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IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA,)
)
Plaintiff,)
)
vs.)
)
ARNOLD DEAN, JR. and)
TYBREAM ROGERS,)
)
Defendant.)

Case No. CF-96-3336

COPY

* * * * *

TRANSCRIPT OF PROCEEDINGS HAD ON THE
24TH DAY OF SEPTEMBER, 1999, BEFORE
THE HONORABLE JERRY D. BASS,
DISTRICT JUDGE

* * * * *

DEFENDANTS' JOINT MOTION TO DISMISS

* * * * *

APPEARANCES:

MARC PATE, ESQ. and SEAN MORGAN, ESQ.,
Assistant District Attorneys, 321 Robert S. Kerr,
Oklahoma City, Oklahoma, 73102, on behalf of the State;

GARVIN A. ISAACS, ESQ. and NANCY ZERR, ESQ.,
123 N.W. 8th Street, Oklahoma City, Oklahoma, 73102, on
behalf of Defendant Dean; and OPIO TOURE, 1500 N.E. 4th
Street, Oklahoma City, Oklahoma, 73117, on behalf of
Defendant Rogers.

REPORTED BY:

SUSAN CONNER, C.S.R.
OFFICIAL COURT REPORTER
805 OKLAHOMA COUNTY COURTHOUSE
OKLAHOMA CITY, OKLAHOMA 73102
(405) 278-1470

1 (The following proceedings took place on the
2 24th day of September, 1999, in open court, all parties
3 present, as indicated:)

4 THE COURT: This is the matter of the State of
5 Oklahoma versus Arnold Dean, Jr. and Tybream Rogers,
6 CF-96-3336. Comes on for the defendant Arnold Dean, Jr.
7 and defendant Tybream Rogers' joint motion to dismiss the
8 Fourth Amended Information and the brief in support.

9 I have read the brief. It was -- Judge Black
10 and I got together. I believe a copy had been delivered
11 to Judge Black, but in the specific instance of where we
12 stand in this case, I think Judge Black and I both agree
13 that I probably need to hear this motion.

14 MR. ISAACS: Judge, we'd heard it was
15 transferred to Judge Black and that's why I took it over
16 there and I was unsure. I was told Judge Black would
17 hear it and then I --

18 THE COURT: Well, with the issues that you have
19 raised here, you and Mr. Toure, in the motion and the
20 brief, Judge Black and I both agree. I think it's issues
21 that I need to hear.

22 MR. ISAACS: Are you the Judge in this case
23 right now?

24 THE COURT: For this motion, for this motion
25 only. All right.

1 MR. ISAACS: Has there been a transfer order
2 entered?

3 THE COURT: There will be. I am transferring
4 it back to Judge Black.

5 MS. ZERR: We were told yesterday, Your Honor,
6 that the case had been transferred to Judge Black. Is
7 that not --

8 THE COURT: I was going to. I had my staff
9 call you and tell you that it was going to be transferred
10 back to Judge Black for trial, all right, but when I
11 received this and Black received this motion today, I
12 think we both agreed that the nature of this motion I
13 need to hear because it raises issues that I heard that
14 Judge Black didn't hear.

15 MS. ZERR: Just so I'm clear, if nobody else
16 raises it, there was no transfer order entered. There
17 has been no transfer order.

18 THE COURT: There's been no specific transfer
19 signed. All right.

20 MS. ZERR: Okay. We just wanted to be really
21 clear which Judge. We were told yesterday it was Judge
22 Black's case and we went over in the courtroom.

23 THE COURT: I understand that because the only
24 reason -- that was before this was filed. That's before
25 we received this.

1 MS. ZERR: We brought that over yesterday
2 afternoon.

3 THE COURT: I wasn't aware of it.

4 MS. ZERR: Between 4:30 and 5:00 and gave a
5 copy to you and another copy to --

6 THE COURT: Judge Black and myself were both
7 out at the Oklahoma Court of Criminal Appeals, meeting
8 with the Oklahoma Court of Criminal Appeals. We didn't
9 find out about this until this morning.

