STATE v. GRASSO

172 Conn. 298 (1977) | Cited 21 times | Supreme Court of Connecticut | February 1, 1977

The defendants, Frank M. Grasso andFrank J. Pastore, were found guilty, on a trial toa jury, of arson in violation of former 53-82 ofthe General Statutes[1] in connection with a fireon November 16, 1968, in an unoccupied two-familyhouse located at 75 Shepard Street in New Raven,Connecticut. Both defendants have appealed fromthe judgments rendered on the verdicts, and theirappeals were consolidated by leave of court.

After argument on the appeal, the defendantPastore died. The appeal is therefore moot as tohim. State v. Granata, 162 Conn. 653, 289 A.2d 385;State v. Raffone, 161 Conn. 117, 120, 285 A.2d 323.The assignments of error pressed and briefed onappeal by the defendant Grasso will be considered.

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These concern (1) the denial of motions for theproduction of all information of prior "criminalinvolvement" of certain of the state's witnessesand for a mistrial and (2) the court's rulings onevidence.

At the trial, evidence was introduced tending toshow that the fire was not accidental. MurrayHershman, president of the Haven Realty Company,which owned the property at 75 Shepard Street,testified that he had contacted one MarshallFazzone with a view to getting someone to burndown the property in order to collect theinsurance, and that he and Fazzone had conspiredwith Grasso and Pastore, who agreed to set thefire and were paid for setting it. Fazzonecorroborated this testimony, which was denied byboth defendants.

On appeal, the defendant Grasso makes numerousclaims of error, but only those which were briefedare determined. Fox v. Fox, 168 Conn. 592, 593,362 A.2d 854. Before the trial, his counsel fileda motion for disclosure of all exculpatorymaterial, to which the state replied that it hadnone. At the trial, counsel renewed the motion,expanding it to seek all prior "criminalinvolvement" of the state's witnesses, claimingthat Brady v. Maryland, 373 U.S. 83, 83 S.Ct.1194, 10 L.Ed.2d 215, gave this right. The courtdenied the motion, and exception was taken. Thecourt did, however, order the state to disclosefelony convictions of its witnesses.

In Brady v. Maryland, supra, a case involvingthe discovery, after trial, of information whichhad been known to the prosecution but unknown tothe defendant, the United States Supreme Court heldthat the prosecution's suppression of exculpatory

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evidence material to guilt or punishment requestedby the defense violated due process. It did notafford a defendant a general right of discovery.Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37L.Ed.2d 82; see annot., 7 A.L.R.3d 8, 22 3. Arecent decision, United States v. Agurs, 427 U.S. 97,96 S.Ct. 2392, 49 L.Ed.2d 342, states that therule of Brady v. Maryland, supra, arguably appliesin three quite different situations. Firstly,error in a constitutional sense is committed whenthe prosecution puts on testimony which it knew orshould have known was perjured, and the materialityof such testimony is strictly construed infavor of the defendant. Secondly, when a pretrialrequest for specific evidence is submitted by thedefense and a substantial basis for claimingmateriality exists, the prosecution's failure torespond is seldom, if ever, excused. Lastly, whenno request, or a broad request, for "exculpatory"or "Brady" material is submitted, the prosecutionis required to disclose material which creates areasonable doubt of guilt which would not otherwiseexist. In a footnote, the court (p. 112 n. 20)expressly rejected the view that the standard ofmateriality "should focus on the impact of theundisclosed evidence on the defendant's ability toprepare for trial."

It must be emphasized that the present case isnot an exact Brady situation where there is discovery,after trial, of specific information not revealed,but a direct appeal where the claim is made thatunknown information, and known information, wassuppressed by the prosecution. Necessarily, in thisappeal, to make a determination of the issue presented,we are confined to the facts and information revealedin the appeal.

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Applying the test of United States v. Agurs,supra, the facts of the present case present aproblem within the last category, since there isno claim of known perjured testimony, and therequest made by counsel was not specific. The term"criminal involvement" is not well defined, and isnot limited to information which would create areasonable doubt of guilt, but could includereports that & witness had been merely questionedregarding a crime, had been seen in unsavorycompany or had been observed in suspiciouscircumstances. The motion was impermissibly broadand, hence, properly denied by the trial court.The state's assurance to the court that "it has inits possession no undisclosed evidence that wouldtend to exculpate [a] defendant justifies thedenial of a motion for inspection that does notmake some particularized showing of materialityand usefulness." United States v. Evanchik,413 F.2d 950, 953 (2d Cir.).

