

IN THE SUPREME COURT OF THE STATE OF NEVADA

LACY L. THOMAS,)
)
Petitioner-Defendant,)
)
vs.)
)
EIGHTH JUDICIAL DISTRICT COURT)
of the State of Nevada, in and for Clark)
County; THE HONORABLE MICHAEL)
VILLANI, DISTRICT JUDGE, DEPT. 17,)
)
Respondents,)
)
and)
)
THE STATE OF NEVADA,)
)

Real Party in Interest.)

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**REPLY IN SUPPORT OF
PETITION FOR WRIT OF
MANDAMUS**

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I. INTRODUCTION

This case has been characterized by the overreaching of the State from the very earliest stages of this prosecution. Before the Grand Jury, the prosecutor deliberately injected the race of the defendant into the proceedings, insuring that the Grand Jury considered the race of the defendant and of some of the contractors in determining whether the case should proceed. See Respondent's [Thomas'] Answering Brief in Appeal No.58833, p.26.¹ Throughout the trial, the trial court judge questioned whether the State's theory constituted a crime, at one point the prosecutor stated that the State need not prove any harm to UMC, only that the contract benefitted "somebody," the court commented that under the State's theory, a bad business decision would become a felony. TT, 3/23/10, p. 151. Following the declaration of a mistrial due to the State's failure to disclose Brady material, the trial court dismissed the entire case on the ground that the conduct

¹For example, before the Grand Jury, the following exchange between the prosecutor and the investigating detective occurred:

Q: But of the companies and ties that you investigated [ACS executives] were the only two exceptions to the general rule of being fraternity brothers and black males from Chicago; is that right?

A: That's correct.

Q: Lacy Thomas is a black male himself?

A: Yes, sir.

Grand Jury Transcript, AA, p. 89 in Appeal No.58833.

alleged failed to state a crime.² Allowing the State to continue its pattern of overreaching and harassment by putting Lacy Thomas through another trial is wrong and should not be tolerated.

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby [1] subjecting him to embarrassment, expense and ordeal and [2] compelling him to live in a continuing state of anxiety and insecurity, as well as [3] enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 335 U.S. 184, 187-88 (1957).

Much of the State's Answer is devoted to issues which are not before this court in this Petition. First, the State argues that the material which was withheld from the defense was not really Brady material. The determination as to whether the material was subject to Brady analysis was made on April 10, 2010, when the mistrial was declared. PA³, pp, p. 109-10. The only purpose of the evidentiary hearing was to determine whether the conduct of the State warranted a determination that double jeopardy would be violated if the defendant was subjected to a second trial after the first trial was aborted as a result of the failure

²This court reversed on a different ground—that the Indictment provided sufficient notice –which is the subject of the second issue in this appeal.

³References to the Petitioner's Appendix in this docket will be to "PA." References to the Respondent's Appendix in this docket will be to "RA."

to disclose the material. The trial court reaffirmed its decision that the material was Brady material in its decision. PA, p. 147. Secondly, the State asks this court to determine that the prosecutor did not have possession of the materials, rather, that they were in the possession of the detectives and the defendant should have known that. The problem with that argument is that the trial court believed Detective Ford's testimony at the evidentiary hearing that he gave the materials to DDA Scott Mitchell long before the trial began.⁴

Resolution of the double jeopardy issue requires only two determinations: 1) whether Nevada's standard for protection of a defendant's double jeopardy rights is broader than that adopted by the U.S. Supreme Court; 2) whether a defendant's protections against double jeopardy can be violated by a second trial when the first trial was aborted due to the failure of the prosecutor to disclose Brady materials that he had in his possession and which had been discussed with him by the investigating detective on the basis that the failure to disclose was not intentional even though the prosecutor offered no reason for the failure to disclose.

⁴The State seeks to supplement its Appendix with the voluminous binder containing the withheld material. Presumably, the State seeks to have this court read the contents of the binder to make its own factual determinations as to the nature of the documents.

II. DOUBLE JEOPARDY

A. The Findings of the Trial Court

The trial court made the following findings of fact and conclusions of law:

- “the ‘binder’ contained exculpatory evidence;”
- “there was a Brady violation by the State...”
- “the ‘binder’ was given to the District Attorney’s Office by the police.”⁵
- “there was no intention to withhold any evidence by the State...”
- “jeopardy did not attach to [counts 2 through 10] because “there was no carryover to those counts [because the withholding was not intentional and Count 1 was dismissed].

