

FILED

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS

Date: 12/28/18
FILE STAMP
Morgan A. Klein
Clerk of the Circuit Court
By Deputy
Winnebago County, IL

People of the State of Illinois,

vs.

Patrick Pursley

Case No. 1993 CF 1174

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS

I. Introduction

This matter comes on for decision on Defendant's motion to dismiss the charge of first-degree murder against Patrick Pursley alleging due process violations for the 19 month delay in the State's disclosure of a bystander report dated April 14, 2017 which suggested that a Rockford Police detective confessed to the victim's mother that he had planted evidence in the defendant's case and because if the substance of her statements is verifiably true, they would constitute materially exculpatory evidence. After the report was disclosed to the defense in November, 2018 and brought to the attention of the Court, the trial date was continued so that the parties, with the assistance of the Court, could conduct expedited discovery on the substance of the statement (*i.e.* whether a detective had made such a statement and whether he had planted evidence in the case) and the circumstances surrounding the 19 month delay in disclosure of the bystander report to the defense.

In subsequent weeks, extensive discovery was undertaken. The Court conducted numerous in-person and telephonic discovery conferences with the parties and convened IT experts from both the City and the County in an attempt to discover any emails and any other communication in whatever form pertaining to the substance of Ms. Asher's statement, the circumstances surrounding the event detailed in the statement, and the conduct of the parties responsible for the investigation and disclosure of her statement.

Prior to an evidentiary hearing held on December 20 and 21, 2018, the parties each submitted a memorandum outlining their respective positions as to the defendant's motion to dismiss. After hearing from fourteen witnesses and receiving stipulations, the parties each argued their positions and the Court took the matter under advisement.

II. Findings of Fact

1. On April 14, 2017, Lois Asher, the mother of the victim, told Jodi Miller, a victim advocate with the State's Attorney's Office, that following the defendant's trial in 1994, a

Rockford City police detective told her words to the effect that because the police had been unable to locate the actual murder weapon used to kill the decedent, the police had planted a firearm in the case.

2. At the time of Ms. Asher's statement to Ms. Miller, the Pursley case was on appeal following this Court granting the defendant a new trial based on expert testimony concerning the ballistic evidence received at trial.
3. Following the disclosure by Ms. Asher, Ms. Miller informed Assistant State's Attorney Steven Biagi who then informed his supervisor, Deputy Assistant State's Attorney Marilyn Hite Ross, what Ms. Asher has said. In Mr. Biagi's opinion, Ms. Asher's information was not credible, but both Mr. Biagi and Ms. Hite Ross agreed that Ms. Hite Ross instructed Mr. Biagi to have Ms. Miller draft a bystander report and to have the Rockford Police Department investigate the matter. Where Mr. Biagi and Ms. Hite Ross disagreed was on Ms. Hite Ross' instructions as to disclosure to the defense. Ms. Hite Ross testified that she told Mr. Biagi to disclose the bystander report immediately. Mr. Biagi testified that Ms. Hite Ross' instruction was, because the case was on appeal, to delay disclosure to the defense until the police investigation was complete. Because reliance on either account leads to the same conclusion, the Court makes no finding as to which is an accurate account of the events following the statements made by Ms. Asher in April 2017.
4. The bystander report (DX 39) was prepared and the report was provided to Assistant Deputy Chief Kevin Ogden with the Rockford Police Department for investigation. According the ADC Ogden, he received the report from Mr. Biagi who indicated that there was no urgency to the investigation. ADC Ogden kept the report for a period of time but never read it and never conducted or assigned an investigation into the matter. Ultimately, he misplaced the report.
5. On May 2, 2018, the trial court's decision in the Pursley case was affirmed by the appellate court and on June 20, 2018, the mandate returning the case to the trial court was entered.
6. In June of 2018, Mr. Biagi was fired from the State's Attorney's Office for reasons unrelated to the Pursley case.
7. Assistant Deputy State's Attorney James Brun was subsequently assigned the case and on August 7, 2018, the matter was set for jury trial on November 13, 2018, with a final pretrial conference on November 7, 2018.
8. On November 2, 2018, prior to the disclosure of the bystander report, the defendant waived his right to a jury trial and the matter was left on for bench trial on November 13, 2018.

