STATE OF LOUISIANA	*	**NO. 2003-K-1320**
VERSUS	*	**COURT OF APPEAL**
LARRY KETCHENS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 318-138, SECTION "E"
Honorable Calvin Johnson, Judge
* * * * * *

PER CURIAM

* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge David S. Gorbaty and Judge Edwin A. Lombard)

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WRIT GRANTED;
RELIEF DENIED;
TRIAL COURT RULING AFFIRMED.

STATEMENT OF THE CASE

The defendant was convicted of murder and sentenced to life imprisonment in 1987. On appeal, this court affirmed his conviction and sentence. State v. Ketchens, 552 So. 2d 485 (La. App. 4 Cir. 1989). The defendant filed an application for post conviction relief that was denied by the trial court in 1992. In 1996, the court denied a second application for post conviction relief, and on review this Court affirmed, noting that the application was untimely under La. C.Cr.P. art. 930.8. State v. Ketchens, 96-2115 (La. App. 4 Cir. 10/17/96), unpub.

In 1997, the defendant filed yet another application for post conviction relief wherein he raised a Cage claim. The trial court denied this application on March 24, 1997. However, in April, 1999, the defendant reurged his Cage claim based upon rulings from the U.S. Eastern District and the U.S. Fifth Circuit. The trial court granted his application on September 24, 1999. The State then came before this court seeking relief from this ruling. The writ was granted, the trial court's ruling was reversed,

and the conviction and sentence were reinstated. State v. Ketchens, 99-3188 (La. App. 4 Cir. 1/26/00), 753 So. 2d 328.

On March 25, 2003 the defendant filed a pleading styled as a motion for new trial. The State filed a motion to dismiss, referring to the pleading as an application for post conviction relief. A hearing was held on May 28, 2003 and on June 25, 2003 the court granted the defendant a new trial. The State objected and gave notice of intent to seek writs.

STATEMENT OF THE FACTS

The facts as set forth in this Court's appeal opinion are as follows:

> On December 3, 1986, Officer Lubrano went to 7804 Spruce Street where the Brinson family resided. He interviewed Glen (sic) Brinson and showed him an array of photographs. Glen picked defendant's picture from the lineup identifying him as the man he saw arguing with the victim a short time before the shooting.
>
> On December 5, Officer Pierce interviewed Glen's father, Ike, and showed him another array of photographs from which Ike identified the defendant as the man he saw shoot the victim. On the day of the crime, Ike had gone outside to start his wife's automobile when he saw defendant talking to the victim. She asked Ike if she could use his phone, he told her to go into the house, and defendant shot her repeatedly.

Ketchens, 552 So. 2d at 485-86. This Court's appeal opinion did not include all of the testimony heard at trial.

Dr. Gerald Liuzza testified that on November 26, 1986 he performed an autopsy on the victim Earline Taylor. She had been shot a total of five

times, with three wounds to the side of the neck, one to the front of the chest, and one to the left hip. Either the shots to the neck, which damaged the spinal cord, or the shot to the chest, which penetrated the heart, would have been fatal. All three shots to the neck were contact wounds.

Officer Paul Bolier testified that he and Officer Kingsmill were the first officers to respond to the scene at 7804 Spruce Street. They observed the victim in the street. A doctor and a nurse were administering C.P.R. to the victim. The officers called an EMT unit, but before one arrived the doctor on the scene determined that the victim was dead and ceased C.P.R.

Officer Bolier further testified that he and his partner attempted to find witnesses to the shooting and interviewed a few people. That was the extent of their involvement in the investigation because the Homicide detective they called took over. On cross-examination, Officer Bolier stated that he and his partner "were unable to find anyone that actually witnessed the shooting."

Detective Norman Pierce, the Homicide detective who handled the investigation, arrived at the scene, talked to witnesses there, and directed the Crime Lab while waiting for the coroner's office to arrive. From the father and sister of the victim, the detective was able to develop a possible suspect. On December 5, 1986, Detective Pierce showed a photographic line-up to

Ike Brinson. Prior to that date, the detective had not spoken to Mr. Brinson, but rather Officer Lubrano had spoken to him and to his son, Glenn Brinson, and learned that they had witnessed the shooting. At the request of Detective Pierce, Officer Lubrano transported Ike Brinson to the Homicide office. Ike Brinson told Detective Pierce that he had seen the shooting, and selected the defendant's photo in the line-up. An arrest warrant was then applied for and issued.

