

No. 4 - 99 - 0679
IN THE APPELLATE COURT OF ILLINOIS
4th JUDICIAL DISTRICT

PEOPLE OF THE STATE)	APPEAL FROM THE CIRCUIT
OF ILLINOIS,)	COURT OF MCLEAN
Plaintiff - Appellee,)	COUNTY, ILLINOIS
vs.)	
Barton McNeil)	No. 98 CF 633
Defendant - Appellant)	HONORABLE Michael Prall
)	Judge Presiding

PETITION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE APPELLATE COURT:

May it please the court:

The appellant requests a rehearing on the judgement issued by the Appellate Court in which the defendant's conviction was upheld. The defendant asserts that the Appellate Justices overlooked several key issues which should have been considered when deciding whether or not to uphold the conviction and/or deny the defendant a new trial. The issues not fully considered by this court are as follows:

I. The court cited several cases as having set a precedent for determining the admittance (or non-admittance) of evidence that the defense wished to present showing that a specific other third party had committed the murder in which the defendant was charged. In the instant case it was the defendant's assertion that Misook Nowlin, the estranged girlfriend of the defendant, had committed the murder of the defendant's daughter, Christina McNeil. An offer-of-proof pre-trial hearing resulted in the Trial Court's ruling that such evidence linking Nowlin to the murder would not be allowed to be presented to the jury during the defendant's trial. The defendant asserts that as a result of that ruling the defendant was precluded from presenting a defense.

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a. The Appellate Court cites People v Enis 139 Ill. 2d 264, 564 N.E.2d 1155 in support of its decision upholding the Trial Court's ruling in disallowing defendant's right to present a defense by presenting evidence of another's guilt.

In Inis, the defendant, Anthony Inis, clearly had a strong motive to kill the victim, Melinda Entrata. Entrata had recently accused Enis of sexual assault resulting in criminal charges being brought against Enis. Entrata was murdered 7 days prior to the trial of Inis for the sexual assault charge. Entrata's murder resulted in the dropping of the sexual assault charges against Enis.

In the instant case Nowlin had been tried and convicted of domestic battery shortly prior to the murder of Christina McNeil. Both this defendant and the later murder victim had been the prior victims of this attack by Nowlin. Christina McNeil had been murdered only one day prior to the sentencing of Nowlin for the above domestic battery. This defendant was to have testified against Nowlin at her sentencing hearing for the domestic battery case - a conviction which was the result of the defendant's testimony as the State's witness (victim) during Nowlin's trial.

In Inis, the State showed motive on the defendant's part by the pending charges against him resulting from a prior sexual assault on the soon-to-be murder victim. This was bolstered by the short amount of time (7 days) separating Entrata's murder from her upcoming testimony against Enis at his sexual assault trial.

The defendant in the instant case contends that the motive evidence against Nowlin is even stronger than that used by the State against Enis by virtue of Nowlin's conviction, and by the vastly shorter amount of time (1 day) separating the murder of Christina McNeil and that of Nowlin's sentencing hearing. Just as Enis' murder of Entrata resulted in the absence of her testimony against him, the murder of Christina McNeil resulted in the absence of this defendant's testimony against Nowlin for a crime against Christina McNeil.

While Enis motive for killing was a strongpoint in the State's case against Enis, the defendant in the instant case contends that Nowlin's motive alone, is quite similar to that of Enis' and that the time distance is vastly less remote between the murder

of Christina McNeil and that of Nowlin's domestic battery sentencing, than was the time between Entrata's murder and that of Enis' upcoming sexual assault trial. This defendant asserts that if motive evidence of this nature was used by the State against Enis, combined with little other evidence, then this defendant should have been allowed to show similar motive on Nowlin's part in conjunction with other evidence, to murder Christina McNeil as a part of this defendant's defense.

In addition, the third party in which Enis wished to suggest was Entrata's true killer was a mere shadowy figure. This third party was never identified, questioned by the authorities, polygraphed, asked to submit a hair sample, or had physical evidence taken from his home. In short, the third party was never treated as a suspect by the authorities.

