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IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION I

59388-9

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JAN -6 AM 11:05

LISA A. MULLEN

Appellant,

v.

THE STATE OF WASHINGTON

Respondent.

APPEALED FROM SKAGIT COUNTY SUPERIOR COURT
CAUSE NO: 02-1-00654-9

APPELLANT'S REPLY BRIEF

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A. Summary of Argument

The State's investigator failed to produce documents in his possession that were specifically requested by the defense. The investigator possessed the documents prior to trial and contrary to the State's assertion his actions indicate that he was aware of the documents value. The defense for Ms. Mullen diligently pursued the documents and were told that they didn't exist or had been turned over when in reality they were in the possession of the owner of Frontier Ford and Mr. Rekdal. The documents were material to Ms. Mullen's defense and she suffered prejudice as a result of not having the documents. Mr. Rekdal was hired to replace the police as an investigator and therefore is an agent of the state. The State's failure to turn over the documents resulted in a *Brady* violation. See generally, *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

B. Statement of Facts

The appellant incorporates the statement of facts and statement of the case from her Opening Brief and cites to additional relevant facts necessary to respond to the State's arguments below.

C. Argument

I. The State Failed to Disclose Material Exculpatory Evidence

The State failed to disclose material exculpatory evidence in the possession of the State's paid investigator, accountant Rick Rekdal. Mr. Rekdal failed to disclose records from National Warranty Company/Payment Insured Plan, Inc. ("NWC/PIPI") and detailed Clothier and Head billing records that were both exculpatory for Ms. Mullen and impeaching of the State's star witnesses, Rick Rekdal and Ron Rennebohm.

A. The Information Was Favorable to Ms. Mullen

1. The Documents Support Ms. Mullen's Testimony About the Tax Evasion Scheme and Mr. Rennebohm's Actions Indicate His Participation Was Not Accidental.

The NWC/PIPI documents that were not turned over were material to Ms. Mullen's defense because they showed that Mr. Rennebohm was involved in a tax evasion scheme. However, just labeling it a tax evasion scheme does not explain what that means in regards to the allegations of embezzlement.

The State argues in its brief that the documents don't show that Mr. Rennebohm knew he was involved in a scheme or that he was under reporting his income. State's Brief pg. 29. However, a

review of the timeline below starting on pg. 11 of this brief shows that his actions indicate that he did know what he was involved in. Mr. Rennebohm knew that checks came to his house, he signed the loan documents for them, and he cashed the checks in his personal bank account, he also knew that he wasn't paying back the loan. Mr. Rennebohm went to great lengths to prevent Ms. Mullen and Mr. Rekdal from obtaining the NCW/PIPI documents.

The actions that Mr. Rennebohm took to keep Mr. Rekdal from getting the documents are outlined below, if you innocently didn't realize you were underreporting income you wouldn't do what Mr. Rennebohm did, his case was almost dismissed and he was sanctioned several times for failure to produce discovery.

Mr. Rennebohm also was willing to mislead the court in the criminal trial. The defense had sent Mr. Rennebohm a Subpoena Duces Tecum November 13, 2003 and October 5, 2005 specifically requesting the NCW/PIPI documents among many other documents desired for the defense. On March 7, 2003 counsel for Mr. Rennebohm, Michael Lewis came into court to quash the defense subpoena and represented to the court "that every single piece of paper, every bit of financial information that we have that supports the charges of embezzlement we turned over to the

accountants.” RP 3/7/03. (However, a review of the civil case record indicates that Mr. Rennebohm finally turned over the PIPI documents to Mr. Rekdal on October 12, 2005.) As a result of this representation the court quashes the subpoena.

At the October 5, 2005 deposition that was scheduled and included another subpoena duces tecum, Mr. Rennebohm failed to appear and Mr. Sequine the prosecutor objected to Mr. Murphy's continued attempts at discovery, accusing him of attempting discovery that was more suited towards a civil case. RP 10/5/05 p. 14 & 15. Mr. Sequine's objections clearly indicate that he was specifically aware of the documents requested in the Subpoena, and the PIPI documents were named as items 21 & 22 requested. CP 3495-3499.

2. The Tax Evasion Scheme Involved More Than Just Not Paying the Proper Amount of Taxes

The NWC/PIPI documents were favorable to Ms. Mullen because they showed that Mr. Rennebohm had artificially reduced the profits of the dealership which in turn reduced Ms. Mullen's pay because she was paid a salary and a percentage of profits. Therefore without all of the PIPI documents the amount of salary Ms. Mullen was owed could not be calculated and therefore any

statement that she took more than she was owed could not be confirmed.

