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THE SEVENTH JUDICIAL CIRCUIT OF MICHIGAN

GEOFFREY L. NEITHERCUT
CIRCUIT JUDGE

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March 6, 2012

Re: *People v Tajuan Williams*
07-21845-FC

Chari K. Grove
State Appellate Defender Office
645 Griswold St Ste 3300
Detroit, Mi 48226

Dear Ms. Grove:

Please find enclosed a true-copy of this Court's Opinion and Order Denying Defendant's Motion for New Trial.

Cordially,

S. M. Newlin
Judicial Advisory Assistant

CC: Tajuan Marnez Williams 268475
Carson City Correctional Facility (DRF)
10274 Boyer Road
Carson City, MI 48811-9746

Prosecutor's Office

File

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE
7TH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Lower Court No. 07-21845-FC
Judge Geoffrey Neithercut

vs.

COA Docket: 301384

TAJUAN MARNEZ WILLIAMS,

Defendant. /

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

At a session of said court
held at the Court House in the
City of Flint on
Tuesday, March 06, 2012.

Present: The Honorable Geoffrey L. Neithercut, Circuit Judge

On November 23, 2011 the Court of Appeals remanded this case back to this Court to hear Defendant's Motion for New Trial and for an evidentiary hearing. Defendant's motion was filed on December 12, 2011. The People filed its response on February 2, 2012. Oral arguments were heard on February 3, 2012.

Facts and Procedure:

Defendant was charged with Murder in the 1st Degree along with a charge of Possession of a Firearm. He was alleged to have murdered Janien Cobbin, a former girlfriend of his. The main evidence against the Defendant was an audio recording in which he admitted to the murder. The recording was made by a cell mate, James Hicks, while they were incarcerated in prison. Secondary evidence was introduced by FBI Agent Dan Harris, who testified that Defendant could be placed near the scene at the time of the murder based upon cell phone records. Defendant was tried before a jury and was convicted on both charges.

Defendant raises three arguments in support of his motion for new trial. First, he argues that he did not have the full and complete prison records for witness James Hicks to use as impeachment evidence at the first trial. Second, the recordings of a conversation with witness James Hicks and defendant, while in prison, were not properly admitted at trial. And lastly, that a new trial is warranted based upon newly discovered

evidence regarding the ability to approximate an individual's location based upon cell phone records.

Argument and Opinion I - Full Prison Records of James Hicks:

As stated above, James Hicks was an important witness to the People in this case. He was the person who recorded the various statements made by the Defendant that he murdered the victim. Defendant attached Mr. Hick's complete prison record in support of his motion. The records are countless pages and are nearly five inches thick. Interestingly, despite the quantity of the records, Defendant's motion and brief fails to cite to even a single page of it which could have been used to exonerate him at trial or which would have changed the testimony of Mr. Hicks.

Defendant does argue that because he did not have the full prison record of Mr. Hicks his attorney was not fully able to impeach his testimony at trial. However, this Court determines that because the Defendant was able to present evidence that Mr. Hicks had a history of being a prison snitch,[1] had lied about his identity in the past,[2] and had a vast criminal record,[3] that any additional evidence would have been cumulative.

Defendant also argues that he was convicted "based on the testimony" of Mr. Hicks.[4] This Court disagrees. Defendant was convicted based upon his recorded statements. The Defendant never argued to the contrary that he made the statements. Defendant's argument at trial was that he was embellishing his criminality to better protect himself from other prisoners while at prison.[5] So this is not an instance where Mr. Hicks testified to the identity of the person on the recording. Accordingly, this is not a situation where Mr. Hicks' credibility was exculpatory.

The Prosecutor used the testimony of Mr. Hicks as a foundation to enter the recorded statements. Regardless of whether or not Mr. Hicks was telling the truth, or had some ulterior motive in his testimony at trial, it is a simple fact that the jury could not have convicted the Defendant on Mr. Hicks' statements alone. Accordingly, nothing Mr. Hicks said could have changed the outcome of the jury.

