

Court of Appeals, State of Michigan

ORDER

People of MI v Otis Lee Powell

Docket No. 280273

LC No. 07-010310-01

Kirsten Frank Kelly
Presiding Judge

Brian K. Zahra

Christopher M. Murray
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The motion to file a late answer is GRANTED.

In lieu of granting the delayed application, the Court orders, pursuant to MCR 7.205(D)(2), that the August 3, 2007, order of the Wayne Circuit Court hereby is REVERSED IN PART with regard to defendant's entitlement to the adverse inference standard criminal jury instruction 5.12. An adverse inference instruction need not be given where the defendant has not shown that the prosecutor acted in bad faith in failing to produce evidence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993), lv den 444 Mich 966 (1994). The circuit court's order specifically indicates that "there was not bad faith on the part of the Detroit Police Department or the Wayne County Prosecuting Attorney's Office . . ." Accordingly, defendant is not entitled to an adverse inference instruction under *Davis*. Moreover, the facts presented to this Court suggest that a videotape recording of the events leading to defendant's arrest may not have existed. The police and prosecution cannot be compelled to produce evidence that does not exist and the trial court thus abused its discretion in finding a lack of due diligence. The case is REMANDED to the circuit court for further proceedings consistent with this order.

This order is to have immediate effect, MCR 7.215(F)(2). The Court retains no further jurisdiction.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

SEP 28 2007

Date

Sandra Schultz Mengel
Chief Clerk