During cross-examination, Detective Pierce explained that the victim's father and sister did not witness the shooting. Instead, they gave the defendant's name because he had been the victim's boyfriend. Detective Pierce further stated that, although the police spoke to several witnesses on the scene of the shooting, to his knowledge no one spoke to Ike Brinson. He also stated that the witnesses to whom they spoke gave several different descriptions of the perpetrator. Detective Pierce also testified that he did not recall having spoken to Glenn Brinson at the scene. During further cross-examination, the detective stated that one witness, Ms. Rowley, stated she thought the weapon used might have been a shotgun.

Officer Anthony Lubrano testified that he was assigned to the Second District and participated in the investigation into the shooting of Earline Taylor. He spoke to Ike Brinson and his son Glenn in front of whose

residence the shooting occurred. He also conducted a photographic line-up with Glenn Brinson on December 3, 1986, where Glenn Brinson selected the defendant's photograph. During cross-examination, the officer clarified that he did not speak to anyone in the Brinson household until a couple of days after the shooting. Glenn Brinson said he did not witness the actual shooting, but did see the victim and the defendant arguing. Officer Lubrano also spoke with Ike Brinson, but he did not testify as to the substance of that conversation.

Officer Kenneth Patrilia of the Crime Lab testified regarding the collection of evidence and photographs he took. Officer Donald Brooks testified that he participated in the arrest of the defendant in January 1987.

Rose Hartford, the victim's sister, testified that she and her sister lived on Burdette Street, approximately one-half block from the shooting location. The defendant had dated her sister for a few months, but they had not been dating at the time of the murder. On that morning, the victim left the house to go to the store, while Ms. Hartford went in the opposite direction to go to their parents' home on Fern Street. Shortly thereafter, there was a commotion down the street with several police cars; Ms. Hartford walked over and saw her sister on the ground. She gave the police the name of the defendant when asked if she knew anyone who might have done the crime.

Glenn Brinson testified that he was standing on the corner outside his home on the morning of November 26, 1986 when he saw the victim approaching, talking with the defendant. As Glenn Brinson walked back to his yard, the victim and defendant stopped by the bushes at the edge of the yard. Glenn went inside, but he heard the victim say, "Why don't you leave me alone. I don't want to be bothered with you no more." Glenn Brinson thought nothing of it and went to his room; approximately fifteen minutes later he heard gunshots. Prior to the gunshots, while inside, he looked outside and saw the defendant and victim mumbling; he saw no physical contact between them.

Glenn Brinson testified that he had seen the victim in the neighborhood before, but had never seen the defendant. He denied hearing the defendant and the victim in an argument or raising their voices. He described the defendant's clothing as an unzipped army jacket over a plaid shirt. He also stated that, when he first saw the victim and the defendant, his father was not outside. He did not know if his father spoke with the police on the day of the shooting. Glenn stated that he spoke to two police officers on the day of the shooting.

Ike Brinson testified that he saw the shooting on November 26, 1986. He had gone outside to try to start his wife's car, and saw the defendant and

the victim outside his house. As he was in the car, the victim walked down the driveway and asked him if she could use his phone. As she turned to go, the defendant grabbed her, spun her around, stuck the gun on her, and fired. When the victim fell to the ground, he shot her again twice, then jogged away with the gun in his hand.

During cross-examination, Ike Brinson stated he did not believe he spoke with the police on the day of the shooting. He never gave the police a description of the person he saw shoot the victim. At trial, he described the defendant's clothing as an army jacket and a cap. Mr. Brinson stated he did not see the gun.

The parties stipulated at trial that if Joel James were called to testify he would testify that he was a registered nurse who lived across the street from the shooting scene, heard the gunshots, and administered C.P.R. to the victim, but did not see the shooting or the perpetrator.

The defense presented no witnesses at trial.

ANALYSIS

This writ application raises two issues: the State's contention that the defendant's application for post conviction relief is procedurally barred as both successive under La. C.Cr.P. art. 930.4 and untimely under La. C.Cr.P. art. 930.8, and whether the trial court erred in granting the defendant a new

trial on the basis that the State intentionally withheld exculpatory material.

