



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY KENT,)
)
 Defendant-Below,)
 Appellant,)
)
 v.) No. 14, 2015
)
 STATE OF DELAWARE,)
)
)
 Plaintiff-Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT'S REPLY BRIEF

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DATED: November 6, 2015

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I. THE PROSECUTION VIOLATED KENT'S DUE PROCESS RIGHTS AND RIGHT TO A FAIR TRIAL WHEN IT FAILED TO PROVIDE *BRADY* MATERIAL IN THE FORM OF STATEMENTS FROM ITS STAR WITNESSES UNTIL THE EVE OF TRIAL THUS PREVENTING DEFENSE COUNSEL FROM USING THE EVIDENCE EFFECTIVELY.

Properly the State admits that the evidence at issue constituted *Brady* material and that it was provided to the defense prior to the start of jury selection. Ans. Br. at 7-8. Accordingly, this issue falls squarely on whether Kent was denied the opportunity to use the material effectively. Ans. Br. at 9. The record reflects he was. The State is wrong that Kent was not prejudiced merely because he presented the witnesses for his defense at trial. That is entirely beside the point because the standard is not such that ultimately using the materials and proceeding to trial is sufficient enough to cleanse a *Brady* violation. If the floor was set so low, nondisclosure of exculpatory evidence would almost never rise to the level of a violation so long as the material was provided.

The State's response to Kent's argument is essentially that having a few days to carefully access *Brady* material, in possession for over a year by the State, is sufficient time for defense counsel in preparation for a murder trial. This contention is ludicrous and why it is so desperately needed for this Court to rein in the systemic problem of *Brady* violations and restore

public faith in the criminal justice system. Prosecutors are not charged simply with securing convictions; they are expected to pursue justice in every case. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (noting that “[t]he United States wins its point whenever justice is done its citizens in the courts”); *Boss v. Pierce*, 263 F.3d 734, 743 (7th Cir. 2001). Cases in which defense counsel is convinced, after a thorough review of the evidence, that the prosecutor cannot prove the defendant’s guilt beyond a reasonable doubt are precisely the cases that should proceed to trial. And in such instances, the quality of the proceedings will benefit substantially from the examination of all of the issues by counsel who are well-acquainted with all of the relevant evidence.

The State doubles down in arguing that the delay in disclosure by the prosecutor was not gamesmanship. Ans. Br. at 12. By his own admission, that is precisely what it was here. Early on, the State made clear that its intention was to provide the materials approximately “a week or so before trial” in order to “keep them close to the vest for as long as [they] can[.]” (A-20). The Prosecutor stood by the position that the defense was only entitled to a week and a half to prepare its case in a murder trial. His reasoned that this was equitable because this was not a civil case and the State had to prove its case beyond a reasonable doubt. (A-21). "The Brady rule is aimed

at defining an important prosecutorial duty; it is not a tool to ensure competent defense counsel." *People v. Chenault*, 845 N.W.2d 731, 738, reh'g denied, 845 N.W.2d 518 (Mich. 2014). Arguably, "Brady's announcement of a constitutional duty on prosecutors to disclose exculpatory evidence to defendants embodies, more powerfully than any other constitutional rule, the core of the prosecutor's ethical duty to seek justice rather than victory." See Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007).

Brady also announced a constitutional norm designed to ensure the disclosure of exculpatory evidence and entrench an ethical duty on the part of prosecutors to seek justice, not wins. Prosecutors' legal obligations under *Brady* have also been translated into explicit ethical duties incumbent upon them as government attorneys. See, e.g., Model Rules of Prof'l Conduct r. 3.8(d) (Am. Bar Ass'n 2015); see also *Gershman, Litigating Brady v. Maryland*, at 565 n.2. While *Brady* supplies a constitutional mandate, it is also emblematic of the trust and responsibility the public places in prosecutors. Given the scope of their authority and discretion – and the importance of the duties with which they are charged – the public rightly expects prosecutors to go beyond legal technicalities and exercise sound and

ethical judgment that complies not only with the letter, but also the spirit of the law. When prosecutors rise to this standard, they benefit along with the community.

