

NO. 34275

**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

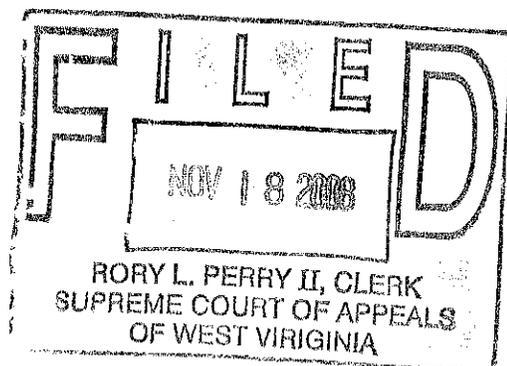
**STATE OF WEST VIRGINIA,
APPELLEE,**

V.

**SHEILA G. ADKINS,
APPELLANT.**

APPELLANT'S BRIEF

Appeal from the Judgment of the Circuit Court of Summers County, West Virginia
Case No. 07-F-27



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KIND OF PROCEEDING AND NATURE OF RULING OF LOWER TRIBUNAL

On March 6, 2007, Petitioner Sheila Adkins was indicted by a Summers County grand jury for two counts of distribution of a controlled substance. On May 11, 2007, Ms. Adkins filed a motion to compel production of exculpatory evidence including the criminal history of the State's confidential informant [CI]. No answer was filed by the State and at a status hearing held on August 10, 2007, Ms. Adkins again requested the CI's criminal history. On August 23, 2007, the State filed a response consisting of a presentence report [PSR] dated October 11, 2005 and a plea order dated September 30, 2005 showing a welfare fraud conviction. On August 29, 2007 the trial was held and Ms. Adkins was convicted on both counts. On September 7, 2007, Ms. Adkins made an oral motion for production for an update of the CI's criminal history. This motion was granted and based the State's production of information showing an extensive criminal history involving the CI's continuing involvement in crimes of dishonesty after the PSR was prepared. Ms. Adkins' moved for a new trial based upon this new material impeachment evidence, but the Court denied this motion on October 10, 2007. On October 12, 2007, Ms. Adkins was sentenced to 1-3 years imprisonment on each count, to run concurrently.

STATEMENT OF FACTS

At trial, the defense attempted to use the CI Lori Carr's convictions for crimes of dishonesty to impeach her testimony and to bolster the defense's claim that the CI was attempting to frame Ms. Adkins because of their mutual love interest Danny "Kool-Aid" Richmond. However, the defense was hampered at every turn by the State's failure to disclose impeachment evidence that could have had quite a negative impact on the CI's

credibility. In the initial discovery production by the State on March 16, 2007, the CIB check showed no criminal history for Ms. Carr. Ms. Adkins' attorney had reason to believe that this could not be the case and filed a motion on May 11, 2007 to compel disclosure of exculpatory evidence, including impeachment evidence. The State did not respond to this motion until it was again requested to do so by the defense at the pretrial on August 10, 2007. On August 23, 2007, the State provided the criminal history section from a pre-sentence report [PSR] prepared by the Summers County Probation Office for the case of State of West Virginia v. Lori Carr, Summers County Circuit Court case number 04-F-65, and the plea order from said case. However, the PSR was dated October 11, 2005 and defense counsel requested an updated criminal history from Prosecuting Attorney Amy Mann on August 27, 2007. See Defendant's Motion for New Trial. Prosecuting Attorney Amy Mann indicated that she would like to update the last two years of the CI's criminal history, but the Summers County probation officer was on vacation and she had no access to the magistrate court records prior to the trial on August 29, 2007. See id.

The extent and time period of the CI's involvement in crimes of dishonesty and the existence of pending charges is material because the State's case hinges solely upon the credibility of its CI on November 8, 2006. There was no audio or videotape of the alleged transactions introduced into evidence at trial. The only witness with direct knowledge of the source of the drugs is the CI. The CI testified that she went to the house occupied by Danny "Kool-Aid" Richmond to make drug buys from Mr. Richmond and Ms. Adkins happened to be there. See Lori Carr direct, p. 92, l. 2 – p. 98, l. 18. Ms. Carr further testified that instead of making the purchases from Mr. Richmond, she

bought the drugs from Ms. Adkins. See id. Sheriff Garry Wheeler testified “Ms. Adkins wasn’t the intended target” of the controlled buy and that the “[p]hone calls [to set up the buy] was [sic] made to [Danny Richmond].” Id. p. 63, l. 24, p. 65, l. 3.

