

Division Two

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STATE OF WASHINGTON
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State of Washington)
) Respondent,
) V.
Jose Anguiano-Alcazar)
) Appellant.

No. 41535-6-II

Statement of Additional
Grounds For Review

I, Jose Anguiano-Alcazar (hereafter Jose), have received the opening brief prepared by my attorney.

Set forth below are the additional facts, citation to record and additional grounds for review that are not addressed in appellant counsel's brief.

Statement Of Facts

On June 11, 2009 about three months prior to this incident Mr. Milam was stopped and his car was searched and approximately 40 grams of heroin was found. This report by Deputy Mullikin, was sealed and placed in the "cold case" file, after which I contend Milam agreed to work as an information for a recommendation, leniency, promise and or agreement concerning this case. See RP 293.

As part of this agreement Milam agreed to perform a series of controlled buys for the Task Force, of people he knew, so they could be arrested, and he would receive less time. RP 191, 144.

This is how Jose became part of this agreement of Milam's, to meet and set up controlled buys with others he knew.

Malim and Jose met in the county jail and Milam struck

up a conversation with him concerning buying or selling heroin, because he alleged that Jose looked like he was coming down off heroin.

Jose agreed with him asked him that if there was some good stuff around he might want some if his funds were right. See RP 114, 144.

After Jose went home from the county jail, he decided against having any dealings with Milam and for the next 1½ weeks to 2 weeks Milam persisted in calling me unknown number of times under the orders of Deputy Nelson. See RP 182, line 21.

Subsequently, Jose finally answered Milam's phone call to get him to stop calling and to see what he wanted.

After informing Milam that he had went back to work as a framer and he was now clean and sober.

Milam advised me that he just wanted to talk and I told him that I would meet him at the Muchas Gracias Restaurant. RP 176-177.

Jose ordered two drinks and contend that Milam offers him some heroin to buy, to which he replied that he did not have any money for any heroin, but Milam gave him some anyway. RP 332.

Approximately, two weeks later I was arrested coming back home from work with my brother.

Appellant was charged and found guilty by jury trial of Count 1-Delivery of a controlled substance on September 17, 2009, and County 2-Selling for profit any controlled or counterfeit substance on September, 17, 2009.

The facts produced at trial shows this was the same incident and the state agreed. RP 368-369.

During trial Jose filed a motion to admit post allegation search evidence on or about June 29, 2010. The basis of the motion was to ask to admit into evidence that when the appellant was ultimately arrested, some 17 days after the incident he was charged with, he had no controlled substance on him.

He was arrested and his property searched pursuant to a search warrant. A hearing was held to argue this motion and the motion was denied on August 25, 2010.

Jose than filed a motion to disclose the informant. The state agreed to disclose the informant, Milam.

When Milam was interviewed he refused to disclose pertinent material information, his current probation officer, his current address, any pending unfiled charges and disclosure of Department of Correction files.

A hearing was held on the motion to disclose on August 25, 2010 and September 16, 2010. The court ordered the state to provide any information in regards to contracts, deals or promises of leniency between Milam and the state for his testimony. The state advised the court and defense counsel no such deals existed.

The Court, in its order, included the law enforcement unit in question which was the prosecuting attorney's office and the Clark-Skamania Drug Task Force Unit. The Court also ordered disclosure of the probation officer and Milam's current address.

Shortly before trial, on or about August 26, 2010, Jose's trial counsel received the "cold case" police report of Milam's arrest in June of 2009, that was still pending, that is, it had not been filed. As far as the Court and trial counsel was informed by the state. The police report was placed under seal

in the court file.

The state filed a motion in limine on September 22, 2010 excluding any prior acts or uncharged bad behavior of Milam including the "cold case" police report filed with the court under seal and any Department of Corrections information they may have had on Milam.

Jose trial attorney argued the information showed in the cold case report shows his motivation to show bias and his motivation to lie to assist his situation to prevent him from going to prison for possession of approximately 40 grams of heroin. The Court granted the motion in limine for the state.

Jose presented an offer of proof orally, as well as, referring to the cold case report under seal.

The court ultimately agreed to allow into evidence, by way of stipulation that Milam was arrested in June of 2009, and subsequently contacted Detective Nelson and worked as an informant with Detective Nelson.

At trial detective Nelson testified that there were no promises made to Milam for his work and at most it would be a recommendation.

Milam said he was promised nothing but he hoped he would get leniency on a future sentencing. He also hoped to serve less time in jail because of his efforts.

