3-29-1974

Decision for New Trial, 3/29/1974

Supreme Court, New York County

P18-19

People v MAYNARD

NEW YORK LAW JOURNAL—Wednesday, April 3, 1974

1.

TRIAL TERM, PART 47
Justice Lang

PEOPLE, &C., v. WILLIAM ANTHONY MAYNARD—The defendant, William Maynard, was charged with the crime of murder in the first degree. The first trial of the case resulted in the jury being unable to agree. The second trial was aborted in its early stages upon a declaration of a mistrial. The third trial resulted in his conviction of the crime of manslaughter in the first degree. The conviction was affirmed by the Appellate Division in a three-to-two decision with a strong dissenting opinion. The case is presently pending before the Court of Appeals.

The defendant has previously made a series of postconviction motions before me, which were all denied. The instant motions seek to set aside the judgment of conviction on the grounds of newly discovered evidence (CPL sec. 440.10 [g]) and that the conviction was had in violation of defendant's constitutional rights under Brady v. Maryland (373 U. S. 83; CPL sec. 440.10 [h]).

The motions revolve around a witness for the prosecution, Michael Febles. Febles was one of three eyewitnesses to the crime. He testified that he saw the defendant and a white companion involved in an argument on West Third Street off Sixth Avenue with a sailor, Robert Crist, in which the deceased intervened. Shortly thereafter, while in a taxicab on Sixth Avenue and West Fourth Street, he heard a "blast" and saw the defendant and his companion run away. He gave chase and observed a tan bag thrown under a car. The bag was later recovered and was evidence on trial in connection with the testimony of one Howard Fox, a cab driver, who testified he had driven the defendant and a white companion, who carried a tan bag, to the general area of the crime some hours before. Febles identified the defendant as "sort of tall," "not very heavily built," dark skinned with "a slender face" and "high cheekbones," wearing an "Afro" haircut and about "19-20 years old." Febles later identified the defendant by means of photographs and a seemingly accidental face-to-face encounter in the courthouse.

The other two eyewitnesses were Robert Crist and Dennis Morris. Crist, who was with the deceased at the time of the shooting, identified the defendant as about 18-22 years old and testified he also viewed photographs of him. There was substantial evidence of the fact Crist was in a state of intoxication at the time of the murder. Morris witnessed the initial argument and also the shooting. He described the defendant as about 5'8"-6' tall, medium complexion, well built, with an Afro type haircut, 18-22 years old, and resembling Martin Luther King.

The instant motions initially arose from recent information imparted to this court by defendant's counsel that sometime about 1954 Febles was hospitalized at Rockland State Hospital for psychiatric disorders. A hearing was ordered to determine if the prosecution was aware of these facts. As a result of this court's order to provide the defendant with Febles' criminal record (yellow sheet), it was further discovered that on Jan. 10, 1966, some fifteen months prior to the homicide, Febles was arrested on a disorderly conduct charge (former Penal Law sec. 722 [3]), to wit: That on or about Jan. 9, 1966, and subsequent thereto, at 16 West 10th Street, New York City, Febles did "ring the deponent's doorbell having no business thereat, did knock upon and look through the deponent's window, at which time the defendant stated to deponent "I want to come in, to fuck you, I want to suck you, put my mouth in your vagina. I'll take your clothes all off and fuck you." The defendant then fled * * *".

This arrest and "incident" took place in the same police precinct as the homicide. The court records of that arrest indicated that upon Febles' conviction by way of a plea of guilty, the District Attorney related to the court that the complainant had informed him that she was also subjected to telephone harassments "not unlike the obscenities mentioned in the affidavit," which she believed were by Febles, and that the arresting officers, Holmes, was told by Febles that "for a long period of time he has been a peeper and that this area is his area for peeping." The court then committed Febles to Bellevue Hospital for psychiatric observation. Upon the sentence proceeding, the record reveals that Febles' attorney indicated that Febles would apply for further psychiatric treatment and supervision. Upon such considerations, the court suspended the six-month sentence imposed.

Given these new facts, the scope of the hearing was broadened to include whether the prosecution had knowledge of this incident and the accompanying commitment. The district attorney was also directed to obtain Febles' complete records from Bellevue Hospital.

At the hearing, testimony was taken from Febles, his mother, the three chief investigating police officers in the defendant's case (Lt. Stone, Off. Hanast and Off. O'Brien), the arresting officer in the 1966 disorderly conduct conviction (Sgt. Holmes), the complainant in that case, the two trial district attorneys (Gino Gallina and Stephen Sawyer) and the two defense lawyers on the third trial (Daniel Meyers and Lewis Steel).