Findings of Fact and Conclusions of Law, App, p. 427

B. The Legal Conclusion by the Trial Court that the Binder Constituted Brady Material was Made on April 2, 2010 and Cannot be Revisited Here

The State argues that the trial court’s determination 10 days into the trial on April 2, 2010 that the material in the binder was exculpatory and constituted a Brady violation should be revisited here. The trial court reaffirmed that legal conclusion in its Findings of Fact and Conclusions of Law, PA, p. 427. It is

⁵Although the State continues to argue that the prosecutor did not gain possession at any time of the materials, the trial court obviously did not believe that and instead found the testimony of Detective Ford more credible.

obvious that the trial court believed at the time of the mistrial that the materials were subject to the Brady doctrine. If they weren't, a mistrial would not have been necessary.

The State argues that the violation was harmless because the defense found out about the materials in the middle of trial and could have presented it then. Again, that issue was resolved at the time of the Motion for Mistrial. The trial court determined that the violation could not be cured by recalling the witnesses after the witnesses "were on notice of the cross-examination and perhaps some of the shortcomings of their testimony" PA 397-398, and thus the mistrial was granted. The time for challenging that determination has passed long ago.

The State argues that the defendant should have gone through the voluminous materials in the evidence vault and found this exculpatory material on his own. That is not how Brady works as the District Attorney has been repeatedly reminded by both state and federal courts after undisclosed exculpatory evidence has been found in post-conviction proceedings. Again, this issue was argued and rejected at the time of the mistrial motion.

Finally, the State argues that the evidence simply wasn't exculpatory. The trial court, which had the advantage of hearing 13-15 witnesses and 10 days of trial before the defense learned of the material, made the determination (a mixed

question of law and fact) that the material was exculpatory.

C. The Trial Court's Factual Findings are Supported by Unrefuted Evidence

In order to argue that the State was surprised by the existence of the Brady material, the State seeks to have this court determine that the testimony of Detective Ford that he had provided the binder to DDA Scott Mitchell prior to trial and discussed the contents with him was not credible and instead the testimony of Detective Whitely should be accepted by the court. The trial court heard the testimony of both detectives and obviously determined that Detective Ford's testimony was more credible. Additionally, the State asks this court to find that, contrary to the findings of the trial court following the evidentiary hearing, the prosecutor was as surprised as the defense to find out about the materials. To support that contention, the State refers to unsworn statements made by DDA Staudaher during trial just before the declaration of a mistrial. Answer, p. 25; PA, p. 56. The problem is that Detective Ford testified at the evidentiary hearing under oath that he provided the materials, and discussed the exculpatory nature of those materials with DDA Scott Mitchell, not DDA Staudaher. In response to a question from the court, the detective testified that he gave "the disc [which became the binder] relating to the Campbell meeting" to prosecutor Scott Mitchell [prior to trial]. PA, p. 359. That was the testimony which was credited by the trial court

judge in his findings. DDA Scott Mitchell did admit at the time of the mistrial motion that he had discussed the exculpatory nature of the materials with the detectives: “[the detectives] did not think there was anything worth pursuing either with respect to Mr. Thomas or ACS.” PA, p.60⁶.

D. The Legal Conclusions are Fatally Flawed

The legal conclusions of the trial court were fatally flawed in two respects:

1) The trial court used the wrong standard to determine if the defendant’s protection against double jeopardy was violated; 2) The trial court erroneously based its decision on a finding that double jeopardy did not attach to all of the counts upon which trial had begun.

E. In Nevada, Double Jeopardy is Violated by a Retrial Caused by a Prosecutor’s Conduct which is Inexcusable, Indifferent to the Consequences, Harassing or Overreaching.

Admittedly, the standard in Nevada applicable to the issue at hand is not clear. The standard to be applied to conduct on the part of the prosecutor when it causes a mistrial has been described as “whether [the conduct] was ‘excusable’ negligence or ‘inexcusable’ negligence.”Hylton v. Eighth Judicial Dist. Court of

⁶The State did not call DDA Scott Mitchell to refute Detective Ford’s testimony or to explain why when he was given the materials and had discussed the exculpatory nature of them with the detective, he did not provide the materials to the defense.

