, 4th Dist. No. 12 CA 16, 2013 Ohio 3351, ¶ 26 (stating that “notes taken by a prosecutor, which are not reviewed, adopted or signed by the witness, do not constitute discoverable statements within the meaning of Crim.R. 16.”).

Thus, Defendant is not entitled to any of the State’s work product, which would include any and all hand-written notes that were produced by the officers and/or assistant prosecutors during the investigation and/or prosecution. This prohibition includes the State’s copies of the juror questionnaires, because they contain numerous notations from the assistant prosecutors made during voir dire.

The requirement that a complete, unabridged transcript be provided to capital defendants does not require that the trial court’s record be perfect for a meaningful appellate review. This Court has previously held that “a capital defendant is entitled to a ‘complete, full, and unabridged transcript of all proceedings against him so that he may prosecute an effective appeal.’” *State v. Palmer*, 80 Ohio St.3d 543, 553, 687 N.E.2d 685 (1997), quoting *State ex rel. Spirko v. Court of Appeals*, 27 Ohio St.3d 13, 18 (1986).

This Court later clarified its holding and held “that the requirement of a complete, full, and unabridged transcript in capital trials does not mean that the trial record must be perfect for purposes of appellate review.” *Palmer*, 80 Ohio St.3d at 553; *accord State v. Skates*, 104 Ohio St.3d 195, 2004 Ohio 6391, 819 N.E2d 215, ¶ 161.

Therefore, as of January 21, 2015, a *complete* copy of the record has been transmitted and filed with this Honorable Court.

Conclusion

WHEREFORE, State of Ohio-Appellee hereby requests this Honorable Court Deny Defendant-Appellant Willie G. Wilks, Jr.'s request for relief in-part.

The State specifically requests this Court to—

- **Sustain Defendant's request to Strike this Court's November 24, 2014 Notice of Filing of the Record;**
- **Sustain Defendant's request to Issue a Notice that the Complete Record was Filed on January 21, 2015;**
- **Deny Defendant's request for the State to File Under Seal a Separate Copy of the Youngstown Police Department's File;**
- **Deny Defendant's request for the State to File Under Seal additional materials in the Prosecutor's File that include Time-Stamped Motions, Pleadings, and Judgment Entries;**
- **Deny Defendant's request for the State to File Under Seal its Copies of Juror Questionnaires;**
- **Deny Defendant's request for the State to File Under Seal any "Work Product" contained within the Prosecutor's File; and**
- **Deny Defendant's request for a Remand to the Trial Court for an Evidentiary Hearing.**

Respectfully Submitted,

PAUL J. GAINS, 0020323
MAHONING COUNTY PROSECUTOR BY:



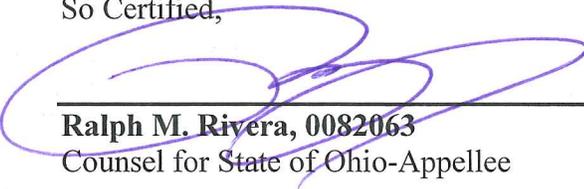
RALPH M. RIVERA, 0082063
ASSISTANT PROSECUTOR
Counsel of Record

Office of the Mahoning County Prosecutor
21 W. Boardman St., 6th Fl.
Youngstown, OH 44503-1426
PH: (330) 740-2330
FX: (330) 740-2008
pgains@mahoningcountyoh.gov
rivera@mahoningcountyoh.gov
Counsel for State of Ohio-Appellee

Certificate of Service

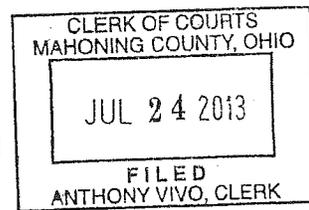
I certify that a copy of the State of Ohio's Response was sent via **Regular U.S. Mail** to counsel for Defendant, **John B. Juhasz, Esq.**, and **Lynn Maro, Esq.**, at 7081 West Boulevard, Suite 4, Youngstown, OH 44512, on April 21, 2015.

