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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed September 9, 1977
v.	)	
JEFFREY JOE DICUS,	)	200
Appellant.	)	<u>59684</u>

Appeal from Woodbury County District Court - George F. Davis, Judge.

Appeal from manslaughter conviction alleging lack of due process arising from prosecution's failure to supply all photographs of deceased taken at autopsy, pursuant to defendant's pretrial request and court order. Affirmed.

Richard C. Turner, Attorney General of Iowa, and Raymond W. Sullins, Assistant Attorney General, and Zigmund Chwirka, Woodbury County Attorney, for appellee.

Donald W. Sylvester, of Sioux City, for appellant.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant, Jeffrey Joe Dicus, appeals his conviction by jury of the crime of manslaughter. He was charged in the death of Sunshine Kissinger. On appeal, defendant asserts he was denied a fair and impartial trial for the reason that the State did not fully comply with a pretrial order wherein the State was required to provide the defendant with all photographs that were taken at the autopsy. The main issue in the case was the exact cause of death. Accordingly, defendant claims the trial court erred in overruling his motion for new trial based upon the suppressed photographs. We affirm.

Defendant filed a motion to produce which in part contained a request for all photographs which were used by a witness, Dr. Thomas Coriden, in the performance of his autopsy. The trial court sustained the motion with regard to the photographs and the State filed a compliance stating that the photographs were being retained by the Sioux City Police Department and were available for inspection. Defense counsel was provided with approximately 20 to 25 photographs when he visited the police department. It was not until Officer David Hansen, the photographer, testified that defendant found out there were actually approximately 50 photographs taken at the autopsy. Defense counsel immediately objected and, following his inspection of the missing photographs, it was agreed by the parties in an "in camera" discussion that only those photographs that had been previously shown to defense counsel would be offered and admitted into evidence. Defendant's contention on appeal is that it is possible that the photographs not admitted would have helped his position and therefore he is entitled to a new trial.

A defendant is entitled to know the physical characteristics of the real evidence the State expects to use against him. *State v. Eads*, 166 N.W.2d 766 (Iowa 1969). See also, *State v. Hall*, 235 N.W.2d 702, 713-15 (Iowa 1975). And it is reversible error for the State to suppress exculpatory information. *State v. Peterson*, 219 N.W.2d 665, 674 (Iowa 1974). Additionally, the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment; irrespective of the good or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed.2d

215, 219 (1963). As to what constitutes materiality under **Brady**, see *United States v. Agurs*, ___ U.S. ___, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

The focal points are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. *Moore v. Illinois*, 408 U.S. 786, 794-95, 92 S.Ct. 2562, 33 L.Ed.2d 706, 713 (1972); *State v. Hummell*, 228 N.W.2d 77, 81 (Iowa 1975). The main issue in the trial was the cause of death of Sunshine Kissinger. Therefore, the additional photographs, although possibly cumulative, were nevertheless material to that issue. There is no evidence why the photographs were suppressed subsequent to defendant's request and the trial court's order. However under **Brady**, the motive for suppression is immaterial. What is in doubt is the favorable character of the evidence. The mere possibility that an item of undisclosed information might have helped the defense, or might have effected the outcome of the trial, does not establish materiality in the constitutional sense. *United States v. Agurs*, 49 L.Ed.2d at 353. However, we need not reach that issue.

The general rule is that defendant waives his right to insist on production of evidence by failing to raise the State's failure to produce it until the time of trial. **Hall**, *supra* at 714; *State v. Cunha*, 193 N.W.2d 106, 111 (Iowa 1972). The reason is that the trial court has the duty and the ability to compel the State to obey its order; but it cannot do so unless the alleged failure to obey is brought to its attention in timely fashion. **Hall**, *supra*. In the instant case, defense counsel immediately objected as soon as he found out that he had not received access to all of the autopsy photographs as required by the pretrial order. The objection was timely and the court then had the ability to compel the State to comply with its order.

At that point the court could have granted either a mistrial or a continuance which would have allowed defendant's expert sufficient time to examine the suppressed photographs. See *United States v. Clark*, 538 F.2d 1236, 1237 (6th Cir. 1976); *United States v. Cole*, 449 F.2d 194, 198 (8th Cir. 1971). Instead, the parties agreed in an "in camera" discussion that only those photographs which had been previously shown to defense counsel would be offered and admitted into evidence.

By agreeing to continue the trial, defendant has waived any error created by the initial suppression. See **State v. Cunha**, supra.

The defendant having adopted one trial strategy and lost, leaves nothing for this court to consider on appeal. See **State v. Myers**, 257 Iowa 857, 860, 135 N.W.2d 73 (1965). Cf. **State v. Campbell**, 217 N.W.2d 251, 253 (Iowa 1974). We find no denial of due process and defendant did in fact receive a fair and impartial trial.

The trial court did not abuse its discretion in overruling defendant's request for a new trial. **AFFIRMED.**