



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA	)	
Plaintiff-Appellee,	)	Filed October 7, 1977
vs.	)	
TERRANCE DUANE HOLLOWELL,	)	<u>225</u>
Defendant-Appellant.	)	59030

Appeal from Polk District Court - J. P. Denato, Judge

Defendant appeals trial court's denial of his motion for new trial based on the prosecution's failure to correct false deposition testimony of the key state's witness. - Reversed.

Richard C. Turner, Attorney General of Iowa, Mark S. Beckman, Assistant Attorney General, and Dan Johnston, Polk County Attorney, for Plaintiff-Appellee.

John C. Wellman and James P. Piazza, of Des Moines, for Defendant-Appellant.

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

OXBERGER, J.

The fighting issue in this case is whether our standards of due process were met when the prosecutor failed to correct false deposition testimony of its sole witness, Kenneth David Dodge. The prosecution and Dodge knew that he was awaiting sentencing after jury conviction on two felony charges. They knew also that Dodge's sentencing on these charges was postponed for six months, during which time he testified against the defendant, Terrance Duane Hollowell. The court, the jury, and the defense did not. We reverse and grant a new trial.

Dodge denied in his deposition testimony that he had been convicted of any felony charges other than one five year old felony charge. Dodge as the alleged robbery victim identified his assailant as Hollowell, a stranger to him. Dodge was the sole victim and the sole witness to the alleged robbery. His eyewitness account of Hollowell's alleged criminal activity was pivotal to the State's case against Hollowell.

Identification testimony is notoriously unreliable and inherently susceptible to a human frailty such as self-interest. The self-interest of a witness in the outcome of a criminal case is a fact that may be shown to impeach that witness. McCormick on Evidence, § 40 at 80. As the court in *Johnson v. Brewer*, 521 F.2d 556, 561 (8th Cir. 1975) observed, impeachment for bias necessarily deals with the uncovering of any powerful motive to shade or color a witness's testimony, either conscious or unconscious.

To argue that the deposition testimony was not used at trial only more graphically isolates the issue before this court. Nothing revealed in Dodge's deposition indicated the potential avenue of attack upon Dodge for bias. Under *State v. Martin*, 217 N.W.2d 536 (Iowa 1974) Dodge's single felony conviction from five years hence was not admissible impeachment. It was unrelated to a conviction on a felony charge involving dishonesty or false statement. However, as a direct result of Dodge's deposition testimony, neither the jury nor the defendant knew of Dodge's potential self-interest in helping the State convict Hollowell. This potential bias was both relevant and admissible.

The dissent believes there is a difference in the duty of the prosecutor to

correct false deposition testimony as opposed to trial testimony. We cannot agree. The discovery process is an integral part of the trial process. It serves to begin the process which culminates at trial in conviction or acquittal. But always the purpose of the trial process remains at every juncture "to ascertain with the requisite degree of certainty the truth of the matter charged in the indictment." *State v. Thomas*, 158 Iowa 687, 138 N.W. 864 (1912). Dodge's falsehood uttered in his discovery deposition directly inhibited and deflected the search for truth in this case. We cannot divorce discovery from trial and allow a greater leniency to the prosecution at the preliminary investigative stage. Such an indulgence would tip the process unduly against a defendant.

Alternatively, the State argues there was no lie because Dodge, although convicted by a jury, had not yet been sentenced. The supreme court in *State v. Hanna*, 179 N.W.2d 503, 507 (Iowa 1970) said: "In its general and popular sense and frequently in its ordinary legal sense the word 'conviction' is used in the sense of establishment of guilt prior to and independently of judgment and sentence by a verdict of guilty or a plea of guilty (citations)." We find the State's attempt to disregard its failure to disclose the falsity of Dodge's deposition testimony on the ground Dodge had not been convicted of the felonies since he had not been sentenced to be wholly devoid of substance.

At the heart of this case is "government conduct which, if true, is both inexplicable and violative of due process. The essential point is that the jury must be given an opportunity to assess the ... incident in whatever manner it wishes. . . ." *Johnson*, 521 F.2d at 562, 563.

Hollowell's remedy should have been a new trial. Under *State v. King*, 256 N.W.2d 1, 15 (Iowa 1977), "... a convicted party is entitled to a new trial if he proves the State intentionally or inadvertently failed to correct materially false testimony relevant to the credibility of a key State witness."

Further, the United States Supreme Court in *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) ruled that a conviction obtained by use of false testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood the false testimony could have affected the judgment of the

jury.