Febles testifies he told no one, police officer or district attorney, about his psychiatric history nor the facts of the 1966 disorderly conduct arrest. [Hours after his testimony, Febles was arrested by federal and state authorities for charges involving the sale of guns. This arrest resulted from a joint investigation by federal authorities and the Rackets Bureau of the New York County District Attorney's office. He has since been indicted on these charges. There is no evidence that the homicide bureau knew of this investigation when Febles testified.] The two district attorneys and the three police officers also testified they were not aware of any psychiatric history. As to the 1966 disorderly conduct case, Sgt. Holmes stated that during the early stages of the homicide investigation he saw Febles in the station house and told "some" officers present, although he could not recall any specific person he told, that he had arrested Febles on the disorderly conduct charge and it was "logical" he also told them about the subsequent mental commitment in his case. He stated that he knew all three officers in the homicide investigation. Lt. Stone, who was the commanding officer of the 6th precinct at the time, stated that he knew about Febles being a "peeper" but did not tell anyone else. Ptls. O'Brien and Hanast stated they knew about Febles disorderly conduct conviction but not the underlying facts.

Testimony was also taken in regard to Febles' yellow sheet. While Ptl. Hanast stated he thought he saw a yellow sheet, he did not personally obtain it. Ptl. O'Brien and Sgt. Stone stated they never got a yellow sheet either. The two district attorneys testified they had no recollection of any yellow sheet for this witness, but Assistant District Attorney Sawyer testified that on the trial he gave the defense a "piece of paper" containing all the information on the yellow sheet which was provided him by the bureau of criminal identification. Defense counsel Meyer testified he examined the "piece of paper" and found it lacking in sufficient information to be of value. Steele testified he could not recollect getting the "paper." Unfortunately that "paper" was not preserved and is not presently available. At the conclusion of the hearing, the district attorney produced the additional records from Bellevue. These records showed that sometime about August to September, 1970, almost at the exact time of the commencement of the third trial, Febles was again psychiatrically evaluated at Bellevue. These reports further indicate he was receiving in-patient treatment for one or two months in 1968. Further records seem to be unavailable.

It is conceded by all the parties that, had the facts of the 1966 disorderly conduct case been known, Febles' entire phychiatric history would have surfaced and been discovered. The direct link to this conviction was the yellow sheet. The determination of these motions, especially the aspect of suppression under Brady v. Maryland, supra and the aspect of due diligence under newly discovered evidence, makes it incumbent to examine the circumstances that the yellow sheet played in the history of this case.

Prior to and during the course of the third trial, defendant sought discovery of Michael Febles' criminal record (yellow sheet) orally and by way of subpoena duces tecum. The District Attorney successfully moved to quash the subpoena duces tecum and no yellow sheet was ever provided defendant. Instead, the district attorney indicated he had a communication from the Bureau of Criminal Identification as to the contents of the yellow sheet and provided that information to defendant (immediately prior to Michael Febles' testimony), informally upon a piece of paper, which, regretfully, was never marked in evidence nor preserved.

The hearing testimony as to the yellow sheet was vague and confusing. Although the prosecutorial team conceded that obtaining a yellow sheet of a witness is standard operating procedure, it would seem that no yellow sheet was actually obtained here. (The Bureau of Criminal Identification folder, upon which all requests for criminal records are noted, indicates the first request for a yellow sheet was in December, 1973, during the course of these proceedings).

Apart from any *Brady* or newly discovered evidence consideration, this court finds it difficult to conceive why such a basic and elementary means of preparing a witness for trial was dispensed with in this case. The prosecutor knew that the witness had a criminal record but he did not obtain the official police or FBI record which might have revealed, for example, other convictions in this other jurisdictions. It is difficult to understand why the district attorney, in such a celebrated and important murder prosecution, would never obtain the criminal records of a most important witness, if only to forestall any surprise impeachment on the trial.

The defendant contends (1) that Febles' mental history and the underlying facts of his 1966 disorderly conduct conviction require, in and of themselves, a new trial pursuant to Criminal Procedure Law section 440.10 (g) and/or (2) that the suppression of this evidence by the prosecution violates constitutional due process under Brady v. Maryland, supra.

The People argue that this evidence is remote, merely relates to the credibility of the witness and is cumulative of former issues, is immaterial, was not suppressed but remained undiscovered by reason of the lack of due diligence on the part of the defendant and, in any event, is privileged and cannot be a basis of the relief sought.

A motion for a new trial based on newly discovered evidence is a statutory remedy and may be granted only in the sound discretion of the court (People v. Patrick, 182 N. Y. 131).

The present statute, Criminal Law section 440.10(g), substantially identical to former Code of Criminal Procedure, section 465 (7), provides a judgment of conviction may be vacated where new evidence has been discovered which could not have been produced by the defendant at the trial even with due diligence on his part, and which is of such a character as to create a probability that, had such evidence been received at trial, the verdict would have been more favorable to the defendant.

The leading case on the issue of newly discovered evidence, People Salemi, 309 N. Y. 208, sets the criteria for determining the sufficiency of the new evidence as:

1. It must be of such nature as would possibly change the verdict should a new trial be granted;
2. It must have been discovered since the previous trial;
3. It must be of such nature that it could not have been discovered before the trial by the exercise of due diligence;
4. It must be material to the issue;
5. It must not be cumulative to the former issue;
6. It must not be impeaching or contradictory of former evidence.

