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Supreme Court, Bronx County, People v. Buari

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SUPREME COURT OF NEW YORK
BRONX COUNTY

People v. Buari[1]
(decided April 10, 2006)

Introduction

In 1995, the defendant, Calvin Buari, was convicted of two counts of murder in the second degree and was sentenced to two consecutive indeterminate terms of imprisonment from twenty-five years to life.[2] On appeal, Buari moved to vacate his conviction based on three separate due process violations. First, Buari alleged that pursuant to *Brady v. Maryland,*[3] the prosecution failed to disclose the pending criminal history of a witness, which would have materially altered the verdict.[4] Second, under *Chambers v. Mississippi*,[5] Buari asserted that newly discovered evidence, a confession, proved his innocence.[6] Third, Buari argued that he did not receive a fair and impartial jury because one juror was his great aunt's estranged husband.[7] The Supreme Court of New York, Bronx County, denied all three of Buari's claims because despite these claims, there was overwhelming evidence supporting his guilt.[8]

On September 10, 1992, Elijah and Salhaddin Harris arrived

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1 No. 211/1993, 2006 N.Y. Misc. LEXIS 769, at *1 (Sup. Ct. Jan. 18, 2006).
2 *Id.*
3 373 U.S. 83, 87 (1963).
4 *Buari*, 2006 N.Y. Misc. LEXIS 769, at *1.
5 410 U.S. 284 (1973).
6 *Buari*, 2006 N.Y. Misc. LEXIS 769, at *1.
7 *Id.*
8 *Id.*

at the intersection of East 213th Street and Bronxwood Avenue in a BMW.[9] While Elijah Harris went into a restaurant, Salhaddin Harris used a nearby payphone.[10] In an adjacent alley, Buari was given a nine millimeter pistol by Kintu Effort.[11] Buari then approached the rear passenger window of the parked car where Elijah Harris and Salhaddin Harris were sitting and fired approximately ten shots into the car, killing both Harris brothers.[12] Seven individuals witnessed the murders.[13] The trial court found that Buari had attempted to coerce these witnesses to testify that he was sitting on a crate while individuals in a brown car circling the block committed the crime.[14] However, at trial, the witnesses testified that Buari committed the murders.[15]

Before sentencing, a member of Buari's family informed Buari's attorney that Thomas Jeffrey, a juror, was related to Buari by way of Mr. Jeffrey's estranged wife.[16] This was verified by Buari's father and sister.[17] Buari did not recall any relation to Mr. Jeffrey prior to this time and during *voir dire* Mr. Jeffrey "indicated that he

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[9] *Id.*, at *2.

[10] *Id.*

[11] *Buari*, 2006 N.Y. Misc. LEXIS 769, at *2.

[12] *Id.*

[13] *Id.* John Parris, Kintu Effort, Jerry Connor, Clarence Seabrook, Brian Johnson, Dwight Robinson and his brother Peter Robinson, all of whom are acquainted with one another and have various criminal backgrounds. *Id.* Effort, Seabrook, and the Johnson brothers had the reputation of being drug dealers in the area, with Dwight Johnson working for the defendant. *Id.*

[14] *Id.*

[15] *Id.*

[16] *Buari*, 2006 N.Y. Misc. LEXIS 769, at **2-3.

[17] *Id.*, at *3. In addition, Buari's family informed Buari's attorney that twenty-five years earlier, Buari had lived with Jeffery for a period of one year. *Id.*

had never seen or heard [of Buari]."[18] Buari moved for the trial court to conduct a hearing to inquire into his relationship with Mr. Jeffrey, but the court denied this motion.[19]

In October 1999, after Buari was convicted, Dwight Robinson, one of the witnesses who testified against Buari, was convicted of second degree murder in an unrelated event.[20] Upon Robinson's incarceration, Buari began cordially communicating with him.[21] When Robinson resisted this communication, Buari wrote an aggressive letter to Robinson, stating, "Stop playing games. Do the right thing or the game's over."[22] Robinson interpreted this letter to mean that if he did not change his testimony, Buari would have him killed.[23] In the following days, numerous inmates claiming to be Buari's friends aggressively and threateningly approached Robinson, asserting that they had been informed he was the "rat" who testified against Buari.[24] Robinson, feeling threatened, made sure that he was transferred by being caught with a razor blade in his possession.[25] However, unbeknownst to Robinson, he was transferred to the same facility where Buari was incarcerated.[26] As a result, Robinson attempted to transfer to a third facility, but was unable to do so for six

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[18] *Id.*, at *3 n.4.

