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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN DEAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SKAGIT COUNTY

REPLY BRIEF OF APPELLANT
(With corrected citation to Clerk's Papers)

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A. ARGUMENT

1. THE STATE DEPRIVED MR. DEAN OF DUE PROCESS BY FAILING TO DISCLOSE MATERIAL EVIDENCE

Kevin Dean challenges his convictions of first degree theft and conspiracy to commit first degree theft. Mr. Dean contends the State violated the dictates of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and deprived him of due process by failing to disclose information that the State's lead investigator knew of regarding criminal acts of the alleged victim. Mr. Dean contends the State also withheld information regarding the existence of an actual conflict of interest by the State's lead investigator that precluded him from revealing information favorable to the defense. Mr. Dean points to several disclosures made by the investigator under oath in a contemporaneous professional liability lawsuit filed by the victim against the investigator that are directly contrary to the opinion and testimony the investigator gave as the State's principle witness.

The State responds that when its lead investigator, and principle witness, withholds information undercutting the credibility of his own opinion, upon which the State's entire case rested, as well as the testimony of the alleged victim no Brady violation

occurs. The State contends these is so even where the evidence directly corroborates defense testimony which the prosecutor attacked at trial. The State claims, contrary to the record, so long as the investigator is unaware of the significance of the withheld information due process is not violated. Aside from the incorrectness of that contention, the State's response also substantially understates the nature and thereby the impact of the withheld information. The State's argument has no support in the record, the Constitution, caselaw or common sense and must be rejected.

a. The State response grossly understates the nature and extent of the withheld evidence. In its brief the State, grossly misrepresents the nature of the withheld information. The State contends its consists solely of information pertaining to "a tax evasion scheme by Rennebohm involving National Warranty Company/Payment Insured Plan (NWC/PIPI)." Response at 9. Mr. Dean's certainly contends the State withheld this info, but the State withheld far more than that.

In his deposition given, contemporaneously with his trial testimony but withheld from Mr. Dean, Mr. Rekdal stated that during his investigation for the Skagit County Prosecutor he discovered

Mr. Rennebohm had indeed failed to report a minimum of \$150,000 and as much as \$1,000,000 in income and interest in loans from PIPI as well as the kickbacks he used for repayment. CP 6514-15 (Deposition pp154-158). Moreover, Mr. Rekdal asserted he discovered Mr. Rennebohm's account receivable was reduced in an amount equal to the loan payments being made. CP 5575-76 ¶3.

The State claims this information was not withheld because co-defendant, Lisa Mullen, testified regarding her limited knowledge of the scheme. Response at 10-11. But the State ignores the fact that at trial the prosecutor extensively cross-examined Ms. Mullen on this point attempting to undercut her allegations. 2/1/06 RP 85-86. Yet, the State knew those Ms. Mullen's allegations were true and yet never shared that information with the defense. The jury never heard that evidence because its was withheld by the State.

But that is merely the beginning. The materiality of withheld evidence must be determined collectively in the context of the entire record. United States v. Agurs, 427 U.S. 97, 112, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976). As detailed in Mr. Dean's opening brief the State withheld far more than the warranty information. Because

the State has chosen to ignore it, Mr. Dean will again provide a more detailed recitation of the withheld evidence.

It should be noted, that the State's response attempts to filter Mr. Rekdal's statements through his declaration prepared to rebut Mr. Dean's motion for new trial, instead of looking to the contemporaneous and inconsistent testimony Mr. Rekdal offered at trial and in his deposition. For instance the State makes much of Mr. Rekdal's claim in his declaration that the withheld evidence would not have changed his testimony. See e.g. Response at 23 (Citing Mr. Rekdal's post-trial Declaration rather than his deposition testimony). But this ignores the larger question of whether Mr. Rekdal could have testified at all in light of the obvious and actual conflict of interest he had between two clients. Moreover, Mr. Rekdal's self-serving claim that his trial testimony would not have changed, does not address the unquestionable impeachment value at trial of his hesitant and outright contradictory testimony in his deposition. To put it another way Mr. Rekdal may have offered the same trial testimony but he would have been forced to acknowledge and explain his contradictory testimony from his deposition. Thus, the focus of this Court's inquiry must be on the

contemporaneous statements made by Mr. Rekdal, and not his after-the-fact efforts to preserve his credibility and reputation.¹

i. Withheld evidence that Mr. Rennebohm was aware of and complicit in mispostings. Although the State's evidence affirmatively established each and every questionable posting was done by Ms. Mullen, the State argued Mr. Dean must have known of the transactions because they involved postings to his account. Yet the State readily accepted Mr. Rennebohm's claimed lack of knowledge of precisely the same type of activity in his own account. The decision to treat Mr. Dean and Mr. Rennebohm differently stemmed from one fact alone; Mr. Rennebohm's assertion to his longtime accountant, Mr. Rekdal, that he was unaware of the activity in his account. 8/27/04 RP 84; 1/25/06 RP 156.