The PIPI documents also indicated that Mr. Rennebohm was benefiting from Transactions in his 1810 receivable account contrary to the testimony of Mr. Rennebohm and Mr. Rekdal that Ms. Mullen had benefited from those transactions but in support of the testimony given by Ms. Mullen. RP 1/31/06 p. 117 & RP 2/1/06 p. 9-26.

Finally, the PIPI documents showed that Mr. Rennebohm had a propensity to be dishonest, was involved in illegal activities and was therefore not credible. Mr. Rennebohm's credibility was essential to the State's case, without his testimony that he did not authorize the transactions there was no crime. If the defense had obtained those PIPI documents in advance of trial and had been allowed to question him about the documents and the underreporting of income and what that meant in regards to him short changing his business partners and employees such as Ms. Mullen he may have chosen not to testify on 5th Amendment grounds, which would have been devastating to the State's case.

The State's argument, suggested by Mr. Rekdal, that Mr. Rennebohm wouldn't authorize this activity because the tax liability

of the activity was greater than the taxes saved misses the point of tax evasion schemes, to hide income and not get caught, therefore not paying taxes on the activities. State's Brief p. 33. Further the State's argument puts forth that they proved through the conviction that Ms. Mullen stole \$1.2 Million and this wouldn't make any sense for him to authorize in relationship to what he was hiding. State's Brief p. 22. However, the Jury only found Ms. Mullen guilty of taking at least \$1,500, there is a lot of space between \$1,500 and \$1.2 Million. An exact figure was not proven at trial and Mr. Rekdal carefully testified to journal entry "irregularities" that added up to \$1.2 million.

Mr. Rekdal also had in his possession detailed billing records and activity sheets that were not turned over to the defense despite a specific request for them. CP 1073-1081(Motion to Compel ITEMIZED billing records) The State argues that the defense was provided billing records, which is true. However, the billing records given to the defense were general. The detailed billing records that Rekdal and his accounting firm turned over to Mr. Rennebohm for his counsel and investigator to review were much more detailed than those given to the defense and would have supported Ms. Mullen's testimony that Mr. Rekdal was much

more involved in the day to day business of Frontier Ford. These records also indicate that Mr. Rekdal gave misleading testimony to the Jury when he indicated that he only did tax returns and some minimal business consulting for Mr. Rennebohm, which understated his conflict of interest and led the jury to believe that he was more neutral than he really was.

With the records turned over in the Civil case between Rekdal and Renebohm the expert, hired by Mr. Rennebohm and his counsel, was able to determine that on average Mr. Rekdal billed Frontier Ford 25 hours per month and that Clothier & Head spent substantial amounts of time and effort on services other than pure tax preparation. CP4866-6696, Exhibit 119, Declaration of Linda Saunders dated April 17, 2006. Ms. Saunders also noted in her declaration that the bills to the client (what was provided to the defense) were broadly worded and contained very little detail, the internal time records were much more detailed and included descriptions of much of the services provided. CP 4866-6696, Declaration of Linda Saunders, pg. 4, paragraph 8.

The time records that were not turned over were impeaching to Mr. Rekdal and Mr. Rekdal was the state's star witness, the case would have been significantly weaker if Mr. Rekdal was not a

credible witness and the jury was to have better understood his conflict of interest.

The time records also would have corroborated Ms. Mullen's testimony that Mr. Rekdal was more involved in the business and accounting procedures at Frontier Ford which would have made her more credible.

B. Ms. Mullen was Prejudiced by the Failure to Produce the Requested Documents

As a result of Mr. Rekdal's failure to turn over the requested documents Ms. Mullen did not receive a fair trial. Ms. Mullen was deprived of the opportunity to corroborate her defense and show that Mr. Rekdal and Mr. Rennebohm were not credible witnesses against her. Not being able to support her defense was a significant disadvantage to Ms. Mullen and likely would have affected the outcome of the trial. The disadvantage was pointed out on several occasions by the Prosecutor Mr. Seguire, mocking Ms. Mullen for not having any evidence to support her story of hiding profits and illegal activity at the dealership. RP 2/2/06 p. 22. That evidence existed it just was not turned over to the defense.

C. Mr. Rekdal's Actions Indicate He Was Aware of the Documents Exculpatory Value

The State asserts in its brief that the documents were not suppressed and no Brady violation occurred because the State's investigator/expert witness was not aware of the exculpatory value and with reasonable diligence the defense could have obtained the information. (Respondent's Brief pg. 8)

The factual evidence from the civil case between Frontier Ford (Rennebohm) and Clothier and Head (Rekdal) does not support the State's argument that Mr. Rekdal was unaware of the value of the NWC/PIPI evidence and was only able to determine intention after reviewing Ms. Mullen's testimony. It simply does not fit with the timeline that comes out of the civil case or fit with the actions of Mr. Rekdal and his civil counsel.

