

2018 IL App (2d) 161010-U
No. 2-16-1010
Order filed February 23, 2018

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 14-CF-884
)	
DANNY RANDALL,)	Honorable
)	Ronald J. White,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting defendant's motion to dismiss the indictment because the State's informant had died: as defendant relied primarily on impeachment evidence that he gleaned from the informant's death, he did not prove by clear and convincing evidence that, had the informant lived, defendant could have effectively impeached him.

¶ 2 On May 7, 2014, a Winnebago County grand jury indicted defendant, Danny Randall, on five counts of delivery of a controlled substance. The State later dismissed three counts. Defendant subsequently moved to quash the indictment on the basis that the State's failure to produce an informant violated defendant's right to due process. The informant, Aaron Zweep,

died while the case was pending. The trial court granted defendant's motion and the State now appeals. We reverse and remand.

¶ 3 Defendant was charged after allegedly delivering heroin to Zweep as part of a controlled purchase operation. Evidence presented at various pretrial hearings establishes the following facts. Zweep was working with John Wassner, a detective with the Rockford police department. Zweep arranged to meet with an individual known as "White Boy" in a parking lot on February 12, 2014.¹ Zweep believed that White Boy's first name was Danny. Wassner had previously arrested defendant and knew that White Boy was his nickname. Before the meeting, Wassner and another detective searched Zweep to make sure that he had no drugs in his possession. They looked for drugs in Zweep's pockets and shoes. Wassner did not look for drugs in Zweep's hat. Wassner also did not search Zweep's socks, or underwear, even though those were common places to hide drugs.

¶ 4 Wassner and another detective with the Rockford police department, Randy Berke, conducted surveillance of the parking lot from different locations. Wassner observed a gold Ford sedan in the parking lot. Zweep got into that vehicle, which then moved to another parking spot. Wassner was unable to identify the driver. Berke observed a gold Ford Taurus driving in the parking lot. Berke identified defendant as the driver. Berke lost view of the vehicle and never saw any interaction between defendant and Zweep. Wassner saw Zweep get out of the Ford sedan. Zweep walked back to Wassner and handed him three bags of heroin.

¶ 5 Zweep arranged another meeting with defendant at Zweep's residence. Before the meeting, Wassner and another detective searched Zweep's jeans, shoes, and pockets. They also

¹ Wassner testified that the meeting took place on February 14, 2014. It is clear, however, that the meeting actually took place two days earlier.

searched the residence for drugs, checking the couch, cushions, ashtrays, and cabinets. Wassner initially conducted surveillance from the living room, videotaping the meeting through the window. Wassner saw defendant arrive near the residence. Zweep went outside to meet him. The meeting was supposed to take place on the street. However, Zweep and defendant walked up to enter the house, at which point Wassner hid in a back bedroom. Zweep came to the bedroom and told Wassner that defendant was in the basement. Zweep and Wassner went outside, and defendant gave Wassner drugs that he supposedly purchased from defendant.

¶ 6 Berke conducted surveillance from a church parking lot located less than 1000 feet from Zweep's residence. He saw a silver car park in front of Zweep's residence. Zweep came outside and then entered the residence with defendant.

¶ 7 On July 6, 2015, defendant filed a motion for additional discovery, seeking, *inter alia*:

“1. Any and all records relative to the stopping, detaining or arresting of the confidential informant in this matter Aaron Zweep, subsequent to February 26, 2014.

2. Any and all reports relative to Aaron Zweep, being treated in a substance abuse program subsequent to February 26, 2014.”

At the hearing on the motion, defense counsel suggested that Zweep might have been spared from criminal prosecution because he promised “continued cooperation in ferreting out other criminal activity.” The trial court ordered the State to ask Zweep whether he was addicted to drugs, what drugs he was addicted to, and whether he had been or was being treated for drug problems. On July 21, 2015, the prosecutor advised the trial court that Wassner had indicated that, to the best of his knowledge, Zweep had not been stopped, detained, or arrested after February 26, 2014.

¶ 8 On August 5, 2015, the parties advised the court that Zweep had died. At a subsequent hearing, Wassner indicated that he did not know Zweep's cause of death, but it was possible that he had died from a drug overdose. Wassner was aware that Zweep had used heroin in the past.