Ms. Adkins introduced evidence, however, that Ms. Carr had a motive to lie against her. Ms. Adkins and Ms. Carr did not get along with each other because of Ms. Carr’s jealousy of Ms. Adkins’ blossoming relationship with Danny Richmond. See Danny Richmond direct, p. 115 l. 1 – p. 119, l. 18. Further, Ms. Adkins testified that she and Ms. Carr had an altercation a few days before the alleged incident that would give cause for Ms. Carr to frame Ms. Adkins for the sale of drugs. See Sheila Adkins direct p. 126, l. 1 – p. 130, l. 13. During this altercation, Ms. Carr and her husband Lee were at Mr. Richmond’s house arguing with Mr. Richmond about his relationship with Lori Carr and that Ms. Carr made a sexual advance toward Mr. Richmond a few days prior. See id. According to Ms. Adkins, “everyone was arguing” and the altercation came to a head when Ms. Carr verbally threatened Ms. Adkins that she would see her “over there on the rock,” meaning “Southern Regional Jail.” Sheila Adkins direct, p. 130, l. 1 – 13.

It was the defense’s theory at trial that there is a reasonable possibility that the Ms. Carr actually purchased the drugs from Danny Richmond. and then framed Ms. Adkins out of spite. Defendant’s closing argument, p. 160, l. 13-19. Mr. Richmond was the target of the investigation, the buy was made at his home and set up over the phone with Mr. Richmond, and there was no other direct evidence that Ms. Adkins made the alleged sales. Garry Wheeler direct, p. 63, l. 14 – p. 68, l. 5. Ms. Adkins’ theory at trial was that Ms. Carr lied about who she got the drugs from, that she really got them from Danny Richmond but blamed Ms. Adkins because of underlying animosity against her.

regarding Ms. Adkins' relationship with Mr. Richmond. Defendant's closing argument, p. 160, l. 15-17; see Danny Richmond direct, p. 115 l. 1 – p. 119, l. 18.

However, it is apparent from the jury verdict that the jury did not believe that Ms. Carr lied against Ms. Adkins. Ms. Carr contradicted Ms. Adkins' theory by denying that she ever had a relationship with Mr. Richmond. Lori Carr cross, p. 99, l. 18 – p. 101, l. 12. Despite the evidence of Ms. Adkins' and Mr. Richmond's relationship on November 8, 2006, and the verbal altercation between the women a few days prior, Ms. Carr testified that she had no motive to lie on Ms. Adkins. Lori Carr cross, p. 105, l. 11-13. Further, the State presented Ms. Carr's testimony as the more believable accounting of events because she had gotten "her life back," had gone to rehab, had "made a change," and had "gained a great deal of self-respect" from working as a CI. See Lori Carr direct, p. 93, l. 22 – p. 94, l. 14, p. 98, l. 24; State's closing argument, p. 159, l. 7-9.

Evidently knowing that the CI's credibility would be an issue, Sheriff Wheeler made an effort during the trial to bolster her credibility by minimizing her criminal history. Despite being a bailiff in circuit court every week, Mr. Wheeler testified that he was unaware that Ms. Carr was involved in any criminal activity outside of worthless checks. Garry Wheeler cross, p. 82, l. 23 – p. 83, l. 4. He testified further that:

I had dealt with Ms. Carr numerous times in the system. Actually and truthfully, nothing major serious to my knowledge. The worst offense she had was probably some bad checks, which is a part of the drug problem, the drug addiction. You can almost read it to the letter. It normally starts out with something, probably bad checks, just several – so on. I had actually, probably, would assume, arrested Ms. Carr. And, actually, we don't arrest on worthless checks, simply for the fact that the jail bill's \$48.50 a day. We normally try to pick them up between the hours of nine and four, bring them to the magistrate and have them arraigned. And that was that. Garry Wheeler direct p. 61, l. 5 –16.

Mr. Wheeler further testified that he doesn't think that writing worthless checks is an indication of dishonesty, and that it didn't make him question Ms. Carr's honesty about her statement about from whom she made the controlled buys. See Garry Wheeler cross, p. 80, l. 11 – p. 82, l. 3. During cross-examination, Mr. Wheeler was provided the impeachment evidence disclosed by the State on August 23, 2007, i.e., Ms. Carr's October 11, 2005 PSR for her conviction of welfare fraud, and the plea order adjudging her guilty of obtaining welfare statements by making false statements. See id., p. 81, l. 1 – p. 84, l. 5. In addition to the welfare fraud conviction, Mr. Wheeler counted twenty-one worthless check convictions against the CI between 2003 and April 10, 2005. See id. However, because the State did not disclose any evidence of the CI's criminal history not contained in Ms. Carr's October 11, 2005 PSR, the defense could not further question Mr. Wheeler about Ms. Carr's honesty on November 8, 2006 in light of her continuing involvement in crimes of dishonesty throughout 2005-2007. The missed opportunities of impeachment include the pending forgery charge from Mr. Wheeler's own sheriff's department of which he claimed no knowledge, the probation revocation for leaving the grounds of the Mother Program and the court order requiring her attendance in the Mother Program that contradicted his and the CI's testimony that the reason Carr worked as a CI was to get into the Mother Program and "get her life back." Lori Carr direct, p. 98, l. 19 – p. 99, l. 13; Garry Wheeler direct, p. 80, l. 11 – p. 84, l. 20.

