

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

MATTHEW DAVIS,)	
)	
MOVANT,)	CASE NO.: 0616-CV00545
VS.)	
)	DIV. 12
STATE OF MISSOURI,)	
)	
RESPONDENT.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This case came before the Court on Movant's Motion to Set Aside his Guilty Plea and/or in the Alternative, for Habeas Corpus, based upon Movant's allegation that the State of Missouri withheld discovery that should have been produced pursuant to Local Rule 32.5 and Missouri Supreme Court Rule 25.03. By agreement of the parties, and based upon an August 24, 2007, Order from the Missouri Court of Appeals, Western District, Movant is allowed to proceed in a bi-furcated proceeding, first raising the discovery issue in a motion to set aside guilty plea or in the alternative for *habeas corpus* and then, if unsuccessful, filing a second amended motion for relief under Rule 24.035.

The Court has taken judicial notice of its files in the underlying criminal cases: 04CR200501 and 04CR200391, as well as the prior record in the instant case. The Honorable J.D. Williamson was the presiding judge in the underlying criminal matter. In addition, the Court takes judicial notice of Missouri statutes, Supreme Court Rules and Local Rules of the Sixteenth Judicial Circuit.

PROCEDURAL HISTORY

1. On June 9, 2004, Movant was charged by complaint in 04CR-200501 with one count of Abandonment of a Corpse, a Class D felony, in violation of Section 194.425 RSMo.

Attorney John O'Connor entered his appearance on July 21, 2004. The Movant was indicted and subsequently arraigned on the charge of Abandonment of a Corpse on July 29, 2004. On September 8, 2004, the State filed an information in lieu of indictment charging the Movant as a prior and persistent offender. On September 17, 2004, the Movant was indicted on Abandonment of a Corpse, and three counts of Possession of a Controlled Substance, Class C felonies, in violation of Section 195.202 RSMo. By operation of law, the initial indictment is quashed. Section 545.110 RSMo. Movant was never arraigned on the September 17, 2004, indictment.

2. Movant was also charged with one count of Domestic Assault, a Class C felony, in 04CR-200391. Attorney John O'Connor also entered his appearance in that case.

3. John O'Connor was provided with approximately 75 pages of discovery in connection with both cases.

4. On April 20, 2005, attorney John Piscerno entered his appearance in both cases on behalf of Movant. John Piscerno received the discovery file from John O'Connor and, in addition, asked for and received a copy of the autopsy report.

5. On May 31, 2005, Movant entered into a plea agreement with the State. In exchange for the State's dismissing case number 04CR-200391, the defendant agreed to plead guilty in 04CR-200501 to the charge of Abandonment of a Corpse and three counts of Possession of a Controlled Substance as a prior and persistent offender. The guilty plea was heard and accepted by Judge Williamson in Division 11 of the Jackson County Circuit Court.

6. On July 19, 2005, Movant was sentenced to a combined total of 22 years: 7 years on Count I, Abandonment of a Corpse; and 15 years on each of the remaining three counts, those sentences to be run concurrently, but consecutively to the seven year sentence imposed in Count I.

7. On January 5, 2006, Movant timely filed his request for relief under Supreme Court Rule 24.035, in case number 0616-CV00545, and the Appellate Public Defender was appointed on March 27, 2006. On April 6, 2006, Patrick Peters entered his appearance for Movant.

8. On August 29, 2006, Movant timely filed his amended 24.035 motion. On September 11, 2006, the Assistant Prosecuting Attorney Nichole Mudd filed the Respondent's brief and, on September 19, 2006, filed the Respondent's Motion to Deny Movant's Rule 24.035 Motion.

9. A hearing was scheduled on Movant's amended 24.035 motion for February 8, 2007. The day before the hearing, on February 7, 2007, the State provided Movant's counsel with 335 pages of police reports.

10. Movant filed a Motion for Continuance and for Discovery Sanctions on February 8, 2007. Movant's motion for discovery sanctions is still pending. Judge Williamson began hearing evidence on the matter. The hearing was continued until February 21, 2007. More evidence was presented on February 21, 2007, and the hearing was continued until June 21, 2007.