Mr. Rekdal claims he became aware of the NWC/PIPI payments and under reporting of income in 2004 while working as an investigator for the Skagit County prosecutor, however billing records of Clothier and Head indicate that work was performed at Frontier Ford with regards to PIPI on 10-12-2001 indicating that Mr. Rekdal may have been aware before 2004. CP 4866-6696, Exhibit 144, Analysis of Clothier and Head Employee Time Charges for

Frontier Ford and Rennebohms Work, dates April 17, 2006. The detailed billing records used in the Analysis for the Civil Case were also not provided to the defense before trial despite being specifically requested.

By Mr. Rekdal's admission he became aware of the problems involved with NWC/PIPI at least by early 2004 which was well in advance of the 2006 trial. CP 4866-6696, Exhibit 68, Rekdal Declaration. In July 2004, Mr. Rekdal sent Mr. Rennebohm a letter indicating that he discovered he had under reported his income and his federal tax returns needed to be amended and that Clothier and Head would no longer be able to do accounting work for Frontier Ford, Whidby Island Ford, or the Rennebohms. CP 4866-6696, Letter to Rennebohm July 2004.

In January 2005 after being sued by Mr. Rennebohm, counsel for Mr. Rekdal began trying to obtain NWC/PIPI documents from both NWC/PIPI and Mr. Rennebohm. CP 4866-6696, Motion by Defendant to Compel Responses to Discovery Requests and Declaration of Barbara L. Schmidt. Mr. Rekdal was able to obtain some (approximately 80) documents directly from the company in September 2005, which was well in advance of the criminal trial and should have been turned over to the defense. CP 4866-6696,

Motion to Compel and Declaration of B. Schmidt. Mr. Rekdal was also able to obtain some documents from Frontier Ford and information that the remaining documents sought by Rekdal were located at Mr. Rennebohm's home during discovery October 12, 2005, also well in advance of trial and should have been turned over to the defense. CP 4866-6696, Motion and Declaration of B. Schmidt.

According to the Motions and Declarations submitted by Barbara Schmidt (Counsel for Rekdal) to compel discovery in the Civil Case the following was done to obtain the NWC/PIPI documents:

- **January 28, 2005** served first discovery requests on Rennebohm/Frontier Ford
- **February 24, 2005** served second discovery requests on Rennebohm/Frontier Ford
- **February 28, 2005** received a letter from counsel for Rennebohm/Frontier Ford stating some objections to the discovery requests and promising answers in the near future. Letter also proposed a protective order and a stipulated protective order.
- **April 25, 2005** Stipulated Protective Order entered by Judge Armstrong.
- **June 30, 2005** Rekdal's counsel goes to Mt. Vernon to Frontier Ford for inspection of documents but was told by the office manager that most of the requested NWC/PIPI documents were at Rennebohm's home and not available that day.
- **August 3, 2005** sent a letter to Rennebohm's counsel reminding him the NWC/PIPI documents were not

made available and requesting the documents by August 10th.

- **September 3, 2005** Rekdal's counsel sent email to Rennebohm's counsel reminding him to follow up with Rennebohm re: the NWC/PIPI documents and asking the documents be made available at the next planned visit to Frontier Ford. Also requested that Plaintiff serve written responses to the Discovery Requests by September 13th.
- **September 15, 2005** Rekdal's counsel again sent email asking about the status of documents in Rennebohm's possession and asked for a response by September 19th.
- **September 25, 2005** Rekdal's counsel sent a letter via email asking for a discovery conference on September 28th.
- **September 28, 2005** discovery conference held, Rennebohm's counsel agreed to serve written responses to Discovery Requests by October 5th and to produce during counsel's next visit to Frontier Ford NWC/PIPI documents and all other documents responsive to discovery requests. Counsel indicated she would serve a motion to compel if the agreement was not followed on or after October 14th. An email was sent to confirm the agreements made during the conference.
- **October 4, 2005** Rennebohm's counsel sent an email to schedule the next document production for October 12th at Frontier Ford. Rekdal's counsel sent an email confirming that she would travel to Frontier Ford on October 12th for the document production.
- **October 11, 2005** Rekdal's counsel sent Rennebohm's counsel an email re-confirming planned document production next day.
- **October 12, 2005** counsel for Rekdal drove to Frontier Ford for document productions, counsel for Rennebohm was also present. Shortly after production began the Frontier Ford office manager informed both counsel that Mr. Rennebohm had additional documents at home but had not brought any of these documents to the office for production.

