

FILED

May 15, 2007

released at 3:00 p.m.

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, J., dissenting:

The Majority opinion attempts to sanitize Youngblood, hide his weapon and provide him with a script to follow for cross-examination at his newly-awarded trial – all upon the misguided premise that the citizens of Morgan County who served on the jury below might have found Youngblood innocent of two sexual assaults, indecent exposure, brandishing and wanton endangerment with a handgun if only the defense had access to a note the provenance and accuracy of which is highly questionable.¹ This authorship of this

¹ Perhaps, instead of rushing to set aside Youngblood's convictions on a document which may fail evidentiary authentication, this Court should have instead adopted the more sensible approach of directing the circuit court to order a provisional or interim analysis of the note to determine the author or authors and, following a hearing, to enter findings of fact. It cannot be said today *as a matter of law* that the note is not a forgery created to discredit the complaining witnesses, especially since the note was not found during the initial search. Without a definitive analysis of the note or at least some effort to obtain one, it is apparent that the Majority goes too far in impulsively and precipitously vacating multiple verdicts upon its own speculation, surmise and conjecture.

Suppose Kimberly K. is called as a witness in the upcoming trial and during the course of her testimony denies any knowledge of the note, which included an admission to multiple acts of vandalism of the Pitner residence? Next, Wendy S. is called to the stand and during her testimony also denies any knowledge of the note. That possibility is not addressed by the Majority.

Perhaps, as the Majority suggests, the admissibility of the note is not a condition upon which the State's obligation to disclose is evaluated. In this case, however, if the note cannot
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note, which the Majority contends is *important* impeachment evidence, is not known. And while the Majority apparently believes that *someone* is subject to impeachment by this note, it is undisputed that Katara N., the victim of Youngblood's sexual assaults, is not subject to that impeachment since even this Court and the Supreme Court of the United States agree that this sixteen year old victim was not the note's author. Since neither *Brady* nor *Hatfield* are dispositive in this case, and since the Majority's characterization of this issue as one of constitutional magnitude cannot serve, under federal or state law, to imbue the note with a legal significance it simply does not have, I dissent. The ordinary standard relating to after-acquired evidence is instead applicable in this case, and the circuit court, having heard the testimony, acted appropriately.

The State's factual case was compelling. It was easily enough for the jury to have convicted Youngblood for his crimes regardless of the note. With respect to the sexual assault charges, the State's case was established by the sixteen year old victim's testimony which was completely consistent with the physical evidence recovered at the scene of the crime. While Youngblood did not testify at trial, a voluntary statement he gave to investigators was introduced *without objection*. This statement was devastating to Youngblood in that it established that Youngblood affirmatively lied to investigators about

¹(...continued)
be connected to anyone and no determination made as to when it was written, then there is no impeachment value whatsoever in it, exculpatory or otherwise.

what happened that night regarding proof at the scene of the sexual act performed on him and about the gun he used throughout the commission of his criminal acts – Youngblood contended that while he had a gun, it was “just the plastic one”!

The evidence of the State with regard to the first sexual assault committed against Katara N. was that Youngblood placed a revolver against her head and made her perform oral sex on him. Youngblood later pointed the revolver at his friend and accomplice, Joseph Pitner, to prevent Pitner from leaving the scene. Thereafter, Youngblood waived the revolver in the vehicle at the three women, ages 16, 15 and 18, thereby committing two acts of brandishing and one act of wanton endangerment. The wanton endangerment with the revolver was specifically directed at Wendy S. Later, the revolver was in sight when Youngblood sexually assaulted Katara N. a second time.² It is indeed unfortunate that in the Majority’s rush to gift Youngblood with a new trial, it ignores the compelling nature of the State’s physical confirmation of Katara N.’s account³ and the devastating effect which

² As indicated in the opinion filed in 2005, the circuit court required Youngblood to wear a stun belt during the voir dire process, in part, because, in addition to the charges herein, Youngblood was facing a felony murder charge in another case.

³ Law enforcement located Youngblood’s sperm in a trash can at Pitner’s residence exactly where Katara N. stated that evidence of the sexual assault would be found. According to the record, Trooper Peer testified that when he asked Youngblood “is there anyway [sic] your sperm could be in a trash can at Joe’s?”, Youngblood responded, “no.” This accuracy of Youngblood’s untruthful statement to investigators was confirmed in Youngblood’s written statement which was introduced without objection at his trial below and which is the *only* evidence in the record of Youngblood’s account of what transpired.
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Youngblood's affirmative attempt to mislead investigators had on the jury's reasoned verdict of guilt.