11. On June 21, 2007, Movant filed a Motion to Set Aside Movant's Guilty Plea or, in the Alternative, a Motion for Habeas Corpus. Additional evidence was heard and then, during the hearing, Judge Williamson recused himself. Also on June 21, 2007, Movant filed a Petition for Habeas Corpus or Mandamus with the Missouri Court of Appeals. On August 24, 2007, the Appellate Court issued an order that the circuit court could proceed on Movant's Motion to Set Aside Guilty Plea or in the Alternative for Habeas Corpus, and Movant's motion for relief under Rule 24.035 could be amended, and such amendment would not be a successive motion.

12. The case was transferred to Division 12, and a pre-trial conference was held on March 6, 2008, at which the parties agreed to proceed in a bifurcated proceeding, first addressing Movant's claim for relief alleging discovery violations and then, if unsuccessful, Movant would file an amended motion under Rule 24.035 and be given a hearing.

13. On April 23, 2008, Movant filed his brief to set aside guilty plea or in the alternative for habeas corpus. On June 2, 2008, the State filed its response.

14. The Court conducted hearings and heard testimony and evidence on June 9, 2008, July 14, 2008, July 16, 2008, July 17, 2008 and August 13, 2008. Following arguments of counsel, the Court requested proposed findings of fact, conclusions of law, and order to be filed (after an extension) on or before September 5, 2008.

15. Based upon the evidence presented, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case comes before the court with extraordinary allegations. The Movant has alleged that the Assistant Jackson County Prosecuting Attorney who handled Movant's two criminal cases intentionally withheld some 260 pages of police reports, constituting 78% of the discoverable material in the case. As part of this allegation, Movant claims that the Assistant Prosecuting Attorney perpetrated a fraud upon the trial court, the Movant, Movant's two trial attorneys, Movant's post-conviction attorneys and Division 11 of the Jackson County Circuit Court. As part of this allegation, Movant alleges that the Assistant Prosecuting Attorney knowingly made false statements to the trial court at Movant's sentencing hearing and that in response to Movant's post-conviction motion under Rule 24.035, the State of Missouri continued to make false and fraudulent claims in pleadings filed with the Court.

This matter is before the Court in a bifurcated proceeding. Following the discovery of the allegedly withheld material, Movant sought a writ with the Missouri Court of Appeals, as a Movant is generally not allowed to file a second amended motion under Rule 24.035. On August 24, 2007, the Court of Appeals ordered:

Because the 24.035 motion is still pending, there is no impediment to the jurisdiction of the circuit court. The hearing, therefore, may proceed in the circuit court on (1) the motion to set aside guilty plea or in the alternative for habeas corpus, and (2) relator's motion for post-conviction relief under Rule 24.035, which relator may amend, whereas amending would not constitute a successive motion. For these reasons, relator's petition for writ of habeas corpus or, in the alternative, writ of mandamus, is denied.

The parties have agreed that the issue currently before the Court is Movant's Motion to Set-Aside his Guilty Plea or in the Alternative for Habeas Corpus. If Movant is unsuccessful, Movant will be allowed to file an amended motion under Rule 24.035 and a second hearing will be held.

Pursuant to Supreme Court Rule 29.07(d), "A motion to withdraw a plea of guilty may be made only before sentence is imposed or when imposition of sentence is suspended; *but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.*" (emphasis added).

A defendant does not have an absolute right to withdraw a guilty plea. *State v. Taylor*, 929 S.W.2d 209, 215 (Mo. banc 1996), *cert. denied*, 519 U.S. 1152, 117 S.Ct. 1088, 137 L.Ed.2d 222 (1997). "The ultimate test whether a plea should be set aside is whether it was made unintelligently and involuntarily." *State v. Nielsen*, 547 S.W.2d 153, 159 (Mo.App.1977). A defendant should be permitted to withdraw a guilty plea only in extraordinary circumstances where the defendant has been misled or induced to plead guilty by fraud, mistake, misapprehension, coercion, fear, persuasion, or the holding out of false hopes. *Taylor*, 929

S.W.2d at 215. The defendant must prove by a preponderance of the evidence that his plea was entered unintelligently and involuntarily. *Johnson v. State*, 607 S.W.2d 185, 186 (Mo.App. E.D.1980).

