

## People v. Ballinger

Decided Feb 8, 2024

368104

02-08-2024

PEOPLE OF MI v. DWAYNE DARNELL  
BALLINGER JR

LC No. 06-008244-01-FC

Christopher P. Yates Presiding Judge Kathleen  
Jansen Michael J. Riordan Judges

### ORDER

Pursuant to [MCR 7.205\(E\)\(2\)](#), in lieu of granting the delayed application for leave to appeal, we VACATE the Wayne Circuit Court's June 28, 2023 order and REMAND this matter to that court for further proceedings consistent with both this order and our Supreme Court's order in *People v Ballinger*, [504 Mich. 962](#) (2019) (*Ballinger II*).

The trial court erred in two distinct respects. First, in analyzing defendant's argument under *Cress*<sup>1</sup> (i.e., his claim that he is entitled to a new trial on grounds of newly discovered evidence), the trial court repeatedly cited *People v Terrell*, [289 Mich.App. 553, 555; 797 N.W.2d 684](#) (2010), overruled in part on other grounds by *People v Grissom*, [492 Mich. 296](#) (2012), for the proposition that "newly available" evidence is not "newly discovered" and thus can *never* warrant the grant of a new trial under *Cress*. Specifically, the trial court reasoned that because the disputed evidence all existed before trial, it followed that such evidence was merely newly available, not newly discovered, and was therefore categorically unable to pass muster under *Cress*. However, as expressly noted in *Terrell*, [289 Mich.App. at 570](#),

its holding concerning "newly available" evidence was not categorical; rather, "[t]here may be cases in which such evidence does indeed constitute newly discovered evidence" that might warrant granting a new trial. More importantly, the categorical rule described by the trial court is fundamentally inconsistent with our Supreme Court's later binding decision in *People v Rao*, [491 Mich. 271, 283-284; 815 N.W.2d 105](#) (2012) (holding that, "under *Cress*, when a defendant is *aware* of evidence before trial, he or she is charged with the burden of using *reasonable diligence* to make that evidence available and produce it at trial," and further holding "that what constitutes reasonable diligence in producing evidence at trial depends on the circumstances of the case").

<sup>1</sup> *People v Cress*, [468 Mich. 678; 664 N.W.2d 174](#) (2003).

Secondly, the trial court erred by conflating the analyses under *Cress* and *Brady*<sup>2</sup> - See *People v Milton*, [506 Mich. 999](#) (2020) (MCCORMACK, C.J., concurring) ("Though *Brady* claims and *Cress* claims are often intertwined, trial courts must address each claim separately.") (footnote omitted). In rejecting defendant's *Brady* claim, the trial court relied on the same TURE/Lbased rationale, reasoning that, because the allegedly suppressed evidence existed at the time of trial-i.e., was "newly available" rather than "newly discovered"-it followed that defendant could not "satisfy the complete *Cress* standard." But by their very nature, all meritorious claims of *Brady* error involve evidence that existed at the time of trial; otherwise, the \*2 government could not have

suppressed it. See *Wearry v Cain*, 577 U.S. 385, 394 n 8; 136 S.Ct. 1002; 194 L.Ed.2d 78 (2016). And unlike an analysis under *Cress*, when reviewing a claim of *Brady* error, no "due diligence" requirement applies to the defendant. *People v Chenault*, 495 Mich. 142, 159-160; 845 N.W.2d 731 (2014) ("We conclude that *Brady* does not support the adoption of a diligence requirement.... In order to establish a *Brady* violation, a defendant need only demonstrate that the government suppressed evidence that is both favorable to the defendant and material."). Indeed, a defendant raising such a claim of error on collateral review satisfies the "good cause" requirement under MCR 6.508(D)(3) by simply demonstrating that the evidence was suppressed by the government. *People v Christian*, 510 Mich. 52, 81; 987 N.W.2d 29 (2022) ("[T]he prosecution

suppressed the transcript. That suppression was an 'external factor' that prevented] appellate counsel from raising a *Brady* violation on direct appeal[.]"). For those reasons, the trial court erred by applying the *Cress* "due diligence" standard to defendant's claim of *Brady* error.

<sup>2</sup> *Brady v Maryland*, 373 U.S. 83; 83 S.Ct. 1194; 10 L.Ed.2d 215 (1963).

On remand, the trial court should promptly reconsider this matter in light of both this order and our Supreme Court's order in *Ballinger IL*. The trial court may hold whatever further proceedings it deems appropriate to that end.

This order is to have immediate effect. MCR 7.215(F)(2). We do not retain jurisdiction.

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