

State v. Joseph Cowan
CC2015-1272
Defense Mot. 44



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CIRCUIT COURT OF
MORGAN COUNTY, ALABAMA
CHRIS PRIEST, CLERK

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

STATE OF ALABAMA,

PLAINTIFF,

vs.

JOSEPH CHRISTOPHER COWAN,

DEFENDANT.

CASE NO. CC2015-1272

MOTION TO CONTINUE

COMES NOW, the Defendant, Joseph Christopher Cowan, by and through his attorneys, Brian M. White and Jake Watson, and hereby moves the Honorable Jennifer Howell to continue the trial of this case in response to disclosure on April 18, 2019 regarding misconduct by former police officer Jonathan Lowery. As grounds for this motion, the defendant would show the following:

I. INTRODUCTION:

1. Joseph Cowan is facing trial on April 29, 2019, on an eleven count indictment consisting of six (6) counts of robbery 1st degree pursuant to §13A-8-41 (Counts 1, 2, 3, 6, 7, 8); two counts of firing into an occupied dwelling, §13A-11-61 (Count 4, 9), and three counts of capital murder §13A-5-40 (Count 5, 10 & 11).

2. Joseph Cowan was charged in each count along with Cedric Lamont Cowan, Amani Juan Goodwin and Cortez Ocie Mitchell.

3. The State of Alabama is seeking imposition of the death penalty against Joseph Cowan if convicted of capital murder.

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4. Amani Goodwin pleaded guilty and was sentenced to concurrent life sentences in exchange for an agreement to testify against his co-defendants, which he did in the Mitchell case.

5. Cortez Mitchell proceeded to trial in February 2018 and was convicted of multiple counts including two counts of felony murder for which he was sentenced to two consecutive life sentences.

II. GROUNDS FOR CONTINUANCE

6. On Tuesday, April 16, 2019, the defendant and the Court was made aware that some matter had to be disclosed on the record to counsel for Mr. Cowan. The Court set a hearing to be held two days later on April 18 at 1:30pm. to permit the district attorney to make this disclosure.

7. At the hearing, the district attorney revealed in open Court that Jonathan Lowery, a former police officer who worked as an evidence technician in this case, had confessed to stealing from the evidence locker at the Decatur Police Department. The district attorney reported that the theft (or possibly thefts) came to light when Mr. Lowery was asked whether he had ever committed a crime in a pre-polygraph test that he was to take as part of his application for a federal law enforcement job. Lowery responded that he had stolen from the evidence locker that had been entrusted to him in his employment as an evidence technician with the Decatur Police Department. The district attorney said that there had been an Internal Affairs investigation into the misconduct of Jonathan Lowery, but did not have a report of that investigation. The Decatur Police Department was reported to have done an audit of the evidence locker, whether that audit was for past or pending cases is unknown. The district attorney only had a “verbal” about the results of the audit finding the misconduct to apply only to “old cases”.

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8. No details were provided about who was the prospective employer where Lowery was forced to reveal his misconduct. No report or communication was provided to identify the precise time of the disclosure by Lowery and how and when the confessed misconduct was relayed to the Decatur Police Department.

9. The information regarding the admitted misconduct came to the attention of the district attorney's office at a time that has been described as "shortly after the Cortez Mitchell trial", which was began on February 5, 2018 and concluded in less than two weeks. Under the holdings in *Brady v. Maryland* and its progeny, the critical inquiry is when did the Decatur Police Department know about this misconduct, the knowledge of which is imputed to the State of Alabama. In *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), the United States Supreme Court held that *Brady* encompasses evidence known only to investigators and not to the prosecutor.

10. On the same day as the hearing, the defense had a subpoena issued by the Circuit Court for various files of the Decatur Police Department and the City of Decatur regarding the termination of Lowery's employment as a police officer and the investigation into the misconduct by Lowery that was disclosed in the April 18 hearing. This subpoena was served on the Decatur Police Department on April 19, 2019. Despite acting immediately on this information, the defense has not received the requested documents, which is understandable given the suddenness of the disclosure and the resulting subpoena. Due to State holidays on Friday, April 19, and Monday, April 22, the defense does not yet know whether the City of Decatur will oppose production of these documents and move to quash the subpoena.

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11. The Court set a hearing for Friday, April 26, 2019, in order for the defense to question former officer Jonathan Lowery and those involved with the investigation of misconduct and the personnel actions taken as a result of that investigation. The defense must have the production of the documents in the subpoena in order to effectively cross-examine these individuals. Whether this will happen in the short time frame remains to be seen.

12. Because of the late disclosure of this information, the defendant's lawyers are now engaged in a "trial within a trial" in the eleven days leading up to the actual trial on the merits of the case, which is prejudicial to the quality of preparation that trial counsel can produce. The important matter of the misconduct of Jonathan Lowery is a distraction from trial preparation. At this stage, the defense would ordinarily be putting fine points on the trial presentation and the possible penalty phase presentation. Instead counsel has had one hearing (April 18), has another pending (April 26), has subpoenaed yet-to-be-seen documents and must follow up on all this with a trial starting the Monday after the hearing on April 26.