Whether to permit a defendant to withdraw a plea of guilty is within the sound discretion of the trial court. *Sharp v. State*, 908 S.W.2d 752, 754 (Mo.App. E.D.1995). In reviewing the denial of a Rule 29.07 motion to withdraw a guilty plea, the reviewing court is to determine whether the trial court abused its discretion or was clearly erroneous. *Taylor*, 929 S.W.2d at 215; *Sharp*, 908 S.W.2d at 755.

Against the backdrop of an intelligent and voluntary plea is the panoply of rights afforded a criminal defendant. In countless plea colloquies each day, Missouri judges go over these rights to insure, as far as practicable, that a guilty plea is entered into intelligently and voluntarily. Courts ascertain by questioning the defendant that the defendant understands the nature of the charges against him; the range of punishment; the right to trial by jury, the burden of proof, the right of cross-examination, the subpoena power of the court, the right to testify or not, the requirement of a unanimous verdict, and the right to appeal. Further the Court inquires whether the defendant can read, write and understand the English language; whether s/he suffers from any mental disease or defect; whether the defendant is suffering from impairment as a result of the ingestion of medication, drugs or alcohol; and whether the defendant has had adequate time to discuss the case with his attorney or anyone else s/he wanted to consult prior to the entry of the plea. While this list is not exhaustive, it does demonstrate the care with which courts proceed during guilty plea proceedings to ensure that the rights of the defendant have not been violated.

Implicit in any guilty plea is an assumption by the Court that the State has provided all discoverable material in compliance with Supreme Court Rule 25.03 and the 16th Circuit's Local

Rule 32.5. An essential component of an intelligent and voluntary plea is the defendant's knowledge and understanding of the state's evidence against him/her after review of the discovery with the assistance of counsel.

The purpose of discovery is to allow the defendant a decent opportunity to prepare in advance for trial and to avoid surprise. *State v. Mease*, 842 S.W.2d 98, 104 (Mo. banc 1992), *cert. denied* 508 U.S. 918, 113 S.Ct. 2363, 124 L.Ed.2d 269 (1993). "The discovery rules seek to foster informed pleas, expedited trials, a minimum of surprise, and the opportunity for effective cross-examination." *State v. Wells*, 639 S.W.2d 563, 566 (Mo. banc 1982). The rules on pre-trial discovery aid in the truth finding aspect of the legal system. *State v. Whitfield*, 837 S.W.2d 503, 507 (Mo. banc 1992). The rules for criminal discovery are not "mere etiquette," nor is compliance a matter of discretion. *State v. Luton*, 795 S.W.2d 468, 477 (Mo.App.1990). "[R]ights of discovery provided criminal defendants by Rule 25 have constitutional underpinning rooted in due process," *State v. Scott*, 647 S.W.2d 601, 606 (Mo.App.1983) and "... the rules of criminal discovery are not a mere etiquette but the festoons of due process." *State v. Stapleton*, 539 S.W.2d 655, 659 (Mo.App.1976).

Movant was initially arraigned in the instant case of July 29, 2004.¹ Pursuant to Local Rule 32.5,

The prosecuting attorney shall without a prior written *demand* provide copies of all documents and other evidence regarding the charge against the defendant, then in the possession of the prosecuting attorney, to the defendant or his/her attorney of record. The prosecuting attorney shall have an ongoing duty to provide copies of any additional documents or evidence obtained after that time to the defendant or his/her attorney of record, within seven days following receipt of the new document or evidence. Failure to comply with this rule shall result in sanctions as permitted by Supreme Court Rule 25.16.

¹ The Movant was arraigned in 0616-CV00545 on July 29, 2004. The State subsequently indicted defendant on the same facts, alleging prior/persistent status. There is no record of the Movant having been arraigned on the subsequent indictment.