Only after the trial did it become known to the defense that the CI had a much more recent involvement with crimes of dishonesty than let on by either Ms. Carr or Sheriff Wheeler during their testimony at trial, and this impeachment evidence was knowingly withheld from the defense. Because the defense never received an update to

the CI's criminal history after the pre-trial disclosure of the October 11, 2005 PSR, Ms. Adkins' counsel again requested the CI's updated criminal history on September 7, 2007. Shockingly, the updated criminal history provided by the Summers County Probation Office revealed that not only did Ms. Carr have an additional thirty-eight criminal convictions for worthless checks and obtaining goods by false pretenses, but Carr also had a pending forgery charge filed by the Summers County Sheriff's Department on July 5, 2006 in Summers County Magistrate Court Case Number 06-F-84. See Attachment 1. It is interesting to note that the Summers County Sheriff Department's forgery charge against the CI was dismissed on September 11, 2007, only a few weeks after Ms. Adkins' trial and this point was made in the Defendant's motion for a new trial. See Garry Wheeler direct p. 61, l. 5-16; Attachment 1. This belies Sheriff Wheeler's testimony that the CI had "nothing major serious" on her criminal record, just "probably some bad checks," and tends to show that the State knowingly withheld impeachment evidence from the defense. Garry Wheeler direct p. 61, l. 5-16.

After receiving the new evidence, the materiality of the CI's updated criminal history becomes quite apparent because it contradicts the State's theory that Ms. Carr wanted desperately to turn her life around and is an altruistic person with no axe to grind with Ms. Adkins. See Lori Carr direct, p. 94, l. 1-6, p. 98, l. 20-24; State's closing argument, p. 159, l. 7-9. Carr testified that she was decided to work for Sheriff Garry Wheeler as a CI in exchange for his agreement to facilitate her admission to the Mother Program, a drug rehabilitation program operated by FMRS in Beckley, West Virginia but it is apparent that the Mother Program was court-ordered as a condition of probation on her welfare fraud conviction. See Lori Carr direct, p. 92, l. 2 - p. 98, l. 24; Attachment 1.

Without the benefit of the updated criminal history the defense's ability to cross-examine the CI regarding her continuing involvement in dishonest behavior through November 8, 2006 and into 2007, Ms. Adkins' defense was materially and negatively affected. The July 5, 2006 forgery charge and the probation order requiring participation in the Mother Program could have been drawn to the jury's attention as a reason for Ms. Carr's agreement to work as a CI, rather than because of her stated reason that she needed to "make a change" and "get her life back" or to facilitate her admission into the Mother Program. Lori Carr direct, p. 92, l. 2 – p. 98, l. 24; see Attachment 1. The additional impeachment evidence also could have been used to bolster the defense's claim that, in light of her continuing involvement in dishonest conduct on November 8, 2006, it is likely that Ms. Carr lied about the source of the drugs in an attempt to frame Ms. Adkins. If the evidence of the CI's ongoing criminally dishonest conduct were coupled with the evidence that: (1) Ms. Adkins was not the target of the buy, (2) the buy was made at Danny Richmond's house, (3) the buys were set up with Danny Richmond, (4) Carr's verbal threat to send Ms. Adkins to "the rock," (5) the love triangle between Ms. Carr, Ms. Adkins, and Mr. Richmond, (6) the pending felony charge hanging over Carr's head to ensure her testimony, and (7) the lack of any other direct evidence tying Ms. Adkins to the sales, the totality of these circumstances could very well have turned the tide in favor of the defense. Danny Richmond direct, p. 115, l. 1 – p. 116, l. 20, p. 119, l. 17-18. The additional mountain of impeachment material would have made it much easier for the defense to discredit the CI's purported virtuous intent when making the alleged buy from Mr. Adkins. It would have tended to lend more credence to the defense position that the

CI would lie under oath in order to put Ms. Adkins on "the rock" as she threatened because Ms. Adkins dared to mess with her man Kool-Aid.