The federal rule (Rule 38, F. R. Crim. P.) and cases hold to the same criteria (United States v. Rutkin, 208 F. 2d 647; United States v. Bertone, 249 F. 2d 156; United States v. Robinson, 329 F. Supp. 723).

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The motion pursuant to Brady presents the issue of the suppression of evidence favorable to an accused, upon his request, where it is material to guilt or punishment, irrespective of the good or bad faith of the prosecution (Brady v. Maryland, supra).

These motions require us to examine two aspects of the facts: (1) the conduct of the parties; and (2) the nature of the evidence. Newly discovered evidence focuses on the conduct of the defendant—whether he could have discovered the evidence by due diligence. Brady focuses on the conduct of the prosecution: Did they, by affirmative conduct, negligence or under the circumstances as viewed by "hindsight" (United States v. Keough, 391 F. 2d 138), prevent the discovery of evidence, irrespective of good or bad faith? The rule of newly discovered evidence sets the strict criteria that the new evidence must be of such character as to create the probability it would have resulted in a more favorable verdict. The evidence is viewed only in context of its effect on the previous outcome of the trial. Brady is not necessarily concerned with the outcome but with the fundamental fairness of the conduct of the trial itself. It may be said that the rule of newly discovered evidence presupposes no suppression and an otherwise fair trial and, but for the new evidence, no further aspects of the trial need be considered. Brady goes to the essence of the procedure which produced the result, namely, was the defendant afforded due process of law in the trial of his case?

While a motion for a new trial based on newly discovered evidence and under Brady v. Maryland, supra, are independent of each other, there is an obvious inter-play of the two doctrines in the facts and circumstances of this case.

The issue of remoteness is removed from the case because the long and continuous history of psychiatric treatment and commitment clearly makes Febles' mental state highly relevant on the issue of not only his credibility but also his ability to perceive and remember the facts to which he testified.

As to the question of suppression, Michael Febles' arrest for disorderly conduct and the homicide occurred in the same police precinct a mere fifteen months apart. The officers involved in both cases knew each other. Sgt. Holmes testified he remembered Febles was "riding" in the investigation and imparted his information about him to certain officers present. Lt. Stone, directly or indirectly, was aware Febles was a convicted peeping tom. Officers Hanast and O'Brien were aware of the disorderly conduct arrest, and Holmes initially put the question of Febles' sexual aberrations into the mainstream of the investigation. It is obvious that, by way of acknowledged procedure of police officers, imparting information between themselves, these facts filered down to the officers investigating the homicide. Whether Stone or any other officers on the homicide case intentionally or negligently failed to investigate further is of no matter. They were put on notice and as fact-finders they could not take a hear-no-evil, see-no-evil; speak-no-evil attitude toward a potential and subsequently major witness in their case.

The fact that the prosecution may not have been aware of the information known by the police does not neutralize the constitutional aspects of suppression. "The police are also part of the prosecution and the taint on the trial is no less if they, rather than the state's attorney, were guilty of the non-disclosure" (Barbee v. Warden, 331 F 2d 842, 846). The district attorney has the high duty and heavy responsibility to prepare and present criminal cases. That duty necessarily entails he be charged with the knowledge and conduct of his agents (see, United States v. Consolidated Laundries Corp., 291 F. 2d 563 [mishandling of files by department clerks imputed to prosecutor]; Giglio v. United States, 405 U. S. 150 [promise of one district attorney is controlling on associate district attorneys]; People v. Churba, N. Y. L. J., Feb. 19, 1974, p. 21 [loss of evidence by investigators imputed to prosecution]).

Even if we were to give this factor of suppression minimal consideration, the fact remains that the defense specifically and continuously called for the yellow sheet to investigate the underlying facts of the disorderly conduct arrest. This "flagging" of the importance of the yellow sheet to the defense "impose [d] upon the prosecution a duty to make a careful check of his files" (U. S. v. Keough, 391 F. 2d 138, 147). Once the district attorney knows of the defendant's interest, if he fails to honor this, even in good faith, he has only himself to blame (U. S. v. Keough, supra, at p. 147; U. S. v. Thomas, 411 F. 2d 825, 831). The trial court, too, with almost prophetic insight, noted that if the disorderly conduct resulted from sexual misconduct, he would permit cross-examination under People v. Sorge, 301 N. Y. 198. He specifically ordered it be given to the defendant! Although it could have been easily obtained from the Bureau of Criminal Identification, a few blocks from the courthouse, the district attorney only provided defendant with a "piece of paper" whose content is disputed and unknown.

The mystery of the yellow sheet is further complicated by the district attorney's reference to Febles' conviction of a 1963 disorderly conduct charge, which he stated arose out of "causing a disturbance of something of the sort." Yet the yellow sheet itself does not indicate this arrest resulted in a conviction nor any facts of the undelying charge. Febles' yellow sheet, up until this time, states only the following:

Date of Arrest — 8-2-62. Name —Michael Febles, 137 W. 93 St. Borough or City—Manhattan, 3240-24. Charge—Gr. Larc. Arresting Officer —O'Shea, 20 Sq. Date, Disp., Judge, Court — Spec. Sess., 8-15-62, No. 10873, Att. Pet. Larc. 8-24-62, 30 Days W. H., Judge Ringel.