Counsel was told that Rennebohm had 4 loans with NWC/PIPI but that 2 of the loans and paperwork are mailed directly to Mr. Rennebohm's home. Only a slim file of NWC/PIPI documents were produced on the 12th. Rekdal's counsel was denied access to Mr. Rennebohm's 1810 account records and told she could not return the next day but must schedule a new date for production. Agreed to resume production on October 18, 2005.

- **October 18, 2005** counsel for Rekdal again traveled to Frontier Ford for document production. None of the 1810 account information was produced. None of the NWC/PIPI was produced.
- **October 21, 2005** counsel for Rekdal submits a motion to compel. To date no answers to discovery requests filed, no NWC/PIPI documents in Rennebohm's possession produced and no access to 1810 account records.
- **October 31, 2005** counsel for Rennebohm delivers answers to Discovery requests that are unsigned and incomplete.
- **November 4, 2005** Order granting Motion to Compel and ordering Rennebohm to pay approximately \$2500 in sanctions and ordering discovery to be turned over by November 23, 2005.
- **January 6, 2006** Rekdal's counsel files a motion for Sanctions (including asking the court to dismiss Mr. Rennebohm's case) for failure to comply with court's November 4, 2005 discovery order.
- **January 10, 2006** Rekdal's counsel receives a letter and the check for sanctions ordered on November 4, 2005
- **January 13, 2006** counsel for Rennebohm files its opposition papers to Rekdal's motion for sanctions via fax. Also delivered via fax were a letter and the signature page to the discovery.
- **January 14, 2006** counsel for Rennebohm emails the unsigned version of the answers to Rekdal's discovery requests to counsel for Rekdal. These documents claim that there are no additional responsive documents (although no NWC/PIPI

documents have been produced), stays silent on the whereabouts of copies and what happened to the original documents.

- **January 17, 2006** Motion for Sanctions granted. The order required Rennebohm to complete discovery including producing PIFI documents within 5 days or a detailed declaration about the history of these documents and what happened to them from 1996-2003. The court also ordered an additional \$2500 in sanctions.
- **January 19, 2006** counsel for Rekdal receives another attempt at answering the discovery that still does not account for the PIFI documents as well as the other items ordered by the court.
- **February 17, 2006** Rekdal's counsel receives via fax another attempt at answering the discovery that still failed to provide the PIFI documents and failed to describe what happened to them. Mr. Rennebohm's signature was not notarized.
- **March 21, 2006** Rekdal's counsel sends letter to Rennebohm's counsel requesting CR 26(i) conference. This request is not responded to.
- **March 29, 2006** counsel for Rekdal files a Motion to Dismiss with Prejudice and Award Sanctions or in the Alternative to Award Sanctions and Compel Discovery from Plaintiff.
- **March 30, 2006** counsel for Rekdal submitted a Motion for Summary Judgment.
- **April 7, 2006** counsel for Rennebohm files a Memorandum in opposition to Defendant's Motion to Compel and Award Sanctions. This memorandum indicates that Rekdal and his counsel received about 2400 pages of PIFI documents directly from NWC/PIFI at the end of March 2006 in response to their August 2005 Subpoena Duces Tecum but did not disclose this to the court or to Mr. Rennebohm and his counsel. As part of this response it also includes a declaration from Rennebohm indicating he threw away any statements sent to him shortly after they were sent, after reviewing them.

- **April 17, 2006** counsel for Rennebohm files a response in opposition to Defendant Rekdal's motion for Summary Judgment.
- **April 20, 2006** court granted defendant Rekdal's motion to compel and award sanctions.
- **April 27, 2006** Motion for Summary Judgment Denied.

CP 4866-6696

Mr. Rekdal and his counsel would not have aggressively pursued documents he didn't think were significant. Mr. Rekdal doggedly pursued those documents in defense of himself well before the criminal trial and Ms. Mullen's testimony.

Contrary to the state's argument, it was not easy for Mr. Rekdal and his counsel to obtain those documents. (State's brief pg. 19) A lot of time and resources were spent to obtain those documents and Mr. Rennebohm went to a lot of trouble to prevent Mr. Rekdal from getting them. (Mr. Rennebohm's actions also negate the State's argument that Mr. Rennebohm relied on others and likely didn't know that he had under reported income or that anything was wrong. (State's Brief pg. 28)

However, despite Mr. Rennebohm's stonewalling and NCW's long delay Mr. Rekdal was able to obtain some of the NWC/PIPI documents directly from NWC and some from Mr. Rennebohm prior to trial yet he did not notify the defense or turn

over the documents that he had in his possession despite the defense specifically requesting the documents.