ASSIGNMENT OF ERROR

The trial court's committed error when it denied Ms. Adkins' motion for a new trial based upon the State's failure to disclose material impeachment evidence.

POINTS, AUTHORITIES, AND DISCUSSION OF LAW

The State violated Ms. Adkins' due process right to disclosure of material impeachment evidence when it did not provide a complete criminal history for the CI that was favorable to Ms. Adkins as evidence drawing into question the CI's credibility and motivation for her claim on November 8, 2006 that Ms. Adkins sold her drugs. In order to establish a due process violation resulting from the State's failure to disclose exculpatory evidence, the evidence not disclosed "must be favorable to the defendant as exculpatory or impeachment evidence," it must have been either willfully or inadvertently suppressed by the State, and the evidence must be material in that it prejudiced the defense at trial. Syllabus Point 2, State v. Youngblood, 650 S.E.2d 119 (W.Va. 2007).

- A. The updated criminal history that the State did not disclose prior to trial is material and prejudiced Ms. Adkins' defense.

There is no doubt that the CI's ongoing involvement in crimes of dishonesty through 2007 is favorable to the Defendant as exculpatory impeachment evidence. The CI's criminal history is material because of the State's reliance on the CI's testimony to secure a conviction. If the jury disbelieved the CI because of her continuing involvement in crimes of dishonesty during the time of the alleged buy, there is no other direct evidence to support a conviction. The defense was denied the opportunity to fully attack

the CI's credibility because the State knowingly failed to provide the necessary information of the CI's criminal history and pending charges so that the defense could properly impeach the CI's credibility and motive for accusing Ms. Adkins, particularly with regard to the pending felony charge filed by the Summers County Sheriff's Department, the same agency for which she worked as a CI.

The evidence of Ms. Carr's continued involvement in criminal activity after the period of time reflected in the October 11, 2005 PSR is material because her continuing dishonest behavior contradicts the State's evidence that Ms. Carr's drug problem is in the past, she has gotten her life back, she went to the Mother Program voluntarily, and now leads a law-abiding lifestyle. See Lori Carr direct, p. 93, l. 22 – p. 94, l. 14; Attachment 1. Ms. Carr and Sheriff Wheeler testified that Ms. Carr funded her drug habit with bad checks, and she continued to write bad checks through 2007, a fact that was never disclosed by the State prior to trial. See id. In fact, Ms. Carr had a total of thirty-eight convictions for crimes of dishonesty not disclosed on the October 11, 2005 PSR. Even since agreeing to work as a CI to "get her life back," Ms. Carr's pattern of unlawful, dishonest criminal conduct continued as follows: one worthless check conviction in Greenbrier County, ten worthless check convictions in Summers County, a sentence to one year probation on the welfare fraud case and less than two months later a bench warrant for her flight from the court-ordered attendance at the Mother Program, and finally a thirty (30) day jail sentence for the violation of her probation. See Attachment 1. Ms. Carr's non-stop involvement in kiting worthless checks, obtaining goods by false pretenses, violating her probation by fleeing from the Mother Program, and the pending felony forgery charge against her could have been used during Ms. Carr's cross-

examination to draw into question the extent of her drug rehabilitation, the voluntariness of her participation in the Mother Program, the nature of her relationship with Danny Richmond, her interest in testifying favorably for the State so that her pending forgery charge would be dismissed, and most importantly, the trustworthiness of her testimony regarding the source of the drugs on November 8, 2006.

Carr's criminal history after the October 11, 2005 PSR is material because Carr is the source of the only direct evidence against Ms. Adkins and her credibility is crucial to the State's ability to prove its case. If the jury had the benefit of this evidence it could have more easily discredited her testimony as that of a jilted lover with a pending felony charge that will be dismissed if she testifies the way the State wants her to, there is a reasonable probability that the result of the proceedings would have been different if all of the impeachment evidence had been disclosed. If Ms. Adkins counsel had the benefit of the impeachment material, he could have better rebutted the State's claim that Carr is more believable than Adkins because on November 8, 2006 Carr wanted to end her drug addiction so she worked as a CI in an effort to mend her ways and she now has her life back. The information provided after the trial pursuant to the September 7, 2007 motion uncovered a myriad of shady circumstances in which the CI was mired that would have given helped the defense immensely at trial with ammunition to attack Carr's credibility and motive to lie against Sheila Adkins on November 8, 2006. The fact that this evidence was not disclosed by the State prior to trial was material and prejudicial to the defense because Ms. Adkins' counsel was flying half-blind during Carr's cross-examination and he could not adequately impeach the State's theory that Carr was more believable than Adkins because Carr was on the path to recovery on November 8, 2006. Therefore, the

State's failure to disclose this material impeachment evidence is rises to the level of a Youngblood violation and requires a remand for new trial.

