No. 33314 *State of West Virginia v. David Farris*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, dissenting:

Assumed facts not in the record should not trigger the ordering by this Court of a new trial. Unfortunately, as in this Court's recent majority decision in *State v. Youngblood*, – W. Va. –, 650 S.E.2d 119 (2007), I believe the majority has again leapt to factual conclusions not borne out by the record before us and, relying on such presuppositions, has prematurely, and perhaps erroneously, ordered a new trial below. Accordingly, I dissent.

To reach its conclusion, the majority must assume that there was a *joint* investigation by Kentucky and West Virginia authorities herein, thereby permitting an imputation of knowledge of Kentucky authorities to West Virginia authorities.[1] For only if there was a joint investigation is there the potential that the knowledge of information contained in the file of a Kentucky forensic psychologist may be imputed to a West Virginia

[1] The majority's rush to order a new trial herein typifies the same error in judging which I believe was also present in the majority's decision in *Youngblood* when, in that case, the majority readily accepted as authentic an unauthenticated document with an exceptionally suspicious governance and, accepting the highly questionable document as absolutely authentic, used that document to order a new trial.

prosecutor under *Youngblood*.[2] However, no evidentiary hearing was held below to determine whether there was such a joint investigation. The trial court made no factual finding that West Virginia officials were ever engaged in a joint investigation with Kentucky authorities on the allegations against Mr. Farris. Furthermore, there is no factual finding by the trial court that Robin Brozowski, a forensic psychologist with the Child Advocacy Center in Pikeville, Kentucky, was a police investigator or part of the investigative team in this matter. To reach an analysis under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963), the majority simply *assumes* that there was a joint investigation into the allegations against Mr. Farris by West Virginia and Kentucky authorities, and further assumes Ms. Brozowski's role therein.

This assumption by the majority that there was a joint investigation and Ms. Brozowski's role therein is critical to the majority's decision herein because without this assumption a *Brady* analysis is not triggered. I would instead remand this matter to the trial court to conduct an evidentiary hearing and make factual findings on whether there indeed was a such a joint investigation and, if so, Ms. Brozowski's role in such an investigation.[3]

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[2] In Syllabus Point 2 of *Youngblood*, this Court held: "A police investigator's knowledge of evidence in a criminal case is imputed to the prosecutor. Therefore, a prosecutor's disclosure duty under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982) includes disclosure of evidence that is known only to a police investigator and not to the prosecutor."

[3]It is apparently undisputed that the prosecutor was unaware of the existence of the (continued...)

Only if the trial court were to make the requisite factual findings that there was such a joint investigation and that Ms. Brozowski was a part of such an investigation would the issue of a new trial be triggered.

By remanding this case, the trial court would have the opportunity to conduct the initial *Brady* analysis, an analysis which is often fact-intensive and therefore not conducive to an appellate determination.[4] Our role on appeal should be one of review, not determination in the first instance. In addition to determining whether a joint investigation between both jurisdictions took place, other facts could be determined by the trial court, such as Ms. Brozowski's *actual* role in the investigation, Mr. Farris' ability to obtain the report other than through the Mingo County prosecutor's office, and the significance of the report to the defense. The trial court, having already sat through two trials in this matter, is in the best position to determine the significance of the report to the defense and should have been afforded the opportunity to make the requisite factual findings and conduct the initial *Brady*

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[3](...continued)
report before trial. Based upon Ms. Brozowski's testimony at the first trial, the prosecutor may have had an obligation to inquire as to the existence of this evidence. However, because that issue was not addressed by the majority nor served as a basis for the majority decision herein, I withhold a definitive opinion on that issue.

[4]I would also note that the potential existence of a report and knowledge of Ms. Brozowski's interview with Barbara R. was apparently known to Mr. Farris and his counsel prior to his first trial. As such, Mr. Farris could have obtained the report pursuant to subpoena through the Kentucky court system if he believed the same to be truly that critical to his defense.

analysis.

Before this Court should jump to the conclusion that a trial court got it wrong, we should ensure that the record actually establishes that the trial court did get it wrong. Here, that is not the case. Unless the majority, as a matter of law, proposes to impute knowledge of an independent criminal investigation by a foreign jurisdiction to West Virginia authorities, we should not vacate a criminal conviction absent some certainty of actual error below.[5] By prematurely accepting as fact something which is clearly not a fact, as it also did in *Youngblood*, the majority has improvidently ordered a new trial herein based upon supposition, not on facts within the evidentiary record. Accordingly, I dissent.

I am authorized to state that Justice Maynard joins in this dissent.

[5]One is left to ponder whether the knowledge of federal authorities developed in a separate investigation may now be imputed to West Virginia prosecutors simply because the same issues may have been present in both federal and state investigations of a given defendant. It is my hope that this Court will, in the future, practice some what more restraint when determining matters with important factually-intensive issues and under-developed records.