In addition to the requirements of Local Rule 32.5, Movant's trial counsel, John O'Connor, filed his Request for Discovery pursuant to Supreme Court Rule 25.03 on September 7, 2004.

WITHHELD DISCOVERY

Movant has alleged that at the time of his guilty plea and sentencing, and at the time he filed his amended motion under Rule 24.035, the State had provided 75 pages of discovery. Movant's Exhibit 2 presented during the hearing in the instant action contains the 75 pages of discovery allegedly provided.

Although not attempting to confirm the exact number of pages provided to them years prior, both John O'Connor and John Piscerno identified Movant's Exhibit 2 as being consistent with the number of pages of discovery provided to them.

On February 7, 2007, one day prior to the hearing scheduled on Movant's original Rule 24.035 motion, the State provided Movant's counsel with an additional 335 pages of discovery. The 335 pages contain police reports under the same police investigative number (04-050605), involving the same suspect (Matthew Davis), the same corpse/victim (Amber McGathey), the same location (500 Delaware), the same time period (June 1-June 6, 2004), and the same witnesses.

Movant's Exhibit 3 offered at the hearing is a demonstrative exhibit. The exhibit contains the 335 pages of discovery provided on February 7, 2007. The police reports have been placed in chronological order, and the police reports have been color coded by the Movant: green for police reports contained in Movant's exhibit 2 (the discovery provided prior to February 7, 2007) and red for police reports not provided to Movant prior to his plea, sentencing or the filing of his amended motion.

The date of the final one page police report in Movant's Exhibit 3 is May 31, 2005—the same date on which Movant pled guilty. That report, not provided to Movant's counsel prior to February 7, 2007, is a report prepared by Detective Williams concerning an interview of Timothy Kirlin. The report prior to that was a March 23, 2005, interview of Frances Gershon by Detective Cobbinah.

At the time of Movant's guilty plea, all 335 pages of police reports had been prepared, with the possible exception of the one page report by Detective Williams prepared on the same date. All reports were completed, and the investigation was completed well before Movant's sentencing on July 19, 2005.

While the State adamantly disputes that only 75 pages of discovery were provided to O'Connor, Piscerno and Peters, the State has also stipulated (Movant's exhibit 17) that 119 pages of reports prepared by Detective Cobbinah under the same police number, involving the same suspect, victim, location and time, were not provided (Movant's exhibit 18).

Although the exact number of pages provided to O'Connor, Piscerno and Peters is not critical to the Court's findings of fact, the Court notes that the State can only account for 68 pages of discovery as evidenced through receipts admitted as Exhibits 25 and 26. The Court, as finder of fact, and based upon the credibility of the witnesses, determines that only 75 pages of discovery were provided by the State at the time of Movant's guilty plea, and that at least 260 pages of discovery were not provided to defense counsel.

In this bifurcated proceeding, the issues before this Court are limited to whether the Movant should be allowed to set aside his guilty plea based upon the failure of the State to provide discovery and/or whether Movant should be granted habeas corpus relief based upon the same allegation. As previously noted, a defendant should be permitted to withdraw a guilty plea

only in extraordinary circumstances where the defendant has been misled or induced to plead guilty by fraud, mistake, misapprehension, coercion, fear, persuasion, or the holding out of false hopes. *Taylor*, 929 S.W.2d at 215.

Dispositive of this case is the fraud that was knowingly perpetrated by the assistant prosecuting attorney. This is not a case where the prosecutor was unaware of a single, missing report that was not provided by the police to the prosecutor. *See State v. Duley*, 0716-CV20900, in which a jury conviction and sentence were set-aside due to the inadvertent failure to disclose a single police report. In the instant case, the assistant prosecuting attorney knew that additional police reports were being prepared, knew that telephone records were being subpoenaed, and knew that additional “documents and evidence” were available and chose not to disclose them.

