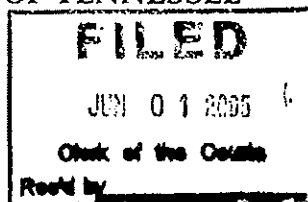


IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE



STATE OF TENNESSEE,

Appellee,

v.

GARY WAYNE SUTTON,

Appellant.

)
)
)
) BLOUNT COUNTY
) No. E2001-02476-CCA-R3-PC
) (CAPITAL CASE)
)
)
)

STATE'S RESPONSE TO PETITIONER'S MOTION FOR REMAND

On May 18, 2005, the appellant filed a motion requesting this Court to remand the instant case to the Blount County Criminal Court so that he may be allowed to present additional evidence in support of his petition for post-conviction relief. In his motion, the appellant asserts that the Tennessee Board of Medical Examiners' permanent revocation of Dr. Charles Harlan's medical license is newly discovered evidence relevant to his claims of ineffective assistance of counsel and prosecutorial misconduct. Appellant argues that, because this evidence was unavailable to him at the time of his post-conviction hearing, he did not have an opportunity to present evidence that trial counsel was ineffective for failing to thoroughly examine Dr. Harlan's opinions and qualifications when he testified at the petitioner's trial.

Additionally, appellant alleges that the State, in violation of *Brady v. Maryland*,

373 U.S. 83 (1963), failed to “provide evidence material and helpful to the defense.” Specifically, he contends that “[t]he findings of negligence and incompetence on the part of Dr. Harlan in forensic autopsies performed prior to the 1996 trial of [the] Appellant reveal that the prosecution had a heightened duty *at the time of trial* to present only competent evidence from a qualified expert, and further, to inform the defense of any material evidence relevant to these issues.” Therefore, the appellant requests that this court remand the instant case so that he can present additional evidence that his trial counsel was ineffective and that the State withheld *Brady* material. However, the State submits that the appellant has forfeited these issues and he cannot seek remand to resurrect these claims.

The appellant and his codefendant, James Dellinger, were convicted of one count of first degree premeditated murder and sentenced to death for shooting Tommy Griffin, the victim. *See State v. Sutton*, 79 S.W.3d 458, 462 (Tenn. 2002). At trial, the appellant’s expert, Dr. Larry Wolfe, opined that, based upon his review of the autopsy photographs, the victim had died approximately twenty-four to thirty-six hours before the body was discovered on February 24, 1992, at approximately 3:30 p.m. *Id.* at 464. In rebuttal, the State offered the testimony of Dr. Harlan who opined that, upon his review of the autopsy photographs, the victim died between 6:00 p.m. on February 21, 1992, and 8:00 a.m. on February 22, 1992. *State v. Sutton*, No. E1997-00196-CCA-R3-DD, 2001 WL 220186, at *10 (Tenn. Crim. App. 2001) (copy attached). The appellant

contends that the time of death was "critical circumstantial evidence" for the State because the victim was last seen alive in the company of the appellant and Dellinger around 11:25 p.m. on February 21, 1992.

With regard to the appellant's claims, the State submits that the charges against Dr. Harlan are not newly discovered evidence and, as a result, the appellant has forfeited his right to raise any issues regarding his trial counsel's failure to thoroughly cross-examine Dr. Harlan or the State's failure to disclose the charges against Dr. Harlan because he failed to raise these issues during his post-conviction proceedings. It cannot be disputed that the charges against Dr. Harlan were a matter of public record while appellant's post-conviction petition was pending in the trial court. Thus, to the extent petitioner wished to argue that his trial counsel was ineffective for failing to impeach Dr. Harlan's testimony with his findings in other cases, and to the extent that he wished to argue that the State failed to disclose this alleged "exculpatory" evidence, he certainly could have raised the issues then. He did not. And accordingly, the appellant has forfeited his right to post-conviction relief on these issues.

In any event, the purported "new evidence" would not warrant relief even if it had been raised below. Appellant's trial counsel clearly cannot be faulted for failing to investigate on the basis of a fact that was not established until nearly a decade after appellant's trial in this case. Indeed, both the formal charges against Dr. Harlan and the Board's disposition post-date appellant's capital murder trial. So even assuming,

arguendo, appellant could establish some deficiency in Dr. Harlan's testimony in this case (a fact not even alleged in his motion), the Board's current disposition of the case against Dr. Harlan could not form the basis of any finding of ineffectiveness in that regard.

Nor has appellant stated a valid claim under *Brady v. Maryland*, 373 U.S. 83 (1963). To establish a due process violation under *Brady*, a defendant must prove that (1) the evidence was requested or apparently exculpatory such that the state would have an automatic duty to disclose it; (2) the state suppressed this information; (3) this information is favorable to the accused either because it is exculpatory in nature or because it can be used for impeachment; and (4) the evidence was material, *i.e.*, there is a reasonable probability that had this evidence been disclosed, the result of the proceeding would have been different. See *State v. Roger Dale Lewis*, No. M2002-02439-CCA-R3-PC, 2003 WL 22438526 (Tenn. Crim. App. 2003) (copy attached).

Here, the petitioner can establish neither that the State suppressed information concerning Dr. Harlan's findings nor that the evidence in question is material to the petitioner's convictions. First, the petitioner has identified *no* evidence that was known to or in the possession of the prosecution, let alone any item that was withheld from him by state prosecutors, of any wrongdoing by Dr. Charles Harlan in this case or that otherwise could have been used to impeach his testimony in 1996. In fact, Dr. Harlan had neither been charged nor found civilly or criminally liable for any wrong doing in connection with his duties as medical examiner. In short, there was nothing for

prosecutors to withhold in 1996.

And even if there had been, appellant cannot establish that there is a reasonable probability that, had he been aware of Dr. Harlan's questionable findings in other cases, the result of his trial would have been different. On February 21, 1992, the victim, the appellant and Mr. Dellinger were involved in an altercation, and the victim was last seen alive with the appellate and Mr. Dellinger on that day at approximately 11:45 p.m. *Sutton*, 79 S.W.3d at 464. This fact remains, regardless as to the victim's time of death. Accordingly, even if the appellant could have properly impeached Dr. Harlan's testimony as to the time of death, he still cannot establish that there is a reasonable probability that the jury would have acquitted him or given him a life sentence.

Because the petitioner clearly had the opportunity to raise the State's failure to disclose information regarding the charges against Dr. Harlan and to challenge the substance of Harlan's testimony during his post-conviction proceedings, but failed to do so, he cannot now seek remand to revive these claims. Accordingly, this Court should deny the appellant's request to remand this case to the Blount County Criminal Court.

Respectfully submitted,

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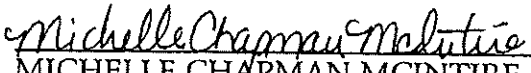
CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first class mail, postage paid, to counsel for the appellant, addressed as follows:

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On this the 27th day of May, 2005.


MICHELLE CHAPMAN MCINTIRE
Assistant Attorney General

cc: Michael L. Flynn
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