
NO. 34275

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

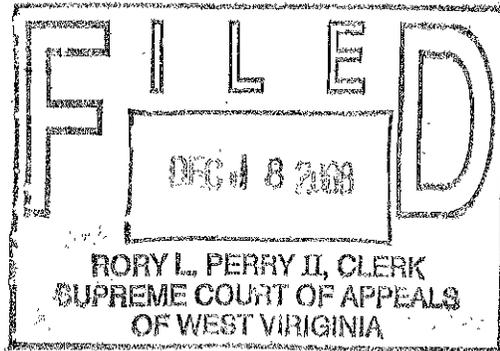
STATE OF WEST VIRGINIA,

Appellee,

v.

SHEILA G. ADKINS,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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SHEILA G. ADKINS,

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal by Sheila G. Adkins, hereinafter Appellant, from her conviction in the Circuit Court of Summers County of two felony counts of distribution of a controlled substance. By Order entered October 12, 2007, the circuit court sentenced Appellant to 1-3 years imprisonment on each count, with the sentences to run concurrently.

On appeal, Appellant alleges one assignment of error: that the circuit court erred in denying her motion for a new trial based on the State's failure to turn over the complete criminal history of Lori Carr, the State's key witness.¹

¹Ms. Carr was a confidential informant who testified that she had purchased drugs from the Appellant. Since there was no other participant or eyewitness to the drug transaction, the State's case rose or fell on the jury's assessment of Ms. Carr's credibility.

II.

CONFESSION OF ERROR

The State concedes that the court below utilized an incorrect standard of review in deciding the Appellant's motion for a new trial, and further concedes that when the undisputed material facts of this case are analyzed under the proper standard, the Appellant was denied due process of law and is entitled to a new trial.

III.

STATEMENT OF THE RELEVANT PROCEDURAL FACTS

The Appellant, Sheila Grimmett Adkins, was indicted on one count of distributing a Schedule III controlled substance, West Virginia Code § 60A-4-401(a)(ii), and one count of distributing a Schedule IV controlled substance, West Virginia Code § 60A-4-401(a)(iii).

Prior to the trial the Appellant's counsel filed a "Motion to Compel Production of Exculpatory Evidence," which included a specific request for "[a] statement of any 404(b) evidence or impeachment material including but not limited to other bad acts, dishonesty, violence, moral turpitude (charged or uncharged) done by any witness known by the State." (App. at 8.) The State initially responded to the motion with a NCIC report indicating "no record found" as to its witness Lori Carr. (App. 21, Attachment.) The Appellant's counsel then filed a "Motion for Additional Criminal History of Witness Lori Carr," informing the court during a hearing on the motion that he had actually seen Ms. Carr in the courthouse on several occasions and "I guess she was charged with some crime. But the information that I received in response to my request for the impeachment material was that she has no criminal record. And I'm not sure – I mean, there were at least charges." (App. 33.) Thereupon, the State apparently furnished a criminal record showing that Ms.

Carr had twenty-two worthless check charges and a welfare fraud charge in 2002, 2003 and 2004, plus one worthless check charge in early 2005.²

The Appellant went to trial with her counsel in possession of this information only, in a case where Ms. Carr was the only witness to the alleged distribution of controlled substances.

Subsequent to the trial, Appellant's counsel learned that Ms. Carr had a far more extensive criminal history than that which had been provided by the State. Specifically, Ms. Carr had fourteen more bad check/obtaining goods by false pretense charges in 2005, fourteen more in 2006, and ten more in 2007; a probation violation charge (on the welfare fraud conviction) had been filed against her in 2006, and another in 2007 that actually resulted in revocation; and she was charged with forgery in 2006, a crime to which she confessed³ but which was quietly ignored until a few days after the Appellant's trial, at which time it was dismissed. (Attachment 1 to Appellant's Brief.)

IV.

STATEMENT OF THE FACTS OF THE CASE

Both acts of distribution of a controlled substance were alleged to have occurred on November 8, 2006, when confidential informant Lori Carr went to the home of Danny "Kool-Aid" Richmond, for the express purpose of making a controlled buy. Mr. Richmond was the target of the police investigation that resulted in Ms. Carr's attempt to make the buy. According to the testimony

²Although the record is not clear about what exactly was furnished to the Appellant's counsel, it appears that the State turned over a copy of the Presentence Investigation Report in a welfare fraud case to which Ms. Carr pleaded guilty on September 12, 2005. The Criminal Record contained therein covers a period of time from April 14, 2002 through April 10, 2005. (The PIR is contained in Attachment 1 to Appellant's Brief.)

