

FILED

JUL 18 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

29667-9-III

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GARY D. McCABE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The State's failure to disclose material exculpatory evidence violated due process.
2. The trial court erred in denying Mr. McCabe's motion for a mistrial under *Brady*¹ after the State failed to disclose exculpatory evidence.
3. Defense counsel's failure to examine evidence violated the right to effective assistance of counsel.
4. The court abused its discretion by considering inadmissible evidence in withholding DOSA.

B. ISSUES

1. The State provided defense counsel with an incomplete list of the contents of an evidentiary container, omitting potentially exculpatory evidence. Did this omission violate the State's due process obligation to disclose material evidence?
2. Did defense counsel violate the Sixth Amendment right to due process by failing to examine significant physical evidence before trial?

¹ *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

3. The State waited two weeks, until the morning of trial, to disclose recently discovered evidence. Did this omission violate the State's due process obligation to disclose material evidence?
4. Did the trial court abuse its discretion and violate the appearance of fairness doctrine by arbitrarily withholding DOSA?

C. STATEMENT OF THE CASE

On the morning of October 1, 2009, Curtis Golden drove past Gerald Chase's house and noticed a man, later identified as Gary McCabe, standing in front of the house. (RP 111) He watched Mr. McCabe remove a black bag from under his coat, walk up to the front porch, and push the front door open. (RP 113)

Mr. Golden called the police. (RP 114) Shortly thereafter, police found Mr. McCabe on Mr. Chase's deck and arrested him. (RP 144, 293) During a search of Mr. McCabe's clothing, police found foreign currency, silver ingots, and jewelry. (RP 31, 147, 176, 177, 298)

Inside the front door, police also found a black bag and jacket containing video games, two watches, and foreign currency. (RP 178, 295)

The State charged Mr. McCabe with one count of residential burglary.

(CP 2)

On October 25, the morning of trial, defense counsel discovered that the black bag removed from Mr. Chase's house contained potentially exculpatory items, including a driver's license for Greg Olson and documents identifying a "Mary Lynn Gore" and a "Jody" with their respective phone numbers. (RP 58) Defense counsel asked the court for a continuance to investigate these newly discovered items, pointing out that the police had failed to document the entire contents of the black bag and contending that this exculpatory evidence should have been disclosed prior to the day of trial. (RP 59) Defense counsel argued that the documents suggested that people other than Mr. McCabe were suspects in the case and that he needed additional time to prepare a defense in view of this new information. (RP 63)

The State assured the court that defense counsel had been provided with a complete list of the evidence including a "black briefcase . . . details, description full electronics, cellphones, iPods" and pointed out that "[I]t certainly doesn't indicate that it's empty." (RP 60) Police had removed numerous items of evidence from the back, including wrist watches, foreign currency, and game cards. (RP 178, 183) These items

had been separately secured and itemized in the list provided to defense counsel. (RP 178, 183, 185)

The court denied defense counsel's motion for a continuance, stating, "I don't think that the State withheld [the evidence]." (RP 64)

On the second day of trial, the prosecutor informed defense counsel that about two weeks earlier, on October 12, a police officer had found a credit card belonging to Mr. Chase in the back of his police car. (RP 153) Defense counsel asked the trial court for a continuance to investigate this new information, or in the alternative, a mistrial, explaining:

This is exculpatory, Your Honor, if [the police officer] didn't transport my client and they found the credit card from Mr. Chase in the back of the car . . . If I'm understanding what [the prosecutor's] representation of the evidence is is that in another squad car, not the one my client was transported in, they found a credit card that is from this same victim in another car after some other inmate had been transported in that car. Certainly, I would want to know what other inmates have been transported in that car and certainly who was the inmate that was transported just before the vehicle was searched because it would be reasonable to believe that that person was in possession of a card for the alleged victim here in this particular case.

(RP 155)

The deputy prosecutor assured the court that he had not been told about the discovery of the credit card until a few minutes earlier. (RP 154)

The trial court ordered the State to provide defense counsel with limited information about recent occupants of the vehicle in which the card was found and denied the defense motion. (RP 168, 172)

Defense counsel moved for a mistrial after the State rested. The court again denied the motion, stating the State only had a duty to disclose exculpatory evidence it knew about: "At this time, the court does not believe that there was any kind of duty. If they [the State] don't know about it, they don't have to disclose it." (RP 317) The court also noted that there was no indication that law enforcement intentionally withheld evidence. (RP 319)

A jury found Mr. McCabe guilty as charged. (CP 72, RP 406)
The defense requested a DOSA sentence. (RP 432) The prosecutor responded:

I have one response, if I may? Your Honor, what I point out to the Court and ask the Court is defendant was arrested in again yet another first appearance was done as many have been done on the defendant, and they do an evaluation of him, and they ask him questions.

