

NO. 90839-7

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JULIO DAVILA,

Petitioner.

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

PETITIONER'S SECOND SUPPLEMENTAL BRIEF
ADDRESSING NEW ISSUES RAISED IN STATE'S BRIEF

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A. SUPPLEMENTAL ARGUMENT¹

1. There is no deference due to the trial court's ruling denying Davila a new trial for the *Brady* violation because the court applied the wrong legal standard, misapprehended the facts, and did not address the issue on review.

*a. This Court reviews the materiality of a Brady violation de novo***Error! Bookmark not defined.**

The central issue in this appeal is whether the prosecution's failure to disclose evidence of Denise Olson's long-standing poor performance in testing DNA was material under *Brady*.² See Petition for Review at 1-2.

As the Ninth Circuit recently explained, "We review *de novo* a district court's denial of a new trial motion based on a *Brady* claim, as well as the issue of materiality under *Brady*." *United States v. Mazzarella*, ___ F.3d ___, No. 12-10171, Slip op. at 10, 2015 WL 1769677, *3 (9th Cir. 2015). The issue for which this Court granted review is similarly reviewed *de novo*.

¹ By order dated April 7, 2015, this Court granted Mr. Davila's motion to offer supplemental argument addressing issues raised for the first time in the State's brief filed after review was granted.

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

b. This Court does not defer to the trial court's findings when they are based on the wrong legal standard.

When a court applies the wrong legal standard, it has abused its discretion. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The court's findings of fact are not deferred to on appeal if it used the "incorrect framework" to reach its decision. *See State v. W.R., Jr.*, 181 Wn.2d 757, 770, 336 P.3d 1134 (2014).

Here, the trial court applied the wrong legal standard to assess the *Brady* claim. First, the court found the prosecutor did not know about the suppressed evidence and had "no obligation" to find out about it. 4RP 596, 613. Yet the prosecution's "inescapable" obligation to turn over favorable evidence exists even if the information was known only to law enforcement and "irrespective of the good or bad faith of the prosecution." *Brady*, 373 U.S. at 87; *Kyles v. Whitley*, 514 U.S. 419, 437-438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The trial court improperly viewed the question as whether there was misconduct, not whether the suppressed evidence was material under *Brady*.

Second, whether suppressed evidence is material under *Brady* requires the court to assess how the evidence may have affected the trial if it had been timely disclosed, including evidence that "opens up new

avenues for impeachment.” *Gonzalez v. Wong*, 667 F.3d 965, 984 (9th Cir. 2011); *see Leka v. Portuondo*, 257 F.3d 89, 102 (2d Cir. 2001) (court must weigh “the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought,” to determine prejudice from belatedly disclosed *Brady* information).

But the trial court only considered and ruled upon whether Denise Olson contaminated the DNA sample from the baseball bat. 4RP 597. When Davila filed his motion for a new trial due to the *Brady* violation, the court said all it was “willing to do” was to “give [Davila] the opportunity to basically demonstrate that you have sufficient evidence which you could say to a jury, we think this was contaminated or these procedures were not followed and it was likely this was contaminated.” *Id.* In its final ruling, the court again explained it was only deciding whether it is “likely that contamination occurred” in the testing of the baseball bat. 4RP 622; *see also* 4RP 598-99 (court explaining, “[c]ontamination means the material was compromised . . . That is what the defense has to show for the court to make any changes [in the verdict]. . . . That is the issue.”).

The prosecution asks this Court to defer to the trial court’s “findings of fact,” but it does not identify the findings to which it refers.

State Supp. Brief at 13. The trial court did not enter written findings. Its ruling was factually incorrect because it believed Olson's supervisor Lorraine Heath "re-did all of the testing" but Heath testified she only retested two items: swab D from the baseball bat, not swabs A, B, or C, and one swab from victim John Allen's car, not the other swabs tested by Olson. 3RP 447-57; 4RP 596. The court did not engage in a "painstaking review" of the evidence at trial and make findings "amply supported by the record," as in *United States v. Thornton*, 1 F.3d 149, 158-59 (3rd Cir. 1993), a case cited by the State. State Supp. Brief at 12 n.7. And it only examined whether there was evidence of actual contamination by Olson, not whether Davila could have used this suppressed evidence to challenge the State's case against him.

The federal cases cited by the prosecution refer to the general proposition that a trial court's findings of fact are "ordinarily" deferred when the question on review is "inherently fact-bound." *United States v. Sanchez*, 917 F.3d 607, 618 (1st Cir. 1990). But when the judge does not enter findings of fact, there are no findings to defer to. A judge's findings are not deferred to when they are not supported by the evidence. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). Likewise, when the judge enters findings based on a

misapprehension or erroneous application of the law, the findings are not entitled to deference. *Id.*

Here, the judge's ruling was based on the possibility Olson contaminated the DNA, not how a lawyer could have used the report detailing Olson's ineptitude in preparing for trial or how the jury may have been effected had it learned of the Washington State Patrol Crime Lab's difficulties insuring the proficiency of its scientists.

Deference to a trial court's assessment of how belatedly discovered evidence may have affected the trial is only proper when the trial court uses the correct legal framework and closely reviews the evidence to make the necessary findings. No deference is appropriate here because the court narrowed the post-trial motion to actual DNA contamination, misapprehended the facts, and did not decide whether the suppressed evidence affected Davila's presentation of his defense.

c. The trial court conducted a truncated review after it narrowed the legal issue presented by the Brady violation.