Contrary to this explanation at trial, Mr. Rekdal stated in his subsequent deposition the "majority of nonbusiness activity in Mr. Rennebohm's account receivable benefited Mr. Rennebohm." CP 6567 (Deposition p 256), compare 1/25/06 151-52, 154 (activity not to Mr. Rennebohm's benefit). Mr. Rekdal's testimony in his

¹ The fact that Mr. Rekdal was willing to contradict in his declaration what he said under oath in his deposition, 8 months earlier, is simply more fodder for the jury in its assessment of Mr. Rekdal's qualifications and to credibility.

deposition, withheld at trial, that Mr. Rennebohm benefited from the majority of activity in his account undercut the State's basic argument; eliminating any claimed distinction between Mr. Dean's supposed knowledge and Mr. Rennebohm's feigned ignorance.

On February 7, 2006, one week after he completed his testimony at trial, Mr. Rekdal stated during his deposition that he had testified at the trial that money had left Frontier Ford and this was done without the authorization of Mr. Rennebohm. CP 6564 (Deposition p 245). Mr. Rekdal then stated that despite his recent trial testimony, while he was certain money had left the corporation he could no longer say it was done without Mr. Rennebohm's authorization. CP 6564-65 (Deposition pp 245-48). When asked if he had shared his doubts with the prosecutor, Mr. Rekdal responded "he hasn't asked." CP 6564 (Deposition p 246).

ii. Withheld evidence impeaching Mr.

Rennebohm. The withheld information undercut Mr. Rennebohm's effort to portray himself as a hapless victim preyed upon by those he had trusted. Mr. Rennebohm testified he had dropped out of high school and began in the car industry as a lot boy, moving cars on a sales lot. 1/18/06 RP 121-22. Despite the fact that he translated those humble beginnings into ownership of at least three

separate dealerships, one of which was generating as much as \$9,500,000 in monthly sales, 1/18/06 RP 149, Mr. Rennebohm testified he is in all respects financially illiterate, completely unable to read so basic a document as a corporate financial statement. 1/18/06 RP 162; 1/19/06 RP 155. Darla Rennebohm even claimed, notwithstanding her husband's obvious success, he couldn't even read a profit and loss statement. 1/17/06 RP 158.

Mr. Rekdal's testimony of the relative complexity of Mr. Rennebohm's scheme would have undercut his self-portrayal and bolstered evidence of his knowledge of Ms. Mullen's transactions. The information would have recast Mr. Rennebohm as a calculating individual willing to misrepresent himself where there were direct benefits to doing so, such as overstating Mr. Rekdal's role in the day-to-day business of Frontier Ford so as to improve his position in his professional negligence lawsuit against Mr. Rekdal.

Compare e.g., 1/18/06 RP 217 (Rennebohm testifying he hired Clothier and Head to "be my eyes and ears") and 1/24/06 RP 39 (Rekdal testifying Clothier and Head were limited to preparing tax returns for Frontier Ford and Rennebohm and occasional special projects).

When asked during his deposition if there was a connection between Mr. Rennebohm's failure to report income and the allegations against Mr. Dean and Ms. Mullen, Mr. Rekdal invoked the attorney client privilege. CP 6517 (Deposition p.169). A jury hearing of that invocation could have properly speculated that Mr. Rennebohm's fraud was indeed related to the allegations against the defendant; that it was as described by Ms. Mullen in her trial testimony; and that the activity was authorized.

At trial, the jury heard Mr. Rennebohm previously acknowledged that during his divorce from his former wife, he signed a false note giving one of his shares in Bellevue Cadillac to his then partner Ragnar Pettersson, in an effort to reduce Mr. Rennebohm's ownership interest and protect the dealership from his wife in their property settlement. 1/19/06 RP 110-16. In his testimony, however, Mr. Rennebohm would not admit he signed the false note or even that there was a false note but only that he testified to that version of events in a lawsuit between himself and Mr. Pettersson. 1/19/06 RP 107.