¶ 9 On April 26, 2016, defendant filed his motion to quash the indictment on the ground that Zweep's unavailability as a witness violated defendant's due process rights. Relying on *People v. Holmes*, 135 Ill. 2d 198 (1990), defendant maintained that, had Zweep been available, his testimony would be exculpatory. At the hearing on the motion, Wassner testified that his relationship with Zweep began in 2006. Zweep was a paid informant. He always worked for money rather than for leniency with respect to criminal charges. Zweep signed a written agreement providing that that he would not sell, deliver, or possess drugs. Working as an informant and "scrapping" were Zweep's sources of income. Wassner testified that an informant would get paid even if an attempt to purchase drugs was unsuccessful. According to Wassner, Zweep had been a very reliable informant and had provided Wassner with "tons of information." Other than a loitering charge, Wassner was unaware of any criminal charges against Zweep while Zweep worked with Wassner. Wassner had no reason to believe that Zweep was using drugs while working as an informant.

¶ 10 Zweep's autopsy report indicated that, on July 25, 2015, Zweep experienced abdominal pain and was taken by ambulance to the emergency room. Zweep told an emergency room doctor that he was a heroin user. Zweep signed out of the emergency room against medical advice and went home with his uncle, Elmer Tighe. Tighe later found Zweep unresponsive and called 911. Zweep was taken to the hospital, where he died. Zweep had track marks on his arms. Tighe told police that Zweep was a drug user. According to Tighe, Zweep had been using heroin for 10 to 15 years. The autopsy report listed heroin use as a factor contributing to Zweep's death.

Defendant attempted to subpoena Tighe to testify at the hearing on the motion to dismiss. However, Tighe had moved and the attempt to subpoena him was unsuccessful.

¶ 11 The trial court granted defendant's motion to dismiss. The State moved for reconsideration. The trial court denied the motion and the State brought this appeal.

¶ 12 In *People v. Stumpe*, 80 Ill. App. 3d 158 (1979), the court adopted the three-part test set forth in *People v. Jenkins*, 360 N.E.2d 1288 (N.Y. 1977), for determining whether a conviction obtained despite the unavailability of a government informant violates the defendant's due process rights. *Stumpe* described the *Jenkins* test as follows:

“[T]he defendant is initially required to establish the relevance and materiality of the missing witness. Once these are established, the State assumes the burden of producing the witness, if that witness is or was employed by the State, or of exerting diligent efforts to do so. If the State can prove that it made reasonable good faith efforts to locate the missing witness, the indictment may not be dismissed nor may a new trial be ordered unless the defendant establishes that the informant's testimony was likely to be exculpatory or, in the alternative, likely to be impeached in a manner that would create a doubt as to the reliability of the State's case.” *Stumpe*, 80 Ill. App. 3d at 163.

¶ 13 Our supreme court adopted the *Stumpe/Jenkins* test in *Holmes*. With respect to the third prong of the test—*i.e.* the requirement that the defendant establish “that the informant's testimony was likely to be exculpatory or, in the alternative, likely to be impeached in a manner that would create a doubt as to the reliability of the State's case” (*Stumpe*, 80 Ill. App. 3d at 163)—the *Holmes* court held that the defendant must prove, by clear and convincing evidence, that “in the context of all of the evidence that has been or will likely be presented at trial, the unavailable evidence would raise a reasonable doubt as to the State's case.” *Holmes*, 135 Ill. 2d

at 213-14. There is no dispute here that Zweep would have provided relevant and material evidence. Furthermore, there is no dispute as to the State's good faith. Only the third prong of the *Stumpe/Jenkins* test is at issue here.

¶ 14 Before proceeding, we consider the applicable standard of review. A trial court's ultimate ruling on a motion to dismiss charges is generally reviewed for an abuse of discretion. *People v. Stapinski*, 2015 IL 118278, ¶ 35. However, where purely legal questions are presented, review is *de novo*. *Id.* The third prong of the *Stumpe/Jenkins* test presents a highly fact-specific inquiry. Thus, we review the trial court's ruling under the abuse-of-discretion standard.