9. On November 8, 2018, in preparation for trial, Mr. Biagi communicated with Mr. Brun via email (DX 62), and at that time Mr. Biagi mentioned the existence of the bystander report.
10. Mr. Brun attempted to locate the bystander report without success. An investigator with the office, Mandy Santiago, then went to speak to Ms. Asher about her conversation with a police detective back in 1994 and her conversations with the State's Attorney's Office in April 2017.
11. Ms. Santiago prepared a report of her interview with Ms. Asher (DX 2) and on November 9, 2018, Ms. Santiago's report as well as Ms. Miller's bystander report (which had been located) were disclosed to the defendant's attorneys.
12. On November 13, 2018, due to the nature of the information provided by Ms. Asher (*i.e.* a statement made by a police officer to the victim's mother in which the officer admitted planting the very evidence that had been a crucial piece of evidence in the defendant's trial and which had been undermined to the point that the Court granted the defendant a new trial), the Court continued the trial scheduled to begin that day to January 10, 2019, and ordered expedited discovery and set an evidentiary hearing on defendant's motion to dismiss on December 20-21, 2018.
13. Ms. Santiago's notes from her interview with Ms. Asher (DX 01) were not disclosed to the defense until November 28, 2018.
14. Ms. Asher testified at the Motion to Dismiss hearing. Whereas Ms. Asher's statements to Ms. Miller and Ms. Santiago (as summarized in each witness' written reports and testimony at the same hearing) seemed straightforward, if somewhat lacking in detail, her testimony was perplexing. According to both Ms. Miller and Ms. Santiago, Ms. Asher told them separately and approximately 19 months apart that the unnamed person spoke of planting evidence in the case and spoke in the presence of Ms. Asher and her now-deceased husband. At the evidentiary hearing, Ms. Asher denied being present for any such conversation, that her husband told her about such a conversation and that she did not see who said such a thing to her husband.

III. Discussion

15. When the Court first became aware of existence of Ms. Asher's comments as contained in the Miller bystander report and the failure of the State's Attorney's Office to disclose the report until 19 months after it was authored, the Court was gravely concerned.
16. It seemed astonishing that such evidence would come forward, from that source, which went to the very heart of the State's appeal of this Court's ruling in granting the defendant a new trial. This Court had granted Mr. Pursley a retrial based on the testimony of forensic experts who testified that the handgun in evidence could not have fired the bullet that killed the decedent nor could it have ejected the shell casings found at the crime scene. Now it was coming to light, from the victim's mother of all people (a

person who could presumably be relied on to have no bias in favor of the person convicted of killing her son), that there may be evidence of a firearm being planted by the police.

17. Even more astonishing was the fact that the investigation had been entrusted to the same department whose conduct was at issue and that nothing was done. Allegations had been made that at least one Rockford police detective had planted evidence in a murder case and matter had been turned over to the Rockford Police Department for investigation.
18. It was for that reason the Court insisted on involvement with the discovery process to attempt to determine whether police misconduct had occurred and if so, whether such misconduct had been covered up. Also, to flesh out in as much detail as possible the circumstances of the detective speaking to Mr. and Ms. Asher back in 1994.
19. However, after the discovery process in which the court and the parties engaged since the November 8th disclosure of the bystander report and after the testimony and other evidence received at the hearing on the defendant's motion to dismiss, the Court cannot find that the bystanders report is "material exculpatory" evidence. Ms. Asher's in court sworn testimony refuted or denied her statement contained in the bystander report. Her prior statement is uncorroborated hearsay. As such, it cannot be considered "material exculpatory evidence".
20. Given the fact that this Court finds Ms. Asher's prior statements are not "material exculpatory", the next inquiry is whether they are "potentially useful evidence" for the defense. The court finds that Ms. Asher's prior statements are "potentially useful evidence". The defendant must show bad faith on the part of the State in order to prevail, where the undisclosed evidence is "potentially useful" (as opposed to "material exculpatory"). *People v. Stolberg*, 2014 IL. App (2d) 130963.
21. It is clear and undisputed that the Winnebago County State's Attorney's Office willfully failed to tender to the defense in a timely manner Ms. Asher's April 13, 2017 statement. At the time of the making of her statement, it was unknown whether the Appellate Court would affirm this Court's decision to grant Mr. Pursley a new trial on the murder charge or order him to serve the rest of his sentence at the Illinois Department of Corrections.
22. Ms. Asher's statement about a gun being substituted by the Rockford City Police Department went to the very heart of the ballistic evidence issues on appeal.
23. At the time the statement was made, it bore all of the earmarks of "material exculpatory evidence". Only after extensive discovery and hearing on the defendant's motion to dismiss did the character of that evidence emerge.
24. The State has admitted, as the defense has contended, that *Brady* and its progeny absolutely compelled the immediate disclosure of that type of evidence and the Court's finding today that it was not "material exculpatory evidence" in no way changes that fact. The discovery rules are different and broader than the rules of evidence and the state does

not get to decide whether or not to disclose based on their own credibility assessment or based on admissibility standards.

25. Whether it was an Assistant State's Attorney acting on his own or following the directions of the Deputy Assistant State's Attorney in charge of the Criminal Division, the statement was not turned over for 19 months and there was no follow up of any kind in spite of the apparent nature of the evidence.
26. However, the Court cannot find that the evidence supports that the State's Attorney's Office or the Rockford City Police Department acted in bad faith. The evidence adduced at the hearing on defendant's motion to dismiss for violation of his due process rights does support the conclusion that each acted with gross negligence.

WHEREFORE, for the reasons stated above and the facts appearing in the record, this Court denies defendant's motion to dismiss for alleged violations of his due process rights and orders that the matter remain set for a bench trial on January 10, 2019.

ENTERED: Joseph D. McGraw
Joseph G. McGraw

DATED: 12/28/2018