[19] *Id.*, at *3. Subsequently, Jeffrey died on August 15, 2001. *Id.*

[20] *Id.*, at *1 n.1.

[21] *Buari*, 2006 N.Y. Misc. LEXIS 769, at *5.

[22] *Id.*

[23] *Id.* Furthermore, Robinson believed that this was not an empty threat because Buari had a strong influence over other inmates due to his ability to obtain drugs. *Id.*

[24] *Id.*, at *5. During these incidents, the men showed Robinson a youthful picture of himself stating that they wanted him to recant his testimony. *Id.*

[25] *Id.*

[26] *Buari*, 2006 N.Y. Misc. LEXIS 769, at *5.

months.[27] While incarcerated in the same jail as Buari, Robinson "provided [Buari] with several 'false leads,' so that [Buari] would believe he was cooperating."[28]

Additional threats followed, and in November 2002, Buari told Robinson to sign a prepared affidavit which stated that Robinson perjured himself at trial and caused the other witnesses to do the same.[29] Because of the abovementioned incidents, Robinson signed the affidavit.[30] Mr. Robinson then met with Buari's counsel and signed a second affidavit, dated December 30, 2003, which stated that Buari was innocent of the murders, because Robinson was the actual perpetrator.[31] The affidavit further explained that Mr. Robinson had lied at trial and had committed the murders due to a drug war between himself and Buari.[32]

However, subsequent to these coerced affidavits, Robinson met with Detective Viggiano and indicated that he did not commit the murders.[33] Robinson explained that his trial testimony was true and

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[27] *Id.*

[28] *Id.*, at *5. Robinson was subsequently threatened by Parris, a friend of Buari and one of the witnesses of the murders, during an unannounced visit. *Id.* Parris asked Robinson, "[A]re you ready to do the right thing and help my man get out of jail?" *Id.* Parris informed Mr. Robinson that there was paperwork circulating the prison that he was a confidential informant or "rat." *Id.* In addition, the individuals who had confronted Robinson had been doing so on Buari's behalf. *Id.* They would continue to strike fear into Robinson until he helped corroborate Buari's story. *Id.*

[29] *Id.*

[30] *Id.*, at *6.

[31] *Buari*, 2006 N.Y. Misc. LEXIS 769, at **3, 7. "Mr. Robinson continued to have contact with defense counsel, in which he indicated that he was adhering to his affidavit. However, Mr. Robinson did so to make Defendant believe he was still cooperating, and, thus, prevent Defendant from having him harmed." *Id.*, at *7.

[32] *Id.*, at *3. And finally, to substantiate this false affidavit, it stated that there were arguments over distribution between Robinson and Buari and this is why Robinson had framed Buari. *Id.*

[33] *Id.*, at *7.

that he signed the aforementioned affidavits because he feared for his life.[34] Further, Robinson stated, "I know his [sic] killed many more. He's very strong in jail and on the street, he could have me and my family killed at anytime. The only reason I sign [sic] those affidavits is so I could stay alive and keep my family safe." [35]

On appeal, Buari moved to vacate his conviction based on three different grounds. First, Buari alleged that he was entitled to a retrial pursuant to *Brady* and Criminal Procedure Law sections 240.44[36] and 240.45[37] because the prosecution failed to disclose the pending criminal history of a witness.[38] The Buari court noted that, " 'impeachment evidence which concerns only collateral issues . . . is not exculpatory, and need not be disclosed as *Brady* material. . . .' "[39]

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[34] *Id.*

[35] *Id.*, at *4. A similar story surrounds the testimony of Effort. At trial, Effort truthfully stated that Buari had committed the murders. *Id.* Later, in an affidavit, Effort stated that he was playing basketball with Buari during the murders and neither was involved. *Id.*, at *3. However, subsequent to this affidavit, in an affidavit dated July 9, 2004, Effort stated that his "trial testimony was true and accurate." *Id.*, at *4. Yet again, Buari had chorused an individual to recant his testimony. The prosecution also offered evidence that Buari had told Effort to "know the script" further indicating foul play on the Buari's behalf. *Id.*, at *10.