So Certified,



Ralph M. Rivera, 0082063
Counsel for State of Ohio-Appellee

Rm-



IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

STATE OF OHIO)
)
 Plaintiff)
)
 v.)
)
 WILLIE GENE WILKS, JR.)
)
 Defendant)

JUDGE LOU D'APOLITO
Case No. 2013 CR 540
JUDGMENT ENTRY
(A CAPITAL CASE)



2013 CR
00540
00019682568
CRJUD

On this 23 day of July, 2013, the following Motions previously filed by the Defendant were determined as follows:

1. Defendant's Request for Notice of State's Evidence is GRANTED.
2. Defendant's Request for Discovery is GRANTED.
3. Defendant's Request for Bill of Particulars is GRANTED.
4. Defendant's Motion for Disclosure of the Juvenile Records of Plaintiff's Witnesses is GRANTED.
5. Defendant's Motion to Compel Law Enforcement Officials to Turn Over and Advise the Prosecuting Attorney of All Information Acquired During the Court of Investigation is GRANTED.
6. Defendant's Motion for an Order Directing that a Complete Copy of the Prosecutor's File Be Made and Turned Over to the Court for Review and to be Sealed for Appellate Review, If Necessary is GRANTED at the conclusion of trial.
7. Defendant's Motion to Properly Preserve and Catalog All Physical Evidence is GRANTED.
8. Defendant's Motion for Disclosure of Rebuttal Witnesses is GRANTED to the extent that such witnesses are known to the State.

J2855
P000383

9. Defendant's Motion to Transcribe the Grand Jury Proceedings Prior to Trial is GRANTED.

10. Defendant's Motion for a Pretrial Copy of the Transcript of the Grand Jury Proceedings is being taken under advisement.

11. Defendant's Motion to Compel Disclosure of Aggravating Factors and Information Relating to Mitigating Factors is GRANTED.

12. Defendant's Motion to Disclose Names of Grand Jury Witnesses is GRANTED.

13. Defendant's Motion to Permit Accused to Be Heard Ex Parte on Appropriation of Funds for Expert Witnesses has been and continues to be GRANTED.

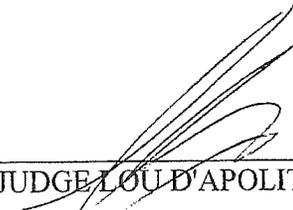
14. Defendant's Motion to Make the State's Physical Evidence Available to Defendant for Inspection and Scientific Testing by Defense Experts is GRANTED.

15. Defendant's Motion to Compel the State to Produce a List of all Witnesses the Prosecution Intends to Call at Trial is GRANTED.

16. Defendant's Motion for Individual Sequestered Alternating Voir Dire is ~~Overruled~~. Each side will be given fifteen minutes for each prospective juror. *INDIVIDUAL VOIR DIRE IS GRANTED*

IT IS SO ORDERED:

7/23/13
Date



JUDGE LOU D'APOLITO

CLERK COPIES TO:

Attorney Thomas Zena
Attorney Ronald Yarwood
Attorney Paul Gains
Attorney Rebecca Doherty
Attorney Jeff Davis
Kristina D. Frost

AWP

CLERK OF COURTS
MAHONING COUNTY, OHIO
MAY 31 2013
FILED
ANTHONY VIVO, CLERK

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

STATE OF OHIO)
)
 Plaintiff)
)
 v.)
)
 WILLIE GENE WILKS, JR.)
)
 Defendant)

CASE NO. 2013 CR 540
JUDGE LOU D'APOLITO
MOTION NO. 6
(A CAPITAL CASE)

**DEFENDANT'S MOTION FOR AN ORDER DIRECTING THAT A
COMPLETE COPY OF THE PROSECUTOR'S FILE BE MADE AND
TURNED OVER TO THE COURT FOR REVIEW AND TO BE
SEALED FOR APPELLATE REVIEW, IF NECESSARY**

Defendant moves this Court for an Order requiring the prosecuting attorney to make a complete copy of the State's file, including information obtained from law enforcement. This copy should be turned over to this Court for a pretrial review of its contents to ensure compliance with the rules of discovery. Defendant further requests the State's file be sealed for appellate review.

MEMORANDUM IN SUPPORT

This motion is a corollary to Defendant's other discovery related demands and motions. It is designed to ensure complete disclosure of all information to which Defendant is entitled. Most importantly, it aims to eliminate any risk of non-disclosure of favorable evidence that is material to guilt or punishment.