In his deposition the day after he completed his trial testimony, Mr. Rekdal shared that Mr. Rennebohm knew the note he had signed in favor of Ragnar Pettersson was invalid. CP 6523

(Deposition p193). Mr. Rekdal stated had never shared that knowledge prior to the deposition. Id. Although he was subpoenaed to testify at trial in the case between Mr. Rennebohm and Mr. Peterson, Mr. Rekdal did not do so invoking some unidentified privilege. CP 6525 (Deposition pp198-99).

Because his lead investigator was withholding such information, the deputy prosecutor at trial moved to preclude questioning of Mr. Rekdal regarding the false note asserting "I don't think [Mr. Rekdal] has any personal knowledge of the note we are talking about." 1/26/06 RP 75. The court agreed there was no relevance to such questioning. Of course, as his deposition made clear, Mr. Rekdal did have knowledge of the fake note and did have knowledge that Mr. Rennebohm knew it was fraudulent, he had simply suppressed that information.

Mr. Rennebohm testified during trial that in 2001 he made a personal loan to Frontier Ford because it was experiencing cash flow problems. 1/18/06 RP 211. Mr. Rennebohm stated he thought it was odd that there was drain on cash despite the regular profits the dealership was then generating, plainly implying it was a product of Ms. Mullen and Mr. Dean's alleged improprieties. 1/18/06 RP 212. Though he did not share as much at trial, Mr.

Rekdal stated in a declaration in the civil suit that the cash flow problems in 2001 were the result of Mr. Rennebohm taking money out of the corporation. CP 5686-90.

iii. Withheld evidence foreclosing, contradicting and/or impeaching Mr. Rekdal's testimony. The information withheld by Mr. Rekdal undercut his own testimony that he ended his representation of Frontier Ford solely because Mr. Rennebohm's constant involvement in litigation was a drag on his work for other clients. 1/27/06 RP 57. While this was apparently part of the decision, the principal basis was his discovery of Mr. Rennebohm's potential criminal acts. CP 6575 (Deposition p9 284-86). Armed with the withheld information, the jury may well have concluded Mr. Rekdal was seeking to distance himself from any potential professional or criminal sanctions resulting from his preparation of Mr. Rennebohm's federal tax return during the period in which Rennebohm was not reporting substantial income.

Finally, the mere fact that Mr. Rekdal chose to withhold from his client the existence of an actual conflict of interest with a former client who happened to be the alleged victim is a material fact which the jury should be permitted to consider in conjunction with the State's offer of Mr. Rekdal's credentials as a certified public

accountant. In closing argument the prosecutor posed the question to the jury "What evidence do you have to show that Clothier and Head or Rick Rekdal are involved in an accounting scandal?" 2/6/06 RP 113. In fact, such evidence existed but had been withheld from the defense and the jury.

At the end of the day, had Mr. Rekdal disclosed even the fact that he was withholding information from the prosecutor, it is hard to imagine any prosecutor relying on him not only as an expert witness but as the keystone of the State's case.

b. The State withheld material information. The withheld evidence detailed above was material. The evidence undercut the State's basic premise to the jury that a theft occurred because Mr. Rekdal took Mr. Rennebohm's word that mispostings were not authorized. Nearly identical postings were made in the accounts of Mr. Rennebohm and Mr. Dean. The decision to treat Mr. Dean and Mr. Rennebohm differently stemmed from one fact alone; Mr. Rennebohm's assertion to his longtime accountant that he was unaware of the activity in his account. 8/27/04 RP 84; 1/25/06 RP 156. The withheld information no longer permitted such a distinction and strongly supported Ms. Mullen's testimony that Mr. Rennebohm was aware of an accomplice in her activities. The

evidence undercut Mr. Rekdal's ability to testify as an expert and called into question the impartiality of the State's investigation.

The State responds, "[i]nformation was not suppressed because Mr. Rekdal was unaware that the evidence had any potentially exculpatory value until after trial." Response at 23. Implicit in this claim are two points. First, the State does not dispute the evidence was material, had potentially "exculpatory value," merely that Mr. Rekdal was ignorant of that fact. Second, the State concedes that the information was not revealed to Mr. Dean. Thus, the State maintains due process is not offended by the failure to disclose material evidence held by the State's investigator so long as the investigator is unaware of the evidence's materiality. The State's contention would limit its obligation under Brady to the subjective assessment of the evidence's value made by which ever third person to which the State entrusts the evidence.