[36] N.Y. CRIM. PROC. LAW § 240.44 (McKinney 2006) states in pertinent part:

> [A]t . . . a pre-trial hearing held in a criminal court at which a witness is called to testify, each party, at the conclusion of the direct examination of each of its witnesses, shall . . . make available to that party to the extent not previously disclosed: 2. A record of a judgment of conviction of such witness other than the defendant if the record of conviction is known by the prosecutor . . . . to exist. 3. The existence of any pending criminal action against such witness . . . if . . .known by the prosecutor or defendant, as the case may be, to exist.

[37] *Id.* § 240.45 states in pertinent part:

> The prosecutor shall . . . make available . . . (b) A record of judgment of conviction of a witness the people intend to call at trial if the record of conviction is known . . . to exist; (c) The existence of any pending criminal action against a witness the people intended to call at trial, if the pending criminal action is known . . . to exist.

[38] *Buari*, 2006 N.Y. Misc. LEXIS 769, at **1, 13.

[39] *Id.*, at *13 (quoting People v. Arthur, 673 N.Y.S.2d 486 (Sup. Ct. 1997). In addition, the present case is quite similar to People v. Battle, 672 N.Y.S.2d 21 (App. Div. 1st Dep't

Furthermore, material which does not qualify as exculpatory evidence only needs to be disclosed in accordance with Criminal Procedure Law sections 240.44 and 240.45.[40] Because Buari failed to prove that withholding this information prejudiced him at trial, the court denied Buari's first claim.[41]

Second, Buari alleged that under the United States Supreme Court's decision in *Chambers*, the lower court's decision should be vacated because newly discovered evidence, Robinson's confession, proved his innocence.[42] The court held that Buari's reliance upon the *Chambers* case was sorely misplaced because "the recantations and confession lack any corroboration or sufficient indicia of reliability."[43] While Buari argued that Robinson subsequently changed his testimony because he was in a drug war with Buari, the court deemed all of the subsequent affidavits "inherently unreliable."[44] In addition, the court pointed out that " 'manipulative conduct of the kind presented in this case should not and will not be rewarded.' "[45]

Finally, Buari alleged that, under *McDonough Power Equip. Inc. v. Greenwood*,[46] he was denied a fair and impartial jury because

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1998) where the existing record indicates that the prosecution gave appropriate notice to the defendant, there was full opportunity to examine the witness's criminal history at trial, and "any error was harmless in light of the overwhelming evidence of Defendant's guilt." *Buari*, 2006 N.Y. Misc. LEXIS 769, at *13 (quoting *Battle*, 672 N.Y.S.2d at 21).

[40] *Buari*, 2006 N.Y. Misc. LEXIS 769, at *13.

[41] *Id.*

[42] *Id.*, at **1, 22.

[43] *Id.*, at *22.

[44] *Id.*, at *20.

[45] *Buari*, 2006 N.Y. Misc. LEXIS 769, at *20 (quoting People v. Branch, 175 Misc. 2d 933, 942 (Sup. Ct. 1998)).

[46] 464 U.S. 548 (1984).

a juror, Mr. Jeffrey, was his great aunt's estranged husband.[47] The court held that, Mr. Jeffrey's honest answer of a question during *voir dire* did not meet the required federal constitutional standard to warrant a new trial and was not a violation of due process.[48] Also, the court explained that, the "failure to raise this claim prior to the first witness being sworn effectively waives the issue."[49] Nonetheless, the *Buari* court further opined that there was no basis for this claim because there was no evidence that Mr. Jeffrey had knowledge of his relationship to Buari.[50] Finally, it appeared Buari's family was aware of the connection and said nothing:[51]

> To allow Defendant, either personally or through his family, to hide this knowledge for the hope of some benefit, and then disclose it afterwards in order to attempt to use it as an allegation of impropriety, would be akin to allowing the defendant "eat [his] cake and have it too."[52]

Thus, the court denied Buari's motion for a new trial on all grounds.

Failure to Disclose Evidence

In denying Buari's allegation that the prosecution's failure to disclose evidence warranted a retrial, the *Buari* court reiterated the Supreme Court's holding in *Brady*, that "the suppression of . . . evidence favorable to an accused upon request violates due process

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[47] *Buari*, 2006 N.Y. Misc. LEXIS 769, at *1.
[48] *Id.*, at *17.
[49] *Id.*, at *14.
[50] *Id.*, at *15.
[51] *Id.*, at *16.
[52] *Buari*, 2006 N.Y. Misc. LEXIS 769, at *16 (quoting People v. Tarsia, 405 N.E.2d 188 (N.Y. 1980).