10 MS. ZERR: But yesterday when we received phone
11 calls, there was no written transfer order.

12 THE COURT: No.

13 MS. ZERR: Okay.

14 THE COURT: Are we all on the same page?

15 MR. PATE: Yes, sir.

16 THE COURT: Mr. Toure? Mr. Pate? It's my
17 understanding, Mr. Pate, the State of Oklahoma has not
18 filed a written answer to this motion.

19 MR. PATE: That's correct, Judge. I saw it, as
20 the Court did, this morning, briefly looked over it, but
21 no, sir, I have not had an opportunity to respond.

22 THE COURT: Do you wish to respond at this
23 time?

24 MR. PATE: Judge, certainly if the Court --
25 yes, sir, I would certainly like to file a response, if

1 the Court needs one. Just glancing over it, I don't
2 think it meets the test. I think manifest necessity
3 dictated that the case be mistried.

4 THE COURT: It appears to me that there -- in
5 reading your motion and your brief, that you also raise
6 some issues as far as a demurrer.

7 MR. ISAACS: No, we raised a motion to dismiss
8 only.

9 THE COURT: Okay, all right. In proceeding on
10 that, I have read the -- I have read the motion and the
11 brief and have sat down and set my rulings set forth as
12 the reason for my mistrial of this case.

13 MR. ISAACS: Judge, we'd object to any reasons
14 for the mistrial on the case because that's not before
15 the Court. Mistrial's already been granted. We're
16 beyond that.

17 What we have got here is a motion to dismiss of
18 a constitutional magnitude: to-wit, double jeopardy, and
19 we're here to present a motion to dismiss. The motion
20 for mistrial's over with. You already granted that. The
21 jury's been discharged.

22 THE COURT: You moved for a motion to dismiss
23 at the end of -- or at -- Wednesday is when we concluded,
24 isn't it, or Thursday. Wednesday morning.

25 MR. PATE: Wednesday.

1 THE COURT: Wednesday.

2 MR. ISAACS: I moved at that place to dismiss
3 based upon prosecutorial misconduct and the refusal to
4 turn over Brady material. What we're here on today is a
5 motion to dismiss based on double jeopardy.

6 And I would ask -- I would ask the Court to
7 clarify in this hearing that that's what we're going to
8 be dealing with. The error is of such constitutional
9 magnitude it cannot be cured by a subsequent ruling.
10 We're beyond that. And what I want to present to the
11 Court is a motion to dismiss based on double jeopardy,
12 Judge.

13 THE COURT: As I read -- as I read this, there
14 were complaints made in this about -- about my ruling on
15 the mistrial.

16 MR. ISAACS: I wouldn't characterize them as
17 complaints. I'd characterize them as errors of a
18 constitutional magnitude. A Trial Judge cannot declare a
19 mistrial unless the defendants consent to it. We did not
20 consent to it. We asked that the trial continue so that
21 we could present this case to the jury that was impaneled
22 and sworn and, over our objection and without our
23 consent, the Court discharged the jury which triggered
24 the motion to dismiss based on double jeopardy.

25 THE COURT: Okay. I'm going to give the

1 reasons for -- my reasons for mistrying this case. And
2 the reasons that I mistried this case is that there was a
3 motion in limine concerning Officer Loudermilk's firing
4 from the Oklahoma City Police Department. Judge Black
5 heard that and ruled that it was not admissible.

6 The same motion was reurged and I again
7 sustained the motion as evidence not admissible and not
8 relevant as to this trial. I can't remember the specific
9 date which I made that ruling.

10 During the course of the trial, Mr. Isaacs
11 proceeded, in front of the jury during cross examination
12 of Loudermilk, without prior notice to this Court or
13 explanation concerning the motion in limine and without
14 providing discovery to the District Attorney according to
15 22 OS 2001 evidence which had to be directly -- deal
16 directly with the firing incident.

