

NO. 86-CR-1032-B

THE STATE OF TEXAS X IN THE DISTRICT COURT
VS. X 117TH JUDICIAL DISTRICT
CARLOS HERNANDEZ X NUECES COUNTY, TEXAS

FILED

1986

MOTION TO DISMISS

OSCAR SOLIZ, CLERK
DISTRICT COURT, NUECES COUNTY, TEXAS

TO THE HONORABLE JUDGE OF SAID COURT:

Jane Ayala
Deputy

NOW COMES Defendant Carlos Hernandez, in the above styled and numbered cause and moves the Court to have the prosecution of this case dismissed on the following ground:

1. That on the 4th day of December, 1986, Defendants Motion for Discovery and Inspection of Evidence was heard by this Honorable Court and the Court pursuant to that hearing of December 4, 1986 Ordered on December 9, 1986 the following:
 - (a) That the Nueces County District Clerk's office, locate the evidence file of Cause No. 79-CR-881-C, styled The State of Texas vs. Jesse Garza. Upon locating the aforesaid evidence file, the District Clerk's office is to contact the Nueces County District Attorney's Office and Defendant's attorney herein, and set a date for the inspection and copying by the Defendant and/or the District Attorney's office of all items retained in evidence by the District Clerk's Office in Cause No. 79-CR-881-C.
 - (b) The Nueces County District Attorney's Office is to provide Defendant Carlos Hernandez by and through his attorney of record, with the tape recording of the conversation between Defendant Carlos Hernandez and his mother made by the Corpus Christi Police Department during the period of Defendant Carlos Hernandez' interrogation in the month of December, 1979.
 - (c) The District Attorney's Office is to provide Defendant Carlos Hernandez with a transcript of the conversation and interview between Asst. District Attorney Kenneth Botary and Defendant Carlos Hernandez, made on or about January 4, 1980.
 - (d) The Nueces County District Attorney's Office by and through the assisting law enforcement agencies is to assist the Defendant Carlos Hernandez and Defendant's attorney, in locating all witnesses who testified in Cause No. 79-CR-881-C styled the State of Texas vs. Jesse Garza. Assistance by the District Attorney's Office would be by means of providing Defendant's attorney with a "current" address for each of the aforesaid witnesses.
 - (e) The Nueces County District Attorney's Office is to provide Defendant's attorney with the criminal records of all possible State's witnesses.

The Court on December 9, 1986 further Ordered that a Compliance Hearing for Discovery was to be held on December 18, 1986.

I.

Defendant, Carlos Hernandez would show the Court that at the compliance hearing of December 18, 1986, the evidence of compliance was as follows:

1. That the District Clerk's Office, located the evidence filed of Cause No. 79-CR-881-C, styled The State of Texas vs. Jesse Garza. That the District Clerk's Office was contacted by Defendant's attorney, Jon J. Kelly and promptly located said evidence file.
2. That the Nueces County District Attorney's Office made no attempt as of December 18, 1986 to take the following acts as Ordered by the Court:
 - (a) No effort was made to ascertain or discover whether there still existed a tape recording of the conversation between Carlos Hernandez and his mother made at the Corpus Christi Police Department during Defendant Hernandez' interrogation in December, 1979.
 - (b) That the District Attorney's Office failed to make any attempt to locate a transcript of the conversation and interview between assistant District Attorney Kenneth Botary and Carlos Hernandez made in January of 1980.
 - (c) That the District Attorney's Office although duly notified of this Court's Order to assist in locating all witnesses who testified in Cause No. 79-CR-881-C, by providing Defendant's attorney with a "current" address for said witnesses, failed to contact any law enforcement agency as Ordered by the Court.
 - (d) Nueces County District Attorney's Office failed to provide Defendants attorney with criminal records of all possible State's witnesses.

II.

Defendant would show that he has been incarcerated since late July, 1986, well over 120 days. That the State was fully aware at the time of the Defendant's indictment that at least three witnesses would be necessary because of prior testimony that they had given in Cause No. 79-CR-881-C.

Defendant would further show that the State in failing to provide or even attempt to locate various items of physical evidence including but not limited to the alleged knife to have been taken from Carlos Hernandez in December of 1979, the tape recording of Carlos

Hernandez' tape recorded conversation with his mother and the transcript of the office conference between Mr. Botary and Carlos Hernandez, wilfully ignored this Court's Order.

III.

Defendant Carlos Hernandez would show that because it can reasonably be presumed that the State was aware of the exculpatory nature of the testimony of at least three witnesses in Cause No. 79-CR-881-C concerning Carlos Hernandez, the State was not ready for trial at any date subsequent to July 15, 1986, the date of Defendant's indictment.

IV.

Defendant would show that the failure of the State to make any attempts to comply with this Honorable Court's Order of December 9, 1986 has so prejudiced the Defendant's case as to deny Defendant of his constitutional rights under the 6th and 14th amendments of the United States Constitution and under Art. 1, Section 10 of the Constitution of the State of Texas.

V.


Defendant Carlos Hernandez would further show the Court that Defendant in no way impeached the State in its actions pursuant to the Court's Order of December 9, 1986 and orally stated by the Court on December 4, 1986

VI.

Defendant would further show that without live witnesses Defendant will be deprived of his constitutional right to defend himself under the United States Constitution and Texas Constitution. In that the record of 79-CR-881-C does not allow the Defendant to present a defense.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant prays and moves this Court to dismiss the prosecution of this case for the reasons outlined above.


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