On August 26, 2010, the defendant reports no past or present treatment needs. You can't fix someone that doesn't want their treatment.

(RP 432)

The court told the defendant:

Well, here's the thing, and I have to agree with Mr. Sargent because part of the reason when I give people treatment and

say you can do treatment is because they're standing here saying I've screwed up and I need treatment, and that's not the case. You get caught, and then you get convicted, and now you want me to have leniency . . .

(RP 434) The court then rejected Mr. McCabe's request for a DOSA and imposed a standard range sentence. (CP 281, RP 434)

D. ARGUMENT

1. THE STATE'S FAILURE TO DISCLOSE EXCULPATORY EVIDENCE VIOLATED DUE PROCESS.

The prosecution has a duty to disclose to the defense all material exculpatory evidence in its possession. U.S. Const. amends. VI, XIV; Const. Art. I, § 3, 22; *Kyles v. Whitley*, 514 U.S. 419, 432-38, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *United States v. Bagley*, 473 U.S. 667, 674, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

Violations of the duty to disclose are reviewed *de novo*. *State v. Mullen*, 2011 WL 2474263 (June 23, 2011).

There are three components to a *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the

State, either willfully or inadvertently; and prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

a. Failure To Disclose The Documents Contained In The Black Bag Violated Due Process.

Non-disclosed evidence is material, and must be disclosed, if there is a reasonable probability that had it been disclosed to the defense, it would have affected the outcome of the case. *Kyles*, 514 U.S. at 433; *Bagley*, 473 U.S. at 682. Evidence is material if its absence undermines confidence in the verdict. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 428-29, 114 P.3d 607 (2005).

Evidence that leads to the identity of other possible suspects is evidence favorable to the defense. See *Bowen v. Maryland*, 799 F.2d 593, 612-13 (10th Cir. 1986).

[T]his ethical duty of disclosure is not limited to admissible “evidence,” such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable “information.” Though possibly inadmissible itself, favorable information may lead a defendant’s lawyer to admissible testimony or other evidence or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable

defenses. Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.

ABA Formal Ethics Opinion 09-454, at 5 (footnote omitted) (July 8, 2009).

The documents contained in the black bag identified individuals other than either Mr. Chase or Mr. McCabe, and earlier disclosure might have led defense counsel to pursue other defenses. The documents were potentially exculpatory and thus favorable to the defense.

The evidence was suppressed, albeit perhaps inadvertently. *See Strickler*, 527 U.S. at 282; *Bagley*, 473 U.S. at 682-83. The trial court denied the defense request for a continuance, finding "I don't think that the State withheld [the evidence]." (RP 64) But the suppression of evidence need not have been willful. *Strickler*, 527 at 282. The obligation to disclose exists even when the evidence is not specifically requested by defense. *Kyles*, 514 U.S. at 432-38; *United States v. Agurs*, 427 U.S. 97, 110, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

The State did not actively conceal the undisclosed contents of the black bag. But by providing the defense with a list of the objects that had been removed from the bag, and omitting any mention of documents from

that list, the State misled defense counsel as to the existence of that evidence, thus inadvertently suppressing the evidence.

Prejudice occurs “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Strickler*, 527 U.S. at 280 (quoting *United States v. Bagley*, 473 U.S. at 682).

[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal. *Kyles*, 514 U.S. at 434. The question 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. . . . *A “reasonable probability” of a different result is accordingly shown when the government’s evidentiary suppression undermines the confidence in the outcome of the trial.*

(emphasis added) *Id.* at 434 (quoting *Bagley*, 473 U.S. at 678).

When, as here, the undisclosed evidence could have been used by the defense to uncover additional leads or develop additional defense theories, the State’s failure to disclose undermines the jury’s verdict.

b. Failure To Disclose The Credit Card Violated Due Process.

Like the undisclosed documents, the discovery of the alleged victim’s credit card inside a police car in which criminal suspects have

been transported was evidence that the defense could have used to determine the identity of an alternative suspect, and was thus evidence favorable to the accused.

The extent of the State's duty to disclose is not determined by the individual prosecutor's awareness that exculpatory evidence exists. Rather, the prosecution has a duty to learn of any exculpatory evidence known to others acting on the State's behalf, including the police. *In re Pers. Restraint of Brennan*, 117 Wn. App. 797, 804, 72 P.3d 182 (2003) (citing *Kyles v. Whitley*, 514 U.S. at 437). While a prosecutor has no duty to independently search for exculpatory evidence, the prosecutor has a duty to learn of evidence favorable to the defendant that is known to others acting on behalf of the government in a particular case, including the police. *Id.*, see *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 399, 972 P.2d 1250 (1999);

“The disclosure obligation exists, after all, not to police the good faith of prosecutors, but to ensure the accuracy and fairness of trials by requiring the adversarial testing of all available evidence bearing on guilt or innocence.” *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997).

