

[Cite as *State v. Calvert*, 2004-Ohio-6366.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Julie A. Edwards, J.
vs.	:	
	:	
VINCENT L. CALVERT	:	Case No. 03CA19
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 96CR21

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 16, 2004

APPEARANCES:

For Plaintiff-Appellee

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Farmer, P.J.

{¶1} On February 15, 1996, the Guernsey County Grand Jury indicted appellant, Vincent Calvert, on one count of aggravated robbery in violation of R.C. 2911.01, and one count of aggravated murder with a death specification in violation of R.C. 2903.01. Said charges arose from the robbery and death of Robert Bennett, a neighbor of the co-defendant, Erwin Mallory.

{¶2} A jury trial commenced on July 14, 2003. The jury found appellant guilty as charged. By judgment entry filed September 12, 1996, the trial court sentenced appellant to life imprisonment with parole eligibility after thirty years.

{¶3} This court affirmed appellant's conviction and sentence. *State v. Calvert* (November 25, 1997), Guernsey App. No. 96CA40. The Supreme Court of Ohio denied jurisdiction and refused to hear appellant's appeal. *State v. Calvert* (1988), 81 Ohio St.3d 1495.

{¶4} Appellant sought habeas corpus relief in the United States District Court for the Southern District of Ohio. The court found the trial court erred in permitting the tape recorded statement of the codefendant, but found such error to be harmless and denied habeas relief. The United States Court of Appeals for the Sixth Circuit reversed, finding prejudice, and remanded the case for conditional habeas or retrial. *Calvert v. Wilson* (C.A.6, 2002), 288 F.3d 823.

{¶5} On May 30, 2002, the state filed a notice of its intention to retry appellant. During a pretrial proceeding, the issue of sentencing arose. By judgment entry filed June 27, 2002, the trial court determined a mitigation phase was not needed as the only available sentence was twenty years to life. On July 3, 2002, the state filed a motion to

reconsider the June 27, 2002 decision, arguing the decision was not a final appealable order because the death specification was still pending.

{¶6} On July 23, 2002, appellant waived his right to a speedy trial due to defense counsel's request for a continuance. The trial was reset for November 12, 2002.

{¶7} On July 29, 2002, the trial court denied the state's motion for reconsideration, but dismissed the death specification. On August 1, 2002, the state filed an appeal of the trial court's July 29, 2002 decision. On November 4, 2002, the state requested a continuance in light of the appeal on the mitigation issue. The trial court granted the request. After the Supreme Court of Ohio rejected the state's appeal, the trial court set the trial for July 15, 2003. See, Entry filed June 24, 2003.

{¶8} On July 14, 2003, appellant filed a motion to dismiss, claiming the state violated his right to a speedy trial and failed to submit requested discovery. The trial court denied the motion.

{¶9} The jury trial commenced on July 15, 2003 as scheduled. The jury found appellant guilty. By judgment entry filed August 8, 2003, the trial court sentenced appellant to twenty years to life on the aggravated murder charge and ten to twenty-five years on the aggravated robbery charge, to be served consecutively.

{¶10} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶11} "THE TRIAL COURT VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS WHEN IT DENIED MR. CALVERT'S

PRETRIAL MOTION TO DISMISS DUE TO THE STATE'S FAILURE TO RESPOND DILIGENTLY AND PROMPTLY TO MR. CALVERT'S DISCOVERY REQUESTS."

II

{¶12} "THE TRIAL COURT VIOLATED THE SPEEDY TRIAL CLAUSE OF THE SIXTH AMENDMENT WHEN IT DENIED MR. CALVERT'S PRETRIAL MOTION TO DISMISS DUE TO THE STATE'S FAILURE TO TRY HIM WITHIN A REASONABLE PERIOD OF TIME."

III

{¶13} "THE TRIAL COURT VIOLATED MR. CALVERT'S RIGHT TO DUE PROCESS WHEN IT CONVICTED HIM OF THE CHARGES WITHOUT SUFFICIENT EVIDENCE TO ESTABLISH EACH AND EVERY ELEMENT OF THE CRIMES BEYOND A REASONABLE DOUBT AND WHEN THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶14} Appellant claims the trial court erred in denying his pretrial motion to dismiss for a discovery violation. Specifically, appellant claimed the state's untimely and non-response to his request for an updated witness list created sufficient error to cause a dismissal. We disagree.

{¶15} Crim.R. 16(E)(3) governs failure to comply and states as follows:

{¶16} "(3) *Failure to comply.* If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in

evidence that material not disclosed, or it may make such other order as it deems just under the circumstances."

{¶17} Imposition of discovery sanctions rests in the trial court's sound discretion. *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 245. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶18} Appellant argues the state failed to submit the address of William Avery, a possible exculpatory witness. However, appellant admitted he learned of Mr. Avery's whereabouts without the state's assistance. Appellant now argues that although he knew of Mr. Avery's location, the state's non-responsiveness was so prejudicial, a dismissal was in order.

