IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

ROBERT ALLEN CORNELL, a/k/a ROBERT ALLAN CORNELL,

Applicant-Appellant,

vs

STATE OF IOWA,

Resister-Appellee.

Filed April 20, 1988

7-588
87-69

Appeal from the Iowa District Court for Clarke County (No. 3453) - Arthur E Gamble, Judge.

Appellant appeals from a judgment denying him postconviction relief.

REVERSED AND REMANDED.

James P Cleary, Des Moines, for applicant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General, and Gary Kimes, County Attorney, for resister-appellee.

Considered by Oxberger, C.J., and Donielson, Schlegel, Sackett and Habhab, JJ Hayden, J , takes no part.

SACKETT, J. 18

In this postconviction relief proceeding we address the issue whether evidence favorable to appellant and requested by appellant but suppressed by the State was material to the guilt of appellant. We hold the evidence is material to appellant's guilt and reverse the trial court.

In 1976 appellant was charged, tried to a jury, and convicted of first-degree murder following the death of Kenneth Crow. Several years after appellant's conviction the appellant learned the State had withheld certain exculpatory evidence. The evidence had been ordered to be disclosed pursuant to appellant's request. The testimony adduced at appellant's trial was that Crow and appellant, accompanied by appellant's fourteen-year-old half-brother Glen Albert Oliver, had driven to Texas. Appellant and Albert returned to Des Moines from Texas on August 30, 1976. Crow did not ride all the way back to Des Moines with them. After appellant's return to Des Moines, his half-brother Albert told authorities appellant had killed Crow. With Albert's help Crow's body was located. Crow had been shot once in the head. The time of Crow's death was determined to be three to seven days prior to September 3, 1976.

At trial the crucial and contradicted testimony came from Albert Oliver, Bryce Oliver and Eric Cross. They all testified as State witnesses. Albert testified on the morning of August 30, 1976, appellant stopped his Jeep on Interstate 35 south of Des Moines. Albert testified appellant and Crow walked into a wooded area to shoot a cow. Albert said appellant had had a large amount of beer and was armed with a .38 caliber revolver. Albert heard a shot. Appellant returned alone and said he had shot Crow. Bryce Oliver testified appellant returned to Des Moines on August 30, and told Bryce and Eric Cross that Crow would not return to Des Moines and that he had a broken neck. Eric Cross's

testimony corroborated Bryce Oliver's. We note but do not consider on this issue the fact that Cross's testimony was later recanted. The fact that Cross's testimony was recanted was part of the postconviction relief testimony relating to another issue which because of our holding we do not address.

Appellant testified in his own behalf. He denied he killed Crow. Appellant said he last saw Crow alive when he got out of the Jeep at the Mount Ayr exit of Interstate 35. Appellant suggested Bryce Oliver killed Crow. Appellant testified Bryce and Crow had a recent fight and Bryce pulled a razor knife on Crow during the fight. At trial Bryce admitted the fight but denied pulling the knife.

The exculpatory evidence included supplemental reports contained in a Bureau of Criminal Investigation file on Crow's murder. There were four items appellant contends were material. We determine two items to be material.

(1) A statement taken from Jody Seidenkranz on October 6, 1976, said she was at her mother's residence when appellant and Albert returned home. Appellant said Crow got out of the car at Mount Ayr and stole his gun. Jody said Albert agreed with appellant's statement.

(2) A September 29, 1976, statement wherein Bryce admitted taking a razor scraper from his pocket during a fight with Crow. The fight occurred about four days before Crow left for Texas.

Other evidence though withheld by the State and exculpatory was determined by the trial court to have been made known to appellant through other channels. We agree with the trial court on this issue.

We are dealing with the suppression of impeachment evidence. When the reliability of a given witness may be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls with the general rule of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (prosecution's suppression of evidence favorable to an accused upon request violates due process

where the evidence is material either to guilt or punishment). See United States v. Bagley, 473 U.S. 667, 677, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481, 490 (1985) (quoting Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed 2d 104, 108 (1972)). We must determine if appellant has proven the suppressed impeachment evidence was material to his guilt. Brogdon v. Blackburn, 790 F.2d 1164, 1167 (5th Cir. 1986). Because appellant alleges constitutional fair trial violations we review the record de novo under the totality of the circumstances. Conner v. State, 362 N.W.2d 449, 458 (Iowa 1985).