Such a rule:

boils down to a plea to substitute the police [or other investigating agency] for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L. Ed. 2d

490 (1995).

Kyles concluded those acting on the government's behalf are subject to the requirements of Brady, it did allow them to be held to a different standard. Simply put if the prosecutor would have been required to disclose the evidence had he been in possession of it, the same is true of Mr. Rekdal. A Brady violations arises regardless of whether the withholding of evidence is intentional or inadvertent. Agurs, 427 U.S. at 110. Thus, Mr. Rekdal's subjective view of the evidence is irrelevant.

In any event, the State's contention is not supported by the evidence. The State contends Mr. Rekdal withheld the information because he did not appreciate its significance. The State contends Mr. Rekdal did not arrive at the opinion that Mr. Rennebohm had engaged in wrong doing until long after the trial was completed. Response at 9, 14. It is precisely because he understood completely the impact of that info that he withheld it. Mr. Rekdal offered two basic explanations for why he did not share this information either with the deputy prosecutor or the defense. First, "because the prosecutor" never asked." CP 6564 (Deposition p 246). Second, because a conflict of interest existed; i.e. he his ethical obligation to his former client, Mr. Rennebohm, prevented his disclosure of the damning information to his present client, the

Skagit County Prosecutor's office. CP 1266. Mr. Rekdal fully understood the nature of the evidence, and it was because of that that he withheld it.

The State's contention is contradicted by the fact that Mr. Rekdal ended his relationship with Mr. Rennebohm prior to trial because he believed Mr. Rennebohm was engaged in potential criminal behavior. Again, it was because he fully understood he knew the extent and value of the information that Mr. Rekdal withheld it.

The State withheld material evidence from Mr. Dean.

c. Mr. Dean could not have discovered the withheld information on his own nor does *Brady* require he do so. The State contends no Brady violation occurred here because it contends Mr. Dean could have discovered the withheld information on his own. Response Brief at 18-19. In doing so the State rests its argument on this point entirely upon comparisons it draws to In re the Personal Restrain of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998). Yet the State fails to mention Benn was overturned on habeas review. See Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002), cert. denied, 537 U.S. 942 (2002) (holding Washington Supreme Court's holding was a clearly erroneous and an unreasonable application of

Brady). The Ninth Circuit did not reach the question of whether a defendant has an obligation to seek out information which the State is suppressing, because the court found the Brady violation so egregious. Id. at 1061. However, in concluding the Washington Supreme Court's holding was an unreasonable application of Brady the court questioned the validity of imposing such a requirement on defendants in light of the requirement of Kyles. Id. at 1061-62.

In any event, there is no basis upon which to conclude Mr. Dean could have discovered the withheld information. Mr. Rekdal did not disclose the information because of his professional obligation to his former client prevented it. CP 1266. That obligation existed regardless of whether the prosecutor or defense counsel asked Mr. Rekdal to divulge what he knew. In light of his willingness to withhold the information from a client who was paying him nearly a quarter of a million dollars precisely to investigate the books of Frontier Ford, there can be no reason to expect Mr. Rekdal would have ever disclosed that information to the defendants no matter how hard they tried to find it. But for a mistake by an employee at the King County Superior Court Clerk's Office the evidence would have never come to light.

The State's cannot deflect the blame for its complete failure to meet its obligation under Brady

d. Reversal is required. The trial court's written ruling states

[the] jury carefully followed all aspects of the trial, listened to Messrs Rennebohm and Rekdal tell their side of the story, listened to Ms. Mullen trash the main witnesses for the State. The jury could easily have concluded, consistent with the position of the defense that Rennebohm and Rekdal conspired to cheat the government, former partners, and a whole number of others The Court allowed broad impeachment. . . . Regardless the jury chose not to find for the defense.

The State's own investigator knew Ms. Mullen was right; Mr. Rennebohm was cheating others and committing tax fraud. The jury never heard that from the State's witnesses. As easy as it would have been for the jury to believe the defense, it would have been substantially easier when the State confirmed the correctness of that testimony. The withheld evidence was material and reversal is required.

2. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE FROM WHICH TO CONVICT MR. DEAN OF EITHER COUNT

At trial, the State presented day after day of testimony detailing innumerable transactions by Ms. Mullen conducted with Frontier Ford funds. The State was able to meticulously trace

specific checks to specific items purchased by Ms. Mullen. The State was able to produce mountains of receipts, credit card bills and canceled check detailing these transactions. The State was even able to provide photographs of her with the some of the items.