Information withheld or not provided by the prosecution, even if at the time unknown to the prosecution, is not material, for *Brady* purposes, "unless the information consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes." *United States v. Phillips*, 948 F.2d 241, 249 (6th Cir. 1991); *United States v. Kennedy*, 890 F.2d 1056, 1059-60 (9th Cir. 1989), *cert. denied*, 494 U.S. 1008, 110 S.Ct. 1308, 108 L.E.2d 484 (1990). Inadmissible evidence is, by its definition, not material for *Brady* purposes because it never would have reached the jury and therefore could not have affected the trial's outcome. *United States v. Ranney*, 719 F.2d 1183, 1190 (1st Cir. 1983). In determining whether evidence that the prosecutor does not disclose to the defendant which could be used to impeach a prosecution witness is material to the defendant's case, it is the job of the *appellate* court to determine what evidence would technically be admissible, and what portion of that evidence the trial court would allow under the discretion granted to the trial court under our rules of evidence dealing with the admissibility of evidence of specific acts of a witness for impeachment purposes. *U.S. v.*

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It goes without saying that this sexual act, verified by physical evidence, is not the same type of sexual act purportedly involving Youngblood and Katara N. which was referenced in the note at issue.

Veras, 51 F.3d 1365, 1375 (7th Cir. 1995); *see also* Rule 608(b) of the West Virginia Rules of Evidence.

Sadly, the Majority attempts no such determination prior to its vacating of the guilty verdicts below.⁴ Rather the Majority seems content to blindly plunge forward into

⁴ The Majority's rush to reverse may perhaps be based, at least in part, on its mistaken belief that the United States Supreme Court's remand was, instead, a reversal. It was not. By the terms of the order itself, what is commonly referred to as a "GVR" order, this case was remanded simply for the benefit of our review of Youngblood's *Brady* claim: "*If this Court is to reach the merits of this case, it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the Brady issue.*" *Youngblood v. West Virginia*, – U.S.–, 126 S.Ct. 2188, 2190, 165 L.Ed.2d 269 (2006) (emphasis added). The United States Supreme Court's *actual* language in the remand order simply does not comport with the Majority's apparent belief, as reflected in footnote 11 of its opinion, that the GVR order instead may have been "a *prima facie* [determination] that the judgment below is in error." *Citing* Martin, "Gaming the GVR," 36 *Ariz.St.L.J.* 551, 564-5 (2004) (internal quotations and citations omitted).

The Majority's misunderstanding appears to stem from its misapprehension of how the GVR order was actually applied in *Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996), compared to this case. Justice Scalia's dissent above proves noteworthy on illuminating the Majority's error. Therein, Justice Scalia observes that the GVR order in the instant case does not fall within *any* of the Court's prior GVR cases:

The [United States Supreme] Court does not invoke even the flabby standard adopted in *Lawrence*, namely whether there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." 516 U.S. at 167, 116 S.Ct. at 606, 133 L.Ed.2d at 554.

– U.S.–, 126 S.Ct. at 2191-2, 165 L.Ed.2d at – (Scalia, J., dissenting). Thus, contrary to the Majority's conclusion, the remand herein is *not* a thinly veiled direction to alter our course. Rather, it is an order that recognizes that the *Brady* decision is pertinent in this case. It
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questionable legal channels by relying on conjecture based on supposition founded on guesswork. No attempt is made to ascertain the provenance of the note or to determine its authenticity – a note supposedly found by and within the control of family members of Youngblood’s accomplice, Pitner. In anticipation of the new trial, the Majority states that it *might* be brought out, this time in conjunction with the unidentified note, that Katara N. had the ability to flee after the first sexual assault or to speak to the police when they approached the vehicle containing the three women. This assumption simply ignores the physical support at the scene of the crime which verifies Katara N.’s account and shows Youngblood to have lied about the events. It also ignores Youngblood’s statement about the weapon he used to perpetrate his crimes. It must be remembered that, at the point of the second sexual assault, the evidence indicated that Youngblood had already used the revolver twice: (1) by placing it to Katara N.’s head during the first sexual assault and (2) by preventing Pitner from leaving the scene. According to the State’s unrefuted evidence, Youngblood also threatened all three women with the revolver and had it in sight during the second sexual assault.

Furthermore, with respect to Youngblood’s sexual assault of Katara N., the note is simply not credible on its face. The note makes no mention whatsoever to the sexual

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requires this Court to determine whether we believe anything in *Brady* demands a different result. That is all. Nothing more.

act to which Katara N. testified, which Youngblood denied in his statement (which was available to the jury), and which *was* physically verified by the objective evidence of the investigation which was admitted into the record. Even if impermissibly offered as hearsay for the truth therein asserted, the note references a different purported sexual act for which there is no other mention whatsoever in the proper record of this case. Thus, the complete circumstances surrounding the actual evidence at trial and the unconvincing nature of the note in question do not support the potential import of the note which the Majority attempts to suggest.⁵