The United States Supreme Court has held in *Giglio v. United States*,

> We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict....' A finding of materiality of the evidence is required under *Brady*.... A new trial is required if 'the false

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[1] Trial transcript, September 15, 2010, page 32, lines 3 through 10 and lines 16 through 23 and page 33, lines 6 and 7.
[2] Trial transcript, September 15, 2010, page 14 line 24 through page 15 line 4.
[3] Trial transcripts, September 15, 2010, page 13 line 18 through page 15 line 2.
[4] Page 12 of Defendant's current brief.
[5] Trial transcript, September 15, 2010, page 53 line 18 through page 55 line 2. Trial transcript, October 1, 2010, Page 106 line 24 through page 107 line 2.

testimony could ... in any reasonable likelihood have affected the judgment of the jury....'[6]

Furthermore, newly discovered evidence will not sustain a request for a new trial where it is merely to impeach.[7] Similarly, a new trial is unwarranted where the newly discovered evidence is cumulative to matters already adduced on cross-examination.[8]

Accordingly, this Court finds no basis to grant the Defendant a new trial and denies any requested relief as to Argument I.

Argument and Opinion II - Admission of Recorded Statements:

Defendant argues that he is entitled to a new trial because the recorded conversations between James Hicks and Defendant, while in prison, were wrongly admitted. Defendant argues that the recordings should have been suppressed because they were made in violation of Michigan Department of Corrections policy pertaining to making recordings. This issue has been addressed prior to trial by this Court and by Judge Joseph Farah.

This Court denies Defendant's current argument based upon the reasons already provided by this Court in the numerous Opinion and Orders issued by this Court back on June 14, 2010. Furthermore, this Court relies on the case of *People v Hawkins*[9] which holds that suppression is not a remedy for a statutory violation or violation of the court rule absent specific language in the statute or court rule calling for suppression.[10] Lastly, this Court determines that any alleged violation of internal manual of procedures of the MDOC do not arise out of any constitutional or statutory duty, accordingly, the exclusionary rule is not applicable.

Accordingly, this Court finds no basis to grant the Defendant a new trial and denies any requested relief as to Argument II.

Argument and Opinion III - Expert Witnesses:

Defendant criticizes the trial testimony of his cell phone tower expert Manfred Schenk based in part on the argument that his expert did not have sufficient time to prepare. This Court was quite impressed with Manfred Schenk. While the People's cell phone tower expert, FBI Agent Dan Harris, had one week of training,[11] the Defendant's expert had multiple degrees, helped invent the precursor to cell phone technology, and

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[6] 405 U.S. 150, 154 (1972)
[7] *Graham v Inskeep*, 5 Mich App 514, 523 (1967); *Kube v Neuenfeldt*, 353 Mich 74 (1958); *Moldovan v Allis Chalmers Mfg. Co.*, 83 Mich App 373, 384-385 (1978).
[8] *Pociopa v Olson* 13 Mich App 324, 327-328 (1968).
[9] 468 Mich 488 (2003)
[10] *Id.* at 500.
[11] Trial transcript, October 1, 2010, page 29 line 25 through 30 line 1.

used his skills in using radio waves to determine locations of objects in space to help NASA land on the moon.[12]

Defendant argues that the testimony of Agent Harris should not have been allowed at trial because it was junk science.[13] Defendant also argues that if Mr. Schenk had more time to prepare, he would have testified "more effectively" to rebut the testimony from Agent Harris.[14]

However, Defendant's acknowledges in his brief that Mr. Schenk testified that it is "impossible" to positively identify which cell phone tower was used by a caller. That it is "impossible" to know if a call is actually matched to a cell tower. That it is "impossible" to tell where in the tower sector the caller was located. That such a sector could be as large as 900 square miles. That it is "impossible" to tell from call records which direction a person was traveling during the call. Additionally, Mr. Schenk testified that the "only way" to pinpoint a location of a caller is through triangulation of cell phone data, which was not used by Agent Harris.[15] Furthermore Agent Harris admitted in his trial testimony that Mr. Schenk was correct on that point.[16]

Accordingly, this Court is perplexed by Defendant's argument. On one hand Defendant argues that his witness was not fully prepared and needed more time. On the other hand, Defendant's witness utterly destroyed the expert testimony of the People's witness. Exactly how could have Mr. Schenk testified "more effectively"? Could he have testified that it was "*really* impossible" and that it was "*really* the only way"? "Impossible" already means no other possibility. The "only way" already means there is no other way. This Court determines that it would have been impossible, and there is no other way, that Mr. Schenk could have testified "more effectively" that how he did at trial.