In contrast, Nowlin was explicitly identified by this defendant even prior to any arrest, as to the likely killer of his daughter. Nowlin was questioned numerous times by Bloomington Police detectives, by DCFS, and by a State Police polygraph examiner. Detectives also collected physical evidence from Nowlin's home. In addition, the authorities were requesting a hair sample from Nowlin to compare to that of hairs found in the deathgrip of the victim. Numerous close associates of Nowlin's were questioned by the authorities as well as a part of the investigation of Nowlin's role in this murder. Clearly Nowlin had been treated as a suspect by the authorities.

In the instant case no evidence of motive was presented by the State against this defendant. There was none. There was no confession, no eye-witnesses, and no physical evidence linking this defendant to the murder of his daughter.

The benchmark for the determination of relevancy is whether such evidence tends to make the defendant's guilt less probable. Given the strength of Enis' motive, and the non-identification and non-suspect status of the third party which Enis wished to implicate, even if Enis had been allowed to present testimony pertaining to a sighting of a third person near to the scene of the murder, this would likely not have made Enis' guilt less probable.

Conversely, given the complete lack of motive evidence on this defendant's part, the lack of a confession, eye-witness.

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testimony, or physical evidence linking this defendant to his daughter's murder, combined with the infinitely greater degree to which Nowlin was identified, had motive, and was at the center of investigative activity by the investigators, this defendant's presentation of such defense evidence would have likely made this defendant's guilt much less probable. This defense would be further bolstered by Nowlin's prior domestic battery conviction as well as a post-murder arrest of Nowlin for an attack on another child in which circumstances were nearly identical to that surrounding the murder of Christina McNeil.

For these reasons, this defendant contends that the citation of the Enis case is inappropriate and non-applicable as a support for the Trial Court's decision denying this defense. This defendant further asserts that the Enis case, in actuality, supports this defendant's position in that Enis' motive with respect to a prior attack on the murder victim was similar to that of Nowlin's with respect to her pre-murder assault on both this defendant and murder victim.

b. The Appeals Court also cited People v Mayberry 193 Ill. App. 3d 250, 140 Ill. Dec. 323 in support of its decision upholding the Trial Court's decision that a jury would not be allowed to hear a defense presentation of evidence implicating Nowlin in the murder of Christina McNeil. Mayberry too is inapplicable to the instant case.

In the Mayberry sexual assault case the victim was "99.9 percent" sure it was the defendant, Scott Mayberry, who had attacked her. In part, evidence used against Mayberry included the existence of a tampered window screen at the victim's home which was used by the attacker to gain entry into her home. Likewise, the tampered window screen found on the bedroom window of Christina McNeil was a paramount piece of evidence this defendant wished to use showing Nowlin's point of entry to the murder scene.

The third party whom Mayberry wished to present evidence as the victim's rapist was that of her former boyfriend, Bob Leonard. However, the victim explicitly stated that it was not Leonard who had attacked her, but that it was the defendant. The eye-witness (victim) both identified Mayberry as her attacker and

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claimed that Leonard was not. In addition, Leonard was never questioned by the authorities about this rape, was not polygraphed, asked for a hair sample, or had evidence taken from his home for forensic testing. Like the unnamed party in Enis, Leonard was not treated as a suspect by the authorities in this rape case. Nowlin was polygraphed, questioned repeatedly by detectives, asked to submit a hair sample, and had evidence taken from her home for forensic testing. The disparity between the degree to which Leonard (and Enis' unidentified third party) and that of other third parties in the cases cited by this court - and that of the degree to which Nowlin was treated as a suspect in the instant case makes for an unequal comparison.

Mayberry wished to present evidence found in Leonard's ^{car} by the police as a result of an unrelated burglary arrest. This defendant wished to present evidence pertaining to not one, but two arrests of Nowlin for attacks perpetrated against children. One was that described previously which led to Nowlin's conviction for domestic battery against this defendant and the murder victim.