³According to the Criminal Complaint, contained in Attachment 1 to the Petitioner's Brief.

testimony of Mr. Richmond and the Appellant, Mr. Richmond and Ms. Carr had had a prior romantic relationship; Ms. Carr denied this.

Ms. Carr testified that upon arriving at the Richmond home, she was greeted by the Appellant and told that "Kool-Aid" wasn't there. "And I said, well, he's supposed to have something for me. And she said, well, I have it here." (Tr. at 96.) At that point, according to Ms. Carr, the Appellant handed her five Lorcets and five Xanaxes, and Ms. Carr paid the Appellant \$60.00.

This transaction was not observed by the police, who at all relevant times were in the parking lot of Talcott Grade School. (Tr. at 64-65.) Therefore, exactly what happened in the Richmond home was a swearing match between Ms. Carr and the Appellant, who testified that "She never bought any pills from me. And as far as buying any from Danny, he never let her into the house where I was at. He would meet her in what we call the well room or he would meet her outside because he kept us apart because, about two weeks before that, she and I had an altercation." (Tr. at 126.)

When asked why she had agreed to be a confidential informant, Ms. Carr testified that her sole reason was to get into a treatment program. (Tr. at 92-93) She later elaborated:

A. I had to change how my life was going, the hunting the drugs all the time, the doing the drugs all the time. I was no longer active in my kids' lives like I had been. And I'd lost a lot. And a lot of things had happened. And it was time to make a change somehow. And this was the only way I knew to make it, was to try to cut off the supply to it.

Q: Are you doing drugs now?

A: No, ma'am.

Q: How was the treatment program?

A: It was good. I did good. I got a lot better. Put on weight. Learned how to deal with things a little differently than I'd been doing dealing with them before. I liked it. It kind of got me back to where I thought I needed to be, but some problems come up. And I had to leave early.

(Tr. at 98-99.)

The Appellant's attorney attempted to impeach Ms. Carr with the information that had been turned over to him, specifically, that she had passed twenty-three bad checks between 2002 and 2005, and had pled guilty to a 2004 charge of welfare fraud.

Q: Okay. Now, the checks. Would you agree, that tends to reflect poorly on your honesty?

A: Yeah.

Q: And this only goes up to '05. Do you have other charges through '05?

A: I had some bad checks in Raleigh County, yes.

Q: Okay. How about into '06? What did you have then?

A: I don't know. All I've ever had is bad checks, besides the welfare fraud. Aside from that, I don't know where you're going on that, what you're asking.

(Tr. at 104-05.)

What Appellant's counsel didn't know, since Ms. Carr's complete criminal history had not been provided to him, was that she had fourteen more bad check/obtaining goods by false pretense charges in 2005, fourteen more in 2006, and ten more in 2007; that a probation violation charge (on the welfare fraud conviction) had been filed against her in 2006, which was the genesis of her desire to get into a substance abuse program; that her probation actually revoked in 2007, since she left the program prematurely and against medical advice; and that she was charged with forgery in 2006, a

crime to which she confessed but which was quietly ignored until a few days after the Appellant's trial, at which time it was dismissed.

V.

ARGUMENT

A. THE CIRCUIT COURT UTILIZED THE WRONG STANDARD OF REVIEW IN DECIDING THE APPELLANT'S MOTION FOR A NEW TRIAL.

Although the Appellant grounded her motion for new trial on an alleged *Brady/Hatfield*⁴ violation, citing *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007), the court below analyzed the case under *State v. Crouch*, 191 W. Va. 272, 445 S.E.2d 213 (1994); *State v. Helmick*, 201 W. Va. 163, 495 S.E.2d 262 (1997); and *State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 (1999). The State concedes that the *Couch/Helmick/Kennedy* standard is not the appropriate standard in a case involving a *Brady/Hatfield* violation, where the lynchpin is the State's federal and state constitutional duty to disclose evidence.

State v. Kennedy, supra, 205 W. Va. at 235, 517 S.E.2d at 466, restates the principle of law set forth in *State v. Crouch, supra*, Syl. Pt. 1, and *State v. Helmick, supra*, Syl. Pt. 1, that a “. . . new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.”

