

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUJUAN O'NEAL,

Defendant-Appellant.

UNPUBLISHED

August 19, 2008

No. 257333

Wayne Circuit Court

LC No. 04-002337-01

Before: Zahra, P.J., and White and O'Connell, JJ.

WHITE, J. (*dissenting*).

I respectfully dissent. I agree with the circuit court's conclusion on remand that defendant's due process rights were violated by the prosecution's failure to produce before trial the federal report (which is under seal) and the correspondence of Jamale Stewart and Felicia Stewart. I do not agree with the majority that defense counsel waived any *Brap*

*dy*¹ violation with respect to the federal report. The pertinent discussion regarding this report occurred at a sidebar during trial. The majority relies upon an ambiguous statement of the prosecutor at trial, verified by defense counsel, in concluding that trial counsel waived the issue. Trial counsel testified at the *Ginther*² hearing, and also explained in an affidavit, that her statement on the record was an acknowledgment of the trial court's ruling barring use of the report, not a waiver. She testified

I was told that I absolutely cannot ask one question on the document, I can't hint towards the document, I can't breath [sic] a word of it, if I did there would be consequences. . . .

Q. Alright. So, you're saying you really didn't make a strategic decision with respect to that document, the judge made a ruling and you respected that ruling?

A. Correct.

¹ *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The circuit court concluded following the *Ginther* hearing that to the extent counsel did not stand up to the trial court and pursue certain areas, she was ineffective. On this record, one or the other conclusion is appropriate, either counsel did not waive the issue, or she was ineffective in doing so.

The federal report contained evidence of an alternative theory for the shootings—that Jamale Stewart, the prosecution’s chief witness against defendant, was under contract to kill one of the three victims, and that Stewart had threatened to kill the three days before the actual murders took place. The federal report also contained evidence that other witnesses for the prosecution were part of Stewart’s drug-dealing operation. The correspondence of Jamale and Felicia Stewart to Ramone is easily interpreted as stating a plan to frame defendant and telling Ramone how to do so, and as informing Ramone that witnesses were changing their accounts to agree with each other.

I conclude that had trial counsel been privy to the federal report and this correspondence prior to trial, and been able to prepare for trial accordingly, there is a reasonable probability that the result of the proceedings would have been different.

I would reverse and remand for a new trial.

/s/ Helene N. White