where the evidence is material either to guilt or to punishment."[53] Brady and his partner were convicted of murder in the first degree as a result of committing a murder during the commission of a robbery.[54] Brady admitted to being present, but denied committing the murder.[55] In extrajudicial statements, Brady's accomplice admitted to committing the murder, however, the prosecution withheld this information from Brady's counsel.[56] The Supreme Court reasoned that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly."[57] Therefore full disclosure of favorable material to the accused is paramount.[58]

However, simply withholding information is insufficient to constitute a *Brady* violation. The Supreme Court, in *Strickler v. Green*, enumerated a three part test to determine when *Brady* material must be disclosed.[59] First, "[t]he evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching."[60] Second, the "evidence must have been suppressed by the State, either willfully or inadvertently."[61] Third, there must be a "reasonable probability that the suppressed evidence would have

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[53] *Brady*, 373 U.S. at 87.
[54] *Id.* at 84.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 87.
[58] *Brady*, 373 U.S. at 87-88.
[59] 527 U.S. 263, 281-82 (1999).
[60] *Id.* at 281-82.
[61] *Id.* at 281.

produced a different verdict."[62] This final prong is "not whether the Defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."[63]

New York State utilizes a lower standard then the federal courts, thereby providing more protection to the criminal defendant. In *People v. Vilardi*,[64] the prosecution failed to disclose an expert report to the defendant. The New York Court of Appeals affirmed the appellate court's decision to grant a retrial because counsel had "specifically sought the undisclosed report," and thus the "prosecution violated the defendant's constitutional right to be informed of exculpatory information known to the state."[65] The *Buari* court summarized the *Vilardi* court's holding as follows: "there must be 'at least a reasonable possibility that Defendant would not have been convicted . . . had the . . . [material] been available to him at trial . . . [or] a showing of a reasonable possibility' that the failure to disclose . . . exculpatory material contributed to the verdict."[66]

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[62] *Id.* Due to the overwhelming evidence that the defendant committed the crime in *Strickler*, the final criterion was not met, and a new trial was not granted. *Id.*

[63] *Id.* at 289-90 (quoting Kyles v. Whitley, 514 U.S 419, 434 (1995)).

[64] 555 N.E.2d 915, 916 (N.Y. 1990).

[65] *Id.*

[66] *Buari*, 2006 N.Y. Misc. LEXIS 769, at *13 (quoting People v. Vilardi, 555 N.E.2d 915, 920-22 (N.Y. 1990)). That court reasoned a higher standard is necessary to preserve the "elemental fairness" to the defendant, and encourage the prosecution to discharge its ethical duty in accordance with procedure. *Vilardi*, 555 N.E.2d at 919.

Newly Discovered Evidence

Finally, Buari challenged the trial due to a subsequent confession by another man, which he alleged proved his innocence. As *Chambers* provides, reliability of the confession and not the confession itself is the determining factor. In that case, the defendant was convicted of killing a state trooper.[67] At trial, evidence was excluded that another man confessed to the killing.[68] *Chambers* provides a three prong test to determine the validity of a confession.[69] First, there is a temporal aspect; the confession must be made shortly after the murder.[70] Second, the confession must be corroborated by some other evidence in the case.[71] Third, the confession must appear to be spontaneous or self-incriminatory and against the individual's interest as opposed to being offered for some other motive.[72]

In *McDonough*, the Supreme Court held that:

> [T]o obtain a new trial . . . because of a juror's mistaken though honest response to a question, . . . a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.[73]

Billy Greenwood, in the *McDonough* case, sued the manufacturer of

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[67] 410 U.S. 284, 285 (1973).
[68] *Id.* at 289.
[69] *Id.* at 300.
[70] *Id.*
[71] *Id.*
[72] *Chambers*, 410 U.S. at 301.
[73] *McDonough Power Equip.*, 464 U.S. at 556.

a lawnmower for injuries sustained during its operation.[74] The potential jurors were asked if any of them, or any member of their immediate family, had sustained a serious injury while working with farm equipment.[75] Ronald Payton, who became a juror, did not respond to this question believing that an injury his son received was not serious.[76] In holding that the juror's failure to respond did not warrant a new trial, the *McDonough* Court reasoned that a "touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.' "[77] Although Payton did not respond to this question, he did not taint the jury through intentional dishonesty.[78] Thus, after the defendant showed that the question was material, the defendant "failed to show that a correct answer would have provided a basis of challenge for cause."[79]

More importantly, in a similar posture to *Buari*, the Second Circuit in *United States v. Shaoul* "specifically rejected the claim that a 'new trial is mandated when the correct disclosure would have sustained a challenge for cause, regardless of the juror's honesty in

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[74] *Id.* at 549.

