No. ED 90312

In the Missouri Court of Appeals Eastern District

JASON MERRIWEATHER,

Respondent,

v.

STATE OF MISSOURI,

Appellant.

Appeal from City of St. Louis Circuit Court
Twenty-Second Judicial Circuit
The Honorable Thomas Grady, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant, State of Missouri, appeals from a City of St. Louis Circuit Court judgment sustaining Respondent's Rule 29.15 motion for post-conviction relief. The motion court found that the state had committed a *Brady* violation, and it vacated Respondent's conviction for forcible sodomy and ordered a new trial. This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court. Therefore, jurisdiction lies in the Missouri Court of Appeals, Eastern District. Art. V § 3, Mo. Const. (as amended 1982).

STATEMENT OF FACTS

Respondent was convicted of Count II forcible sodomy in the Circuit Court for the City of St. Louis on April 12, 2005. He was found not guilty of Count I kidnapping, as to Count III armed criminal action not guilty and as to Count IV not guilty of Attempt Forcible Rape.

On March 31, 2002 T.B. , also known as T.D. (Vol. II Trial 81) also known as N.B. also known as N.D. (Respondent's Appendix) was walking from the Greyhound Bus Station when respondent pulled his car up in front of her on the street (Vol. II Tr.82, 83.) He displayed a hand gun. She got into the car and was taken to an alleyway behind some apartment buildings. Respondent asked if she was an undercover cop and patted her down looking for a wire (Vol. II Tr. 84.) Respondent placed his fingers in her vagina (Vol. II Tr. 85, 86.) He unzipped his pants and tried to climb on top of her (Vol. II Tr. 86.) She screamed and pushed him out of the car.

Police Officer Ryan, upon being questioned at trial, described complainant's demeanor that she was more mad about the incident than anything (Vol. II Tr. 86.) P.O. Officer Hebrank testified on direct examination that he ran the name T.B. for a prostitution history. When asked if prostitutes commonly go by different names he answered "Certainly" (Vol. III Tr. 87.)

Respondent testified that T.B. also known as T.D. flagged him while he was driving his car. She got into his car (Vol. III Tr. 93.) She

agreed to give him oral sex in exchange for crack (Vol. III Tr. 94, 95.) After the sex he told her he had no crack and she was angry (Vol. III Tr. 96, 97.)

At the evidentiary hearing for respondent's 29.15 motion trial counsel stated he filed his Motion For Discovery pursuant to Rule 25.03. The investigator for The Office of the Circuit Attorney testified that prior to trial he runs the criminal histories of witnesses (App. Tr. 81, 82.) The investigator believed he would have run the name T.B. but not T.D. , N.B. , or N.D. . No record printout of T.B. was produced from the prosecutor's file reflecting that a record check has been done (App. Tr. 83.) Further a REJIS check was negative for prior conviction and pending cases in St. Louis County (App. Tr. 84.)

The State on the morning of the evidentiary hearing ran the name T.B.

That record check revealed three prior convictions for retail thefts in Sangamon County Illinois and pending Fraudulent Use of a Credit Device in St. Louis County. Respondent's (State) Exhibit A (See Appendix).

Counsel for Merriweather by proffer introduced a REJIS printout detailing T.B. AKA T.D. 's pending three counts of Fraudulent Use of a Credit Device. Said charges were in warrant states at the time of her trial testimony (Legal file p).

The Court in its Findings of Facts Conclusions of Law opined that the reason for the discovery failure was never established (Legal file p70.) The Court found that the records at issue were basic criminal history records of the State's primary witness (Legal File 70.)

POINT RELIED ON

The trial court was correct in its Finding of Facts and Conclusions of Law that the failure of the State of Missouri whether intentional or inadvertent to disclose to the defendant the prior convictions and there pending misdemeanor charges of the complaining witness denied him a fair trial and a verdict worthy of confidence.

Brady v. Maryland, 373 U.S. 83 1963

Crivens v. Roth, 172 F 2d 991 7th Cir 1999

United States v. Auten, 632 F 2d 478, 481 (5th Circuit 1990)

Supreme Court Rule 25.03

ARGUMENT

In *Brady v. Maryland* 373 U.S. 837 (1963) the Supreme Court held that due process requires the prosecution to disclose evidence favorable to an accused upon request when said evidence is material to guilt or punishment. Missouri Rule of Criminal Procedure 25.03 provides in part:

> (A)…the state shall, upon written request of defendant's counsel, disclose to defendant's counsel such part of all of the following material and information within its possession or control designated in such request:
>
> (7) Any record of prior criminal convictions of persons the state intends to call as witnesses at a hearing or the trial:
>
> (9) Any material or information, within the possession or control of the state, which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment.
>
> (C) If the defense in its request designates material or information which would be discoverable under this Rule if in the possession or control of the state, but which is, in fact, in the possession or control of other governmental personnel, the state shall use diligence and make good faith efforts to cause such materials to be made available to the defense counsel, and if the state's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court, upon request, shall issue suitable subpoenas or orders to cause such

material or information to be made available to the state for disclosure to the defense.

