IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: OCTOBER 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-0268-MR

WILLIAM EUGENE THOMPSON — APPELLANT

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
V. 72-CR-2007

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

In 1974, a jury of the Pike Circuit Court convicted Appellant, William Eugene Thompson, of the willful murder-for-hire of Gladys Deskins. For this crime, Appellant was sentenced to life imprisonment. Appellant's conviction was appealed to and affirmed by this Court, although the resolution was considerably delayed due to the complete loss of his trial record.[1] Appellant also filed an unsuccessful RCr 11.42 motion. In 1986, Appellant murdered a prison guard during a successful escape. He was subsequently apprehended, charged, and convicted of the prison guard's willful murder. For this crime, Appellant's conviction for the murder of Gladys Deskins was

[1] A narrative statement prepared by the Commonwealth pursuant to CR 75.13 is the only record of Appellant's 1974 trial.

used as a statutory aggravator, and Appellant was sentenced to death. He is currently awaiting his sentence on death row.

In December 2002, the Commonwealth notified Appellant, some twenty-eight (28) years after his initial conviction, that one of the witnesses at his trial for the murder of Gladys Deskins was given a plea agreement for his testimony. On December 17, 2003, within one year of learning of the plea agreement, Appellant filed a CR 60.02 motion asking that his conviction be overturned. The trial court denied Appellant's motion, and he now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm the trial court's rulings.

The 1971 murder of Gladys Deskins was both brutal and notorious. She was undergoing a contested divorce with her husband of some forty years, Boone Deskins. Mr. Deskins became impatient with the wrangling concerning property disposition, so he paid Willard "Woody" Christian seven thousand dollars ($7,000) to murder his wife. Apparently too squeamish to commit the murder himself, he subcontracted the job to Appellant and another man, Robert Sykes. According to Christian, on July 12, 1971, Sykes drove Christian and Appellant to a point near the Deskins' home. Christian and Appellant got out of the vehicle and walked some distance to the home's perimeter. Christian then waited outside while Appellant went inside the home. Christian reported that he heard a shot gun blast and that Appellant rejoined him shortly thereafter with the shotgun in hand. Appellant and Christian then met with Sykes, and the trio buried the shotgun and threw away Appellant's shoes. When Gladys was found, she had several stab wounds and most of her head was blown away by a shot gun blast. The evening after the murder, Christian reported receiving the agreed amount of money from Boone Deskins and sharing the proceeds with Sykes and Appellant.

Deskins, Christian, Sykes, and Appellant were indicted for Gladys' murder almost a year later after an intensive investigation. The husband was tried first, Appellant was tried next, and finally, Robert Sykes was tried. All three were convicted of murder and sentenced to life imprisonment. Although a pivotal player in the murder plot, Christian was never tried but did serve as a key witness against his three co-defendants.

The indictment against Christian lay dormant for approximately twenty-seven (27) years. In November 1998, Judge Eddy Coleman, *sua sponte*, assigned the case for a status conference. Christian's attorney filed a motion to dismiss, claiming a violation of Christian's constitutional right to a speedy trial. The motion was overruled and the case was set for trial. In September 1999, Christian claimed for the first time that he could not be prosecuted due to a plea agreement he entered into with John Paul Runyon, the Commonwealth's Attorney, in 1971. Initially, the trial court rejected Christian's claims, but on appeal, this Court remanded the matter back to the trial court for further consideration. 2000-SC-0547-MR.

Upon further consideration, the trial court ultimately determined that only one explanation could account for the fact that Christian was never tried for his role in Gladys' murder - Christian must have been given an immunity deal in exchange for his testimony against Appellant and others. The trial court further determined that Christian was directed by the Commonwealth's Attorney to deny the existence of the agreement if asked about it at trial. The trial court's determination was appealed to and affirmed by this Court, and our opinion on the matter became final on January 9, 2003. 2001-SC-0659-MR.