17 MR. ISAACS: May I respond to that?

18 THE COURT: No, let me finish. I'm going to
19 finish.

20 MR. ISAACS: Can I respond when you finish?

21 THE COURT: Yes, sir. That had to do directly
22 with the firing incident, in direct violation of the
23 Court's ruling on the motion in limine. This misconduct
24 on the part of Mr. Isaacs was followed by questioning
25 concerning the firing by the -- by the tribal police and

1 I do not remember particularly about the tribal police, a
2 situation clearly that I believe not admissible under the
3 facts of the case. Did you have a copy of the -- of this
4 tribal police report?

5 MR. PATE: No, sir.

6 THE COURT: All right. That would have been a
7 violation of discovery, clearly not admissible. Mr.
8 Isaacs then attempted, in questioning Loudermilk about a
9 temporary restraining order for the third time in front
10 of the jury, allegedly entered by Mr. Loudermilk's wife
11 against Officer Loudermilk. That was clearly
12 inadmissible in my opinion and not relevant to this case,
13 all three clearly heard by the jury, and the Court then
14 recessed for the day.

15 We resumed that following morning and had
16 hearing where a purported -- there was a -- the District
17 Attorney had purportedly declined charges on Officer
18 Loudermilk and the document that the Court has sealed and
19 has issued a protective order was shown to the Court and
20 as of this time is not an authenticated document, but was
21 shown to the Court and sealed by this Court. As that
22 document pretends to show that the contact between
23 Officer Loudermilk and this individual was of consensual
24 nature, it is my belief --

25 MR. ISAACS: That's a disclosure of what's in

1 the record, Your Honor, and we have got a protective
2 order entered and I dispute that and I have had no
3 opportunity to cross-examine Mr. Keel and I would ask
4 that Mr. Keel be brought down here and put under oath in
5 this court right now.

6 THE COURT: All right. Both sides in any
7 lawsuit are entitled to a fair trial, under the laws of
8 the State of Oklahoma and the Constitution of Oklahoma
9 and the Constitution of the United States of America.
10 And they're designed to ensure that the trial's played on
11 a level and fair playing field.

12 And those laws prohibit the introduction of
13 certain testimony that violates the Constitution and
14 Statutes of the State of Oklahoma and gives rules for the
15 Court to follow and ensure evidence is properly presented
16 to this jury so the jury can apply the proper facts to
17 the proper law and render a verdict on the guilt or
18 innocence of the defendants in this case.

19 I have taken an oath to this. The jury has
20 taken an oath and, of course, the lawyers have taken an
21 oath to this, to uphold this. This case was not mistried
22 because of Brady, not mistried because -- but it was
23 mistried because of by bringing these issues in front of
24 the jury by Mr. Isaacs when he willfully and grossly
25 violated the rules of evidence of the State of Oklahoma

1 and the United States.

2 I specifically find that no actions of the
3 State caused the mistrial. Your motion to dismiss is
4 overruled. This case will be returned to Judge Black as
5 the original Trial Judge.

6 MR. ISAACS: I've been shocked. May I respond?

7 THE COURT: Yes, sir.

8 MR. ISAACS: I want to ask the Court to
9 reconsider this motion. I've been a lawyer for a long
10 time and have tried a lot of cases involving criminal
11 matters. I have never violated a Court ruling or
12 misrepresented anything to a Court in my life and I pride
13 myself on my reputation for being able to stand up in
14 court and say, yes, Judge, the case goes against me and
15 you got to rule against me. And I pride myself on the
16 fact that when I have an obligation to turn over
17 evidence, I turn it over. And I take my oath as an
18 attorney very seriously.

19 And, Judge, we live in a time where there is
20 very little trust in government, with Waco, with Ruby
21 Ridge and things of that sort, and it is a time when we
22 have had the O.J. Simpson trial where people have come to
23 distrust the judicial system.

