3-13-1959

State ex rel. Sheppard, Answer Brief of Relator

William J. Corrigan
Counsel for Sam Sheppard

Fred W. Garmone
Counsel for Sam Sheppard

Arthur E. Petersilge
Counsel for Sam Sheppard

IN THE SUPREME COURT OF OHIO

State of Ohio, ex rel.
SAMUEL H. SHEPPARD,

Relator,

vs.

RALPH ALVIS, Warden of
Ohio Penitentiary,

Respondent.

No. 35777

ANSWER BRIEF OF RELATOR

WILLIAM J. CORRIGAN,
620 Williamson Building,
Cleveland 14, Ohio

FRED W. GARMONE,
620 Williamson Building,
Cleveland 14, Ohio,

ARTHUR E. PETERSILGE,
706 Citizens Building,
Cleveland 14, Ohio,

Attorneys for Relator.

MARK McELROY,
Attorney General

WILLIAM M. VANCE,
Assistant Attorney General,
State House Annex,
Columbus, Ohio,

Attorneys for Respondent.

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. SAMUEL H. SHEPPARD, Relator,	)	No. 35777
vs.	)	
RALPH ALVIS, Warden of the Ohio Penitentiary, Respondent.	)	ANSWER BRIEF OF RELATOR

The brief of the Attorney General concedes that Revised Code Section 2725.05 is no bar to issuance of the writ if something extraordinary occurred, prior to judgment, which deprived the court of its normal jurisdiction to impose sentence.

It is our position that such extraordinary event did occur - namely, the concealment and suppression by the state of material evidence beneficial to relator which in all probability would have changed the verdict had it been revealed - that this was a denial of due process which voided the trial, made the whole proceeding a sham and a pretense, and destroyed the court's jurisdiction to impose sentence.

The Prosecutor's entire case was tried and submitted on the theory that during the night of July 3rd and the early morning of July 4th, 1954, there never was anyone in the Sheppard home except the relator, his wife Marilyn, and his young son; that there was no evidence of forcible entry and no evidence that any third

person was present; that the relator's description of a bushy haired intruder was a figment of his imagination and that there was no such person; that there was no car parked along Lake Road near the Sheppard residence; that the young son did not commit the murder; that relator was the only other person who could have done it and that he therefore must have done it.

The evidence which we have alleged was suppressed would establish that an outside door to the Sheppard home (not the door referred to in the brief of the Prosecuting Attorney) had been forced, that a car was parked on Lake Road near the Sheppard home at the time of the murder, that later that morning a bushy haired man whose clothing was spattered with brownish spots was seen on Lake Road west of the Sheppard home and that blood found on Marilyn Sheppard's wrist watch was not the blood of the relator or of Marilyn, but was the blood of a third person. Had all these facts been laid before the jury, who can say that in all probability the jury would not have set the relator free? Just the proof that the blood was the blood of a third person should have been enough.

This evidence would have gone far beyond raising a reasonable doubt about relator's guilt. It would have upset the state's entire case. It would have proved that a third person was in the house and that his blood was on Marilyn's watch.

The brief filed by the Prosecuting Attorney denies that there was any concealment or suppression. Attached to this brief as Appendix A is a photostat of the front and back sides of a card which was the original record in the office of the Coroner of Cuyahoga County on which was reported the tests made of the blood on

the deceased woman's watch. Contrary to what is said at page 6 of the brief filed by the Prosecuting Attorney, this record was not made available to the defense, nor did the defense know of its existence, before the trial. This card shows that Mary Cowan, the coroner's technician, ran the tests twice and found slight agglutination of both A and B cells both times. Neither relator's blood nor the blood of his murdered wife contained any B cells, so that not even a trace of B could have been obtained from their blood. The blood on Marilyn's watch has to be the blood from some third person. Once that fact has been established the other evidence which was suppressed is especially significant.

This record also shows on its face that it was turned over to the Prosecutor's office on November 4, 1954, at 10:27 A.M. Almost four weeks later, on November 30, 1954, the Prosecutor put Mary Cowan on the stand. The Prosecutor did not offer this card in evidence. Without producing the card Mary Cowan testified that tests had been made of the blood on the murdered woman's watch and that the results were "inconclusive". (R. 4664) On cross-examination she reiterated that the tests were inconclusive. (R. 4753).

There can be no doubt whatsoever that when she made that statement, both the witness and the Prosecutor knew that the tests showed the presence of B cells.