D. The Defense Diligently Pursued the NWC/PIPI Documents

Ms. Mullen and her counsel diligently pursued the NWC/PIPI documents that corroborated her defense and showed the Mr. Rennebohm benefited from the transactions in his 1810 account contrary to his testimony and the testimony of Mr. Rekdal that Ms. Mullen had benefited from those transactions.

Ms. Mullen's counsel attempted to get the documents via subpoena, asked about them in depositions and petitioned the court several times to obtain them and Mr. Rekdal acknowledged receiving a Subpoena asking for the documents. CP 6835-6859, Defendant's Supplemental Memorandum in Support of Motion for a New Trial p. 8-9.

Counsel for Ms. Mullen was told that the documents didn't exist or had been turned over to the prosecutor. RP 3/7/03 p. 3, lines 9-16. This turned out not to be true; after counsel for Mr. Rennebohm assured the court that the documents sought by Ms. Mullen didn't exist or had been turned over to the accountants (ie

Mr. Rekdal), Mr. Rekdal obtained PIPI documents directly from Mr. Rennebohm. CP 4866-6696, Declaration of B. Schmidt in support of Motion to Compel and For Sanctions dated January 6, 2006.

Counsel for Ms. Mullen was not required to assume that sworn court statements were false and chase down the documents elsewhere. The documents were in the possession of an agent of the state prior to trial, the documents had been specifically requested, the documents were material to Ms. Mullen's defense and it was a *Brady* violation to not produce the documents.

E. Mr. Rekdal was an Agent of the State

In *Kyles*, the court found that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf, including the police." *Kyles v. Whitley*, 514 US 419, 454 (1995). This finding extends the duty to disclose beyond the prosecutor to "others acting on the government's behalf" and adds "including the police" but does not limit the requirement just to the police. The court goes on to reason that the duty should be extended because otherwise "the prosecutor has

the means to discharge the government's Brady responsibility" *Id* at 455.

In this case, that is exactly what the State is arguing should happen, since Mr. Rekdal is a private CPA and not a member of law enforcement or regularly employed by the Prosecutors office his failure to produce documents should not be a *Brady* violation. However, this narrow reading of *Kyles* would serve as an avenue for prosecutors to get around their *Brady* responsibilities simply by hiring a private citizen to fill a role normally held by law enforcement or someone in the prosecutor's office that would be subject to the *Brady* requirements.

Mr. Rekdal was acting on behalf of the state. Mr. Rekdal was hired to investigate the crime and gather evidence and was later used as an expert witness. Additionally, Mr. Rekdal was hired instead of the investigative unit at the State Patrol. RP 1/30/06 p.94, Testimony of Officer Nordmark. If the prosecutor and police had decided to use the investigators at the State Patrol instead of Mr. Rekdal the *Brady* obligation would no doubt apply to them and therefore it should apply to Mr. Rekdal as well. The fact that the state freely decided to use Mr. Rekdal, someone with a conflict of

interest and self interest in the outcome, instead of law enforcement, should not relieve the state of its *Brady* obligation as the State suggests.

D. Conclusion

For the reasons set for in Appellant's Opening Brief and herein the Reply, Appellant respectfully requests a new trial be granted in order allow Ms. Mullen to present a full defense with all of the documents now available to her that were previously withheld or not available until after trial.

Respectfully Submitted this 5th Day of January, 2009

Magnusson Law Office, P.S.

By:  _____

Jennifer L. Castro, WSBA #38215

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DECLARATION OF SERVICE

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DECLARATION OF SERVICE

I, Jennifer L. Castro, under penalty of perjury and in accordance with the laws of the State of Washington, declare that on the 5th day of January 2009, I caused true and correct copies of the following documents:

1. Appellant's 3rd Request for Time Extension;
2. Appellant's Reply Brief; and
3. Declaration of Mailing

to be delivered via E-Mail and on January 6, 2009 via US Mail, to the following parties of record:

COUNSEL FOR THE STATE OF WASHINGTON

Erik Pedersen
Skagit County Deputy Prosecuting Attorney
605 South 3rd Street
Mount Vernon, WA 98273

DATED this 5th day of January, 2009.

MAGNUSSON LAW OFFICE, P.S.

By 
Jennifer L. Castro