24 And I say to you, Judge, that in the context
25 that this examination was conducted, I have a duty to

1 Arnold Dean, Jr., this man right over here, to represent
2 him and render effective assistance of counsel, and that
3 means to bring to this jury any evidence which might show
4 this jury that a witness might shade or slant his
5 testimony. That's the Constitution of the United States.

6 The Oklahoma Discovery Code requires me to turn
7 over exhibits that I intend on introducing into evidence,
8 and I did that and I complied with that rule. The
9 Oklahoma Evidence Code does not require me to turn over
10 my work product that I have gathered in anticipation of
11 cross-examining a witness.

12 It would be improper for the Court to try to
13 tell me what questions I ask on behalf of this young man
14 who's charged with three counts of murder. It is for the
15 Court to rule on the evidence and the objections.

16 Mr. Loudermilk was fired from the Police
17 Department and the Court said you can't ask him about
18 that. I didn't ask him anything about being fired from
19 the Oklahoma City Police Department. What I did ask him
20 about was his bias in this case. Did he have
21 conversations with Lou Keel? Yes. And isn't it true,
22 Officer Loudermilk, that you were investigated for rape
23 and Mr. Keel declined to file charges? He said, yes, I
24 was investigated for rape, but I don't know the
25 disposition of those charges.

1 It is the duty of the prosecution under Giglio
2 against the United States to turn that evidence over to
3 me and to let the Court decide, based on that evidence,
4 whether or not that might slant his testimony. What we
5 have here is a denial of his Sixth Amendment
6 confrontation rights for me to cross-examine the
7 witnesses against him about the fact the D.A.'s office
8 refused to prosecute this man for rape.

9 And I -- we have a protective order and I would
10 not address what's in that order. I dispute what was
11 said, that that was consensual. It is part of a
12 cover-up. In my opinion it's nothing more than a
13 cover-up, the same kind of thing that we see at Waco,
14 Ruby Ridge and other places.

15 And Judge, it isn't right for the prosecutor to
16 come in here and say to you there is no evidence that Lou
17 Keel declined to file those charges when you know and I
18 know that it's in black and white.

19 I want the Court to think of it like this.
20 It's awful difficult in Oklahoma County when the District
21 Attorney stands up and says, the Judges in this
22 courthouse are bought and paid for by criminal defense
23 lawyers. He said that to intimidate Judges. He said
24 that to try to intimidate lawyers and shut them up so
25 they wouldn't come down and cross-examine witnesses and

1 ask questions that were hard questions, questions that
2 the witness ought to answer.

3 I wouldn't want to be a Judge because I don't
4 know if I've got the stuff to do this as a Judge. It
5 would be awful difficult for me to sit where you are and
6 I've thought about that a lot because these are hard
7 decisions and they affect people's lives.

8 THE COURT: They do, Mr. Isaacs.

9 MR. ISAACS: And I want you to know I
10 understand where you're coming from, Judge, and I
11 understand that with these statements made that criticize
12 Judges, that it has -- it pollutes the atmosphere in
13 which we try cases and I want to say to you, Your Honor,
14 that in this courthouse everybody is entitled to a fair
15 trial.

16 THE COURT: Yes, sir.

17 MR. ISAACS: And everybody's entitled to
18 cross-examine the witnesses against them. In the
19 questions that I asked Mr. Loudermilk, every one of those
20 questions is admissible, is a proper question under the
21 holdings of Giglio against the United States, under Davis
22 against Alaska, and that whole progeny of cases.

23 What they would like for us to do is pretend to
24 engage in a fiction that Mr. Keel didn't decline to file
25 rape charges on Mr. Loudermilk. It is for a jury to

1 decide whether that would slant his testimony and it's
2 for a jury to decide whether that might affect
3 Loudermilk's testimony.