State of Nev., Dept. IV, 743 P.2d 622, 627 (Nev. 1987). Hylton makes it clear that a mistrial caused by conduct of a prosecutor even when the prosecutor is “subjectively unaware” of the consequences of the conduct will prevent retrial when the defendant’s “constitutional right to be free from repeated attempts to convict him,” is weighed against “inexcusable” errors in judgment. Id.

Additionally Hylton addresses the standard set forth in Melchor-Gloria v. State, 660 P.2d 109 (1983), a case relied upon by the State in its Answer. Discussing why the double jeopardy bar did not apply, this court stated “The *Melchor-Gloria* prosecutor did not act intentionally or with bad faith, and the prosecutor was not ‘grossly’ negligent. We concluded that the prosecutor had been negligent but that ‘relatively unusual factual setting of the instant case partially mitigates the prosecutor’s derelictions.’”⁷ The State cites to federal cases in support of its position that only conduct which is found to be intentional will bar repeated attempts to convict Mr. Thomas. The problem is that both Hylton and Melchor-

⁷The State avers that it is “unclear” why the federal court order PA, pp. 243-246, laying out all of the instances in which the Clark County District Attorney’s office has failed to recognize or disclose Brady material et seq. is relevant to the issue here. It is relevant because six years before the conduct at issue in this case, the federal court warned that office that it has failed to adopt appropriate protocols to protect against future violations of a defendant’s rights under Brady. The order shows that the conduct of the District Attorney’s office here is not mitigated as the conduct was in Melchor-Gloria.

Gloria clearly provide for alternative grounds for a determination that a second trial is barred: “inexcusable negligence” (Hylton) or “gross negligence” that is not mitigated.” (Melchor-Gloria) or the prosecutor otherwise engaged in “overreaching” or “harassment.” (Melchor-Gloria). The trial court’s determination that only subjectively intentional conduct would bar retrial was wrong.

The State fails to recognize that Nevada is one of the jurisdictions which agree, based on state constitutional standards, with the concurring opinion of in Oregon v. Kennedy, 456 U.S. 667, 682 (1982) (Stevens, Brennan, Marshall and Blackmun, JJ concurring) that the exception adopted by the majority (the one chosen by the State here) should not be limited to “intentional conduct intended to goad the defendant into a motion for mistrial.” The concurring Justices argue that “an exception for overreaching or harassment” should remain available...” Id. at 691. As explained by one commentator,

In determining whether to bar retrial, the United States Supreme Court and several state courts focus on the prosecutor’s intent, analyzing whether the prosecutor specifically intended to goad the defendant into requesting a mistrial. Several other states suggested that the pre-Kennedy standard better protected the rights of a defendant and created their own expanded standards when determining whether to bar retrial.

Edwards, Jessica, *Prosecutorial Misconduct and the Double Jeopardy Clause: An Attempt to Find a Universally Acceptable Standard*, 37 Suffolk U.L.Rev. 145, 166 (2004)

Nevada has apparently joined those states (See cases cited at pp. 17-19 of the Petition in this case) which have decided under their state constitutions that a defendant's protections against harassment and overreaching by a prosecutor or inexcusable negligence which causes a mistrial are important enough that a failure of a prosecutor to show how the conduct was excusable, is sufficient to bar retrial.

The Double Jeopardy Clause is based on three rationales: 1) Because of the government's vastly greater resources than the average defendant, the government has potential to harass and emotionally wear down the defendant; 2) During the continuance of a trial, the defendant suffers great anxiety and insecurity; 3) An additional trial increases the likelihood of an unjust conviction. See discussion and citations in Young, Michael, *Double Jeopardy and Defendant's Request for Mistrial*, 27 Tex. Tech. L.Rev. 1631, 1634 (1996).

All three of these rationales are poignantly present in this case.

F. Jeopardy Attached when the Jury was Sworn as to all counts

In determining that another trial was not barred, the trial court reached the following conclusion of law:

THE COURT FURTHER FINDS THAT because the Nevada Supreme Court determined that Count 1 of the original indictment should be dismissed and also because there was no intention to withhold any evidence by the State, that there is no carryover to the other counts so jeopardy did not attach to those counts.