{¶19} As his July 14, 2003 motion to dismiss indicates, appellant requested Mr. Avery's address on April 24, 2003. The state responded twice, first on May 24, 2003 and then July 1, 2003, stating it could not locate Mr. Avery. By happenstance, defense counsel discovered Mr. Avery's address during an internet search. Appellant argues if his counsel could find the address, why was the state unable to do so?

{¶20} During argument on the motion, defense counsel conceded a continuance of the trial was not necessary. T. at 36. The trial court acknowledged a continuance could have been available upon request. T. at 44.

{¶21} We find the lack of ingenuity by the state in providing discovery did not unduly prejudice appellant. Appellant located Mr. Avery's address and did not request a continuance to pursue the matter. Upon review, we find the trial court did not abuse its

discretion in not imposing the harshest sanction of Crim.R. 16 in denying the motion to dismiss.

{¶22} Assignment of Error I is denied.

II

{¶23} Appellant claims the trial court should have dismissed the case for a speedy trial violation. Specifically, appellant claims the state's appeal of an interlocutory order to this court and the Supreme Court of Ohio violated his right to a speedy trial under Section 10, Article 1, of the Ohio Constitution. We disagree.

{¶24} In *Barker v. Wingo* (1972), 407 U.S. 514, the United States Supreme Court set forth a four-part test to determine whether the state has violated an accused's right to a speedy trial. The four factors include (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the prejudice to the defendant. *Id.* at 530. The *Barker* court at 532 explained prejudice as follows:

{¶25} "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.***Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." (Footnote omitted.)

{¶26} Appellant argues as a result of the state's appeal, he was forced to remain in jail a year longer and therefore he suffered prejudiced. Appellant also argues the

length of time from his original conviction to the granting of habeas corpus relief by the United States Court of Appeals for the Sixth Circuit also violated the speedy trial provisions.

{¶27} On July 23, 2002, appellant waived his right to a speedy trial due to defense counsel's request for a continuance. The trial was reset for November 12, 2002. On August 1, 2002, the state filed an appeal of the trial court's decision on the mitigation issue. The trial court acknowledged the interlocutory appeal, but did not stay the case and permitted discovery to proceed. See, Entry filed September 9, 2002. On November 4, 2002, the state filed a request for continuance in light of the appeal. The next day, the trial court granted the request. After the Supreme Court of Ohio rejected the state's appeal, the trial court set the trial for July 15, 2003. See, Entry filed June 24, 2003.

{¶28} Appellant's speedy trial argument can be divided into two periods. The first period is the time from the original indictment to the decision by the United States Court of Appeals for the Sixth Circuit overturning appellant's conviction. This delay cannot be charged to the state because the state fulfilled the speedy trial mandates with the commencement of the first trial. Appellant's own request for a continuance for independent analysis and examination of evidence is not chargeable against the state. The continuance was granted on July 23, 2002, after appellant waived his right to a speedy trial regarding the November 12, 2002 date.

{¶29} The second period of time is the time between the November 12, 2002 continued trial date and the July 14, 2003 trial. The appeal of the interlocutory order created this delay. The appeal was subsequently dismissed as untimely.

{¶30} We find the period of November 12, 2002 to July 14, 2003 was not a delay that was stubborn and frivolous as there was a dispute as to whether the June 27, 2002 entry on the mitigation issue was a final order. Clearly, the trial court in addressing the motion to reconsider and issuing findings of fact on July 29, 2003 also did not believe it to be a final order as the death specification had not been dismissed. Further, we find an appeal of a dismissal of a specification in an indictment to be proper under App.R. 5(C), even though the appeal was later dismissed as untimely.

{¶31} Appellant has failed to establish any undue delay chargeable to the state and has failed to establish any prejudice as a result of the delay of the trial pending appeal. The discovery process continued relative to the bloodstain analysis report and mental evaluations. As noted in Assignment of Error I, Mr. Avery's whereabouts was not discovered until just before the July 15, 2003 trial date.

{¶32} Based upon appellant's waiver of his speedy trial rights which was never revoked, the appeal of the mitigation issue and the lack of any showing of prejudice, we find the trial court did not err in denying the motion to dismiss.

{¶33} Assignment of Error li is denied.

III

{¶34} Appellant claims his conviction was against the sufficiency and manifest weight of the evidence. We disagree.

{¶35} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences,

consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶36} Appellant was charged with aggravated murder in violation of R.C. 2903.01 and aggravated robbery in violation of R.C. 2911.01 which state as follows, respectively:

{¶37} "[R.C. 2903.01] (A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

{¶38} "[R.C. 2911.01] (A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶39} "(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

{¶40} "(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

{¶41} "(3) Inflict, or attempt to inflict, serious physical harm on another."