4 The spousal abuse charges were brought to the
5 D.A.'s office and that is revealed to us here in open
6 court, that Mr. Loudermilk had been investigated for
7 spousal abuse and that those charges were brought over to
8 the D.A.'s office and they declined to prosecute him for
9 the spousal abuse.

10 Mr. Loudermilk's record shows that at Arvest
11 Bank he made a material omission from his application for
12 work. That's admissible under 608(B)1 and probably
13 admissible under bias because to omit that you work for
14 somebody for six -- for a year and six months is to
15 mislead them, to deceive them.

16 All of these issues are for a jury. It's not
17 for the Court to decide, it's not for me to decide, it's
18 for the jury to know all the evidence. That's what
19 Justice Burger meant in Davis against Alaska. That's
20 what cross examination is all about.

21 This country, the United States of America, is
22 different from any other court system in the world
23 because we get to cross-examine in the presence of a jury
24 and the jury gets to decide whether they believe a
25 witness or not.

1 I ask the Court, in the name of justice, do the
2 right thing in this case. There is only one answer to
3 what happened here and that is to dismiss this based on
4 double jeopardy.

5 THE COURT: I'm going to overrule your motion,
6 Mr. Isaacs, to dismiss based on double jeopardy at this
7 time. This case will be set for trial on October 18th in
8 front of Judge Virgil C. Black, which is the same date
9 that I had given you.

10 MR. TOURE: Judge, may I ask a question of the
11 Court?

12 THE COURT: Yes, sir.

13 MR. TOURE: I understand your ruling, Judge. I
14 wanted to inquire, because we did allege it was
15 prosecutorial misconduct by the State in not turning over
16 the information about Loudermilk, especially the rape
17 charge. Is the Court saying that it was not -- that
18 information should not have been turned over?

19 THE COURT: No, I'm not.. I'm not going -- if
20 we should have -- in my opinion, Mr. Toure, if there was
21 information that you had that you thought that the
22 District Attorney had not turned over to you, it should
23 have been taken up with Judge Black, or I believe they
24 should have been taken up with me.

25 And I don't know until these issues are brought

1 up in the middle of the trial and that's what -- and
2 that's what concerned me. You people knew; I didn't.

3 MR. TOURE: Judge, if I could respond, and I
4 think clearly this is a point of departure between Mr.
5 Rogers and Mr. Arnold. I did not have this information.
6 The D.A. had it. Mr. Arnold had it, but I didn't have
7 it. I didn't have -- it was his work product; I didn't
8 have it. I heard for the first time, I saw for the first
9 time in this courtroom in the middle of the trial.

10 THE COURT: Which is exactly the same time that
11 I had heard of it.

12 MR. TOURE: That's what I'm saying, that the
13 D.A. then, the District Attorney then refused to turn
14 over to my client information, Judge, that could, I
15 believe, be used for impeachment purposes. So I think
16 that it was clearly misconduct, prosecutorial misconduct
17 by the District Attorney in respect to Mr. Rogers.

18 We did not say one word to Mr. Loudermilk
19 because we didn't have a chance to cross-examine him. We
20 cannot be held responsible for what Mr. Arnold does, but
21 we disagree with the Court's interpretation.

22 But, Judge, what the District Attorney did not
23 do clearly in my mind -- that's what I'm asking the Court
24 for, for clarification -- was to turn over information
25 that should have been turned over pursuant to our

1 discovery motion which the Court sustained and the
2 prosecution did not do it.

3 The Court found out about it the same time we
4 did, in the middle of the trial, and the Court declared a
5 mistrial. The case should have been dismissed right
6 then, but it declared a mistrial. That prejudices Mr.
7 Rogers, Judge.

8 THE COURT: And I appreciate your argument, Mr.
9 Toure but -- and I appreciate your argument. Mr. Isaacs,
10 let me say this. I've known you gentlemen for a long
11 time. I've known Mr. Morgan, I've known Mr. Pate and
12 I've known Mr. Toure and I've known Mr. Isaacs for
13 sometime. I have nothing but the utmost respect for you
14 gentlemen. It concerns me, but after sitting down and,
15 you know, thinking about this, we all have an oath to do
16 justice in this country.