The state may call this "trivia". We do not. We submit that it is vital information that should have been revealed if the accused were to have the kind of fair trial that comports with due process as guaranteed by the constitution. We agree that the Prosecuting Attorney does not have to make the case for the defense, but we believe that the facts of this case bring it squarely within the

principles announced in State v. Rhoads, 81 O. S. 397 at 424, when the court said that a Prosecuting Attorney

> "should not endeavor to convict an innocent person, and he should not suppress or conceal evidence that might tend to acquit the prisoner."

Under the constitution relator was guaranteed a fair trial and due process of law. The authorities are plain that if those were denied to him the conviction was void and the writ of habeas corpus must be granted. The suppression by the prosecution of material evidence favorable to the defendant is a denial of due process for which habeas corpus will be granted.

> Pyle v. Kansas, 317 U.S. 213, 216, 63 S. Ct. 177, 178 87 L. Ed. 214;
>
> United States ex rel Montgomery v. Ragen, 86 F. Supp. 382;
>
> United States ex rel Almeida v. Baldi, 195 F. (2d) 815, certiorari denied 345 U.S. 904, rehearing denied 345 U.S. 946, where the Third Circuit Court of Appeals said at page 820:

> "We think that the conduct of the Commonwealth as outlined in the instant case is in conflict with our fundamental principles of liberty and justice. The suppression of evidence favorable to Almeida was a denial of due process. In Pyle v. Kansas, 317 U.S. 213, 216, 63 S. Ct. 177, 178, 87 L. Ed. 214, the Supreme Court of the United States said that allegations of 'perjured testimony, knowingly used by the State authorities to obtain [a] conviction, and * * * the deliberate suppression by those same authorities of evidence favorable to [a defendant] * * * sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle [him] to release from his present custody. Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791.' The decision cited is the controlling authority. It has been such for seventeen years."

On the same theory, the dueprocess clause is violated where the state denies the accused the aid of counsel, Powell v. Alabama, 287 U.S. 45, or where a conviction has been obtained by violence and torture, Brown v. Mississippi, 297 U.S. 278. As the court said in

the latter case at page 286:

> "The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' Hebert vs. Louisiana, 272 U.S. 312, 316."

The same theory underlies the numerous cases in which the use by the prosecution of testimony known to be perjured has been recognized as a denial of due process and ground for granting habeas corpus.

Mooney v. Holohan, 294 U.S. 103;

White v. Ragen, 324 U.S. 760;

Hysler v. Florida, 315 U.S. 411, 316 U.S. 642.

At page 5 of his brief, the Attorney General cites the case of Jones v. Commonwealth, 269 Ky. 779, on what constitutes "due process of law". This is a famous case, which is also reported in 267 Ky. 465, 102 S.W. (2d) 345, and in 269 Ky. 772, 108 S.W. (2d) 812. In that case the perjury was not known to the prosecution at the time of trial, but was discovered after the time for filing a motion for new trial had run. The highest court of Kentucky denied relief, but the convicted man went into the federal courts which took a broader view of what due process requires and granted the writ of habeas corpus. In Jones v. Commonwealth of Kentucky, 97 F. (2d) 335, the Sixth Circuit Court of Appeals had this to say at page 338:

> "The concept of due process as it has become crystallized in the public mind and by judicial pronouncement, is formulated in Mooney v. Holohan, 294 U.S. 103, 112, 55 S. Ct. 340, 341, 342, 79 L. Ed. 791, 98 A.L.R. 406. Its requirement in safe-guarding the liberty of the citizen against deprivation through the action of the state embodies

> those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' referred to in Hebert v. Louisiana, 272 U.S. 312, 316, 317, 47 S. Ct. 103, 71 L. Ed. 270, 48 A.L.R. 1102. This requirement cannot be satisfied 'By mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.' If it be urged that the concept thus formulated but condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the delineated requirement of due process in the Mooney Case embraces no more than the facts of that case require, and that 'the fundamental conceptions of justice which lie at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired."

The net result of the above authorities is that where a false picture has been presented to the court and jury, whether it be by the use of perjured testimony or the suppression of material evidence favorable to the defendant, or by false evidence obtained by violence and intimidation of witnesses, or by failure to supply the defendant with adequate counsel, the requirements of due process have not been met, the trial is void ab initio, and habeas corpus must be granted.

"Due course of law" in Article I Section 16 of the Ohio Constitution is the same as "due process of law" in the Fourteenth Amendment to the Federal Constitution. State v. French, 71 O.S. 186 at 201.