United States v. Agurs, supra, does impose aduty upon the prosecution to disclose informationsufficient to create a reasonable doubt of guiltindependent of any motion by the defense fordisclosure. When a conviction depends entirelyupon the testimony of certain witnesses, as it didin the present case, information affecting theircredibility is material in the constitutionalsense since if they are not believed a reasonabledoubt of guilt would be created. Felonyconvictions can be used to impeach, and the trialcourt ordered those disclosed. Information that awitness has been arrested, is

being prosecuted, orhas confessed to a crime, tends to show that thestate has power over a witness which may inducehim to give testimony which will win favor withthe state and, when the witness is an essentiallink in the state's case, must be disclosed.

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See State v. Annunziato, 169 Conn. 517, 524,363 A.2d 1011. The prosecution's failure to disclose,however, in advance of the trial, Hershman'sconfession that he had set a second fire at HavenStreet, Fazzone's arrest in a stolen carpetingcase, and the promise of immunity given to Fazzonein the present case, did not deprive the defendantof a fair trial, since all that information cameout at the trial. A finding of error cannot bebased on the unsupported speculation of thedefense that there were other constitutionallymaterial matters in the state's file which werenot turned over to the defense. State v. Moynahan,164 Conn. 560, 593, 325 A.2d 199, cert. denied,414 U.S. 976, 94 S.Ct. 291, 38 L.Ed.2d 219. Thecourt was not in error in denying the defendant'smotion for disclosure of all prior "criminalinvolvement" of the state's witnesses, nor has itbeen shown that the state has failed to discloseany information that might create a reasonabledoubt of guilt which would not otherwise exist.

The defendant assigns as error the court'srestriction of the cross-examination of Hershman,which was apparently directed toward showing thatFazzone had claimed Hershman was threatening him,but that no arrest of Hershman for obstructingjustice or threatening government witnesses hadbeen made. The scope of cross-examination of awitness is largely a matter in the discretion ofthe trial court. State v. Clemons, 168 Conn. 395,404, 363 A.2d 33. While this court has held thatarrest or indictment of a witness may be inquiredinto when it tends to show bias; State v. Annunziato,supra; see also annot., 62 A.L.R.2d 610, 624 3; ithas never been suggested that facts which merelysuggest that an arrest might have been made are

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admissible to show consciousness of guilt inHershman (compare State v. Moynahan, supra, 597,involving the defendant's frightening of theprosecutor's family), since Hershman's guilt wasnot at issue in the present case.

The defendant Grasso also assigns error in thecourt's admission of certain testimony by Hershmanand in its denial of a motion by the defendantPastore for a mistrial. Hershman testified that heasked Pastore to set a second fire in property onHaven Street two years later, and that Pastoreagreed to go look at the building but then refusedto set the fire because "there were too many copsaround." Although this is argued vigorously in thedefendant Grasso's brief, neither the record northe transcript reveals that counsel for Grassomade any objection to the admission of thistestimony, which concerned only Pastore. PracticeBook 226[2] requires that an objection andexception be taken to be a ground of appeal. Themerits of the claim are therefore not discussed.

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There is no error in the appeal of Frank M.Grasso; the appeal of Frank J. Pastore is dismissedas moot, and the trial court is directed so tonote on its records.

In this opinion HOUSE, C.J., COTTER and BARBER,Js., concurred.

1. Section 53-82 was repealed in 1969, repealeffective October 1, 1971, as part of a generalrevision of the criminal laws. The present arsonstatutes are 53a-111 to 53a-113, inclusive.

2. "[Practice Book] Sec. 226. OBJECTIONSTO EVIDENCE Whenever an objection to the admission ofevidence is made, counsel shall state the grounds uponwhich it is claimed or upon which objection is made,succinctly and in such form as he desires it to goupon the record, before any discussion or argumentis had. Argument upon such objection shall not bemade by either party unless the court requests itand, if made, must be brief and to the point. Anexception to the ruling must be taken in order tomake it a ground of appeal."Page 305