Milam, the informant, testified he called the appellant to arrange a purchase. The purchase allegedly occurred at Muchas Gracias Restaurant. Milam testified that Jose handed him the controlled substance under the table while he passed him pre-recorded money.

He then testified Jose requested the controlled substance

back and took it into the restroom.

Than returned to the table and told Milam it was in the restroom and told him where to look. Milam had been searched by Detective Nelson prior to his contact with Jose and he was kept under surveillance. However, they did not perform a body cavity search(rectum).

Nor, had any area of the restaurant been searched by the officers prior to the delivery. The officers kept the "parties" under continuous observation, Jose from when he left his house and rode his bicycle to Muchas Gracias, and Milam from where he was dropped of by Detective Nelson and walked to Muchas Gracias.

Sgt. Barnes kept the parties under observation at Muchas Gracias. Sgt. Barnes said that he could not "recall" Jose leaving the table at any time. I would have been an important factor for him to note through a dispatch call if Jose had left the table in the middle of the drug transaction with the informant.

Specifically, when taking into consideration that the safety of the informant was the Deputies obligation and neither knew if Jose went to the bathroom what he may have brought back(gun, etc.).

After Milam's testimony, Jose defense counsel made a motion to dismiss for a Brady v. Maryland, 373 U.S. 83(1963), violations for failure to provide exculpatory or impeachment evidence. See Kyles v. Whitley, 514 U.S. 419(1996).

The state again stated falsely, that it had no promises or deals, or recommendations.

But from Milam's testimony it was clear Milam had a factually based expectation based on his conversations with

Detective Nelson who would make a recommendation for him. See RP 188-189, 191.

The Court rule that an "agreement to make a recommendation is an agreement that should have been disclosed," but it was not a Brady violation, because Brady is where it is hiding something. See RP 202, 203-204-211.

As noted above, the parties agreed to enter into a stipulation as to Milam's arrest, because the Court had already overruled defense counsel's request that more detail must be give as to why Mr. Milam was arrested and how much heroin he possessed approximately 40 grams, so that the jury as the ultimate trier of facts could gauge his motivation, bias, and what weight if any to give his bias testimony so that he did not go to prison.

This Statement Of Additional Grounds follow:

Statement Of Additional Grounds I.

The trial court's decision was contrary to and an unreasonable application of firmly established federal law as determined by the United States Supreme Court when the court failed to apply the Brady Doctrine properly and the other Supreme Court decisions upholding and expanding Brady, when the court found as a matter of law, "that a understanding, agreement, etc. existed" and the prosecution had withheld it from the trial court and defense counsel. See RP 204(Brady violation court ruled), RP 202-211, RP 93., see also Kyles v. Whitley, 514 U.S. 419(1996), Giglio v. U.S., 406 U.S. 155(1972).

In Giglio a similar case, supra, at 151, defense counsel discovered new evidence indicating that the government had failed to disclose an alleged promise, as in this instant case, that Milam would not be prosecuted if he testified for the state.

The High Court held at 92 S.Ct. 763, 765, that "when the reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within the Brady's rule.

Here the states case depended entirely on Milam's testimony, without it there would have been no indictment and no conviction by the states chief witness(informant) who would have said and done anything to save his own skin from going to prison for his possession of approximately 40 grams. See Banks v. Dretke, 540 U.S. 668, at 675(2004).

Milams credibility as a witness was therefore an important issue in the case, and any understanding or agreement as to a "future" prosecution would have been relevant to his credibility and the jury was entitled to know. See Giglo v.

U.S., 92 S.Ct. at 766, U.S. v. Bagley, 473 U.S. 667(1985).

Furthermore, I adamantly contend, that these constitutional errors were not harmless beyond a reasonable doubt.

Further, as a general rule "constitutional error" is presumptively prejudicial and should not be considered harmless unless the appellate court is convinced beyond a reasonable doubt that any reasonably jury would have reached the same result after learning of Mr. Milam's August 2009 arrest with approximately 40 grams of heroin and the basis of why he was exonerated of this charge and whether his testimony and actions were the direct results of his expectation of a deal in the future after providing enough controlled buys. See RP 189, 191.

Therefore, any presentation challenging the credibility of Mr. Milam was a key issue at trial and one of the means of challenging his credibility was through the understandings or agreement he had with Deputy Nelson.

This is crucial where as here the defendant testified in his own behalf at trial, and disputed and denied all allegations concerning the disputed matters.

If Mr. Jose had the exoneration order that was presented to another Judge and signed August, 2009, an exoneration of Milam's crimes, that every state witness testified did not exist.

