

In The Court Of Common Pleas
Portage County, Ohio

FILED
COURT OF COMMON PLEAS

JUN 21 2010

LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

State of Ohio,

Plaintiff-Respondent,

Case no. 95-CR-220

- vs -

Tyrone Noling,

Defendant-Petitioner.

This is a capital case

Application For Leave To File A Motion For New Trial

Tyrone Noling respectfully requests leave from this Court under O.R.C. § 2945.80 and Ohio R. Crim. P. 33 authorizing him to file a Motion for New Trial outside of the statutory time limits. The reasons for this motion are stated in the attached memorandum in support.

Respectfully submitted,

Office of the
Ohio Public Defender

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Supervisor, Death Penalty Division
Counsel of Record

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Assistant State Public Defender

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Counsel For Defendant

By: 
Counsel for Defendant

Memorandum in Support

Tyrone Noling did not kill Bearnhardt and Cora Hartig. Noling has obtained evidence, previously unavailable to him, that supports his contention that he did not commit these murders. This newly discovered evidence demonstrates the State of Ohio withheld material exculpatory and impeaching evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). However, absent an order from this Court, Noling is procedurally precluded from presenting this evidence via a Motion for a New Trial under O.R.C. § 2945.79.

Both O.R.C. § 2945.79(B) and (F) are relevant to Noling's request. O.R.C. 2945.79(B) allows for a new trial based on misconduct of the prosecutors or a witness. O.R.C. § 2945.79(F) provides for a new trial when "new evidence is discovered material to the defendant, which he could not with reasonable diligence have discovered and produced at trial."

O.R.C. § 2945.80 places time limits on new trial motions, requiring filing within 3 days of the verdict, or 120 days after the verdict in the case of newly discovered evidence. Noling was sentenced to death on January 22, 1996. He is thus outside the time limits delineated by statute.

But, O.R.C. § 2945.80 makes an exception where “it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely.” The motion then may be filed within three days of the court’s order “finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.”¹ O.R.C. § 2945.80.

Noling was unavoidably prevented from the discovering the evidence that now merits granting him the opportunity to file a Motion for a New Trial. Noling could not have discovered, through due diligence, the information contained in his new trial motion. The newly discovered evidence includes:

Brady

The failure of prosecutors to disclose favorable evidence to an accused in a criminal proceeding violates the Due Process Clause, where the evidence is material either to guilt or to the sentencing, regardless of the good or bad faith of the prosecutor. Brady, 373 U.S. at 87. The Court has expanded the duty to disclose to include impeachment evidence, as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676 (1985).

In order to comply with Brady, “the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in this case, including the police.” Kyles v. Whitley, 514 U.S. 419, 437 (1995). Evidence is material “if there is a

¹ Out of an abundance of caution, and to avoid any appearance of delay, Noling is simultaneously filing his Motion for a New Trial Instanter with this application.

reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” Id. at 433-34.

“Evidence which may be used to impeach a prosecution witness falls within the scope of the Brady rule and therefore must be disclosed upon defense counsel’s request.” United States v. Farley, 2 F.3d 645, 654 (6th Cir. 1993) (citing Giglio v. United States, 405 U.S. 150 (1972)). This includes grand jury testimony, which “is regularly disclosed to criminal defendants without a court order pursuant to Brady v. Maryland, 373 U.S. 83[.]” Tierney v. United States, 410 U.S. 914, 916 (1973) (Douglas, J., dissenting). See also Dennis v. United States, 384 U.S. 855, 874 (1966) (“For this reason, we cannot accept the view of the Court of Appeals that it is ‘safe to assume’ no inconsistencies would have come to light if the grand jury testimony had been examined. There is no justification for relying upon ‘assumption.’”); United States v. Alonzo, 26 Fed. Appx. 159, 162 (4th Cir. 2001); United States v. Breit, 767 F.2d 1084, 1089 (4th Cir. 1985); United States v. Peters, 732 F.2d 1004, 1008 (1st Cir. 1984); United States v. Campagnuolo, 592 F.2d 852, 859 (5th Cir. 1979).

Affidavits filed with Noling’s new trial motion demonstrate that trial counsel were not provided with significant and compelling Brady material. This included evidence evidence that DNA testing failed to exclude an alternative suspect in the Hartigs’ murders, Dan Wilson, and also information relating to the suspicious circumstances surrounding a gun that was the same make and model as the murder weapon.

“As stated in United States v. Stifel, 594 F. Supp. 1525 (N.D. Ohio 1984), “the most persuasive indication that the defense did not possess this evidence is the fact that the defense never used this evidence at trial.” State v. Larkins, Case No. 82325, 2003 Ohio App. LEXIS

5276, **11-12 (Ohio Ct. App. Nov. 6, 2003). Noling argues in his new trial motion the import of this evidence and the prejudice resulting from the prosecutor's failure to disclose.

Actual Innocence

The combined impact of the Brady material was to deprive Noling of the opportunity to prove what he has contended for nearly 2 decades—he did not kill Bearnhardt and Cora Hartig. At a minimum, the evidence discussed in Noling's new trial motion would have raised a reasonable doubt in his jurors' minds.

Diligence

In state post-conviction, Noling requested development of the facts upon which he now relies to support his misconduct and innocence claims. (See Postconviction petition and amendments filed 7/23/97, 7/31/97, 8/26/97, and 9/5/97.) In his First Claim for Relief, Noling alleged he was actually innocent of the Hartig's murders. (PCP filed 7/23/97.) In his Second Claim for Relief, Noling asserted that the prosecution knowingly used false evidence to obtain his conviction. (Id.) In his Third Claim for Relief, Noling argued that the prosecution suppressed material exculpatory evidence. (Id.) Noling requested an evidentiary hearing to establish the existence of the facts to support these claims. (PCP and amendments filed 7/23/97, 7/31/97, 8/26/97.) This Court dismissed Noling's post-conviction petition, denying his requests for full fact development. (State v. Noling, Case no. 03-1950, MISJ filed 11/6/03.)

This information was available through only two sources—the prosecutor or a court-ordered grant of discovery. The prosecutor failed to produce these materials. And, no state court granted Noling his requested discovery. Noling obtained this evidence through a public records request to the Prosecutor's Office.

Conclusion

Noling asked the prosecutor for this information 6 times in State court. He could do little more than ask and assume that the prosecution complied with its constitutional and ethical duties.

Noling could not have discovered, through due diligence, material the State withheld from his counsel. Noling “was unavoidably prevented from the discovery of the evidence upon which he must rely.” See O.R.C. §2945.80. Therefore, Noling respectfully requests this Court grant his application for leave to file a motion for new trial.

Respectfully submitted,

Office of the
Ohio Public Defender

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Counsel of Record

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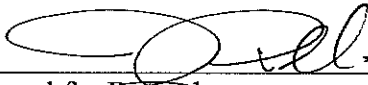
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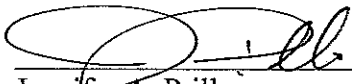
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Counsel For Defendant

By: 
Counsel for Defendant

Certificate Of Service

I hereby certify that a true copy of the foregoing Application For Leave To File A Motion For New Trial was forwarded to Prosecutor Victor Vigluicci, 241 South Chestnut St. Ravenna, Ohio 44266 on this 17th day of June, 2010.


Jennifer A. Prillo
Assistant State Public Defender

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