On December 17, 2003, almost one year after being notified by the Commonwealth of the adverse ruling in the above matter, Appellant filed a CR 60.02

motion in the Pike Circuit Court asking that he be relieved of the judgment entered against him for the willful murder of Gladys Deskins. In his motion, Appellant alleged violations of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (prosecution may not withhold materially exculpatory evidence) and Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (prosecution may not elicit or condone perjury). The trial court denied Appellant's claims, finding that Appellant "failed to prove that the use of this information to impeach Christian would have resulted in a different outcome in his trial." Appellant now appeals the denial of his CR 60.02 claims to this Court.

In his appeal, Appellant argues that he is entitled to relief pursuant to subsections (b) and (f) of CR 60.02. Subsection (b) allows relief based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02." Id. Subsection (f) allows relief for "any other reason of an extraordinary nature justifying relief." Id.

As contended by the Commonwealth, relief pursuant to CR 60.02(b) is not available in this case. Appellant filed his CR 60.02 motion many years after a judgment against him for the murder of Gladys Deskins was entered and became final. See CR 60.02 ("The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken."). Accordingly, Appellant has missed the deadline to claim relief under this section.[2]

[2] Relief under RCr 10.06 would have been the proper vehicle for Appellant in this case. RCr 10.06 permits motions for a new trial based on newly discovered evidence after one year upon a showing of good cause. Id.

However, we do believe that Appellant's claims are appropriate for consideration under subsection (f) of CR 60.02. See Bishir v. Bishir, 698 S.W.2d 823, 826 (Ky. 1985) ("Relief under CR 60.02(f) is available where a clear showing of extraordinary and compelling equities is made."). The extraordinary and compelling equities in this case consist of impeaching, and possibly perjured, evidence that was intentionally withheld from Appellant by the prosecution for nearly thirty years. The fact that such evidence was not disclosed or reasonably discovered for such an extended period of time enhances the extraordinary nature of Appellant's claims and warrants a closer look under this rule. See Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1975) ("deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'"); Commonwealth v. Spaulding, 991 S.W.2d 651, 655 (Ky. 1999)(" if the introduction of perjured testimony at Spaulding's second trial amounted to a denial of due process of law, then his motion is properly brought under CR 60.02(f)").

Appellant claims relief under two alternate theories. First, he argues that sufficient evidence exists to infer that the prosecution elicited, condoned, or did not correct the occurrence of actual perjury at Appellant's trial in violation of Napue, supra. In the event there is not sufficient evidence to infer that perjury actually occurred at Appellant's trial, he contends he is still entitled to relief based on the withholding of materially exculpatory evidence in violation of Brady, supra.

The trial court found as fact that Appellant failed to demonstrate that any perjury was actually committed at his trial. The trial court based its ruling on the following findings: (1) no transcript of Appellant's trial exists and the narrative statement is silent as to this issue; (2) when Christian testified at Boone Deskin's trial, the first of the co-

defendants to be tried, he was never asked about any possible plea deals or incentives for testifying; and (3) neither Appellant nor his attorney have any memory of whether Christian was asked about any possible plea deals or incentives at Appellant's trial. Appellant counters that (1) Christian was asked about and denied the existence of any deals at Robert Syke's trial, the third and final co-defendant to be tried, and (2) his attorney acknowledged that while he does not remember whether he specifically asked about a plea deal at Appellant's trial, he believes it was his habit at that time to ask such questions.[3] We believe this is a close question, and thus, on balance, cannot say that the trial court's finding is clearly erroneous. CR 52.01. Accordingly, we affirm the trial court's holding that insufficient evidence exists to infer that any perjury actually occurred at Appellant's trial.

We next determine whether the prosecution nonetheless withheld materially exculpatory evidence in violation of Brady, supra. Evidence is "material" under the Brady doctrine "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). We review *de novo* whether particular evidence is material under Brady. United States v. Corrado, 227 F.3d 528, 538 (6th Cir. 2000).