13. Because of the hearing on Friday, April 26 being followed two days later on Monday, April 29, there is no guaranty that counsel for the defendant can have completed due diligence concerning the disclosures about the Lowery misconduct. The danger is that counsel will be ineffective simply as a result of the clock running to zero with things left undone on the Lowery matter and a lack of adequate preparation for the trial itself due to the distraction of the late *Brady/Giglio* disclosure.

14. The prejudicial nature of the late notice of the evidence technician's misconduct does not depend on proof of bad faith in regard to the late disclosure. Motive or lack of motive for the late disclosure is immaterial to the consideration of whether the defense has had adequate

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time to discover the extent of the misconduct of the witness and make use of that information in the impeachment of the witness. The tardy *Brady/Giglio* disclosure, whether the State's failure to disclose earlier is blameworthy or not, may only be remedied by a continuance at this stage, one week before trial, to enable the defense to discover, assess and make use of the disclosure in the trial of the case. The need for additional time for dealing with this late disclosure is required because of what appears to be limited actual knowledge by the State regarding the extent of Lowery's misconduct and the response by the Decatur Police Department.

III. THE LOWERY DISCLOSURES ARE CRITICAL TO TRIAL PREPARATION.

15. The misconduct of Jonathan Lowery in connection with his employment as an evidence technician in the Decatur Police Department is not collateral to a fair trial for Joseph Cowan.

16. Jonathan Lowery was the evidence technician who was in charge of the scene of the killing of Joshua Davis at Wilson Morgan Park. He was in charge of the evidence detection and collection at the execution of the search warrant at Joseph and Cedrick Cowan's home. He was in charge of the relinquishing of evidence to the Department of Forensic Sciences and he was in charge of receiving that evidence back from DFS on behalf of the Decatur Police Department.

17. The critical nature of Jonathan Lowery as a witness is demonstrated by the prosecution persisting to use him as a witness. He is essential to the foundation for the admission of firearms, ammunition, items claimed to be stolen from robbery victims and the remainder of the evidence that the State is expected to seek to admit at the Cowan trial, as judged by the record from the trial of co-defendant Cortez Mitchell.

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18. *Giglio v. United States*, 405 U.S. 150, 155, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), extended the scope of *Brady* to include relevant impeachment evidence. As the Court explained in *United States v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), “[i]mpeachment evidence . . . falls within the Brady rule” (citing *Giglio*, 405 US at 154). When determining materiality, there is no distinction between exculpatory evidence and impeachment evidence. *Bagley*, 473 US at 676 (“This Court has rejected any . . . distinction between impeachment evidence and exculpatory evidence [for Brady purposes].”). Therefore, the importance of this information is not lessened by the fact that it appears to go to impeachment rather than to substantive exculpation of the defendant.

19. The State has asserted that the information disclosed about Lowery only concerns inadmissible matters – that is, matters that may not be inquired into on cross-examination under Rule 608(b). It must be noted that the limitation on inquiring into specific instances of conduct in Rule 608(b) only applies to attacking the witness character for truthfulness, not to other uses such as possible bias of the witness. See Committee Comments to Rule 608(b) regarding amendments to the rule effective October 1, 2013. Further, it must be that the matters regarding Lowery must be of some importance to the trial or the State would not have felt the duty, consistent with obligations under *Brady/Giglio*, to request a hearing to disclose the information about Lowery in open court and on the record.

IV. CONCLUSION:

20. The disclosure of the matter related to former officer Jonathan Lowery at eleven days before trial, the short window for discovering material relevant to the disclosure, and the hearing into the Lowery matters set only three days before commencement of trial requires that the trial be

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continued in order to give the defense an opportunity to fully investigate the disclosure regarding the former officer. Additionally, the defense requests a continuance due to the fact that the late disclosures regarding Jonathan Lowery and the unanticipated work and attention required of counsel to respond to the disclosure has derailed counsel's ordinary trial preparation that is essential to effective representation of Joseph Cowan where the State is seeking the imposition of the death penalty. There is no room for error or important preparation being crowded out by the tardy disclosure of *Brady/Giglio* evidence. A sufficient continuance is the remedy.

WHEREFORE, the defendant moves this Honorable Court to continue the trial of this case currently set for April 29, 2019.

Respectfully submitted this the 23rd day of April 2019.

/s/ Brian M. White

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CERTIFICATE OF SERVICE

This document has been filed electronically and served on opposing counsel pursuant to the Administrative Procedure for Filing Signing and Verifying Documents by Electronic Means in the Alabama Judicial System. Any opposing counsel or pro se parties not registered to file electronically were served with this pleading via the U.S. mail, postage pre-paid, to the litigant's address of record in the Circuit Clerk's office.

Dated this the 23rd day of April, 2019.

/s/ Brian M. White
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