The prosecution asserts that the court gave Davila extensive time to review the State Patrol records in claiming deference is due to the trial court's ruling. But the State misstates Davila's access to evidence as well as the court's limited post-trial review.

After Davila located an expert to review the records, there was “quite a delay” in obtaining the records and forwarding them to his expert. 4RP 604-05. On October 19, 2012, defense counsel asked for more time due to the complexity of the issue and his expert’s limited opportunity to review the information. 4RP 606-07. The court acknowledged that Davila was having difficulty getting answers from his expert. 4RP 609. But the court gave counsel only six additional days to prove Olson had Davila’s DNA in the lab when testing the evidence in 2007. 4RP 613. Six days later, the court entered its ruling denying the motion for a new trial. 4RP 623-24.

Davila argued that had he known about Olson’s inadequacies as a DNA tester, he would have litigated the possibility of cross-contamination prior to trial, including moving to suppress the DNA evidence. 4RP 607-08. The State claims contamination was impossible because the evidence samples were tested months apart. State Supp. Brief at 6-7. But the actual testing was performed within two days in August 2007 and the items were held together in the lab. 4RP 618. The State incorrectly relies on the dates Olson wrote her reports, not when she performed her tests. State Supp. Brief at 6-7.

Based on the narrow review conducted by the court, its misunderstanding of Heath's role in retesting only some evidence and its failure to apply the legal test required by *Brady*, the trial court's ruling denying a new trial does not merit deference on appeal.

2. The prosecution erroneously asserts for the first time in its supplemental brief that Olson was an expert witness for the defense subject to a different type of vetting by the defense.

a. Olson was not proffered as an expert witness for the defense.

The State's supplemental brief repeatedly mischaracterizes Olson as an "expert witness" listed by the defense and asserts that Davila had an obligation to independently assess the credentials of its own expert witness. State Supp. Brief at 19, 21, 22.

The defense never put forward Olson as its own expert witness. There is no "witness list" in the record that the State cites. The record only shows that defense counsel thought he might need to call Olson as a fact witness and subpoenaed her for that purpose shortly before trial. 4RP 576-77; 602. Defense counsel spoke to Olson over the telephone one time at the start of trial because he thought there might be factual issues regarding "chain of custody issues" and DNA tested from Allen's truck. 4RP 575-78; CP 283. He did not know if he could obtain the

necessary information from the State's witness Heath because Heath was not present when Olson did her tests and his questions were factual in nature. 4RP 578.

The prosecutor discouraged defense counsel from calling Olson, offering that Heath could answer the factual questions he had. 2RP 399. Davila did not call Olson to testify at trial and used Heath to elicit some information about Olson's reports. 3RP 453-55, 462-63.

It is undisputed that defense counsel had no idea Olson had been terminated due to her poor performance and no one from the government told him. 4RP 574-77. Even the prosecutor, who also spoke with Olson prior to trial, claimed he did not know the reason Olson left the WSP Crime Lab. 4RP 584. The trial court made no finding that Davila should have known of Olson's failings as a forensic scientist. 4RP 601, 622-24.

Retrospectively, defense counsel realized it was suspicious that the State had not put Olson on its own witness list. 4RP 598. Given the likelihood that members of the prosecutor's office knew that Olson had been removed from duty due to her long-term performance failings, it is hard to believe that the prosecutor did not know Olson was a tainted witness. But if the prosecutor's assertion that he did not know is taken

as true, it is unreasonable to blame defense counsel for not being aware of Olson's history of incompetence.

b. There is no basis to assert defense counsel was deficient in his preparation.

Had the defense called Olson as an expert for the purpose of relying on her specialized experience and knowledge, it would have needed to conduct "some minimal investigation into qualifications." *State v. Thomas*, 109 Wn.2d 222, 231, 743 P.2d 816 (1987). However, defense counsel appropriately vetted Olson for the narrow purpose he thought he might call her as a witness, and his failure to use her testimony demonstrates his limited contact with her. He interviewed the State's expert Heath in detail, discussing with her the WSP Crime Lab's procedures and protocols. 4RP 574. She never mentioned to him that there were issues with Olson's performance or that Olson had left the WSP Crime Lab under a cloud of misconduct. 4RP 574-75.

Despite the State's efforts to shift the blame onto Davila for failing to learn about information about the WSP Crime Lab of which the prosecution says it did not know of, there is no factual support for the State's assertion that Olson was the defense's expert witness. This

new argument raised in the State's supplemental brief for the first time should be disregarded.

B. CONCLUSION

Julio Davila respectfully requests this Court reverse his conviction due to the State's failure to disclose material evidence favorable to the defense.

DATED this 21st day of April 2015.

Respectfully submitted,

s/ Nancy P. Collins

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 RESPONDENT,)
)
 v.) NO. 90839-7
)
 JULIO DAVILA,)
)
 PETITIONER.)

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF APRIL, 2015, I CAUSED THE ORIGINAL **PETITIONER'S SECOND SUPPLEMENTAL BRIEF** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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Second Supplemental Brief of Petitioner

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