Mr. Miller testified before Judge Williamson on February 21, 2007, and before this Court on June 9, 2008, July 14, 16, 17, 2008 and August 13, 2008. During such time, Mr. Miller claimed that he did not recall “when [the investigating officer] brought over the entire file.” However, Mr. Miller seemed to recall that the exchange was made “sometime after the guilty plea,” possibly “a month, maybe longer [after the guilty plea].” Later, when asked “So you received all this information after the guilty plea but before sentencing?” Mr. Miller answered, “Oh, I’m sorry. I keep saying plea. It’s after sentencing. It’s after the case against your client’s been resolved. And he has wrapped up his investigation. And then he brings it all over.” *See* Transcript, page 184.

Counsel can be excused for not remembering exactly when he received the completed police file. What is clear, however, is that the police investigation was completed on March 23, 2005, 70 days prior to Movant’s guilty plea and 119 days prior to Movant’s sentencing. *See* Movant’s Exhibit 3 and the Stipulation (Movant’s Exhibit 17).

In Mr. Miller's testimony, he repeatedly suggested that the additional police reports were not provided because they were part of an ongoing investigation for murder. This explanation, candidly, defies both logic and the requirements under Rules 25.03 and 32.5. Virtually every homicide investigation begins with a corpse having been abandoned. The case begins, as did the instance case, as a homicide investigation. To suggest, as Mr. Miller does, that a prosecutor can pick and choose which documents are to be provided, is contrary to the prosecutor's duty under Rules 25.03 and 32.5.

In addition, Mr. Miller's suggestion that a prosecutor can determine whether material may be withheld because, in the mind of the prosecutor, it is not relevant has been resoundingly rejected by the Court of Appeals in another case involving the Jackson County Prosecutor's Office. In *State v. White*, 81 S.W.3d 561 (Mo.Ct.App.W.D. 2002), the prosecutor withheld information that had not been reduced to writing in a police report. Defendant's conviction was reversed and Mr. White was retried. Armed with the very material the prosecutor had determined was "immaterial" and not discoverable, Mr. White was acquitted.

In the instant case, the withheld discovery contains the same police number, involves the same suspect, the same corpse/victim, the same vehicle, the same date range, and the same witnesses. Not only was Mr. Miller aware of the withheld discovery, but he played an active role in securing some of the very same evidence that he then withheld. He applied for and received the investigative subpoenas for the phone records that he then withheld from Movant and Movant's counsel. (Movant's exhibits 12, 13, 14, Transcript page 206)

When Mr. Miller appeared at Movant's guilty plea, he was aware that additional police reports had been generated, and that those reports had not been provided to Movant's counsel. Although aware of the additional police reports, Mr. Miller claimed that he believed such reports

were not discoverable because they were part of an ongoing investigation. The Court has found such an argument is untenable. In addition, however, even if such an argument had any legal merit, when Mr. Miller became aware that the ongoing investigation was completed, he had a duty to advise the Court and Movant's counsel that the reports were in his custody or available. Mr. Miller's failure to advise the Court and Movant's counsel was at best an egregious error based on a mistaken belief held by Mr. Miller, or at worse, constituted fraudulent activity.

Regardless of the reason the discovery was withheld, the effect is the same. The Court would prefer to think that the discovery was mistakenly -- rather than fraudulently -- withheld. The totality of the evidence, however, leads this Court to the inevitable conclusion that counsel deliberately withheld the discovery and at the time of Movant's sentencing, deliberately and fraudulently misled the Court and defense counsel.

Having perpetrated a fraud upon the trial court, the State continued the fraud during the years following Movant's fraudulent guilty plea and sentencing. In Movant's original 24.035 motion (based upon the 75 pages of discovery provided) Movant alleged ineffective assistance of counsel based upon Mr. O'Connor and Mr. Piscerno's failure to pursue Movant's assertion that he had contacted John Quinn for legal advice on what to do with the body of Amber McGathey. In response to Movant's original 24.035 motion, the State filed "Respondent's Brief" on September 11, 2006 in which the State answered: "Further, the State is not in receipt of any evidence or testimony to validate movant's claim of notifying attorney John Quinn that he had placed Ms. McGathey's Corpse in the back of his Jeep and that he was seeking advice on what to do." (Respondent's brief, page 7)

The State's pleading on September 11, 2006 that it was "not in receipt of any evidence or testimony to validate movant's claim of notifying attorney John Quinn" is false and a fraud upon

the motion court. Contained within the 75 pages of discovery provided (Movant's exhibit 2) there is, indeed, no "evidence or testimony to validate movant's claim." However, among the 260 pages not disclosed was an 8 x 10 photograph of Quinn, coupled with numerous reports and testimony from witnesses who had seen Quinn and Movant together. Also contained within the 260 pages not disclosed, and within the 119 pages that the State has stipulated it did not disclose, are telephone records demonstrating that calls were placed to attorney John Quinn as many as 19 times during the time relevant to the charges.