PA, p. 427.

The State has failed to respond in any way to the argument made in the Petition at p. 21 that jeopardy attached to all counts when the jury was sworn. Hanley v. State, 83 Nev. 461, 465, 434 P. 2d 440, 442 (1967). The trial court's determination that the remaining nine counts were not even subject to a double jeopardy analysis fatally flaws the trial court's legal conclusion that a second trial could proceed on Counts 2 through 10. The writ must be granted on this ground alone.

III. THIS COURT'S DECISION IN THE PRIOR APPEAL DID NOT DECIDE THE ISSUES RAISED IN THE MOTION TO DISMISS THUS THE TRIAL COURT COULD RULE ON THE MERITS OF THE MOTION.

During the trial, the district court repeatedly questioned the State with regard to its theory of criminal culpability. This is a public corruption prosecution which involves no kickbacks, no peddling of influence, no violations of any nepotism regulations and the contracts at issue were all approved by the appropriate staff and Commission of the County.⁸ In his Answering Brief, Thomas

⁸The trial court's ruled on the original Motion to Dismiss: "Throughout the pleadings and arguments during the various motions in this matter and based upon the Grand Jury testimony, the State concedes that Thomas has not personally received any private benefit from the contracts in question. Further, they concede that each original contract had to go through a vetting process by Thomas, various members of UMC, a Clark County District Attorney, and Clark County staff

provided an exhaustive list of all case law that could be found on state public corruption cases and pointed out that no prosecutor anywhere in the country had attempted to criminalize similar conduct. Respondent's Answering Brief in Appeal No 58833, pp. 10-17. The Motion to Dismiss, then and now, moved to dismiss on alternative grounds: the conduct alleged in the indictment failed to state a crime or in the alternative, if it constituted a crime, the statutes were vague as applied due to the lack of standards and the dangers of overreaching by prosecutors. The defendant did not move to dismiss on the ground that the Indictment failed to provide sufficient notice of the conduct alleged. The trial court ruled that the conduct alleged did not constitute a crime. The State analyzed the case not under the theories set forth in the motion to dismiss but on a theory that the Indictment provided adequate notice of the conduct alleged. This court decided the case on the State's theory and affirmed the dismissal of Count 1 but reversed on the remaining counts. PA, pp. 120-125.

Here, the State makes the curious argument that the trial court judge did not refuse to rule on the Motion to Dismiss and therefore extraordinary relief is not warranted. As part of that argument, the State asserts that the judge did not use the

before receiving ultimate approval by the Clark County Commissioners. Also, all invoices submitted by the entities identified in Counts I-V were paid by the County and not by Thomas. RA, p. 32.

words “law of the case” and therefore any authority based on the doctrine of law-of-the case is not applicable.

First, at the argument on the motion, it was clear that the district court believed that it could not rule on the motion on its merits because it believed that this court had implicitly decided the issues in the previous appeal taken by the State from the dismissal of the case.

I have to assume that the Supreme Court reviewed the entire record when this case up on appeal. I’m assuming they reviewed my decision because like I said it was crystal clear to me that I never said the –that the allegations [of the Indictment] were unclear. I said the allegations in my opinion at the time did not constitute a crime or it was of I called it an ill-conceived ...contract....And by the Supreme court deciding the matter in a way they did as well as by denying the motion for consideration, I believe they took into consideration the arguments today.

And I think I’m being asked to overrule the Supreme court because it just seems to me that the defense and the motion for reconsideration said, look, Judges or Justices–Villani didn’t say it was clear. He said it was clear. But it’s not–it’s not–it’s not alleging a crime. And then they just denied. And so I’ve got to believe they reviewed the entire record and the briefs. And based upon that, I’m going to deny the motion at this point.

If anything is unclear, then the defense will appeal this decision today and hopefully we’ll have more clarity down the road, but—and maybe the Sate will—the State does say it’s crystal clear where we’re at and the Supreme Court perhaps it’s saying it’s crystal clear as well. I didn’t read it that way, but I file—I will follow the directives of the Nevada Supreme Court. And so I’m going to deny the motion for the unconstitutional as applied here.