However, in *State v. Youngblood, supra*, 221 W. Va. at 29 n. 15, 650 S.E.2d at 128 n. 15, this Court specifically pointed out that this principle of law “. . . has no application in the context of the constitutionally required disclosure under *Brady* and *Hatfield*. . .,” further noting that “[w]e have

⁴*Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982).

repeatedly recognized . . . , the distinction between the disclosure of . . . evidence, which is constitutionally mandated under *Brady* and its progeny, and the production of evidence pursuant to a court order implementing discovery.” *Id.*, citing *State v. Fortner*, 182 W. Va. 345, 353 n. 5, 387 S.E.2d 812, 820 n. 5 (1989) (ellipses in original).

The court below devoted almost the entirety its memorandum opinion denying the Appellant’s motion for a new trial to a *Kennedy* newly-discovered-evidence analysis; glaringly absent is even a mention of *Youngblood*, upon which the Appellant relied. At the conclusion of its opinion the court below touched upon the Appellant’s argument in cursory fashion, citing *Kyles v. Whitley*, 514 U.S. 419 (1995) for the proposition that a *Brady* violation requires “. . . a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” (Memorandum Opinion of October 10, 2007, p. 5.) However, as this Court made clear in *Youngblood*, *supra*, 221 W. Va. at 33-34 & ns. 29 and 30, 650 S.E.2d at 132 & ns. 29 and 30, the court’s reliance on *Kyles* was misplaced. First, the cited language from *Kyles* is not a harmless error standard, as the court below seemed to think; to the contrary, “. . . once a reviewing court applying *Bagley*⁵ has found constitutional error there is no need for further harmless-error review.” *Kyles v. Whitley*, *supra*, 514 U.S. at 435. *See also State v. Salmons*, 203 W. Va. 561, 573, 509 S.E.2d 842, 854 (1998). Second, West Virginia’s due process standard under *State v. Hatfield*, *supra*, appears to be higher than the due process standard under *Brady* and its progeny, including *Kyles*:

We wish to make clear that our standard under *Hatfield* may be higher than *Brady*. That is, “[d]isposition of [Mr. Youngblood’s] federal due process rights, under [*Brady*], does not necessarily resolve his right of due process under [*Hatfield*].” *State*

⁵*United States v. Bagley*, 473 U.S. 667 (1985).

v. Osakalumi, 194 W. Va. 758, 765, 461 S.E.2d 504, 511 (1995). Therefore, should the United States Supreme Court grant certiorari again and find that the failure to disclose the note did not violate *Brady*, we wish to make clear that we unequivocally find that Hatfield has been violated.

In his motion for new trial, the Appellant's counsel cited and relied upon the case that should have been the basis for review of his *Brady/Hatfield* claim: *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007). For reasons that are not apparent, the court below ignored *Youngblood* and therefore failed to apprehend that *State v. Crouch*, 191 W. Va. 272, 445 S.E.2d 213 (1994), *State v. Helmick*, 201 W. Va. 163, 495 S.E.2d 262 (1997), and *State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 (1999) do not apply; and that *Kyles v. Whitley*, 514 U.S. 419 (1995) sets a standard of materiality, not harmless error.

Therefore, this Court must analyze the Appellant's due process claim under the relevant standard of review.

**B. UNDER THE DUE PROCESS STANDARD SET FORTH IN
STATE v. YOUNGBLOOD, 221 W. Va. 20, 650 S.E.2d 119 (2007),
THE APPELLANT IS ENTITLED TO A NEW TRIAL.**

This Court's fidelity to the principles of *Brady v. Maryland*, 373 U.S. 83 (1963), spans decades. See, e.g., *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982), Syl. Pt. 4; *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812 (1989), Syl. Pt. 4. Most recently, in *State v. Youngblood*, *supra*, 221 W. Va. at 28, 650 S.E.2d at 127, the Court wrote that:

There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

1. In the instant case, it is beyond argument that the evidence is "favorable to the accused." Although the Appellant's counsel did a good job of impeaching the State's witness with

her prior convictions – those that were known to him – he had no ammunition to contest what she presented as her “credibility credentials.”