We cannot say that a person awaiting sentence would not color his testimony to gain favor with the prosecution. Perhaps a full airing of this issue will show that Dodge's testimony was not influenced by the pending sentence. However, we believe without such an airing a cloud hangs over this conviction.

Reversed and remanded for new trial.

Snell, J. concurs; Donielson, J. concurs specially; Allbee, C.J. and Carter, J. dissent.

DONIELSON, J. (specially concurring)

Although I concur in the result reached by the majority, I do so with some reluctance because of my regard for the logic and persuasiveness of the dissenting opinion. However, my decision to reverse is premised largely upon *State v. King*, 256 N.W.2d 1, 15-16 (Iowa 1977), where the court states:

"Also, a convicted party is entitled to a new trial if he proves the State intentionally or inadvertently failed to correct materially false testimony relevant to credibility of a key State witness, including evidence concerning 'any understanding or agreement as to a future prosecution' between a witness and the government." (citations omitted) (emphasis added).

In the instant case, the following colloquy occurred:

"Q. (Mr. Piazza) Have you ever been convicted of a felony?
A. (Mr. Dodge) Yes, I have.
Q. (Mr. Piazza) What was it? A. (Mr. Dodge) It was for possession of grass, five years ago.
Q. (Mr. Piazza) Anything else? A. (Mr. Dodge) That is it."

However, this key witness had in fact been convicted of two felonies just two months before but, as a result of at least two continuances, had not yet been sentenced. Upon the state of this record, I am persuaded that this witness lied or, at the very least, seriously misled defense counsel and the court.

Since, in my view, this testimony was materially false, the state had an affirmative duty to correct it immediately and without hesitation. Since it did not do so, *State v. King*, supra, requires reversal and a new trial.

The State argues that since judgment had not been officially entered at the time the witness testified, he had not yet been legally "convicted" and therefore the testimony was not actually false. *Hackett v. Freeman*, 103 Iowa 296, 299, 72 N.W. 528 (1897).

However, such a technical and strained interpretation of the term "conviction" does not seem either reasonable or justifiable. A common sense approach should be utilized so as to construe this term in accordance with the level of intelligence and comprehension of the average individual (as well as this witness). The interpretation urged by the state would not only be foreign to the average layman, but it would be obscure to many competent attorneys as well.

The Iowa court, in construing the term "conviction," stated in *State v. Hanna*, 179 N.W.2d 503, 507-508 (Iowa 1970):

"In the restricted or technical legal sense in which it is sometimes used, the word 'conviction' includes the status of being guilty of, and sentenced for, a criminal offense, whether that status is established after confession of guilt by a guilty plea or after determination by a jury verdict upon an assertion of innocence. Stated otherwise technically the word means the final consummation of the prosecution against the accused including the judgment or sentence rendered pursuant to an ascertainment of his guilt.

"In its general and popular sense and frequently in its ordinary legal sense, the word 'conviction' is used in the sense of establishment of guilt prior to and independently of judgment and sentence by a verdict of guilty or a plea of guilty. *State v. Superior Court*, 141 A.2d 468, 471-472, (Del.1958); *Bubar v. Dizdar*, 240 Minn. 26, 60 N.W.2d 77, 79-80; *Commonwealth v. Greer*, 215 Pa. Super. 66, 257 A.2d 317, 320-321. See also *State v. Delano*, 161 N.W.2d 66, 72-73, (Iowa 1968); 24 C.J.S. Criminal Law § 1556 (2); 9A Words and Phrases, pages 270-282."

Consequently, the general and more commonly understood interpretation of the term "conviction" leads to the conclusion that this witness should have stated that he had previously been convicted of a felony. Since he did not, the testimony given was materially false. However, even if, arguendo, the statement was not technically false, it was so seriously misleading as to warrant correction and clarification by the prosecutor, consistent with the language and spirit of King, supra. Again, the state's failure to do so requires reversal.

A thorough reading of King also convinces me that the state's failure to correct this testimony had a serious impact upon defendant's ability to impeach Dodge's statements. Since defense counsel was not aware of those two previous convictions and the fact that Dodge had not yet been sentenced, he was unable to explore the possibility of an agreement between Dodge and the state. Consequently, defendant was not able to discover and possibly introduce evidence of such an agreement. Although the language cited from King deals with assurances made with regard to "future prosecutions," its rationale and the cases cited in support thereof seem equally applicable here, where the witness had already been found guilty by a jury but had not yet been sentenced. See *State v. King*, supra, at 16.