The other child-attack took place shortly following the murder of Christina McNeil. This post-murder attack involved a threat by Nowlin to murder her own daughter combined by an act of smothering. This attack, in which some testimony was heard at this defendant's March 4, 1999 offer of proof hearing, was not unlike the murder by smothering of Christina McNeil. A close connection exists between Nowlin and the murder of Christina McNeil because: 1) the murder victim (along with this defendant) had recently been the victim(s) of domestic battery an the hands of Nowlin; 2) because Nowlin threateded to murder another child while performing an act of smothering - a circumstance nearly identical to the murder by smothering of Christina McNeil, and 3) because Nowlin is being questioned repeatedly, in connection to the murder, by police detectives and DCFS, and that this investigative activity includes a poylgraph exam, a request for Nowlin's hair sample, the aquisition of items from her home for forensic testing, and more.

In addition, Mayberry was strongly implicated in his case. There was an eye-witness (the victim) who identified Mayberry as the assailiant. There was also forensic evidence in the form of hair fibers and semen / bloodtype ABO evidence which strongly

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implicated Mayberry further. Like in Enis, even if Mayberry had presented evidence suggesting Leonard's guilt, the evidence against against Mayberry was so strong, by virtue of the victim's identification of the defendant as her attacker combined by the forensic evidence, that Mayberry's third party evidence would not have made his own guilt less probable. This type of defense is further deminished by the lack of Leonard's treatment by the authorities as a suspect in the Mayberry case.

Again, this type of evidence was absent in the instant case. There was no eye-witness testimony, no forensic evidence linking this defendant to the murder, no motive, nor a confession. Absent strong evidence against this defendant combined with a vastly greater degree to which Nowlin was treated as a suspect along with her propensity to attack other children, would have made this defendant's guilt much less probable.

c. This Appellate Court also refers to People v Howard 147 Ill 2d 103, 167 Ill. Dec. 914 in support of the Trial Courts ruling against a defense presentation of the evidence implicating Nowlin. Stanly Howard wished to present evidence that the victim was murdered by a jealous husband - and that the murder victim had been having an affair with his wife. The wife, Tecora Mullen, was a witness to the murder of Oliver Ridgell. Like in Mayberry, an eye-witness, Mullen, identified Howard as Ridgell's killer. In addition, Howard actually confessed to the police that he had in fact murdered Ridgell, and that it was an armed robbery attempt.

In Howard we have a strong motive (robbery), an eye-witness identification of Howard as the killer, and a confession by Howard. These strong indications of Howard's guilt are totally absent in the instant case. Even if Howard had been allowed to point an accusing finger at Mullen's husband provided there was a sufficient connection and relevance to such evidence, it would likely not overcome eye-witness identification of Howard as the killer nor overcome Howard's own confession. Such a defense would not have made Howard's guilt less probable as the evidence against him was overwhelming. In the instant, an eye-witness account is absent as is a confession. Also absent is physical evidence linking this defendant to the murder of Christina McNeil, nor is a motive

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present.

While the presentation of evidence of another's guilt would not make a defendant's guilt less probable where eye-witnesses, confessions, physical evidence, and motives are used against the defendant in various combinations, the absence of any similar sort of evidence against the defendant in the instant case would make presentation of third party guilt result in a lesser probability of this defendant's guilt.

In addition, Mullen's husband was not treated as a suspect anywhere near to the same degree that Nowlin was in the instant case. Even if Mullen's husband had been, the eye-witness identification of Howard as the killer, his robbery motive, and his confession would have likely negated any third party evidence of guilt.

In the three cases cited above, the evidence of the defendant's guilt was so strong as to make evidence of another's guilt unpersuasive. Such evidence would not have made these defendant's guilt less probable. Such incriminating evidence against these defendants was absent in the instant case. This defendant's case contained no motive, no eye-witness of this defendant as the attacker, no confession, and no physical evidence linking this defendant to the murder. Absent such evidence, this defendant asserts that the presentation of evidence of Nowlin's guilt would have made this defendant's guilt less probable.

Further more, in the above cited case, the third party evidence was weak. None of the third parties were even treated by the police as suspects at all. Mullen's husband was questioned by the police twice. Leonard was never questioned about the Mayberry case at all, and in Enis the other party was never even identified much less questioned. Nowlin on the other hand was questioned repeatedly by three different investigative bodies, polygraphed, asked to submit a hair sample for comparison purposes (which she refused to submit), had evidence taken from her home for forensic testing, and more. This degree of Nowlin's treatment by the authorities strongly suggests her suspect status. This in and of itself would likely make this defendant's guilt less probable. The absence of strong evidence against this defendant would likely further reduce the probability of this defendant's guilt.