The court denied the motion for a mistrial based on the erroneous belief that “if they [the prosecutors] don't know about it, they don't have to disclose it.” (RP 319) This was clearly error.

Acquittal is not the touchstone of materiality. Rather, the dispositive question is whether the non-disclosure deprived Mr. McCabe of an accurate and fair trial. The State's failure to timely disclose the evidence at issue deprived Mr. McCabe of a fair trial. Accordingly, the trial court erred in denying Mr. McCabe's motion for a mistrial.

2. DEFENSE COUNSEL'S FAILURE TO INVESTIGATE VIOLATED THE SIXTH AMENDMENT RIGHT TO COUNSEL.

“A *Brady* violation does not arise if the defendant, using reasonable diligence, could have obtained the information' at issue.” *In re Benn*, 134 Wn.2d 868, 916, 952 P.2d 116 (1998) (quoting *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994)). If this court finds that the State's discovery materials did not mislead defense counsel and thus did not give rise to a *Brady* violation, then this court should find that Mr. McCabe did not receive effective assistance of counsel.

The United States and Washington State Constitutions guarantee a defendant the right to effective assistance of counsel in criminal trials. U.S. Const. amend. VI; Wash. Const. Art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

On review, an appellant must show that “(1) defense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). In making such a showing, the appellant must overcome a strong presumption that his counsel’s performance was not deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

[T]he presumption of counsel’s competence can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial.

State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (*quoting State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978)) *See, State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995).

The record shows that defense counsel failed to examine the exhibits that were central to the State’s case, namely the black bag, with which Mr. McCabe was allegedly seen, and its contents. As a result, he

failed to conduct the investigation that could have provided the kind of exculpatory information he described to the court. Defense counsel's failure to fully investigate the evidence, and to pursue defense theories that could have been derived therefrom, prejudiced Mr. McCabe.

3. THE TRIAL COURT ABUSED ITS DISCRETION
BY ARBITRARILY WITHHOLDING DOSA.

Washington law requires judges to act impartially and to appear to be impartial. *State v. Ring*, 134 Wn. App. 716, 722, 141 P.3d 669 (2006). When the appearance of fairness is in question, this court must consider how the challenged proceeding would appear to a reasonably disinterested person. *Id.*

At sentencing, the defense asked the court to allow Mr. McCabe to receive treatment in prison under RCW 9.94A.660, the Drug Offender Sentencing Alternative (DOSA), noting that Mr. McCabe had never committed a crime of violence or been treated for his drug dependency. (RP 429-32) In denying DOSA, the court said, "You get caught, and then you get convicted, and now you want me to have leniency" This statement reflects one of two possible considerations. Possibly the court believed Mr. McCabe should not have the benefit of DOSA because he had exercised his right to trial instead of pleading guilty. Alternatively,

the court denied DOSA because, according to the prosecutor, Mr. McCabe had allegedly denied the need for treatment.

The sentencing court may not impose a greater sentence because a defendant has exercised his right to go to trial. *See State v. Richardson*, 105 Wn. App. 19, 22-23, 19 P.3d 431 (2001) (citing *State v. Sandefer*, 79 Wn. App. 178, 181-84, 900 P.2d 1132 (1995)).

Nor may the court base a sentencing decision on facts that were never proven or acknowledged by the defendant. RCW 9.94A.530(b). The sentencing court's consideration is limited to criminal history, facts relating to the crime of which the offender has been convicted, and documents submitted for the court's consideration. *See State v. Benefiel*, 111 Wn. App. 789, 792-93, 46 P.3d 808 (2002).

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports. . . .

RCW 9.94A.530(b).

The court appears to have denied DOSA in its reliance on the prosecutor's representation that Mr. McCabe had denied the need for treatment. This was not evidence, and bore no relationship to the crime of

which Mr. McCabe was accused. The court erred in relying on the State's allegation.

Washington law requires that our judges act impartially to appear to be impartial. *State v. Ring*, 134 Wn. App. at 722. When the appearance of fairness is in question, this court must consider how the challenged proceeding would appear to a reasonably disinterested person. *Id.*

In denying the defense motion for a DOSA sentence, the court improperly relied on the prosecutor's representations in violation of the sentencing statute and without regard for the appearance of fairness.

E. CONCLUSION

The court should reverse Mr. McCabe's conviction and remand for retrial in accordance with due process and the right to effective assistance of counsel. Alternatively, the court should reverse the sentence, and remand for resentencing.

Dated this 15th day of July, 2011.

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