Date of Arrest—7-17-63. Name—Michael Febles. Borough or City—Manhattan. Charge—722-3 PL. Arresting Officer—Iannone, 20th Pct. Dat, Disp., Judge, Court—Crim. Ct., 7-17-63, No. 11910, Pt. 1C.

Date of Arrest—1-10-66. Name—Michael Febles. Borough or City—Manhattan. Charge—Diso. Cond. Arresting Officer—Holmes, 6th Pct. Date, Disp., Judge, Court—1-10-66, Cr. Ct., Pt. 1E, Dkt. No.-C322.

How, then, did the District Attorney know that the 1963 case resulted in a conviction unless he had further information? If he had such information as to the 1963 arrest, would it not have also been obligatory for him to investigate the facts and disposition of the 1966 arrest?

Further disturbing is that as to another witness, Dennis Morris, the district attorney revealed that a prior arrest for possession of marijuana was dismissed because a laboratory report indicated the substance was in fact oregano. How is it the District Attorney knew the specifics of a dismissed case of this witness and yet had no knowledge of the facts underlying Febles' 1966 case? Obviously he did investigate the criminal background of that witness. This court can only wonder why it was not done with Febles.

It is well recognized that the prosecution has a great advantage over the defendant in the fact-gathering process due to his superior manpower and access to other law enforcement facilities (see Goldstein, The State of The Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1960; Application of Kapatos, 208 F. Supp. 883, 888; Jackson v. Wainwright, 390 F. 2d 288, 294). The District Attorney here failed to utilize his advantage in his behalf and refused the defendant any access to the information at all. The request for the yellow sheet was after all basic and not extraordinary discovery, and this court cannot conceive why it should not have been provided. The defendant's case was a highly publicized trial based upon a brutal murder. It was the third trial of the case and at issue were charges of prosecutorial misconduct. The District Attorney had an obligation to the court and to the People he represents to leave no reasonable avenue unexplored in the preparation of the case. Given these circumstances, in fact of defendant's persistent demand and the trial court's order, the question of suppression cannot be permitted to stand or fall on the unknown contents of the "piece of paper", provided in lieu of the yellow sheet.

Therefore by reason of imputation from the police officers' and the District Attorney's own affirmative conduct in regard to the yellow sheet, I conclude there was a suppression of the facts of the 1966 disorderly conduct conviction and the psychiatric history of Febles which would have become evident. To label such suppression intentional or negligent is unnecessary. It is enough that the prosecution was the active and effective cause of the non-disclosure of the evidence. If the prosecutor did not erect a barrer to the evidence it certainly enshrouded the information in fog. If such not be a willful suppression, the result was a de facto suppression.

As to the nature of the evidence, were the facts of the sexual basis of the disorderly conduct conviction the only issue here, I might be inclined to agree that such evidence would be merely cumulative of the trial attempt to impeach the witness and not sufficiently material under Brady of the criteria of People v. Salemi, supra. This would be so even if it advanced a new theory challenging credibility (People v. Mackman, 15 N. Y. S. 2d 746, 751; but cf. Davis v. Alaska,—U. S.—42 LW 4297 [1974]). But the quintessential evidence here is the long-standing and on-going mental condition of a major eyewitness, in conjunctio with an apparent sexual aberration. This mental condition raises the question of the accurateness, perception, truthfulness and susceptibility to suggestion of Febles as a witne . His capacity to be a witness may even be in question. As our Court of Appeals recognized in (People v. Rensing, 14 N. Y. 2d 210)

evidence of mental illness is a special type of evidence in that it is a fact a jury would be entitled to know to "assess and evaluate the testimony given by him and not accept it, as the statement of a 'normal' individual" (at p. 213-214). This is especially so where a witness acts normally throughout the trial, and his demeanor in the courtroom and on the witness stand furnishes no basis for inferring that there is "something mentally wrong" with him (at p. 214). There was no indication at the trial here that Febles had any psychiatric disorders. His conduct was not extraordinary. During summations, the district attorney held him out as an ordinary witness. Febles himself hid his mental history. It is well recognized that mistaken identification "probably accounts for more miscarriages of justice than any other factor" (United States v. Wade, 388 U.S. 218). Of the three eyewitnesses, Febles discription of the defendant most accurately fit his actual attributes. His testimony remained relatively unimpeached.