The trial court ruled on both issues on June 25, 2003. The defense counsel reurged her primary argument, which was that the State had withheld information and denied the defendant due process when it denied in its answer to discovery that any witness had viewed a line-up containing the defendant's photograph but failed to make an identification. Counsel argued that the defendant did not learn until 2001 that a witness had in fact viewed a line-up without making an identification; this information was contained in the district attorney's file. The State responded by rearguing that the defendant's claim was untimely because it was based on the police report provided to the defendant in 1996, and that it was successive for the same reason. At that point, the trial court ruled that it did not believe the application was untimely. The court did not specifically mention the issue of repetitiveness. However, La. C.Cr.P. art. 930.4(A) allows the court to overlook the repetitive nature of an application in the interest of justice, and this is apparently what the court did.

As to the timeliness of the post conviction relief application under La. C.Cr.P. art. 930.8, there is no dispute that the defendant did not obtain the district attorney's file before the article 930.8 prescriptive period ran. However, it also clear that the defendant made no effort obtain the records

until 1997 at the earliest, well after the time limits ran. Article 930.8 does not impose an express due diligence requirement on a defendant, but provides that, if the application is permitted under an exception to the prescriptive period, it shall be dismissed if the State shows it has been materially prejudiced in "its ability to respond to, negate, or rebut the allegations of the petition by events not under the control of the state since the date of original conviction . . . ." Nevertheless, in two cases, State v. Obney, 99-592 (La. App. 3 Cir. 8/11/99), 746 So. 2d 24, and State v. Chapman, 97-0967 (La. App. 4 Cir. 9/3/97), 699 So. 2d 504, a due diligence requirement was imposed in connection with article 930.8.

The Supreme Court denied writs from Chapman, 97-2600 (La. 4/3/98); 717 So. 2d 229, reconsideration denied, 97-2600 (La. 5/29/98), 720 So. 2d 337. However, a month before it did so, it rendered a *per curiam* in Carlin v. Cain, 97-2390 (La. 3/13/98), 706 So. 2d 968, in which it explicitly stated that La. C.Cr.P. art. 930.8(A)(1) imposes no due diligence requirement on an inmate. The court stated that, instead of a lack of due diligence, only the "laches-like provisions of La. C.Cr.P. art. 930.8(B)" bars consideration of an application. Id. The Supreme Court also stated that an appellate court on its own may not deny relief under La. C.Cr.P. art. 930.4 (B) through (E), which pertain to successive and repetitive applications, "but

instead may only review a district court's actions under them for an abuse of the district court's discretion . . . ." Id. In the instant case, the transcripts contain no argument or evidence by the State that it has been prejudiced by the lateness of the application.

This case clearly demonstrates the problems inherent in the lack of an explicit due diligence requirement. The defendant contends that the material in the district attorney's file should have been provided to him pretrial and was not. Neither the defendant nor the State presented any witnesses, such as the assistant district attorneys or the defense trial attorney, with personal knowledge regarding the non-disclosure or sources of the information, much less the witnesses who allegedly viewed photographic line-ups but did not select the defendant's picture or the police officers who conducted the line-ups. In essence, the trial court's decision in this case is based on the barest of records. Moreover, nowhere in the application for post conviction relief, the response from the State, or the transcripts is there any discussion about the lack of witnesses.

Before reaching the merits of the defendant's post conviction claim, the trial court specifically found that the application was timely. The court's decision was most likely based on two considerations. First, the defendant did request the police files in the early 1990s, but the information relative to

the non-identifications was apparently not contained therein. Moreover, after the defendant paid the estimated cost of the district attorney's file in 1998, that office informed him that they had misplaced it. The district attorney's file was not provided until July 2001 when the defendant's counsel received it. Thus, it appears that the defendant's ability to obtain all relevant material was at least delayed significantly by entities aligned with the State's interest.

Our reading of the cases convinces us that Carlin v. Cain precludes our finding that the application was time-barred because the State made no showing that it has been materially prejudiced under the "laches-like provisions" of article 930.8(B). We shall now address the merits of the trial court's decision granting a new trial.

In his application, the defendant averred that the State withheld exculpatory material in the police reports that referred to multiple witnesses who saw the shooting, two of whom could not identify the defendant in a photo line-up. Additionally, the defendant contended that the handwritten report prepared by Officers Kingsmill and Bolier indicated that the prime State's witness at trial, Ike Brinson, told the officers that he did not see the shooting. The defendant also made various complaints about discrepancies in the description of the perpetrator that he alleges should have been

disclosed as exculpatory material.