¶ 15 In *Holmes*, the defendant was charged with two counts of unlawful delivery of cannabis. Count I alleged that, on February 25, 1986, the defendant sold cannabis to a police officer in the presence of a government informant. Count II alleged that, on March 5, 1986, the defendant sold cannabis to the informant. The informant had five convictions of theft and three convictions of possession of cannabis. *Holmes* 135 Ill. 2d at 202. Moreover, "the State paid cash to, and promised to be lenient with, the informant in return for his services." *Id.* Employing the *Stumpe/Jenkins* test, the trial court dismissed both counts and the appellate court affirmed. On appeal to our supreme court, the parties agreed that the informant's testimony would be material and relevant. *Id.* at 215. The *Holmes* court upheld the trial court's finding that the State had made a good faith effort to locate the informant. *Id.* at 216. With respect to count I, the *Holmes* court concluded that the defendant failed to meet his burden under the third prong of the *Stumpe/Jenkins* test. The court noted that the State's case on count I depended on the testimony of the police officer to whom the defendant allegedly sold cannabis. The defendant did not show how the informant would impeach the officer's testimony. *Id.* at 217-18. In contrast, the court

concluded that, with respect to count II, the defendant did meet his burden under the third prong.

The court reasoned as follows:

“Apparently, the informant was the only witness to the alleged transaction and so the State’s case against defendant with respect to count II depends entirely upon the credibility of the informant’s version of what occurred on March 5, 1986. Defendant has demonstrated, and the State does not dispute, that the informant’s version of the events that occurred on March 5, 1986, if the informant were to testify, would be subject to severe impeachment in that the informant has eight prior convictions (three of which were for drug-related offenses), and the informant was paid money and promised leniency by the State in exchange for his services. We find that such impeachment could call into question the credibility of the informant’s version of what took place on March 5, 1986, and therefore could raise a reasonable doubt as to the State’s case with regard to count II of the indictment.” *Id.* at 219.

¶ 16 In *Holmes*, the informant would have been the only witness to the transaction alleged to have taken place on March 5, 1986. Similarly, Zweep would have been the only witness to the transactions alleged to have occurred here. The State contends, however, that “[t]he testimony from Detective Wassner about [Zweep] is not damning, unlike the description of the informant in *Holmes*.” In both this case and *Holmes*, the informants were paid, but in *Holmes* the informant was also promised leniency in exchange for his services and had a significant criminal record.

¶ 17 Defendant stresses that Zweep’s work as an informant was a principal source of his income. Thus, according to defendant, “[e]vidence that Zweep’s livelihood was dependant [*sic*] on the police paying him to participate in drug transactions would have revealed a strong bias and motive for him to testify against [defendant].” However, as the State notes, Wassner testified

that Zweep would be paid whether or not he completed a transaction. Although evidence of Zweep's financial incentives would have some impeachment value, it would not, standing alone, raise a reasonable doubt.

¶ 18 Defendant also contends that Zweep would have been subject to impeachment because he was a heroin user. Defendant notes that the coroner's report listed heroin use as contributing to Zweep's death. Moreover, the report related that Zweep had told medical personnel that he used heroin; that Tighe had told police that Zweep was a heroin user; and that Zweep had track marks on his arms. Defendant further contends that, because the police did not thoroughly search Zweep's person and residence for drugs, the State cannot circumstantially prove that Zweep obtained the heroin from defendant. However, as the State astutely notes, if Zweep were alive to testify, there would be no coroner's report with which to impeach him. Although the record indicates that defense counsel suspected that Zweep was a drug user, it does not appear that, prior to Zweep's death, counsel had evidence to support that suspicion. The very event that made Zweep unavailable to testify—his death—brought the evidence to counsel's attention. Had Zweep lived, counsel might possibly have unearthed evidence of Zweep's heroin use. Defendant might also have been able to make the trier of fact aware of Zweep's track marks and thereby alert the trier of fact to his heroin use. But speculation about whether, absent the coroner's report, defendant would have known of, or been able to prove, Zweep's heroin use cannot meet defendant's burden to prove, by clear and convincing evidence, that "in the context of all of the evidence *that has been or will likely be presented at trial*, the unavailable evidence would raise a reasonable doubt as to the State's case." (Emphasis added.) *Id.* at 213-14.

¶ 19 For the foregoing reasons, the judgment of the circuit court of Winnebago County is reversed and the case is remanded for further proceedings.

¶ 20 Reversed and remanded.