In Giglio v. United States, supra, the Supreme Court, quoting Napue v. Illinois (360 U.S. 264) held that when the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence effecting credibility may justify a new trial (at p. 154). In Moore v. Illinois, (408 U.S. 786) while the court found suppressed prior statements of a witness did not "significantly" impeach his testimony, it did recognize that substantial impeaching evidence might have that effect. In Levin v. Katzenbach (363 F. 2d 287) the court held that where the suppressed evidence would have tended to impeach the credibility of a "key" witness, the "question is whether this weakening might have led the jury to entertain a reasonable doubt" as to guilt (at p. 292) (see also "Withholding or Suppression of Evidence by Prosecution," 34 ALR 3f 16, section 5 [b]).

In United States v. Keough (391 F. 2d 138) Judge Friendly classifies the law as to prosecutorial suppression as falling into three basic categories: (1) deliberate bad faith suppression requiring a low degree of prejudice to the defendant; (2) deliberate refusal to honor a request for evidence irrespective of good or bad faith in doing so, which requires a finding of some prejudice; and (3) where suppression was not deliberate and no request made but where hindsight discloses the evidence could have been put to "not insignificant" use (which requires a substantially higher probabiltiy the evidence would have altered the result).

While this case falls most comfortably into the second category, even if we were to set the standards of the third and "no-fault" the suppression, I conclude that the facts of the disorderly conduct conviction in conjunction with Febles psychiatric history bear much more than only on the reliability of his specific testimony but also upon his trustworthiness as a witness per se (Simos v. Gray, 256 F. Supp. 265, 270).

Given the imperfection of the other witnesses' testimony and personal characters, Febles must have played a crucial role in the jury's verdict. Thus evidence of his aberrant mental condition is highly material on the question of the defendant's guilt. Without this evidence, the jury did not have all the facts before them and were effectively misled in evaluating this testimony (see Juviler, Psychiatric Opinions as to Credibility of Witnesses A suggested Approach, Calif. L. Rev., vol 48, October 1960, No. 4 pp. 648-656). Under the circumstances, the evidence of his mental history could have been put not only to "not insignificant use" (U.S. v. Keough, supra, p. 147) but to most significant use.

Furthermore had the jury known that this major witness had a history of mental problems requiring hospitalization, both at the time of the crime and the trial, together with admitted conduct evidencing sexual degeneracy and perversion, it would have borne heavily upon their consideration of his testimony, with a strong possibility that such witness's testimony might be entirely discredited. The probability of a more favorable verdict, be it minimally a hung jury would thus be [illegible].

As to the question of due dilligence, this issue is somewhat overshadowed by the highly antagonistic atmosphere created by the respective counsel in this case, which at times caused each to diminish their professional responsibilities in favor of overt hostility on a personal level. This unprofessional conduct must be attributed to both sides. However, considering the fact that the defense counsel was moved to trial almost immediately upon being retained, his lack of experience, the extensive preparation and the investigation involved, I cannot conclude that the failure to discover the new evidence here was a result of a "slovenly preparation for trial" (Levin v. Katzenback, 363 F. 2d 287, 297, dissenting opinion). I have no quarrel with the trial court or the district attorney in pressing for trial.

Indeed, the constant spectacle of attempts to frustrate the trial determinations of cases by stalling, blocking, delaying tactics, changing of counsel, frivolous motions and the like is a major blight on our criminal justice system. But where a case such as this is moved for trial with new counsel, who has a short time to prepare properly, it is incumbent upon a prosecutor to make certain that the defendant is provided with all discovery materials to which he is entitled at the earliest possible stage, rather than withholding and impeding access to such information until the last possible moment.

Here, the district attorney's parochial insistence on moving to quash the subpoena for the yellow sheet resulted at best in the disclosure of contested information just prior to cross-examination of a key witness with the unfortunate result that vital evidence was not heard or evaluated by trial jury.

The remaining issue is the question of the privileged nature of Febles' medical records.

At common law, there was no rule prohibiting the disclosure of communications between physician and patient (Edington v. Aetna Life Ins. Co., 77 N. Y. 564). The privilege is purely a creature of statute (CPLR sec. 4504, made applicable to criminal actions by CPL sec. 60.10). The purpose of the rule is to protect those who are required to consult physicians from the disclosure of secrets imparted to them, to protect the relationship of patient and physician and to prevent physicians from disclosing information which might result in humiliation, embarrassment or disgrace to patients (People v. Al-Kanani, 33 N. Y. 2d 260). But the statutory rule of privilege is not so rigid that it will prevent disclosure at any stage of a court proceeding nor regardless of the issues litigated. In People v. Fartholomew (73 Misc. 2d 541), while upholding the privilege therein, the court also recognized that the examination of the merits of the issues, "particularly upon a post trial motion to set aside a jury verdict" (at p. 543), may require the "laying aside the issue of the privileged nature of these reports" (at 544). In People v. Dodge (74 Misc. 2d 80), the court, in denying discovery of medical reports because of the privilege, noted "it is significant that this is a pretrial motion", and the records were not sought in connection with the issue of guilt or innocence but merely on the collateral issue of credibility of a witness. We are, of course, concerned here with post-conviction motions in a case where the question of privilege was never before an issue. Since the Brady aspect of the motion involves constitutional considerations, the state's police interest in protecting the confidentiality of the physician-patient relationship must give way to the determination of the constitutional question (cf. Davis v. Alaska — U. S. — 42 LW 4295 [Feb. 27, 1974]), where the Supreme Court held that a state's policy interest in protecting the confidentiality of a witness's juvenile record—must yield to an accused's constitutional right to effectively cross-examine an adverse witness for bias under the confrontation clause of the Sixth Amendment. The court suggested that if a state deems the confidentiality of records so paramount, it should refrain from using that witness to make out its case. "* * * the state cannot, consistent with [the] right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of * * * records" (2 LW 4299). Minimally, then, there is no privilege as to the court and since privilege must be ultimately decided by the court in any circumstance, I find that, given the nature of the newly discovered evidence aspects of this motion, the need to privilege the medical records does not surpass the crucial need for their disclosure in determining the merits of the relief sought (see People v. Preston 13 Misc. 2d 802, aff'd. sub nom. Silyer v. Sobel, 7 A. D. 2d 728; Milano v. State, 44 Misc. 2d 290; Juviler, phychiatric opinions as to credibility of witnesses, supra pp. 668-669). [However, the court will withhold turning over these records to the defense and, instead, will seal them and mark them into evidence as a court exhibit in the event of appellate review.]