A review of the transcript of the trial court's ruling on June 25, 2003 reveals that the court granted relief only on the claim that the State withheld the fact that witnesses did not identify the defendant in a line-up, and not any of the other claims regarding withheld material. The parties focused primarily on the fact that one of the witnesses, Ms. Rowley, participated in a photographic line-up and did not identify the defendant. That information is contained in Detective Pierce's report and is very clearly stated in a parenthetical paragraph:

> (On Monday, 12-1-86, Detective's (sic) Norman Pierce and Charles Noulet showed Rowley a photo line-up with the suspect Larry Ketchum's photograph in it. Rowley was unable to identify this subject.) (Oral statement)

The district court record showed that the defendant's discovery request number 67 asked:

> Have any of the witnesses or victims who were asked to make identifications of the defendant, whether by photographs or physical line-up, at anytime (sic) failed to identify the defendant as the perpetrator, only tentatively identified the defendant as the perpetrator, or identified another individual as the perpetrator? If so, state the name or the person attempting to make the identification, where, when, and in what manner the line-up was conducted, and who conducted the line-up?

The answer provided by the State to question 67 was "No." In the face of this plainly erroneous response, the trial court in this case

explained why it was granting relief to the defendant:

> State, my problem with this is the fact that an assistant district attorney both in writing and verbally in this court, lied. Now, there is no question in my mind that that assistant DA who answered the defendant's motions . . . lied because the police report - - the officer who prepared the police report . . . which includes all of the information as regards to those four people who either gave a different description or who failed to identify the defendant, that information contained in that report, given to the DA, the DA then files with this Court an answer to motions and tells this Court and the defendant that in essence, "that does not exist". That's a lie. Then the DA comes into court on a date . . . and again makes the same statement, "that does not exist". That is a lie. **I don't understand how a system of justice can be in fact one that rewards a lawyer who straight up lies. Not only once but more than once straight up lies, regardless now of whether in fact there is or was sufficient evidence to convict the defendant.** I don't think that standard which is either a harmless error standard . . . I don't think that none (sic) of those standards come into play when you have at the outset of the proceeding itself, a lie. **And that can't be rewarded. Because if this Court does anything other than say, "he gets a new trial", the lawyer who lied - - behavior is rewarded. That can't happen, ever happen.**

The State's writ application does not squarely discuss the trial court's finding that the State engaged in prosecutorial misconduct in this case. Instead the State argues that Ms. Rowley's failure to identify the defendant's photograph, after stating that she believed she could, would have been "disregarded by the jury as factually incorrect" because her statement

regarding the weapon and the description of the perpetrator conflicted with testimony of other witnesses. The State argues that the jury would have found Ms. Rowley to be unworthy of belief.

The standard for granting a new trial on a claim that the State withheld exculpatory material is well settled. To comport with the dictates of the due process clause of the Fourteenth Amendment, the State must disclose to the defense evidence that is favorable to the defense and is material to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963); State v. Porter, 98-0279 (La. App. 4 Cir. 3/15/00), 756 So. 2d 1156. Included in this rule is evidence that impeaches the testimony of a witness whose credibility or reliability may determine guilt or innocence. Giglio v. U.S., 405 U.S. 150, 92 S.Ct. 763 (1972).

Materiality was defined in U.S. v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985): "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A `reasonable probability' is a probability sufficient to undermine confidence in the outcome." The same test is to be employed whether or not the defense makes a pretrial request for exculpatory evidence.

In Kyles v. Whitley, 514 U.S. 419, 434-435, 115 S.Ct. 1555, 1565-

1566 (1995), the Court discussed "materiality":

> Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). . . . Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." Bagley, 473 U.S., at 678, 105 S.Ct., at 3381.
>
> The second aspect of Bagley materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

The trial court in this case stated that it was unwilling to weigh the withheld information regarding Ms. Rowley against the evidence that was presented at trial. Instead, the court determined that the misconduct of the prosecutor was clearly designed to prevent a fair trial for the defendant.