The problem for the Defendant is not the quality of Mr. Schenk's testimony. It was clear to the Court that Manfred Schenk's testimony destroyed the testimony of the People's expert. The problem for the Defendant is that Mr. Schenk's testimony was not exculpatory. In a nutshell, Mr. Schenk did not testify to prove that the Defendant was not at the crime scene. His purpose in testifying was to contradict the People's argument that the cell phone data proved he was at least near the scene.

It is a simple fact that the People did not need the cell phone evidence to convict the Defendant. The jury heard the recorded statements of the Defendant himself that he committed the murder. The cell phone evidence merely attempted to prove that the Defendant was where he stated he was; at the scene committing the murder. If the jury found the statements of the Defendant to be credible, and it appears from the verdict they

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[12] Trial transcript, September 30, 2010, page 119 line 25 through page 120 line 5, page 123 lines 6 through 11, and page 127 line 25 through page 128 line 9.
[13] Page 20 of Defendant's current brief.
[14] Page 22 of Defendant's current brief.
[15] Page 22 of Defendant's current brief.
[16] Trial transcript, October 1, 2010, page 32 lines 14 through 23.

did, then all of the testimony relating to cell phone towers became nothing more than evidentiary flotsam and jetsam.

To put it another way, in and of itself, the testimony relating to the cell phone towers could never have led to the conviction of the Defendant. If a mere possibility that the Defendant was somewhere near the scene was the sole evidence the People had, this Court would have been compelled to grant a motion for directed verdict. This Court will take it even further. Even if Agent Harris had testified that the cell phone data proved beyond any doubt that the Defendant was in the exact location of the murder at the exact time it occurred, that in and of itself would not have been sufficient to convict the Defendant as charged. Even with that evidence, this Court would have been compelled to grant a motion for directed verdict.

It is this Court's opinion that Defendant's arguments put police and prosecutors in a Catch-22 situation. Defendants complain when the police and prosecutors leave stones unturned. Hypothetically,

> "My client had a cell phone. Why didn't they use cell phone data to prove he was at the crime scene? You can't convict my client based upon sloppy and inadequate police work."

But, on the other hand, they also complain when the stone *is* turned. The People and the police did not have to investigate what was underneath the cell phone tower stone to obtain a conviction of the Defendant. However, this Court finds no error in testimony relating to cell phone towers and determines that the Defendant's expert was more than qualified to rebut the People's argument.

The granting of a new trial on grounds of newly-discovered evidence is within the discretion of the trial court.[17] Furthermore, there are four legal requirements that must be met before a claim of newly discovered evidence can support a motion for post judgment relief: (1) the evidence, not simply its materiality, must be newly discovered, (2) the evidence must not be merely cumulative, (3) the newly discovered evidence must be such that it is likely to change the result, and (4) the party moving for relief from judgment must be found to have not been able to produce the evidence with reasonable diligence.[18]

This Court determines that the so called newly discovered evidence of Mr. Schenk is not in fact newly discovered evidence because even Defendant admits that Mr. Schenk testified that it would be impossible to identify a location as testified to by Agent Harris. In other words, the testimony would only be cumulative to what Mr. Schenk already testified to at trial. Furthermore, as it was cumulative, any new testimony of Mr. Schenk could not have changed the result of the trial. And lastly, this Court determines that the trial attorney found and presented Mr. Schenk with reasonable diligence at trial.

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[17] *Luckhurst v Schroeder*, 183 Mich 487 (1914); *Graham v Inskeep*, 5 Mich.App. 514, 523 (1967).
[18] *Hauser v Roma's of Michigan, Inc.*, 156 Mich App 102 (1986); *South Macomb Disposal Authority v American Ins. Co.*, 243 Mich App 647, 655 (2000).

accordingly, there was simply no basis for Mr. Schenk to testify any further than what he did at trial.

Accordingly, this Court finds no basis to grant the Defendant a new trial and denies any requested relief as to Argument III.

Order:

IT IS HEREBY ORDERED that Defendant Tajuan Marnez Williams' Motion for New Trial is DENIED for all the reasons stated above.

Dated: March 6, 2012

Geoffrey L Neithercut

Hon. Geoffrey L. Neithercut