In 1985 The Supreme Court further held in *United States v. Bagley*, 473 U.S. 667 (1985) that evidence is material if there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding. A "reasonable probability" is defined as a probability sufficient to undermine the confidence of the outcome (at 683).

The Court continued to expand the obligations of the prosecution in *Giglio v. United States* 405 U.S. 150 1972. Pursuant to *Brady* the government must provide information that could be used to impeach prosecution witnesses.

Judge Grady in his opinion was careful not to cast blame on the failure not to discover the criminal history or for the failure to use diligence and reasonable inquiry to discover it.

This is known. The complaining witness had been convicted on three separate occasions of retail theft (see Respondent's Appendix). The state claimed that they run all of the criminal histories of their witnesses (App. Tr. 81). These printouts would be given to the prosecutor (App. Tr. 83). No such printout was offered by the state to show that it had been done.

The criminal history of the complaining witness as shown in Respondent's trial exhibit A reveals the use of aliases. The state's evidence at trial confirmed that prostitutes use different names (Vol. II Tr. 87).

It is further known that counsel for Merriweather with limited access to criminal history records was able to discover that the complaining witness had charges pending at the time of trial that were in warrant status. Appellant's counsel would suggest that the

pending charges were not known or in the possession of the prosecutor and were not reasonably discoverable.

Can we conclude a search was made by either the state or trial counsel with the use of REGIS and they could not be found?

To comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf on in this case, including the police." *Kyles v. Whitney*, 514 U. S. 419, 437 (1985).

This duty to disclose includes not only information that is actually known to the prosecutor, but also information that may be learned through reasonable inquiry. *State v. Rippee* 118 S.W. 3d 682, 684 (Mo. App. S.D. 2003).

The state relies on *United States v. Jones*, 34 F 3d 596 (8th Circuit). In that case the prosecution made a record check of their victim. No prior convictions were discovered. The complaining witness informed the prosecutor of one prior conviction on the day of trial. It was later learned that the victim had additional convictions not known to the defendant. These convictions were from the State of Illinois. The 8th Circuit denied the appellant's claim of a Brady violation finding the government had no affirmative duty to discover information it did not possess.

Both the 5th Circuit Court and the 7th Circuit Court disagree with this decision. In *United States v. Auten* 632 F 2d 478, 480 (5th Circuit 1980) the prosecution is deemed to have knowledge of its witness' criminal history information that would be revealed by a routine check of FBI and state data bases including a witness's state rap sheet, where such information is readily available. The prosecutor failed to run an FBI or NCIC

record check. The court in premised its opinion that "the prosecutor has ready access to a storehouse of relevant facts…this access must be shared." at 481.

The hearing court in its decision to sustain movant's 29.15 petition relied on *Crivens v. Roth* 172 F 3d 991 (7th Circuit 1999).

In *Crivens*, the state failed to disclose the criminal history of a government witness. A request for her criminal history had been made by defense counsel.

Six years after the trial the defendant learned the witness had prior criminal history and the state failed to provide it to defense counsel. This parallels movant's 29.15 petition.

The state claimed in *Crivens* that "no violation occurred because it did not suppress or withhold this information deliberately and therefore, should not be found to have violated the first aspect of the *Brady* test" id at 994. The state claimed the use of an alias by its witness prevented discovery. The excuse was rejected. A prosecutor may not simply complain ignorance. at 996.

The Seventh Circuit and perhaps Judge Grady found it implausible that the prior convictions could not be found. Be reminded that the prosecution was aware that the complaining witness used other names.

Respondent would reiterate that Rule 25.03 further imposes a requirement of diligence and a good faith effort.

As to the pending charges in St. Louis County for fraudulent use of a credit device a witness may be impeached by showing her bad character for truth and veracity. Specific acts of misconduct not resulting in a conviction may be inquired about on cross-

examination if they relate to the truth and veracity of the witness and may not be proved by extrinsic evidence.

The state would argue that the pending charges in St. Louis County were not reasonably discoverable. Counsel for movant easily discovered them by running her alias. As to cross examination of the witness the trial court could make a determination of their admissibility of the pending charges by applying the exceptions to the general rule that a witness may not be impeached by pending charges. These exceptions are: (1) where the inquiry demonstrates a specific interest of the witness; (2) where the inquiry demonstrates the witness' motivation to testify favorably for the state; or (3) where the inquiry demonstrates that the witness testifies with an expectation of leniency. *State v. Franklin*, 16 S.W. 3d 692, 695 (Mo. App. E.D. 2000).

It can not be ignored that the witness was in warrant status and should have been arrested before or after her testimony. Her motivation and self interest is obvious.

The hearing court correctly framed the issue in its opinion. The "focus of Brady is on the fairness of the trial not the good faith of the prosecutor." Was there verdict returned that was worthy of confidence? *State v. Goodwin* 43 S.W. 3d 805 at 812. The records at issue were basic criminal history records of the complaining witness. In their absence the defendant could not have received a fair trial.

CONCLUSION

The motion court was correct in its decision to set aside movant's sentence and judgment.

The Court should affirm that decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06; and

2. That the CD filed with this brief, containing a copy of this brief has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a CD containing a copy of this brief, were mailed this 5th day of June, 2008, to:

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