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d. The Appellate Court cited other cases in support of the Trial Court's ruling on the inadmissability of evidence pertaining to Nowlin. These are People v Ward, Nitti, and Hughs. The same issues apply to these cases, this defendant contends, that apply to the above cases. These cases all have evidence against the defendant that includes combinations of eye-witness identifications of the defendant(s) as the perpetrator, strong motive evidence, physical evidence linking the defendant(s) to the crime, and / or confession(s).

Similarly, the evidence of the guilt of another party is comparatively weak. In none of these cases does the degree to which these other parties are treated as suspects by the authorities come close to matching that of Nowlin in the instant case.

This defendant contends that none of these case citings are applicable to the instant case. Even with the admittance of evidence of third party guilt in these above cases, the presence of the defendants' motives, eye-witness identification, physical evidence, and confessions dictates that the defendant's guilt would not have been rendered less probable one way or another. These conditions of this defendant's guilt are absent in the instant case in addition to the vastly greater degree of evidence implicating Nowlin. Because of this, this defendant asserts that such evidence is relevant and that it would have made this defendant's guilt much less probable.

II. This defendant also contends that the Trial Courts ruling against the defendant's offer of proof with regards to evidence presentation of Nowlin's guilt was only relevant to a Jury trial. The trial court ruled that such evidence would not be allowed to be presented to a Jury. An offer of proor is typically a hearing held outside the presense of a jury to get a ruling as to whether certain evidence is relevant and subject to jury consideration.

This ruling should not have, and did not, preclude the presentation of such evidence at a bench trial. Even if the case citings above are applicable to the Trial Court's ruling on Nowlin evidence, they are not applicable to a ^{bench} jury trial. All of the case citings are relevant only to a Jury trial.

This defendant's instant case was not a jury trial, it was a bench trial. As such, this defendant asserts that he has much

more latitude in the type of evidence which he wishes to present. It is the judge who rules on the weight and relevance of evidence and it's admissibility in a jury trial. In a bench trial it is the trial judge who alone weighs the relevance and weight of evidence during the trial itself, and that bench trial evidence is not precluded by pre-trial offers of proof.

This defendant asserts that the ruling on the offer of proof has no bearing on a bench trial where no jury is present and where the judge alone weighs the evidence even if such evidence were not necessarily appropriate to a jury trial.

Were ~~evidence~~⁸ Nowlin's guilt presented during the bench trial, the judge could consider such evidence, or dismiss it as irrelevant and not consider it in his final determination of guilt (or lack there-of) should he choose to do so.

In addition, the ruling on Nowlin evidence took place prior to the discovery of certain peices of evidence. At the time of the offer of proof, Nowlins smothering attack upon her own daughter, for which she was arrested, had not yet gone to trial. This conviction would have been crucial either at an offer of proot, or at a bench trial. Forensic evidence had not yet been tested either, and by the time it had been, the offer of proof had long past. The forensic (DNA) test revealed that Nowlin had used an accomplice.

The offer of proof was imcomplete because 1. the State refused to disclose or acknowledge Nowlins prior conviction for domestic battery against the murder victim, 2. nor did the State disclose any documentation pertaining to Nowlin's near smothering murder of her own daughter, 3. forensic testing had not yet been completed, and 4. numerous exculpatory documents incriminating to Nowlin were never disclosed.

Nevertheless, this defendant prays this court to consider that the offer of proof has no bearing on a bench trial, that the accompanying case citings have no bearing on a bench trial, and that at this bench trial, absent a jury, this defendant should have been allowed to put up a defense that included incriminating evidence that the State itself had accumulated against Nowlin.

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In summary, this defendant asserts the Trial Courts ruling resulting from the offer of proof was a denial of his right to put up a defense. And that his right to a Jury trial was denied by this defendant's wish to present a defense.

WHEREFORE, the petitioner respectfully requests a reconsideration of the opinion.

Respectfully submitted,

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This was filed in 1972