The court recognizes that a jury verdict is not to be set aside but for the most compelling reasons. A jury verdict is the most desired, if not perfect, resolution of a case in our criminal justice system. But that verdict to have any meaning must be the result of a careful consideration of all the material facts. For the district attorney to argue that, in a close case such as this, the long, continuous and possibly organic mental condition of a major witness, manifesting itself on at least one occasion in sexually aberrant behavior, is not of such sufficiency as to be required to be considered by the jury, is not reasonable, and reason is the foundation of justice.

The motions for a new trial pursuant to Criminal Procedure Law, section 440.10 (g) and 440.10 (h) are granted.

This decision shall constitute the order of the court.

Call Appt Div 532-7800

MAYNARD

Notice of Appeal pursuant to

450.15

by personal only

SUPREME COURT : NEW YORK COUNTY

TRIAL TERM : PART

THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

WILLIAM MAYNARD, : Indictment No. 3937/67

Defendant. :

Aug 7 affirmed

Appearances:

Frank S. Hogan, Esq.
District Attorney of New York County
155 Leonard Street
New York, N. Y. 10013
By: Juris Cederbaums, Esq.
Assistant District Attorney
of Counsel
For the People

Lewis Steel, Esq.
351 Broadway
New York, N. Y. 10013
For the Defendant

Lang, J.:

During the early morning of April 3, 1968, Marine Sergeant Michael Kroll was shot and killed on West 4th Street in the Greenwich Village area of New York City. Some six months later, the defendant, William Maynard, was indicted for that homicide.

The first trial in this case was held in 1969 and resulted in a hung jury. The second trial resulted in a mistrial. The third trial resulted in defendant's conviction of Manslaughter in the First Degree. On February 4, 1971, the defendant was sentenced to a prison term of not less than 10 nor more than 20

years. The conviction was subsequently affirmed in the Appellate Division by a divided court 3-2 (People v. Maynard, 40 A D 2d 779).

At the trial, the People produced four witnesses placing the defendant at the scene. Robert Crist, who was with Kroll at the time of the shooting, Dennis Morris, and Melvin Febles; each of whom identified the defendant as the person who shot Kroll. All testified that after the shooting they saw Maynard and his companion run west on West 4th Street to 6th Avenue and then north on 6th Avenue. A cab driver, Howard Fox, testified that earlier that evening, he drove Maynard and a companion to the Greenwich Village area. The defendant testified in his own behalf that he was not in the area but was with his family in Queens. Members of his family corroborated his alibi.

In the present motions, defendant seeks the following relief:

(1) to set aside the conviction, pursuant to CPL § 440.10, on the grounds of newly-discovered evidence based on affidavits by Paul Dietz, Edward Murphy and William Purcell;

(2) to set aside the conviction and/or sentence, pursuant to CPL §§ 440.10 and 440.20, on the grounds of improper conduct by the District Attorney and the trial court;

(3) an order permitting the defendant to be given a lie detector test; and

(4) an order permitting broad discovery of various police department and prosecutor's reports concerning investigations in this case.

These motions were originally returnable before another judge of this court who set the matter down for a hearing before

another judge, not the trial judge. The Administrative Judge of this court referred these motions to me. At the onset, it is my opinion that the better practice with respect to motions to set aside a judgment of conviction based on newly-discovered evidence is that they be made before the judge who conducted the trial. This is apparent because the judge who has heard the case is in the best position to determine whether in fact the new evidence may have affected the jury's verdict.

The power to grant an order for a new trial on the grounds of newly-discovered evidence is purely statutory and such power may only be exercised when the requirements of the statute have been satisfied, the determination of which rests in the sound discretion of the court (People v. Salemi, 309 N.Y. 208, 215).

