



COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROBERT L. BURNS, JR.

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. John W. Wise, J.

Hon. Earle E. Wise, Jr., J.

Case No. 17 CA 0069

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common  
Pleas, Case No. 12 CR 0116

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

January 8, 2018

APPEARANCES:

For Plaintiff-Appellee

WILLIAM C. HAYES  
PROSECUTING ATTORNEY  
DANIEL J. BENOIT  
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For Defendant-Appellant

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*Wise, John, J.*

{¶1} Appellant Robert L. Burns, Jr. appeals the decision of the Court of Common Pleas, Licking County, which denied his *pro se* post-conviction motion to compel disclosure of allegedly exculpatory evidence. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} In March 2012, appellant was charged with three counts of illegal use of a minor in a nudity-oriented performance, three counts of corruption of a minor, and two counts of corruption of a minor with drugs. Following a jury trial, appellant was convicted on all but one count of corruption of a minor with drugs. The trial court sentenced him to a total prison term of thirteen years and three months, with the terms to run consecutively. Additionally, appellant was classified as a sexually oriented offender, with an annual registration requirement for ten years.

{¶3} Appellant then filed a direct appeal to this Court, arguing in his sole assigned error that his due process rights were violated when the State read portions of his son's prior testimony from a juvenile proceeding, for purposes of refreshing the son's recollection. On October 9, 2012, we overruled the assigned error and affirmed appellant's convictions. See *State v. Burns*, 5th Dist. Licking No. 2012-CA-37, 2012-Ohio-4706.

{¶4} On October 22, 2015, more than three years after his trial, appellant filed a *pro se* petition for post-conviction relief ("PCR"). Via a judgment entry issued on November 25, 2015, the trial court denied appellant's petition for post-conviction relief as untimely. On July 6, 2016, we affirmed. See *State v. Burns*, 5th Dist. Licking No. 15-CA-98, 2016-Ohio-4833. Appellant's attempts to have the decision reviewed by the Ohio

Supreme Court and the United States Supreme Court were unsuccessful. *See State v. Burns*, 147 Ohio St.3d 1506, 2017-Ohio-261, 67 N.E.3d 824; *Burns v. Ohio*, 138 S.Ct. 73, 199 L.Ed.2d 50 (2017).

{¶15} In addition, on February 23, 2015, prior to his aforesaid PCR petition, appellant had filed a post-conviction “motion for production of *Brady* material.”<sup>1</sup> Then, on June 22, 2017, appellant filed a “motion to compel disclosure of exculpatory material and information.” The State filed a response on August 3, 2017.

{¶16} On August 8, 2017, the trial court denied appellant’s motion to compel disclosure via a judgment entry.

{¶17} On August 31, 2017, appellant filed a notice of appeal. He herein raises the following sole Assignment of Error:

{¶18} “I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT’S ‘MOTION TO COMPEL DISCLOSURE OF EXCULPATORY MATERIAL AND INFORMATION,’ WHEN IT IS CLEAR THAT SOME OF THE DISCOVERY WAS SUPPRESSED, AND OTHER DISCOVERY WAS MARKED ‘COUNSEL ONLY’ BY THE PROSECUTION WHO SET OUT TO MISLEAD THE TRIAL PROCESS, IN VIOLATION OF APPELLANT’S RIGHT TO DUE PROCESS.”

I.

{¶19} In his sole Assignment of Error, appellant contends the trial court erred or abused its discretion in denying his motion to compel the disclosure of allegedly exculpatory evidence, which he asserts is in the form of items originally marked “counsel only” and documents that purportedly were sealed or excluded from trial. We disagree.

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<sup>1</sup> See *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

{¶10} Generally, a trial court has discretion to determine what sanction is appropriate when the State fails to disclose discoverable material. *State v. Wiles* (1991), 59 Ohio St.3d 71, 78, 571 N.E.2d 97. However, Crim.R. 16(B)(1)(f) formerly stated: “Upon motion of the defendant *before trial* the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. \* \* \*.” (Emphasis added). The present rule, specifically Crim.R. 16(B), refers to items “which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial. \*\*\*.”

{¶11} In the case *sub judice*, we surmise that appellant’s February 2015 request for “*Brady* material,” filed nearly three years after his convictions, was a preparatory step in his litigation of the October 2015 petition for post-conviction relief. We observe appellant thereafter did not pursue his attempt to compel disclosure until 2017, well after the PCR proceedings were completed. Furthermore, a petition for post-conviction relief is a civil proceeding, and the procedure to be followed in ruling on such a petition is established by R.C. 2953.21. *State v. Muff*, 5<sup>th</sup> Dist. Perry No. 06-CA-13, 2006-Ohio-6215, ¶ 21. The power to conduct and compel discovery under the Civil Rules is not included within the trial court’s statutorily defined authority in PCR proceedings. *Id.* Thus, appellant herein never had a right to discovery or the compelling thereof in pursuit of his PCR proceedings, which nonetheless are now over. See *State v. Lang*, 5<sup>th</sup> Dist. Stark No. 2009 CA 00187, 2010-Ohio-3975, ¶ 21. See, also, *State v. Franks*, 9<sup>th</sup> Dist. Summit No. 28533, 2017-Ohio-7045, ¶ 20 (holding “\*\*\* there is no right to discovery in a post-conviction proceeding”).

{¶12} The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish “materiality” for *Brady* purposes. *State v. Jackson*, 57 Ohio St.3d 29, 33 (1991), additional citations omitted. Furthermore, “[p]ursuant to *Brady* \*\*\*, the state is required to disclose material evidence to *defense counsel*.” *State v. Banks*, 10th Dist. Franklin No. 03AP-1286, 2005-Ohio-1943, ¶ 18 (emphasis added). In this instance, the trial court reviewed and rejected the merits of appellant’s 2017 motion to compel disclosure, determining *inter alia* that “[t]here appears to be nothing in [appellant’s] request that he did not or does not have access to through his own counsel.” Judgment Entry, August 8, 2017, at 1. Appellant presently fails to demonstrate that the trial court’s decision was outside of the bounds of its discretion.

{¶13} We therefore find no merit in appellant’s claim that he was erroneously denied post-conviction disclosure of evidence under the circumstances presented in the case *sub judice*.

{¶14} Accordingly, appellant’s sole Assignment of Error is overruled.

{¶15} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby affirmed.

By: Wise, John, J.  
Gwin, P. J., and  
Wise, Earle, J., concur.

JWW/d 1221