The State did not violate *Brady*. The note, even if credible, would not have made a difference in the trial's result because, while it may be argued that the note could have impeached its author (which was not Katara N.), it could not have come in for substantive consideration by the jury because it was inadmissible hearsay. Furthermore, the note's accuracy was fully and powerfully undermined by Youngblood's own statement (in which he admitted to no sexual act by Katara N. whatsoever and in which he affirmatively lied to investigators) and the objective physical evidence found by investigators at the scene

⁵ Moreover, the Majority opinion incorrectly states that the residences of Youngblood and Pitner, where the sexual assaults were said to have taken place, were in Berkeley Springs. As indicated in this Court's original opinion, however, Youngblood and Pitner lived *near, or in the area of*, Berkeley Springs, and when Wendy S. made the 911 call, she stated that she and the other two women were at an unknown location.

of the crime which substantiated Katara N.'s account of what happened.⁶ The note was simply not material.⁷

Simply stated, the prosecution's failure to disclose a note that may have served as possible impeachment material for a corroborating prosecution witness's credibility, did not constitute a *Brady* violation since Youngblood fails to show that the note would have put the whole case in such a different light as to undermine confidence in the verdict. Neither Kimberly K. nor Wendy S. were principal witnesses against Youngblood on the sexual assault charges, nor was their testimony "the glue that held the prosecution's case together."

⁶ Youngblood's counsel sought throughout Katara N.'s testimony to attack her credibility. Obviously, the jury did not agree and considered all of the evidence together which compelled them to return a guilty verdict. It is equally obvious that the jury trusted the credibility of Katara N. more so than the account of Youngblood present in his voluntary statement given to investigators which was admitted into evidence without objection.

⁷ A comment regarding Youngblood's contention that he relied upon a defense of consent is appropriate. The Majority accepts without question that Youngblood defended himself by contending that any sexual encounter was consensual. A review of the record is enlightening. No where in the opening statement of Youngblood's counsel is there any indication that Youngblood intended to use a defense of consent. No where in Youngblood's case is there an indication that Katara N.'s oral sex on Youngblood was consensual. No where in Youngblood's case was any evidence introduced to question the statements Youngblood made to investigators, which were made a part of the record, that evidence for such sexual activity would not be found at the place of the activity. Only once, in closing, did Youngblood's counsel reference consent with respect to the issue of Katara N. being forced to have oral sex on Youngblood in the presence of a gun. The jury was certainly cognizant of this shift from Youngblood's initial position in his statement and his attorney's later suggestion that, if it happened, it might have been consensual – and this realization by the jury of the inconsistency in Youngblood's initial and ultimate positions no doubt was not beneficial to Youngblood, as evidenced by the jury's verdict.

Schad v. Schrivo, 454 F.Supp. 2d 897, 911 (D. Ariz. 2006), *quoting Horton v. Mayle*, 408 F.3d 570, 579 (9th Cir. 2005).

The Majority also revisits the post-trial hearing concerning the note and quotes testimony therefrom while disregarding the conclusion reached by the circuit court. Finding that the note was not the type of evidence justifying a new trial, the circuit court stated that, although the note might have been used for impeachment:

the Court would however in looking at the note not see it as an act of gratitude or thankfulness for receipt of sexual attention but sees it as rather a spiteful or vindictive act or in this rather bitter irony a get-back for an offense is what the note appears to read.

Contrary to the opinion of the Majority, this was a call for the circuit court to make following the evidentiary hearing, and this Court should have been reluctant to set aside Youngblood's convictions, particularly the convictions legally distinguishable from the sexual assaults. The note did not fall within the category of impeachment evidence considered to be so exculpatory that the outcome may have been different.

Finally, the Majority sets forth a misstatement of the law in its introductory discussion. In remanding the case for a new trial upon all charges, the Majority, citing a case involving contract law, states that, except for the *Brady* issue, the "resolution" of the

remaining issues remain the law of the case on remand to the circuit court. That is incorrect. At this point, the law of the case upon remand is not that the Rule 404(b) evidence will be admitted or that Youngblood will necessarily wear a stun belt. Those issues are among matters to be determined anew upon evidentiary proffers at a future trial. The sexual assault convictions aside, the Majority even holds that Youngblood no longer stands convicted of indecent exposure, brandishing and wanton endangerment with the revolver.⁸

Youngblood's convictions should have been affirmed. Accordingly, I dissent.

⁸ As the Majority states later in the opinion: “[B]ecause all of the charges were factually intertwined our resolution of the *Brady* and *Hatfield* issue impacts the disposition of all of the charges.” However, although the events in question were part of a “complete story” or continuing episode, that does not mean that all of the convictions, each with differing legal elements such as the weapon violations, should be set aside. Rather, the intertwining nature of the events more appropriately related to the basis for admitting the Rule 404(b) evidence in the first place.