CPL § 440.10(g) provides that a judgment of conviction may be set aside on grounds that new evidence has been discovered which could not be produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

Prior to the enactment of CPL § 440.10, CCP § 465(7) provided for a new trial based on newly-discovered evidence if such evidence was not cumulative and would probably have changed the verdict.

I find there is no distinction between these two statutes and the criteria for determining the sufficiency of the new evidence remains the same.

The case law interpreting these statutes makes it clear that not every type of new evidence will be grounds for setting aside the conviction. Besides meeting the requirements of the statute, the new evidence must also be material to the issues at trial, it must be more than merely cumulative and it must not be merely of an impeaching or contradictory nature (People v. Salemi, supra; People v. Priori, 164 N.Y. 459).

For purposes of these motions, it is deemed that the evidence was not discoverable at the time of the trial and that the motions are timely made.

(1) The Dietz Motion

In respect to the Dietz affidavit, having examined it and the memoranda provided by the prosecution and the defense, I find no need for a testimonial hearing. Basically, the affidavit states that Dietz heard the shooting and saw two men run toward 6th Avenue. He was also present when Robert Crist was interviewed by the police officer and described Crist as being "drunk." At the trial the testimony indicated Crist was "intoxicated." The gist of the motion is that there is a difference between being "drunk" and being "intoxicated" and this difference requires a new trial.

I disagree. The fact that Crist was in an intoxicated state was not disputed at the trial. His condition was fully explored, subjected to a vigorous cross-examination, adverted to by counsel in summation, and alluded to by the dissenters in the Appellate Division. The weight and credibility to be given his testimony was determined by the jury. Thus the most that can be said of this 'new evidence' is that it is cumulative and designed

merely to impeach the credibility of Crist as a witness. It throws no new light on the issues and the motion must be denied (People v. Salemi, supra; People v. Patrick, 182 N.Y. 131; People v. Williams, 35 A D 2d 1023).

(2) The Murphy Motion*

As to the Murphy affidavit, a testimonial hearing was ordered, but Mr. Murphy never appeared. While defense counsel intimates possible intimidation of Murphy by the Police Department, there is no evidence of this. It should also be noted that defendant's counsel never asked the court for a subpoena or body attachment to produce his witness.

Assuming Murphy would have testified to the contents of his affidavit, that although he did not see the person who shot Kroll, he did see a man, who was not Maynard, run east on West 4th Street after the shooting. Even if such testimony were true, the overwhelming evidence, including statements in the Dietz affidavit, is that the killer ran west on West 4th Street. Since Murphy makes no claim that the person he saw was the killer, his testimony cannot be said to be such 'new evidence' that would require a new trial.

In People v. Priori (164 N.Y. 459), a case not dissimilar to the present one (the area of the homicides are even the same), the newly-discovered evidence was contained in an affidavit by a witness who stated he heard a shot and saw a man run from the scene. He also said he saw the defendant, known to him, at the scene but defendant did not do the shooting.

The court held that assuming the evidence was recently discovered, material to the issue, not cumulative or of an impeaching nature, it was not such as required the court to hold it

would probably have changed the result if a new trial was granted. I reach the same conclusion in regard to the purported Murphy affidavit.

(3) The Purcell Motion

While I am not either condemning or sanctioning any conduct of the Police Department or the prosecution relating to Purcell, in light of the other evidence examined, including affidavits by the District Attorney, defendant and Purcell's own letters, I find that the Purcell affidavit is presumptively and demonstratively perjurious and unworthy of any credence whatever.

Defendant argues that in order to create evidence in the case, the police officers attempted to create in Purcell a witness who would testify that Maynard confessed the murder to Purcell. That this being so, the entire prosecution case is so tainted that a new trial must be ordered.

Purcell, in his affidavit, states that sometime in June of 1970, he was removed from his jail cell, where he was awaiting trial on an unrelated homicide charge, and placed in Civil Jail, force fed heavy doses of tranquilizing and narcotic drugs and intimidated and rehearsed into being a witness against defendant. But the overwhelming evidence shows that some five months prior to this alleged plot, Purcell wrote a letter, dated 2/2/70, to the District Attorney, stating Maynard confessed the crime to him while they were in the Tombs together and that he wanted to prove his rehabilitation by offering to testify against him. Purcell, also known as James Sullivan, was at the time awaiting trial on a felony murder charge upon which he was found incompetent to stand trial and had spent more than 10 years at Matteawan State Hospital.

This letter was unsolicited. In a series of following letters Purcell told of his befriending Maynard, gaining his confidence and gave details about Maynard and the killing as allegedly related to him by defendant. Following up on this, the District Attorney, at Purcell's insistence that his life was in danger in prison, had him committed to civil jail, where he was prescribed certain drug therapy by the prison doctor, now deceased. Purcell, after recantations and re-recantations, was never called to testify.