Although the State suggests that the court applied an inappropriate standard, the court's reasons can be viewed as within the jurisprudential standard. By intentionally preventing the defense from giving the jury the opportunity to judge the credibility of the witnesses, two of whom identified the defendant (Ike and Glenn Brinson) and one who clearly did not (Ms. Rowley), the State deprived the defendant of a fair trial and undermined the confidence in the outcome. By not informing the defense of the non-identification, and then not calling Patterson to testify at trial, the State prevented the defense from possibly having Rowley testify in open court that the defendant was not the perpetrator.

The State's actions in this case are compounded when one sees that the district attorney's file contained another document generated by Detective Pierce. This document (attached to defendant's post conviction relief application as exhibit N) is the Criminal Investigation Bureau daily report on the incident. It consists of four typed pages and includes summaries of witness interviews. The report has handwritten notations that appear to update the daily report. On page two, the paragraph regarding the interview of Ms. Jane Rowley has the following note: "Shown photos by Pierce & could not ID. Do not use this witness. See me about her." On the next two pages, there are summaries of interviews with three NOPSI

employees who were working nearby when the shooting occurred. Handwritten notations next to the statements of George May and Ivan Maheu state, "can't ID." However, as to the third NOPSI employee, Isaiah Patterson, the handwritten notation states: "Shown Photos by Lubrano but no ID. Reluctant to get involved." Thus, it appears that there were actually two witnesses who failed to identify the defendant in photo line-ups; at trial the State presented the two witnesses who did, Ike and Glenn Brinson.

Perhaps the jury, if it had heard the testimony of all of these witnesses, would have been persuaded by the testimony of the Brinsons. However, the contrary is just as likely. At trial, the defense counsel successfully elicited testimony from Ike Brinson that, despite having seen the actual shooting, he made no attempt to speak to the police when they were on the scene, and did not speak to them until two or three days after the crime occurred. He also testified that he did not give the police a description of the perpetrator because he "wasn't sure." However, the initial police report, which the defendant alleges was also withheld from him, recounts that Officers Kingsmill and Bolier "spoke with Ike Brinson residing at 7806 Spruce St. Mr. Brinson stated that prior to the shooting he was inside his residence and observed the victim and wanted subject arguing . . . . He did not see the actual shooting." This same statement was incorporated into the

supplemental report prepared by Detective Pierce. Det. Pierce's daily report states that Ike Brinson said he was inside when he heard several shots, exited his residence, and observed the victim lying in a pool of blood.

Notably, in the initial and supplement reports, the interview with Ms. Rowley includes her statement that, just prior to the shooting, she observed Glenn Brinson, Gregory Trask, and Anthony Wilson standing about ten feet away from the victim and the perpetrator. Ms. Rowley did not mention the presence of Ike Brinson. Thus, the statement by the investigating officers that Ike Brinson said that he was inside and he did not see the shooting supports Ms. Rowley's statement omitting his presence and conflicts with his unequivocal testimony that he never spoke to any police officers until days after the shooting.

Furthermore, Ms. Rowley's statement recounted in the initial police report is very detailed. She stated that she was arriving home in a cab after shopping. She saw the victim in the driveway of the Brinson residence arguing with a black male wearing a light colored shirt and dark slacks. She was on her porch when she heard the victim say, "Why don't you just leave." Then she heard three shots and saw the victim running near a vehicle. The perpetrator fired at the victim again, then ran from the scene. Thus, according to this statement, Ms. Rowley saw and heard as much or

more than Glenn Brinson testified he saw.

The record before this Court establishes that there were many people who either witnessed the victim and her assailant arguing before the shooting, or heard the shooting and saw the assailant fleeing. Two of these people, Ms. Rowley and Isaiah Patterson, apparently viewed a photo line-up and did not identify the defendant. The State not only did not disclose this information to the defense, but, when asked, it denied that any such identification procedures had occurred. The State called the only two witnesses who identified the defendant. Of those two witnesses, Ike Brinson initially denied seeing the shooting, but then denied at trial that he ever spoke to the police at the scene. Although the State now contends that the jury would have continued to believe his testimony as supported by Glenn Brinson's identification of the defendant, we cannot say that the withheld information does not undermine confidence in the jury verdict.

For the foregoing reasons, we grant the writ application and affirm the ruling of the trial court.

WRIT GRANTED;
RELIEF DENIED;
TRIAL COURT RULING AFFIRMED.