[75] *Id.* at 549-50. The jurors were asked:

> Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain and suffering, that is you or any members of your immediate family?

Id. at 550.

[76] *Id.* ("[J]uror Payton's son may have been injured at one time, a fact which had not been revealed during *voir dire*.").

[77] *Id.* at 554 (quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)).

[78] *McDonough Power Equip. Inc.*, 464 U.S. at 549-50, 556.

[79] *Id.* at 556.

failing to answer the question correctly. . . because it would eliminate the threshold requirement of . . . juror dishonesty.' "[80]

New York deals with this issue in substantially the same way as federal courts. In *People v. Cintron*,[81] a New York court, in attempting to discern the motive for confession, looked at the totality of the circumstances to determine whether there were grounds for a retrial.[82] The *Cintron* court, like the Supreme Court in *Chambers*, utilized a three prong test, taking into consideration a temporal aspect, credibility of the affidavit, as well as looking to see if there was corroborating evidence.[83] However, reliability of the recantation or confession was the main thrust of the court's inquisition.[84] In that case, the defendant was convicted of murder in the second degree. Ten years later when a witness who had testified against the defendant became incarcerated at the same prison as the defendant he recanted his testimony.[85] The *Cintron* court reasoned that the recantation was inherently unreliable and therefore the trial court's denial of the defendant's motion for retrial did not constitute a due process violation.[86]

In *People v. Cosmo*, the court held that if there is a challenge regarding a juror, it must be made before "the jury [is] sworn."[87] The

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[80] *Buari*, 2006 N.Y. Misc. LEXIS 769 at *17 (citing United States v. Shaoul, 41 F.3d 811, 815 (2d Cir. 1994)).

[81] 763 N.Y.S.2d 11 (App. Div. 1st Dep't 2003).

[82] *Id.* at 11-12.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Cintron*, 763 N.Y.S.2d at 11-12.

[87] 98 N.E. 408, 411 (N.Y. 1912) (stating a juror cannot be related to a defendant but relation is contingent upon knowledge of such relation.).

court further opined that "a known cause of challenge is always waived by withholding it, and raising it as an objection after the verdict."[88] Additionally, the court reasoned that withholding a challenge to the jury until after the verdict was "incompatible with the good faith and fair dealing which should characterize the administration of justice."[89] In *Cosmo*, an individual was denied a retrial for a murder conviction because the Constitution only requires a "trial conducted according to the established forms of law . . . [and] a jury of twelve in number who were capable of deciding his case fairly and impartially,"[90] and nothing more. Later, in *People v. Harris*[91] the Appellate Division, Second Department, clarified *Cosmo* by stating that "unless the juror is aware of it[,]. . . . there is no showing of a relationship within the meaning of the statute [CPL §270.20(1)(c)]."[92]

Conclusion

The *Buari* decision illustrates the similar protections New York and federal courts provide to criminal defendants in each issue raised by Buari. First, in terms of the failure to disclose evidence, New York and federal courts utilize a three-prong inquiry to determine whether the prosecution wrongly suppressed exculpatory evidence. However, New York's standard is more beneficial to the defendant because it only requires a defendant to show the existence

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88 *Cosmo*, 98 N.E. at 411.
89 *Id.*
90 *Id.*
91 445 N.Y.S.2d 520 (App. Div. 2d Dep't 1981).
92 *Id.* at 540.

of a "reasonable possibility" that the result would have been different if the exculpatory material had been turned over as opposed to the federal court's "reasonable probability" standard. Additionally, both federal and New York State courts cautiously scrutinize recantations and post-trial confessions due to their inherent unreliability and developed a set of rules which attempt to discern the motives behind a confession, in evaluating its trustworthiness. Regarding the related-juror issue, Mr. Jeffrey, New York provides substantially the same protection as the United States Constitution. An effective justice system is dependant upon a fair trial, and impartial jurors are critical to ensuring this. In light of this, one must be critical of the *voir dire* process, however, a simple misstep by a juror during questioning is not sufficient to warrant a retrial, in either federal or state court. New York courts, in an attempt to foster disclosure, favor the non-challenging party by forcibly waiving an objection once a witness is sworn.

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