It is upon the affidavit of such a man that defendant bases his motion. While defense counsel, just as the District Attorney, had a duty to investigate any of Purcell's claims, it taxes this court's senses why defendant suddenly puts him forth as a person deserved to be believed. Defense counsel attacks Purcell's letters as "worthless", "containing obvious misstatements", "sounds completely made up" and yet asks us to review the affidavit as a statement of an honorable and truthful man. The court agrees that the Purcell letters must be considered products of a practiced prevaricator. And we look upon the affidavit with the same eyes.

Defense counsel, an able and exceptionally committed attorney, would have this court believe that this case has a spiritual similarity to the Dreyfus affair. Yet I cannot view Henry Purcell as a present day M. Picquart. Purcell's chameleon like character is evidenced by his claim that after he was given a suspended sentence and released in his own case, he attempted, on numerous occasions, to notify law enforcement officials of the fabrication plot but that he was constantly thwarted and as a

result was rearrested on trumped up charges and returned to prison. But the only documentary evidence of Purcell's activity when he was free (and presumably not under the influence of any drugs) is a letter he wrote to the District Attorney indicating how he was "sick to [his] stomach" that the press, especially James Wechsler of the New York Post, has been deceived by Maynard and that he would let Mr. Wechsler know the truth about the confession.

The fact of the matter still remains that Purcell was never called as a witness, the jury was never aware of his existence, and defendant was convicted on the evidence at the trial.

In light of these facts, I find the affidavit of Henry Purcell, to be unworthy of belief and that it does not require a hearing. The motion is denied.

(4) Lie Detector Test

While I would have signed an order permitting defendant to take such test during the pendency of the trial, for the reason that if he were at liberty he could take such test by choice regardless of its admissibility and an incarcerated person should not be deprived of such right merely because of his incarceration, the present law in this state is that evidence of the results of a lie detector test is inadmissible at trial (People v. Leone, 25 N Y 2d 511).

Since the results of such test would not be relevant upon any of the present motions, the motion is denied. But, in the interests of justice if the results of all appellate review is adverse to the defendant, I will sign an order allowing him to take such test for purposes of a petition for Executive clemency,

if defendant proceeds to do so, since the Executive is not bound by the rules of evidence.

(5) The "ex parte" Disclosure Motions

Although not used as a witness, Henry Purcell was allowed to plead guilty to a lesser charge of manslaughter in his own case. At the time of sentencing, before the same judge who presided over the Maynard case, the District Attorney pointed out that Purcell had cooperated with the District Attorney although Maynard was not specifically mentioned. The record indicates the judge was aware the reference was to the Maynard case. Purcell subsequently received a suspended sentence.

Defendant argues that such ex parte communication by the District Attorney and to the Maynard trial judge, while that judge was considering pending pretrial motions and sentence, and without Maynard's presence, violated defendant's rights to due process of law.

I disagree. I know of no case that requires a defendant to be present at any sentencing but his own.

Townsend v. Burke, 334 U.S. 736, cited by the defendant, is not in point. In Townsend, the court held that before a defendant is sentenced he is entitled to the presence of counsel to ensure that the conviction and sentence are not based on misinformation or misreading of the court records (See Mempa v. Rhay, 389 U.S. 128). Defendant's absence at the sentence of Purcell did not violate his rights even if that proceeding were related to his case.

Defendant's other contention and the basis of his motion is that Purcell's sentencing should not have been referred to the

Maynard trial judge and by doing so, Maynard's rights were violated.

Specifically defendant claims that during Purcell's sentence proceeding, certain disclosures were made which portrayed Maynard in a most violent light and which necessarily prejudiced the trial judge in determining the Maynard motions and sentence which were then being considered.

While the better practice might have been to have the District Attorney place Purcell's sentencing before another judge, it would be highly speculative for this court to determine whether or not any statements relating to Purcell and Maynard had any influence on the trial judge. This is especially so considering the violent nature of the crime defendant was convicted of by the jury. The motion to set aside the conviction and/or sentence is thus denied, without prejudice to renew same before the trial judge.

deleted without prejudice etc on 8/7/73

(6) The Discovery Motion

Defendant seeks broad discovery and inspection of police investigative reports called DD5's in this case. I recognize that such reports may contain all sorts of raw material, hearsay, investigative leads, false confessions and irrelevant matters which are generally exempt property, and the District Attorney vigorously opposes their inspection. However, because of the various allegations and circumstances of this case, to assure that there was no deliberate concealment of evidence and in view of the sharp dissent in the Appellate Division, the motion is granted. The District Attorney is directed to turn over copies of such reports within 7 days.

This decision constitutes the order of the court.

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* Subsequent to the present motions, with respect to the Murphy affidavit, defense counsel submitted an affidavit from one Nicholas De Martino which was in some respects corroborative of the Murphy affidavit and in some respects contradictory to it.

In any event, this new affidavit would not change the decision upon the motion.

Counsel also submitted an anonymous letter written to Mr. James Wechsler of the New York Post relating to this case. While this letter is clearly hearsay upon hearsay and cannot be considered evidence, the District Attorney was instructed to check his files in regard to the letter and make any appropriate investigation.

Dated: June , 1973.

J.