- B. To the extent that State v. Kennedy applies as a basis for the denial of Ms. Adkins' motion for a new trial, the court erred in finding that the Kennedy test is not satisfied. To the extent that Kennedy conflicts with Youngblood, it should be overruled.

The Court erred by using State v. Kennedy as the basis to deny Ms. Adkins' motion for a new trial. See 205 W.Va. 224 (1999); Order Denying Motion for New Trial.

This case involves a Brady/Youngblood constitutional due process violation that Kennedy does not adequately address in light of Youngblood. See State v. Youngblood, 650 S.E.2d 119 (W.Va. 2007); see also State v. Farris, 656 S.E.2d 121 (W.Va. 2007).

Even if the Kennedy analysis does apply in part, Ms. Adkins' motion for a new trial should have been granted.

In its order denying the motion for a new trial, the court found that although Ms. Adkins satisfied the first two prongs of Kennedy, the last three prongs were not satisfied. With regard to the third prong of Kennedy, the updated criminal history is not merely cumulative evidence because the State's case hinged upon the credibility of its CI and her continued involvement in crimes of dishonesty on November 8, 2006 makes it more likely that she would lie about where she got the drugs. The defense's theory at trial was that rather than working as a CI because she wanted to better herself, Ms. Carr wanted to frame Ms. Adkins in retaliation for Ms. Adkins' relationship with Danny "Kool-Aid" Richmond. If the defense had the benefit of the evidence of Ms. Carr's continuing involvement in dishonest activities through 2007 and the pending forgery charge, the jury would have given more weight to Ms. Adkins' theory because it would have seemed more likely that if Ms. Carr was still stealing money by writing bad checks and forging

checks she may be more likely to lie on Ms. Adkins to get her into trouble. Therefore, the evidence is material to the defense and should pass the third prong of Kennedy.

For the same reason the fourth prong of Kennedy is satisfied because the new evidence would produce an opposite result at a second trial on the merits. Because there is no independent evidence of the source of the drugs, an impeachment of Ms. Carr's testimony with evidence of her dishonest behavior through November 8, 2007, coupled with the evidence of Ms. Carr's motive and opportunity to frame Ms. Adkins would place an entirely different light on the CI's testimony. The Court even concedes that the CI "may have not been completely honest [but] it was up to the counsel for the Defendant to inquire as to the specifics of her pending criminal situation." Order Denying Motion for New Trial, p. 4. Not only does the Court recognize that the CI lied under oath, but the Court's position puts the Defense in an untenable position of questioning a witness regarding crimes of dishonesty without having a factual basis for doing so or an ability to impeach if the crimes are denied. See West Virginia Rules of Evidence, Rule 609. The Court's reasoning is wrong-headed and in any event the additional evidence would have produced an opposite result at a second trial.

Finally, the Court misses the point in its analysis of the fifth Kennedy prong. The true test is not that a new trial should be refused because the new evidence "can only impeach the State's witness," but whether the new evidence is material and failure to disclose it "prejudiced the defense at trial." Syllabus Point 2, in part, State v. Youngblood, 650 S.E.2d 119 (W.Va. 2007). Ms. Adkins re-submits her Youngblood argument *supra* and prays that the Court rule that to the extent the State v. Kennedy holds to the contrary, it should be overruled.

In conclusion, the new evidence disclosed by the State after the trial was impeachment evidence, suppressed by the State either willfully or inadvertently, and it prejudiced that defense at trial. See Syllabus Point 2, State v. Youngblood. The defense was not able to adequately impeach the CI's testimony and draw into question the extent of her rehabilitation from unlawful, dishonest behavior. Therefore, the Court erred when it denied the Defendant's motion for a new trial.

PRAYER FOR RELIEF

The Petitioner prays that this Court grant her petition for appeal, that her trial be reversed and remanded for a new trial because of the constitutional due process error committed by the State as contemplated in Youngblood, and all other relief deemed just and proper.

Respectfully Submitted,

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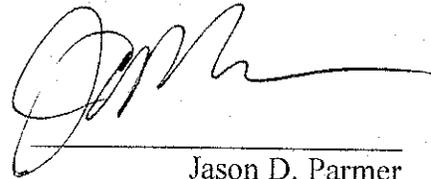
Case No. 34275

SHEILA G. ADKINS,
APPELLANT.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of the foregoing appellant's brief by first class mail on November 17, 2008 upon:

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