● That she only agreed to be a confidential informant in order to get the Sheriff’s assistance in getting her into a substance abuse treatment program. (Tr. at 92-93.) *Cross examination on this point might have been different had defense counsel known that at the time Lori Carr agreed to be a CI, she had a pending forgery case in which she had given a taped confession. By the time of Appellant’s trial, the State had quietly let the time limits for prosecution lapse, and the case was officially dismissed a few days after the Appellant’s conviction.*

● That she benefitted greatly from the substance treatment program, despite the fact that “. . . some problems come up. And I had to leave early.” (Tr. at 99.) *Cross examination on this point might have been different had defense counsel known that Lori Carr simply walked out of the program against medical advice – whereabouts unknown – and that her probation on a previous welfare fraud conviction was revoked as a result.*

● That she didn’t know whether she had any charges filed against her after 2005. (Tr. at 105.) *Cross examination on this point might have been different had defense counsel known that Lori Carr had fifteen more worthless check charges filed against her in 2006, as well as the forgery charge discussed above and a probation revocation proceeding; and that she had ten more worthless check charges filed against her in 2007, as well as another probation revocation proceeding.*

In short, Ms. Carr presented herself as a troubled individual who had cleaned up her act well before the Appellant’s trial and had nothing to gain from her cooperation with the police other than assistance in getting into a drug program. Had the State turned over the witness’ complete criminal

history, which it was obligated to do, the Appellant's counsel could have presented a very different picture of Ms. Carr as an unrepentant paperhanger and a parole violator, with a forgery case hanging over her head and an unwillingness to complete the treatment that might have aided her drug dependency problems.

2. In the instant case, it is also beyond argument that State did not turn over Lori Carr's complete criminal history. The record does not disclose the reason for the State's failure, and the Appellant does not contend that it was anything other than negligent or inadvertent. Under the case law, it doesn't matter; "... the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

3. In *State v. Youngblood*, *supra*, 221 W. Va. at 32, 650 S.E.2d at 131, this Court defined Brady/Hatfield materiality as follows: "That is, was the defense prejudiced by the failure to disclose. . . ."

As is clear from the preceding argument, V(B)(1), *infra*, the State believes that the withheld impeachment evidence could have changed the outcome of the trial, since the testimony of Lori Carr was the sole evidence upon which the conviction rested and her credibility was therefore a critical issue. It is all well and good to say, as the court below did, that "... the jury was already put on notice that the witness may have some credibility issues since she had engaged in several acts of deceit that led to several convictions." (Memorandum Opinion of October 10, 2007, at pp. 5-6.) However, the truncated criminal history disclosed to the Appellant's counsel allowed Ms. Carr to present herself as a person whose crimes (numerous bad checks and a welfare fraud) took place years

before the trial, and whose only motivation for becoming a confidential informant was her desire to obtain admission into a drug treatment program. That Horatio Alger image could certainly have been shaken had the witness been confronted with her complete criminal history, which showed a continuing pattern of criminal conduct (dozens more bad checks and two probation violations) continuing well into 2007; her decision to leave the drug treatment program against medical advice, without even leaving a forwarding address, which resulted in a probation revocation and a jail sentence; and the pendency of a forgery charge to which she had confessed, a charge that was dismissed less than two weeks after the Appellant's trial.

The Appellant was constitutionally entitled to the information that would have allowed her counsel to effectively impeach the witness. The State joins in the Appellant's request that this Court grant her a new trial so that a jury can determine Lori Carr's credibility based upon a full and fair presentation of the facts.

VI.

CONCLUSION

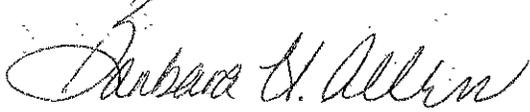
WHEREFORE, for the foregoing reasons, the State confesses error. The judgment of the Circuit Court of Summers County should be reversed by this Honorable Court, and this case remanded for a new trial.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

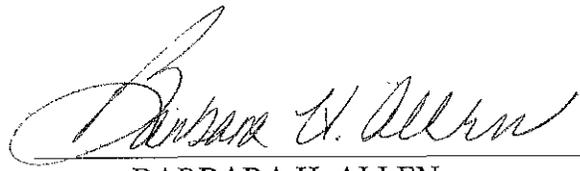
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CERTIFICATE OF SERVICE

I, Barbara H. Allen, Managing Deputy Attorney General and counsel for Appellee, do hereby certify that a true and accurate copy of the foregoing "Brief of Appellee State of West Virginia" was served upon plaintiff's counsel of record, by depositing the same in the United States Mail, first class postage prepaid, this 18th day of December, 2008, addressed as follows:

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A handwritten signature in cursive script, reading "Barbara H. Allen", written over a horizontal line.

BARBARA H. ALLEN