As a matter of practice in capital cases, the Ohio Supreme Court has implicitly recognized the importance attached to the filing of this motion by defense counsel and the granting of this motion by the trial court. The Court reversed a capital case because the prosecutors failed to provide defense counsel with exculpatory evidence within their possession at trial. State v. Brown, 115 Ohio St. 3d 55, 873 N.E. 2d 858 (2007). The Court noted that at a

pretrial hearing, the defense argued the motion for disclosure of exculpatory evidence, particularly law enforcement documents, and requested that the prosecutor's file be sealed and made a part of the record on appellate review. The trial court granted the motion.

Because the contents of the prosecutor's file was available on appeal, Brown's appellate counsel were able to point to documents uncovered in the file that supported his claim of a Brady violation. The Court found that the prosecutor's failure to turn over the documents contained in the prosecutor's file, specifically police reports, was highly prejudicial. The Court found prejudice—and grounds to reverse—because defense counsel was deprived of the right to call declarants who made statements contained in police reports that implicated a key State's witness in the murders. Defense counsel was also prevented from cross-examining that witness with his prior statements made to the police that contradicted his testimony at trial. Brown, 115 Ohio St. 3d at 65, 873 N.E. 2d at 867. The Court concluded that the undisclosed reports were material and the contents of the reports offered independent evidence to suggest that Brown was not the actual killer. The Court noted that the "significance and materiality of the reports are inherent in their content and does not rest upon how they might have been used by the defense or how the defense may have altered its trial strategy." Id.

The prosecution has a constitutional obligation to disclose evidence favorable to the accused. Brady v. Maryland, 373 U.S. 83, 86 (1963). Favorable evidence for Brady purposes includes both exculpatory and impeachment evidence. Kyles v. Whitley, 514 U.S. 419, 433 (1995). The suppression by the prosecution of favorable evidence results in constitutional error "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). A reasonable probability of a different result is accordingly shown when

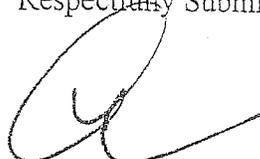
the government's evidentiary suppression 'undermines confidence in the outcome of the trial. Id. at 434; see also Strickler v. Greene, 527 U.S. 263, 264 (1999).

The United States Supreme Court made clear in Kyles that the prosecuting attorney's obligation to disclose Brady material includes all evidence in the prosecutor's file as well as that obtained by law enforcement. See Kyles, 514 U.S. at 437-38. As the prosecution is charged with the responsibility of turning over all evidence found in police investigation files that is favorable to the Defendant, this Court should also review these files, and have them sealed and preserved for appellate review.

As the United States Supreme Court's jurisprudence has made evident, death is different; for that reason more process is due, not less. See Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). This is all the more so when a petitioner's life interest, protected by the "life, liberty and property" language in the Due Process Clause, is at stake in the proceeding. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 288 (1998) (O'Connor, Souter, Ginsberg, and Breyer, J.J., concurring); id. at 291 (Stevens, J., dissenting) (recognizing a distinct, continuing, life interest protected by the Due Process Clause in capital cases). All measures must be taken to prevent arbitrary, cruel, and unusual results in a capital trial. See Lockett, 438 U.S. at 604; Woodson, 428 U.S. at 304-05.

For these reasons, Defendant requests that this Court issue an Order directing that a complete copy of the prosecuting attorney's file as well as the police file, be copied and turned over to the Court for review and if necessary, be sealed for appellate review.

Respectfully Submitted,



THOMAS E. ZENA (#0007375)
4822 Market Street
Youngstown, OH 44512
Tel: (330) 629-9030
Fax: (330) 629-9036
Counsel for Defendant

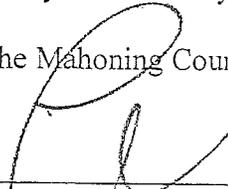


RONALD D. YARWOOD (#0068775)
DeGenova & Yarwood, Ltd.
The Liberty Building
42 N. Phelps Street
Youngstown, Ohio 44503
Tel: (330) 743-4116
Fax: (330) 743-2536
Counsel for Defendant

CERTIFICATE OF SERVICE

A copy of the foregoing Motion was delivered on the 31 day of May, 2013 to the office of the Mahoning County Prosecutor by the following means:

(X) Placed in the Prosecutor's mailbox located at the Mahoning County Clerk of Court Office.



THOMAS E. ZENA (0007375)
RONALD D. YARWOOD (0068775)
Counsel for Defendant