Certainly the suppression by the state of the evidence set forth in relator's petition for habeas corpus was not consistent with the fundamental principles of liberty and justice set forth above, and if that suppression is proven, it can not be said that relator had a fair trial or was given due process of law.

The full effect of this suppression of evidence on relator's right to a fair trial can not be determined until the court hears the evidence. Neither the Prosecuting Attorney nor the Attorney General has heard any of this new evidence. Their briefs are drawn as if such evidence had already been introduced. They draw conclusions, which, of course, are erroneous, from facts that have not yet been established. The assertion of evidence that will be introduced under the petition as amended is not evidence that is in the record. This evidence, which is entirely new as far as the record is concerned, has been obtained after long and difficult investigation and its value cannot be determined by this Court on opinions expressed by opposing counsel before it is heard.

Relator is entitled to a hearing in order to establish the facts set forth in his petition. On this point we call attention to the case of Commonwealth of Pennsylvania ex rel Herman v. Clouty, 350 U.S. 116, 100 L. Ed. 126. Eight years after conviction upon his plea of guilty and after sentence, the petitioner filed a petition for habeas corpus in the same court where he had been convicted, asking that his conviction be held invalid as in violation of the due process clause. He alleged that his plea of guilty was the result of coercion and that he had not been given the benefit

of counsel. The state filed an answer denying the allegations and the Pennsylvania court dismissed the petition summarily without any hearing. The Supreme Court of the United States reversed and remanded the case, holding that the petitioner could not be denied a hearing just because the Prosecuting Attorney denied the charges. The court said at 350 U.S. page 123:

> "The chief argument made by the State here in support of the court's summary dismissal of the petition is this: 'Counsel for petitioner argues that since facts are alleged in the petition, a hearing must be held. Since our answer contradicted the allegations in the petition, the lower court was not required to grant a hearing. This contention was sustained by the Superior Court.' We cannot accept this argument. Under the allegations here petitioner is entitled to relief if he can prove his charges. He cannot be denied a hearing merely because the allegations of his petition were contradicted by the prosecuting officers."

All that relator asks is a chance to prove that the evidence was suppressed. Why are such strenuous efforts being made to prevent him from making this proof? Who is afraid to have the truth come out, and why? Is it because of any real belief that further litigation will be "oppressive" as charged by the Prosecuting Attorney? Or is it because certain persons are afraid to let the truth be known, and would rather let an innocent man rot in the penitentiary than admit that they made a mistake?

Relator was not only tried "in the atmosphere of a Roman holiday" as this Court so aptly described his trial, but he was convicted through the suppression of material evidence. His conviction is a gross miscarriage of justice, a blot on the adminis-

tration of justice in this state. The writ of habeas corpus is the only available remedy to right this wrong. Under the above authorities it should be granted.

Respectfully submitted,

William J. Corrigan
William J. Corrigan

Fred W. Garmone
Fred W. Garmone

Arthur E. Petersilge
Arthur E. Petersilge,

Attorneys for Relator.

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Answer Brief of Relator have been mailed this 13th day of March, 1959, to Mark McElroy, Attorney General, State House Annex, Columbus, Ohio, and to John T. Corrigan, Prosecuting Attorney of Cuyahoga County, Criminal Courts Building, 1560 East 21st Street, Cleveland, Ohio.

Arthur E. Petersilge
Attorney for Relator.

APPENDIX A

Case# 76629

In re: MARILYN SHEPPARD Autopsy M 7280

Test for _____ Spec. # TE 108

Source of Specimen: Sheppard home. Identified by Dr. S.R. Gerber as property of Marilyn Sheppard

Submitted by Dr. S.R. Gerber (name) of Coroner (agency)

at 10:50 AM 7-6-54 Rec'd by M.Cowan

Description of Specimen 1 stoppered vial containing 1 lady's yellow metal wrist watch (Hamilton) with yellow metal wristband. Watch has stopped time indicated: 3:17 (over)

Turned over to Prosecutor's office (Chief Hartt) 7/6/54 @ 10:27 pm

card # 1 - TE 108

Laboratory Examination: 7-7-54 Benzidine test on stains on watch-- positive. Crusted stains removed and tested for agglutinins against known A,B,&O cells rec'd from R. Marsters (11:40 a.m. 7-7-54). Results inconclusive altho there appeared to be slight agglutination of both A and B cells. Observe at intervals over 3 hr period. and after 18 hrs.

Tested by M.Cowan at 7/7/54 11:40 pm (Date and time.) Started

Repeated 7/9/54. Similar results.

EMPHASIS OURS