

THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,

Plaintiff,

v.

THEMBA HASAAN KELLEY,

Defendant.

Case No. 19CR53657

DECLARATION OF BARRY W.
ENGLE IN SUPPORT OF
DEFENDANT'S MOTION FOR A NEW
TRIAL

I, Barry W. Engle, under penalty of perjury, make the following statements:

1. I am an attorney licensed to practice law in the State of Oregon. In that capacity, I represent Defendant in the matter above referenced. This declaration is in support of Defendant's Motion for a New Trial based on newly discovered evidence.
2. I have represented accused persons in the State of Oregon without substantial pause since 1996. I worked a public defense contract in Multnomah County from 1996 to 2006 and have continued a practice of representing the accused through today. I have tried hundreds of trials to juries in this state. I am very familiar with law enforcement practices as they relate to prosecution of the accused.
3. This case presented several irregularities relevant to the motion before the court. For instance, the District Attorney assigned to the case changed several times in just the couple of weeks before the trial. In total, six different DDAs are listed on the official record as representing Plaintiff. This is unusual for a case of this

1 severity. Judging by the sudden burst of additional discovery on a four-year-old
2 case, the failure to provide thousands of pages of discovery until during trial and a
3 new Indictment days before the trial, the last DDAs assigned to the case, in my
4 opinion, were scrambling to put on a case.

5 4. I reviewed discovery regarding this case to determine the timeline of the state's
6 interaction with Olivia Ordenes. Def. 103 demonstrates that she was interviewed
7 on the same day of Kelley's arrest, August 14, 2019. She expressly told police on
8 that day that "she never saw a gun with Themba." Def. 104 demonstrates that on
9 August 19, 2019 she didn't see a gun but that she "bumped into the bed, right?
10 Well, something fell on the other side. Like, if it fell from the mattress, like, it
11 could have been a gun or an ashtray (but she's) not sure."

12
13 5. Def. 105 demonstrates that on April 4, 2023, a team of Robbie Thompson, Brian
14 Davidson, Anthony Dundon and Alhena Herrera Martin, all from the Multnomah
15 County District Attorney's Office, interviewed Olivia Ordenes in the Multnomah
16 County District Attorney's Office. In my experience, this is also unusual, because
17 four members of the DA's Office were present, including two attorneys, that none
18 of the Gresham Police Officers that originally investigated the case were present,
19 and that it was in the DA's Office. In my opinion, this indicates that the DA's
20 Office saw extreme importance to this witness for some reason. What is also
21 unusual is that Def. 105 is not a police report but an email sent from the DA
22 investigator to the DDA. This indicates that the account of the interview was not
23 made or maintained in a normal reliable process for some reason.
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- 1 6. Def. 105 also indicates that for the first time Ordenes said that she saw a gun
2 "flashed" at her. In my opinion, the DDA found this extremely important because
3 the email substituting for a report was created that same day.
- 4 7. In my experience, many Deputy District Attorneys around the state would not have
5 used this witness. This is for two reasons: 1. Many DDAs value truth and
6 veracity of the witness over getting convictions. When a witness has so greatly
7 modified her story without any good reason for it, it points to the unreliability of
8 the witness. Many DDAs in my opinion would insist on an extremely good reason
9 why the witness has changed her testimony and additional reassurances that the
10 witness is being honest before using it at trial just to preserve the integrity of the
11 trial and to serve justice. Def. 105 contains none of that. In fact, the DDA here
12 actually accused her in his closing of smuggling the gun out of the room, thereby
13 doubling down on his use of a witness he believed to be unreliable. 2. Many
14 DDAs would not use this witness because of the demonstrated unreliability of that
15 witness and the potential that she could change her testimony again, resulting in
16 things like new trials, motions in arrest of judgment and post-conviction relief. In
17 other words, to avoid an unreliable conviction. In my opinion, a DDA who
18 purposefully uses an unreliable witness runs the risk of exactly what happened
19 here, which is the trial is unjust and unreliable and therefore requires retrial to
20 preserve justice. My belief is that both points are well considered amongst state-
21 wide prosecutors, so a DDA who chooses to use such a witness is aware of the risk
22 that he runs by doing so.
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1 8. It is my opinion that Ordenes's testimony at trial changed the outcome of the trial.

2 Wendy Parris, the complainant, was extremely unreliable. It was demonstrated
3 that she lied about her arm being broken, lied about being held captive, lied about
4 trying to escape and lied about her own drug use at the incident. I believe that the
5 state needed the gun not only to corroborate Parris's testimony about the gun, but
6 to substantively prove forcible compulsion. Olivia Ordenes was an independent
7 witness, who disarmingly made no sexual allegations against Kelley and proved
8 the most important piece of evidence relevant to forcible compulsion, that is the
9 gun.

10 9. It is also my opinion that Ordenes's statement reverting back to the original
11 statement is important. That is, that because of the consistency of that statement
12 with her original statement to the police, that is easily the most credible.
13 Therefore, it is my opinion that this is a conviction based on non-credible
14 testimony, and that the incredulity of the testimony was known or should have
15 been known to the District Attorney before calling the witness. This case must be
16 retried.
17

18 **I hereby declare that the above statements are true to the best of my knowledge**
19 **and belief, and that I understand they are made for use as evidence in court and are**
20 **subject to penalty for perjury.**
21

22 DATED this 14th day of July, 2023.

23 */s/ Barry W. Engle*

24 Barry W. Engle, Declarant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANT'S REPLY TO STATE'S
RESPONSE TO DEFENDANT'S MOTION FOR A NEW TRIAL and supporting
DECLARATION on:

DDA Brian Scott Davidson
Multnomah County District Attorney's Office
brian.davidson@mcdca.us

by emailing a copy thereof to said attorney at his last-known email address on the date set
forth below.

DATED this 14th day of July, 2023.

/s/ Denise A. Rich

Denise A. Rich
Legal Assistant to Barry W. Engle