In arguing that the plea agreement is material, Appellant claims that the circumstances in this case are akin to the circumstances in Giglio, supra. In Giglio, supra, a new trial was ordered where the key witness against the defendant was promised immunity by one of the prosecutors, but this information was withheld and not

[3] As of July 1, 2006, habit evidence is now admissible in the Commonwealth of Kentucky to prove that the conduct of a person on a particular occasion was in conformity with his or her stated habit or routine practice. KRE 406.

discovered by the defendant until after his trial. Id. at 154-55. In granting a new trial, the U.S. Supreme Court found it significant that "the Government's case depended almost entirely on [the key witness'] testimony; without it there could have been no indictment and no evidence to carry the case to the jury." Id. at 154.

This case is distinguishable from Giglio, supra, however, because the prosecution's case at Appellant's trial did not depend almost entirely on Christian's testimony. Compelling physical evidence which corroborated Christian's testimony was also submitted at trial. This physical evidence included the existence of two sets of footprints from John's Creek to the Deskins' home, the existence of shoes and a shotgun buried at a place near the Deskins' home where Christian said they were buried, and testimony by a firearms examiner stating that at least one of the shells found at the scene of Gladys' murder had been fired from the buried shotgun. Moreover, several independent witnesses testified that (1) Christian and Appellant were together on the night of Gladys' murder; and (2) Appellant was in possession of a large amount of money immediately following Gladys' murder. Finally, two men incarcerated with Appellant testified, stating that Appellant had confessed to stabbing and shooting Gladys.

Appellant counters that he submitted evidence of his own at trial, including (1) testimony from himself denying any involvement with the crime;[4] (2) testimony from Appellant's wife and mother, which was subsequently impeached on rebuttal, providing alibis for Appellant on the night of the murder; and (3) testimony from another inmate

[4] At Robert Sykes' subsequent trial, Appellant testified once again. But, this time, Appellant admitted being in Gladys' home armed with a sawed-off shotgun. He disavowed any intent to murder Gladys, but claimed that the gun accidentally discharged into Gladys' head while he was holding it.

stating that the two inmates testifying for the Commonwealth were lying about Appellant's alleged confessions.

When these circumstances are considered and weighed in their totality, we agree with the trial court that even if Christian's immunity deal had been disclosed to the jury, there is no reasonable probability that the result of Appellant's trial would have been different. Ample independent evidence existed at the time of Appellant's trial which placed Appellant at the scene of the crime and corroborated Christian's story. Thus, our confidence in the jury's ultimate verdict is in no way undermined by the limited effect this impeachment evidence would have had at trial. See Strickler, supra, at 293-94 (although evidence impeaching key witness was significant, in light of other evidence presented before the jury, it was not significant enough to be material); Foley v. Commowealth, 55 S.W.3d 809, 814 (Ky. 2000) ("newly discovered evidence that merely impeaches the credibility of a witness or is cumulative is generally disfavored as grounds for granting a new trial").

In his final assignment of error, Appellant appeals from a ruling of the trial court denying Appellant's Motion for Supplemental Discovery of the Commonwealth Attorney's notes. Appellant claims that those notes could reveal, once and for all, whether Christian was ever asked at Appellant's trial about his immunity deal. As a rule, post-conviction discovery is simply not available. Haight v. Commonwealth, 41 S.W.3d 436, 445 (Ky. 2001). Moreover, a prosecutor's trial notes are work product and thus, are generally not discoverable. See Hillard v. Commonwealth, 158 S.W.3d 758, 766 (Ky. 2005). However, it is also axiomatic that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the

evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Strickler, supra, at 280 (quoting Brady, supra, at 87).

Here, Appellant merely speculates that additional exculpatory evidence could be discovered in the Commonwealth Attorney's notes. "Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review." Id. at 286. Accordingly, we find no reversible error in the trial court's denial of Appellant's Motion for Supplemental Discovery of the Commonwealth Attorney's notes.

For the reasons set forth herein, we affirm the orders entered by the Pike Circuit Court.

Lambert, C.J., Graves, Minton, Scott, and Wintersheimer, J.J., concur. Roach, J., concurs in result only. McAnulty, J., dissents without opinion.

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