AGGRAVATED MURDER

{¶42} Appellant argues because it cannot be established that he personally inflicted the mortal wounds, the conviction is against the manifest weight and sufficiency of the evidence.

{¶43} Appellant argues he was not charged as an aider and abetter of the crime of aggravated murder, and the evidence did not establish that any of blows he delivered caused Mr. Bennett's death.

{¶44} The scientific evidence established that after an examination of appellant's clothing and the bloodstains thereon, appellant was present during the entire attack. T. at 695-705. The patterning of the blood on appellant's jacket sleeves were contact stains, and indicated an up and down motion of staining. T. at 742-745. Mr. Bennett's blood type was on appellant's nail swabs. T. at 711. Appellant told the police he was not going to take the fall for Erwin Mallory, the co-defendant. T. at 627. Appellant was overheard saying to Mr. Mallory immediately after the assault/murder, "we showed him." T. at 277. Appellant also told a friend he had been in a fight with a black man and thought he had killed him. T. at 328, 340.

{¶45} Mr. Mallory testified appellant subdued Mr. Bennett by hitting him with a hammer before he [Mallory] struck Mr. Bennett with a stick and stabbed him "several times in the heart and solar plexus." T. at 925-926. Appellant then stabbed Mr. Bennett and slit his throat. T. at 926-927, 933.

{¶46} We find the evidence did not establish appellant was a mere aider or abetter in causing Mr. Bennett's death. Appellant struck the first blow that presumably subdued Mr. Bennett after which Mr. Mallory struck and stabbed him. Appellant then slit

Mr. Bennett's throat. Evidence established some of the chest and abdomen wounds were inflicted by appellant.

{¶47} Upon review, we find sufficient, credible evidence to establish appellant was one of two principal offenders.

PRIOR CALCULATION AND DESIGN

{¶48} Appellant argues he did not participate in the planning and execution of the murder.

{¶49} "'Prior calculation and design' is not defined in the Revised Code, but is considered to be more than just an instantaneous decision to kill; it encompasses planning 'a scheme designed to carry out the calculated decision to cause the death.' See *State v. Jones*, 91 Ohio St.3d 335,348, 2001-Ohio-57 (approving quoted jury instruction on prior calculation and design as 'consistent with * * * our own definition of these elements'). Prior calculation and design is considered 'a more stringent element than premeditation.' *State v. Green*, 90 Ohio St.3d 352, 357, 738 N.E.2d 1208, 2000-Ohio-182, citing *State v. Cotton* (1978), 56 Ohio St.2d 8, 381 N.E.2d 190, paragraph one of the syllabus." *State v. Collymore*, Cuyahoga App. No. 81594, 2003-Ohio-3328, ¶48.

{¶50} The evidence establishes Mr. Mallory told appellant they were going to kill Mr. Bennett. Mr. Mallory provided appellant with a hammer, and appellant used his own knife to slit Mr. Bennett's throat. T. at 924-925, 927. Although it is clear that Mr. Mallory had the motive, whether it was a gambling disagreement or an alleged threat by Mr. Bennett to rape Mr. Mallory's sister, appellant clearly was aware the plan was to kill Mr.

Bennett. T. at 922-923, 925. Appellant chose to enter Mr. Bennett's residence and subdue him with the first blow of the hammer. T. at 925.

{¶51} Upon review, we find the evidence established prior calculation and design.

AGGRAVATED ROBBERY

{¶52} Appellant argues there is no evidence to establish that he received any of the proceeds from the robbery. Mr. Mallory testified to searching the residence for money and taking twenty dollars. T. at 917.

{¶53} Mr. Bennett's residence was ransacked, and the drawer where Mr. Bennett kept his money was pried out and pulled out from the bureau. T. 382, 390. Mr. Bennett had considerable cash in twenty dollar bills stored in the drawer. T. at 418, 426. That money was missing when the police arrived. T. at 586. Mr. Mallory was overheard stating to appellant "you have all the money." T. at 312. Appellant was seen with a wad of bills immediately after the offense. T. at 276-277.

{¶54} Upon review, we find this evidence, although circumstantial, to sufficiently establish that appellant took some of Mr. Bennett's money after the murder.

{¶55} Assignment of Error III is denied.

{¶56} The judgment of the Court of Common Pleas of Guernsey County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Edwards, J. concur.

JUDGES

SGF/db 1101

[Cite as *State v. Calvert*, 2004-Ohio-6366.]

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
vs.	:	JUDGMENT ENTRY
	:	
VINCENT CALVERT	:	
	:	
Defendant-Appellant	:	CASE NO. 03CA19

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Guernsey County, Ohio is affirmed.

JUDGES