PA, p.421-2.

The oral ruling of the court became the following written conclusion:

THE COURT FURTHER FINDS THAT the Nevada Supreme Court has previously determined that Defendant was sufficiently put on notice of the criminal acts charged in the remaining counts of the Indictment. The court assumes that the Nevada Supreme Court considered the arguments made by Defendant in the briefs and Motion for Reconsideration and therefore this court is **without authority** to consider the Defendant's Renewed Motion to Dismiss Based on Failure to State a Crime, or in the alternative, Unconstitutional Vagueness of the Statutes. PA, p. 427 [emphasis added].

It is difficult to understand how the State could believe that the trial court ruled on the merits of the renewed Motion when it concluded that it was without authority to do so. The court could either grant or deny the pending motion. It denied the motion on the basis that it was without authority to rule on it.

Secondly, the State argues that the issue cannot be analyzed based on the doctrine of law-of-the-case but does not suggest an alternative legal theory. The district court concluded that it was without authority to rule on the motion because it was bound by a previous ruling in the case. Simply put, that is a ruling based on law-of-the-case. The State doesn't like that analysis because they are unable to point to any place in the decision of this court where the issues raised in the motion are discussed, referenced or rejected. "Normally, 'for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue

explicitly or by necessary implication.” Recontrust Co. v. Zhang, 130 Nev. ____, 317 P. 3d 814, 818 (2014).

The issues raised with regard to the breadth and specificity of Nevada’s public corruption statute are important ones and must be ruled upon to permit review by this, or subsequent courts. As argued in the motion below, the federal courts have been struggling with insuring that the application of federal public corruption statutes are applied constitutionally. As recently as January 15, 2016, the United States Supreme Court granted certiorari on yet another federal prosecution in which the constitutionality of the application of the federal “honest services” statute has been challenged. See McDonnell v. United States, U. S. Supreme Court Docket No. 15-474. Lacy Thomas is entitled to take this very current issue to the United States Supreme Court to test the constitutionality of the application of the state statute to his case. If he were to try to seek that review, what would the U.S. Supreme Court review? The original motion was granted by the trial court. This court did not decide the issue and the trial court has determined that it is without authority to rule on the merits of the renewed motion. This court must allow this defendant to secure a ruling which is capable of review.

IV. CONCLUSION

The fundamental rationales underlying the Double Jeopardy Clause are at

issue in this case. The Clark County District Attorney's office and/or its agents have a long history of withholding material from the defense. Citizens such as Lacy Thomas have constitutional protections under both the federal and state constitutions precluding a prosecutor from receiving exculpatory evidence which has been brought to his attention by law enforcement and failing to disclose it to the defense. The balance which must be struck between the power of the government and the rights of the defendant, tips in favor of the defendant when a grossly negligent prosecutor offers nothing to mitigate the withholding of the information and forces a defendant to abort a lengthy trial in order to attempt to compensate for the State's failure to disclose. The District Attorney's office (despite being warned five years earlier by a federal judge) simply does not understand its obligations under Brady and Kyles⁹. We know this because the remedy suggested by the State at the time of the mistrial motion was to "bring Metro in here and scold them..." PA, p. 84. Mr. Thomas' constitutional rights should not be ignored merely because the State has chosen not to learn its

⁹References to Brady throughout these pleadings are to Brady v. Maryland, 373 U.S. 83 (1963) and Kyles v. Whitley, 514 U.S. 419 (1995) establishing that it is the prosecutor's responsibility to insure that *Brady* material in its possession and in the possession of its agents is disclosed to the defense. See discussion of a Nevada case explaining these obligations in United States v. Blanco, 392 F.3d 382, 388-9 (9th Cir. 2004).

obligations.

This court ruled on the State's appeal on a ground which was not raised by the defendant, or decided by the trial judge. This court did not rule on the merits of the defendant's motion to dismiss for failure to state a crime or in the alternative, unconstitutional vagueness of the application of the statute to the conduct alleged. At this juncture, there is simply no ruling on the merits of the motion and the trial court has determined that its hands are tied. Extraordinary relief is warranted to insure that the merits of the motion are addressed in a manner that will permit review.

Dated this 8th day of February, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was electronically filed with the Nevada Supreme Court on February 8, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to

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