Unlike the hundreds of thousands of dollars of purchases traced directly to Ms. Mullen, by receipts, checks, and even pictures, the State did not offer a single transaction traceable to Mr. Dean. Mr. Dean did not write a single check or make a single inappropriate transfer or posting in Frontier Ford's book. The State could not specifically show Mr. Dean to a single dollar from Frontier Ford.

Instead, what the State proved was Mr. Dean was the general manager, responsible for the day-to-day operations at Frontier Ford, and that he had at one time had a romantic relationship with the comptroller who admitted making erroneous bookkeeping entries. The State proved that many of these entries were made in Mr. Dean's account, and that checks were drawn off those accounts. But the State did not prove that Mr. Dean ever received money or anything of value in excess of what he was owed by the dealership. Indeed, the State's proof established

identical activity in Mr. Rennebohm's account and yet he was never charged him with theft from the corporation.

Again, on appeal the State details Ms. Mullen's transactions and imputes Mr. Dean's complicity from former romantic relationship with Ms. Mullen and his purported knowledge of her activities knowledge gained as the general manager. Response at 32-36. But the State still cannot detail a single inappropriate transaction which resulted in Mr. Dean wrongly receiving anything of value or aiding Ms. Mullen in receiving anything of value.

Because the State failed to prove Mr. Dean committed either a theft or a conspiracy to commit theft, the Court must reverse Mr. Dean's convictions and dismiss the charges.

3. THE TRIAL COURT DEPRIVED MR. DEAN OF EQUAL PROTECTION IN IMPOSING A DISPROPORTIONATELY HARSHER SENTENCE ON HIM AS COMPARED TO HIS MORE CULPABLE CO-DEFENDANT

On appeal, Mr. Dean has contended that imposition of a sentence on him that is two times more onerous than that imposed on his more culpable codefendant.

The State correctly observes Ms. Mullen had an additional conviction and that Mr. Dean and Ms. Mullen were not "similarly situated by virtue of nearly identical participation." Response at 42.

But completely lost on the State is that both these factors weigh substantially in favor of a harsher sentence for Ms. Mullen, and do not provide a defense for Mr. Dean's disproportionately harsher sentence. The State nonetheless posits Mr. Dean's position as general manager supports the disproportionately harsher sentence. Response at 42 But this is not a meaningful distinction for a variety of reasons.

First, it contradicts the State's own admissions at sentencing that Ms. Mullen was more culpable. 12/11/06 RP 13. Second, it contradicts the trial court's own finding that Ms. Mullen "benefited significantly more than" Mr. Dean and "it is appropriate to distinguish between the two" for sentencing purposes. 12/11/06 RP 42. Third, Ms. Mullen's position as comptroller plainly but her in position of authority, at least of financial matters, equal to or greater than Mr. Dean. Fourth, the State's theory is wholly unsupported by the jury's verdicts.

The State fanciful view of the record is just that, and does not support the disproportionate sentence imposed. The trial court plainly understood Ms. Mullen's greater culpability. The also record also indicates the court intended to impose a harsher sentence on Ms. Mullen. Nonetheless, Mr. Dean received the harsher sentence

The State asks “how does one weigh by numbers the relative culpability” of codefendants? Response at 44. Whether or not the State believes its is possible to quantify the relative culpability of codefendants, the Legislature in enacting the SRA certainly believed it could be done stating among the purposes of the Act is the imposition of punishment “proportionate to the seriousness of the offense” and “commensurate with the punishment imposed on others committing similar offenses.” RCW 9.94A.010(1)(3).

Despite his substantially lower culpability, Mr. Dean’s sentence is more than twice as onerous than Ms. Mullen’s sentence. To the extent there are meaningful distinctions between Mr. Dean and Ms. Mullen, they support a harsher sentence for Ms. Mullen and do not justify the disproportionately harsher sentence imposed on Mr. Dean. This Court should remand Mr. Dean’s case for resentencing.

B. CONCLUSION

For the reasons stated, this Court must reverse Mr. Dean's conviction and sentence.

Respectfully submitted after corrections to citation, this 23rd day of February, 2009.



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Appellant.)

NO. 59389-7-I

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF FEBRUARY, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT (WITH CORRECTED CITATION TO CLERK'S PAPERS)** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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