It is noteworthy that, but for the deposition taken of Matthew Davis in connection with a civil suit, the fraud perpetrated upon the trial and motion Court would have been complete. It is ironic that the State has claimed that over 260 pages of withheld discovery are immaterial or irrelevant. The facts of this case demonstrate that a single report—a single *question* asked during a deposition—can be of monumental importance. But for a single *question* asked during a deposition in a civil case, the fraud perpetrated by the State would have gone undetected.

The Court has found that Assistant Prosecuting Attorney Dan Miller knowingly perpetrated a fraud upon the trial court, and that the State's Respondent's Brief, filed September 11, 2006 falsely and fraudulently claimed that the State was "not in receipt of any evidence or testimony" regarding John Quinn.

Moreover, it appears to the Court that, in addition to the documents withheld that were prepared by Detective Cobbinah, the State withheld other documents in a manner calculated to not raise suspicion that the State was hiding discovery. The evidence supports a finding that the withheld discovery shows that witness interviews and reports by detectives other than Detective Cobbinah were withheld. *See, for example*, Detective Blakemore (Movant's 3, pages 151, 164-169, 172), Detective Williams (Movant's 3, pages 76, 16, 228-231, 131-137, 335), Detective

Downing (Movant's 3, pages 99-100, 112-113), and Detective Marinella (Movant's 3, pages 102-104, 48, 49, 101). Movant's Exhibit 3 is compelling because it graphically shows the quantity of discovery withheld.

This Court has specifically found that a fraud was perpetrated upon the both the trial and the motion court. The Court's inquiry need go no further. However, were this simply a motion under Rule 24.035 alleging a missing page of discovery, the Court would be called upon to determine whether the missing page was material to the defense.

In *Buchli v. State*, 242 S.W.3d 449 (Mo.Ct.App.W.D. 2007), a case in which the Jackson County, Missouri Prosecuting Attorney withheld a video tape, the Court stated: "Under *Brady*, the State has a broad duty 'to disclose evidence in its possession that is favorable to the accused and material to guilty or punishment. . . . The State violates due process if (1) it does not disclose evidence that is favorable to a defendant because it is either exculpatory or impeaching, (2) it has suppressed the evidence intentionally or inadvertently, and (3) the undisclosed evidence is material. . . . In the context of a *Brady* type challenge, evidence is material if it would have provided the defendant with plausible and persuasive evidence to support a theory of innocence or would have enabled the defendant to present a plausible, different theory of innocence." Evidence is material if "the undisclosed evidence would have been significant to the defendant in the way that he tried his case." *Buchli* at 454.

The evidence intentionally withheld by the prosecutor in the instant case was material. Attorney John Piscerno had not reviewed the 260 pages of withheld discovery prior to his testimony. When shown Movant's Exhibit 7, an admittedly withheld document, and asked if he had seen the document, Piscerno replied: "No, I've never seen—I've only read the first paragraph and I can tell you I've never seen it." Q: "Okay. And for the judge's benefit, why is it,

'I can tell you I've never seen this before?'" A: "Well, it's a complete defense to the abandonment of a body charge in that he called an attorney, according to this report by Detective Cobinaw [sic] on November 10th of '04. He called an attorney prior to the victim's body being discovered in the back of his van."

Regardless of whether Mr. Piscerno is correct that the phone records provided a complete defense to the abandonment of a body charge, his testimony supports his belief that the fact that the Movant attempted to contact his attorney prior to the victim's body being discovered was at least material.