If Jose had this evidence he could have presented it to the jury during trial to discredit Milam and to show his biasness, may have been the evidence that could have tipped the scales for the jury to consider Jose testimony was quite plausible and the jury as the ultimate trier of facts should have been made aware of this understanding, agreement, and/or deal why Milam was testifying, this information was crucial

to present to the jury as the ultimate trier of fact should have been made aware of this understanding, agreement, and or deal why Milim was testifying, this information was crucial to present to the jury, so as to determine what weight or credibility if any to give to Milam's bias testimony. RP 509-510, Banks, supra, 540 U.S. at 675, 698, 699.

Statement Of Additional Grounds II.

Appellant contends that I was prejudiced by the Prosecutions failure to disclose crucial matrial "impeaching evidence" of (1) the State and Mr. Malim(the informant hereafter), deal to work as an informant, in exchange for a promise of leniency, recommendation, and or exoneration, to Mr. Meyer, the taskforce prosecutor.

Who refused to answer defense calls, emails ect., until he was informed that Mr. Sowder was seeking a court Order so that he could question him concerning any agreements made with Milan. RP 492, line 21

(2) By informing on or providing anyone for arrest to try to solidify his deal to not go to prison for the possession with intent to distribute heroin.

Had counsel been given this evidence, defense counsel would have been able to pursue devastating cross-examination of Mr. Milam, to impeach Milam, by way of his deal, to show bias or interest. See Banks v. Dretke, No. 02-8286(U.S. 2004), U.S. v. Bagley, 475 U.S. 667, 682(1985)(quoting Strickland v. Washington, 466 U.S. 668(1984)).

Milam was the states only witness to the events concerning whether he or Mr. Jose actually had the heroin for sell.

Milam, a man who only months earlier before had been

arrested by his Department of Corrections Community Placement Officer and Police Department, and was in possession of approximately 40 grams of heroin, 827.00 dollars, and balloons immediately ready for packaging and distribution. See Police Report CCS0090028283.

Yet, Mr. Milam was never prosecuted for this drug offense and immediately became an informant for the Drug Task Force, to seek out and provide individuals like Mr. Jose, to keep from having to pay his debt to society for the possession with intent to distribute heroin for profit.

These circumstances raise serious questions concerning Mr. Milam's credibility and implicate the fairness of Mr. Jose's trial, specifically when Mr. Meyer, after trial "refused to disclose why Milam was exonerated." See RP 510, e.g., *Grisby v. Blodget*, 130 F.3d. 365(9th Cir. 1997).

Appellant adamantly contends that this evidence would have substantially influence at least one of the juror's, who I contend could not properly gauge what weight if any to give to Mr. Milam's testimony, or to discredit Milam's testimony completely. See *Banks*, 560 U.S. at 675.

Additionally, there is a reasonable probability that had this deal(evidence) been admitted or disclosed to defense counsel before trial, or during pre-trial and the jury had this evidence before it, the jury's decision may have been different. See *Strickler v. Green.*, 527 U.S. 263(200).

The question thus now presented is "whether in the absence of this evidence Jose received a fair trial," understood as a trial resulting in a verdict worthy of confidence, specifically when Sgt. Tony Barnes, testified that he watched Mr. Jose through

a pair of binoculars with a clear view, the whole time, and he never say Mr. Jose leave the table at any time to go and place any narcotics under the garbage can in the bathroom, as testified to by Milam. RP 236.

Therefore, no other evidence in the record provides any support for the conclusion that Mr. Jose placed any substance under the garbage can in the bathroom. Strickler, supra, 527 U.S. at 265.

Statement Of Additional Grounds III.

Denied Constitutional Right to Confront Witness

The Sixth Amendment of the U.S. and Washington Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." See Pointer v. Texas, 380 U.S. 400(1965).

Confrontation means more than being allowed to confront the witness physically.

The cases decided by the United States Supreme Court construing the confrontation clause hold that a primary interest secured by it is the right of cross-examination." See Douglas v. Alabama, 380 U.S. 415, 418(1965).

The Supreme Court has also determined and recognized that the "exposure of a witness motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Green v. McElroy, 360 U.S. 474, 496, n.4(1959)(to show if individual might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.).

Appellant also contends, that I was denied the right of effective cross examination, which would be constitutional error

of the first magnitude, when the trial court limited trial counsels inquiry about the understanding and/or agreement Mr. Milam testified existed.

On the facts of this case, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility could have appropriately draw inferences relating to the reliability of the states chief witness. See Davis v. Alaska, 94 S.ct at 111(1974).

Dated this 26 day of August, 2011.

Respectfully Submitted

Jose Arguiano