Finally, the State is correct in asserting that the facts in *Braden* are very much different from what's occurred in this case. Ans. Br. at 11-12. However, the fatal flaw in the State's position is that those differences support Kent's argument when examined closely. Most notably, the Superior Court in *Braden* provided a four week continuance to address the untimely disclosure by the State and ordered an "open file" policy between the parties. Kent was not afforded such an ameliorative effort on behalf of the Superior Court. Instead, defense counsel was forced to proceed to trial on a murder first degree charge even after disclosure of the exculpatory statements made by the State's star witnesses on the eve of trial. This prevented defense counsel from interviewing and securing these individuals as witnesses for the defense to use effectively. Therefore, Kent's constitutional rights were violated and reversal is now warranted to prevent a manifest injustice.

II. KENT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION VII OF THE DELAWARE CONSTITUTION WHEN THE TRIAL COURT FAILED TO PRECLUDE THE STATE FROM PRESENTING A CRITICAL WITNESS AT TRIAL WHICH RESULTED IN A CONFLICT OF INTEREST AS TO KENT'S REPRESENTATION.

The State properly states that "[a]bsent a waiver, or an express exception, concurrent representation is generally discouraged." Ans. Br. at 25. Here, the record makes clear that no waiver or express exception was present. Still the Superior Court permitted the Office of the Public Defender to concurrently represent Kent and Thurman Boston, the State's star witness. The State, like the court below, fails to recognize that the representation need not be directly adverse to another client in order for there to be a conflict. A conflict also arises, as was the case here, when there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. Delaware Rules of Prof'l Conduct R. 1.7(a).

The State goes on *ad nauseum* that Kent failed to provide any evidence below showing that a conflict was present. Ans. Br. at 29. Not so.

The issue involving the conflict was properly brought up to the Superior Court as soon as it was realized. However, in the early stages of the case it was difficult to ascertain which exact interests would be materially adverse to Kent and interfere with defense counsel's independent professional judgment. The record does reflect that as part of Boston's defense, the PDO's psycho-forensic evaluator completed an assessment of Boston. Additionally, the office accessed and reviewed his medical records and prescription information. As a result, the PDO became aware of confidential information concerning Boston that was material to Kent's trial. The State, like the Superior Court, fails to recognize that the conflict was already prevalent at the pre-trial phase and would only manifest further the longer the relationship was permitted to continue.

It's worth noting that this conduct is never tolerated in the civil context and it should not be tolerated here. *See Acierno v. Hayward*, CIV. A. 19729, 2004 WL 1517134 (Del. Ch. July 1, 2004)(finding that attorney and his firm were in violation of DLRPC 1.9 and thus disqualified from representing client because matter was substantially related to prior representation); *Matter of Mekler*, 689 A.2d 1171, 1175 (Del. 1996)(holding that attorney's representation of mother in custody dispute was conflict of interest because attorney had previously represented father in dispute

involving same child); *Madukwe v. Delaware State Univ.*, 552 F. Supp. 2d 452, 465 (D. Del. 2008)(Judge Jordan found that the representation was prohibited by M.R.P.C. Rule 1.9 because it was substantially related to the attorney's prior representation of the County during the grand jury investigation that had resulted in the indictment against the County official); *Conley v. Chaffinch*, 431 F. Supp. 2d 494 (D. Del. 2006)(opposing counsel's representation of commander violated professional conduct rule prohibiting counsel's representation of client on a matter substantially related to his representation of former client where current client's interests are materially adverse to the interests of the former client).

The record shows that Kent's trial counsel held divided loyalties to an adverse witness that affected trial counsel's performance and denied Kent his Sixth Amendment right to the effective assistance of counsel. Thus, reversal is now required.

CONCLUSION

For the reasons and upon the authorities set forth herein, the Court should reverse Jeffrey Kent's convictions.

Respectfully submitted,

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