In Movant's pre-sentence report, he stated that he had called attorney Quinn for legal advice. At sentencing, Assistant Prosecuting Attorney Dan Miller told the Court: "That simply is not the truth. . . . He says he's waiting for the police to show up and was relieved when they did, and that's not the facts. The fact is he never called the police. He never called anyone." At the time Mr. Miller made that argument, he knew that Matt Davis's telephone records had been subpoenaed (by Miller), that Detective Cobbinah had reviewed the telephone records, that Detective Cobbinah had interviewed witnesses who had seen Quinn and Davis together, that numerous calls were placed from Davis's cell phone to John Quinn, and that a 911 call was placed from Davis's cell phone prior to his arrest.

Prior to Movant's plea of guilty, Mr. Miller knew that Detective Cobbinah had secured the telephone records of Matt Davis and that Matt Davis had called John Quinn. The phone records and reports were not disclosed. (Transcript, page 519) Mr. Miller acknowledged that Cobbinah and Miller talked about the 911 call and its possible significance: Q: "Do you recall if, in your discussions with Cobinaw (*sic*), he had mentioned to you the 911 call that Matt had placed." A: "It doesn't—nothing says Matt Davis placed a 911 call. We at the time believed that

was Gena Gutierrez who placed the 911 call, because what's the point in Matt Davis placing a 911 call So we believe that it was Gena Gutierrez who called 911 and that Mr. Davis made her hang up. That's what our belief regarding the 911 call." (Transcript, page 518)

SANCTIONS FOR DISCOVERY VIOLATIONS

Supreme Court Rule 25.18 gives a trial court broad discretion in fashioning a remedy for a discovery violation under Supreme Court Rule 25.03 or Local Rule 35.2. In the instant case, an Assistant Prosecuting Attorney knowingly withheld material discovery from Movant. As a result, a continuing fraud was perpetrated upon the trial and motion Courts.

Movant's guilty plea and sentencing took very little time, with a guilty plea transcript of 23 pages and a sentencing transcript of 38 pages. Because of the fraud perpetrated on the Court, the Courts in the instant case have conducted over seven days of hearings, with over 850 pages of transcripts. In addition, the Court of Appeals has ruled upon a writ.

As a general rule, when the Court sets aside a guilty plea or grants a motion under Rule 24.035, the purpose is to place the Movant/defendant back to the same position he or she was in prior to the guilty plea.

This case is different. The fraud perpetrated upon the trial and motion court was intentional. Movant has, presumably, paid the costs of attorneys O'Connor, Piscerno and Peters and, due to the fraud perpetrated by the prosecutor, to place Movant in the position he would have been prior to the fraud will be difficult. In addition, Movant has gone to trial in a civil case where, presumably, his conviction for Abandonment of a Corpse (based upon such fraud) was placed before the jury.

In this ongoing litigation, predicated upon the fraud of the State of Missouri before the trial and motion court, Movant's motion for sanctions will be complex. This Court, with

Movant's original motion for sanctions currently pending, will set out a briefing schedule on that issue at a later time.

CONCLUSION

This Court has found, and the State has stipulated, that over 100 pages of police reports involving the same suspect, same Corpse/victim, same dates, same vehicle, same location and same witnesses prepared under the same police investigative number was knowingly and intentionally withheld by the State of Missouri. As a matter of first impression, this Court finds that, under those circumstances, as a matter of law the defendant's plea was not a knowing, voluntary or intelligent plea.

This Court also finds that at the time of the plea and at the time of sentencing, the trial court relied upon the prosecutor's duty to disclose all "documents and evidence" in the case, and that the prosecutor had not done so.

The Court finds that, at sentencing, the prosecutor made a materially false representation to the Court when he stated: "The fact is he never called the police. He never called anyone."

The Court finds that before the motion court, the State made a materially false statement when it pled "the State is not in receipt of any evidence or testimony to validate movant's claim of notifying attorney John Quinn."

JUDGMENT

Based upon the foregoing, this Court finds as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant's pleas of guilty are set aside.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendant's convictions and sentence are set aside.

IT IS SO ORDERED.

2/10/09

Date

Edith L. Messina

Judge Edith L. Messina