A competent defense counsel would have desired to utilize the information about Dodge's criminal record to impeach his testimony by trying to establish that he was actually testifying for the state in exchange for some promise, assurance, or recommendation by the prosecutor regarding the two felony convictions. Since the state did not correct this testimony, defense counsel was not apprised of the two

felonies and therefore was unable to attempt to use that information to his client's advantage. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, 218-219 (1963); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217, 1221 (1959). In Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104, 108 (1972), the United States Supreme Court stated:

"... suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' ... When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. (citation omitted) ... A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury ...'" (citation omitted)

After a review of the record, I am convinced that under the criteria established in Giglio and King, defendant is entitled to a new trial.

CARTER, J. (dissenting)

I dissent. I believe the majority applies an improper legal standard to arrive at the result which it reaches. This is not a case involving the knowing use by the State of false or misleading testimony at trial. It is at most a case involving a failure of the State to disclose information which possibly had some impeachment value. I say "possibly" because on the present record there is no reason to assume it did.

The deposition testimony of Dodge, the State's identification witness, which forms the basis for defendant's sole assignment of error, was not used at the trial. Nor is there any merit to the suggestion that the deposition was given evidentiary consideration during pretrial motions before the trial court seeking to limit the scope of defendant's cross-examination of this witness. The most that the record discloses in this regard is that the trial court, being informed of the single conviction disclosed in the witness's deposition, ruled before trial that this was not admissible impeachment under *State v. Martin*, 217 N.W.2d 536 (Iowa 1974). Under *Martin* and the later decision of *State v. Brewer*, 247 N.W.2d 205, 213 (Iowa 1976), which applies the *Martin* rule to State's witnesses, this ruling was correct.

The record discloses no action by the trial court which prevented defendant from seeking or using other valid impeaching evidence as a result of anything stated or not stated in Dodge's deposition. The trial court did not foreclose such inquiry and indeed could not have done so without committing error. The case is thus to be distinguished from *Johnson v. Brewer*, 521 F.2d 556 (8th Cir. 1975).

On the issue of failure to disclose exculpatory evidence, the sanction imposed upon the State, if any, in the present case, should certainly rise no higher than in those instances where there has been a general request for exculpatory material. There was clearly a latent ambiguity in the deposition question propounded to Dodge as it pertained to the type of information which defendant now claims is exculpatory. Dodge may well have believed he had not yet been convicted on the two latest drug charges as there had been no judgment of conviction on these charges and the time for filing motions for new trial had not expired. The assistant county attorney present at the taking of the deposition may have considered the witness's answer to be correct for the same reasons and, with respect to the general category of information being sought, may have believed defendant's counsel was seeking information pertaining to felony

convictions to be used as impeachment under section 622.17, The Code. Quite apart from the implications of *State v. Martin*, supra, the jury verdicts were not convictions admissible under section 622.17, The Code, because of the absence of the record entry thereof. I cannot agree with the majority's assumption that the assistant county attorney should have anticipated that defense counsel might wish to use the fact of Dodge's impending sentencing on the two felony drug charges as evidence of a motive for Dodge to testify favorably to the State.

A strong argument can be made that there was no duty on the part of the State to disclose the status of the two controlled substance charges against Dodge. But, assuming *arguendo*, that there was some obligation to disclose this information, the uncertainty as to what was called for by the question militates against application of sanctions applied for failure of the State to respond to a specific request for information. See *United States v. Crow Dog*, 532 F.2d 1182, 1191 (8th Cir. 1976). Thus, the standard for determining whether the omission requires reversal of the conviction under *United States v. Agurs*, 427 U.S. 97 (1976) and *State v. Hall*, 249 N.W.2d 843, 847 (Iowa 1977) should be whether the omitted evidence created a reasonable doubt that did not otherwise exist.

Defendant's theory of materiality of this evidence is that it suggests the existence of a motive for Dodge to testify favorably to the State. It is claimed that this affects his credibility as a witness. It is undisputed that Dodge had identified defendant to the police as the perpetrator of the robbery some three months prior to being charged with the two controlled substance violations for which he was awaiting sentencing at the time of defendant's trial. This factor strongly detracts from the suggestion that these drug prosecutions and pending sentence materially affected the credibility of his identification testimony at defendant's trial. I cannot find that this information created a reasonable doubt that did not otherwise exist.

As stated in *Agurs*, supra, 427 U.S. at 107; "unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside." The omission, if any, in the present case has not been demonstrated to have deprived the defendant of a fair trial and his conviction should be affirmed.

ALLBEE, C.J., joins in this dissent.