17 Some of the things that Mr. Isaacs stated to me
18 just a few moments ago ring true. And being a Judge is
19 difficult and making sure that evidence is provided and
20 presented to the jury properly and the decisions that
21 come down are -- and you're right, Mr. Isaacs. What's
22 happened here recently in Oklahoma City in the past four
23 years, people don't have confidence in their government,
24 in their justice system, and I've thought about this for
25 a long time. That's what's behind our oaths.

1 I'll be honest with you. You know, at times
2 it's brought me to tears, but it is my duty as a Judge to
3 make the hard decisions -- I asked for this job; I got
4 it -- and make those decisions and see that all parties,
5 that all sides that come into the courtroom play on a
6 level playing field.

7 I stand by my ruling. Any other motions need
8 to be urged in front of Judge Black and we'll be -- we'll
9 be in recess.

10 MS. ZERR: Your Honor, if I may?

11 THE COURT: Yes.

12 MS. ZERR: This morning I received first a
13 phone call from Judge Black's court reporter and then I
14 received a follow-up phone call from your court reporter
15 regarding the personnel file of Johnny Loudermilk that
16 was received by the Court under seal.

17 THE COURT: That -- that file has been sealed
18 by this Court as has the document that Mr. Isaacs gave to
19 the Court.

20 MS. ZERR: Court's Exhibit 1?

21 THE COURT: Court's Exhibit 1. I'll re-urge
22 mine to do -- it's my understanding that between the
23 court reporters is how to handle these exhibits, whether
24 the exhibits transfer from the court reporter, my court
25 reporter, over to -- over to Susan Conner, Judge Black's

1 court reporter, who is in the courtroom today.

2 MS. ZERR: Yes, Your Honor. It was my
3 understanding when the file was presented to the Judge,
4 to the Trial Judge, to you, by the attorney for the City,
5 Mr. Washbourne?

6 THE COURT: Hasbrook.

7 MS. ZERR: Hasbrook, I'm sorry. There was a
8 discussion on the record, I believe, that that file would
9 be placed under seal and made a part of the permanent
10 court file to be kept with the Clerk's office and in the
11 court file, not to be maintained by the Judge in his
12 office or by the court reporter in her office and I would
13 ask for a --

14 THE COURT: At that point in time we're talking
15 about exhibits. I believe the Court's exhibits and that,
16 I have no problem with making a part of the file. I have
17 not discussed that with the court reporters or with Judge
18 Black. My intention was to turn it over to Judge Black,
19 all right?

20 MS. ZERR: Well, it was my understanding from
21 being in court, and I believe Mr. Toure was present, Mr.
22 Isaacs made a request that it become a part of the
23 permanent court file and I believe Your Honor stated that
24 it would be, so I'm just trying to clear that up and get
25 on the record today that it will be made a part of the

1 be made a part of the court file?

2 MR. ISAACS: Yes, sir.

3 THE COURT: It'll be done.

4 MS. ZERR: That's all I have, Your Honor.

5 THE COURT: Anything on behalf of the State?

6 MR. PATE: No, sir.

7 THE COURT: We'll be in recess.

8 (Whereupon, these proceedings were concluded).

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CERTIFICATE OF THE COURT REPORTER

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STATE OF OKLAHOMA)
)
COUNTY OF OKLAHOMA)

I, Susan Conner, Certified Shorthand Reporter in and for the State of Oklahoma, do hereby certify that the within and foregoing transcript is a true, accurate, and complete transcription of my machine shorthand notes taken in this cause.

Dated this 27th day of September, 1999.



SUSAN CONNER, C.S.R.

CSR #1062

State of Oklahoma
Certified Shorthand Reporter
September 27, 1999