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682, 105 S.Ct. at 3384, 87 L.Ed.2d at 494 A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. We consider the totality of the circumstances, including the possible effects of nondisclosure on defense counsel's trial preparation Id. at 683, 105 S.Ct. at 3384, 87 L.Ed.2d at 494. The State is not required to make a complete and detailed accounting to the defense of all police investigatory work on a case. Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706, 713 (1972); see Bagley, 473 U.S. at 675, 105 S.Ct. at 3380, 87 L.Ed 2d at 489; see also United States v. Jackson, 579 F.2d 553, 560 (10th Cir.), cert denied, 439 U.S. 981 (1978). The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of trial, does not establish materiality in the constitutional sense.

We assess the possibility in light of the totality of the circumstances We are aware of the difficulty of reconstructing in a posttrial proceeding the course the trial would have taken had the evidence been available to the State Bagley, 473 U.S. at 683, 105 S.Ct. at 3384, 87 L.Ed.2d at 494.

The medical and physical evidence support both the State's theory appellant killed Crow on August 30, 1976, and appellant's theory he last saw Crow alive when he got out of the Jeep near Mount Ayr on August 30, 1976. The testimony of Albert and Bryce is crucial to appellant's conviction.

We first look at the testimony of Jody Seidenkranz that Albert acquiesced in appellant's testimony Crow got out at Mount Ayr. The most important issue to appellant's defense was the truthfulness of Albert Oliver. One of appellant's attorneys summarized the defense tactic in his postconviction testimony when he said "our whole purpose was to impeach the dickens out of Albert Oliver . . . its what the whole case was about, to try to impeach the only person who could claim that he didn't get out of the Jeep at Mt. Ayr." About the suppressed statement of Jody he said, "This was the first time we knew of a witness who was present when Albert acquiesced in the story of appellant . . . but Bob Cornell saying he [Albert] is a liar is not the same thing as calling an independent, neutral half-sister to say he is a liar."

The State contends the statement of Jody regarding Albert's acquiescence is of little relevance because (1) Albert explained his initial acquiescence in appellant's story (that the appellant had threatened and frightened him), and (2) the information was merely cumulative because Albert's testimony had already been impeached. Where evidence can contradict the testimony of a key State witness, or cast such serious doubt upon his credibility as to leave the jury with a reasonable doubt of a defendant's guilt, its suppression can vitiate a criminal conviction. See Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966); State v. Amarillo, 503 A.2d 146, 155 (Conn. 1986). Albert's testimony was critical to the State's case. Albert was young and easily influenced. There was considerable evidence impeaching his testimony. The suppressed testimony cast additional

doubt on Albert's testimony. It showed an acquiescence in appellant's testimony before Albert had been subject to the influence of others.

We consider the suppressed impeachment testimony of Albert as one factor in assessing the materiality of the suppressed evidence. See Cannon v. Alabama, 558 F.2d 1211, 1213 (5th Cir. 1977), cert. denied, 434 U.S. 1087 (1978) (court held because State's evidence was already very weak, the undisclosed eyewitness testimony would have created a reasonable doubt as to defendant's guilt; in determining State had weak evidence, court considered fact defendant had impeached State's two eyewitnesses).

We next look at the suppressed impeachment testimony of Bryce Oliver. Bryce was a crucial State witness. The credibility of Bryce was relevant. Appellant testified Bryce had drawn a knife on Crow. On the witness stand Bryce denied doing so. The State argues the evidence is not crucial because appellant already knew Bryce drew a knife on Crow. As to appellant's testimony Bryce drew a knife on Crow, appellant's attorney said, "It wasn't there to the extent that you could impeach Bryce Oliver with a prior inconsistent matter from a State BCI agent." We consider the suppressed statement of Bryce in our examination of the overall value of the suppressed evidence to the appellant in light of the other evidence admitted against him.

We distinguish cases in which evidence has been determined not to be material. See, e.g., Moore v. Illinois, 408 U.S. at 798, 92 S.Ct. at 2570, 33 L.Ed.2d at 715 (evidence not material because it was an insignificant factor on identification where two or more witnesses had identified defendant at the relevant times); Brogdon v. Blackburn, 790 F.2d at 1168 (blood test taken by State not material because jury already knew defendant was drinking heavily on the night in question).

We consider too the length of jury deliberations. The trial commenced on December 6, 1976. The jury was instructed at 1:00 p.m. on December 14 and returned a verdict on December 17. The State called eight witnesses, a pathologist, two BCI agents, a highway patrolman, the county sheriff and Albert Oliver, Bryce Oliver and Cross. The jury in this case deliberated during parts of three days, reported they were five to seven, were given a jury-urging instruction and reached a decision toward the end of the fourth day of deliberations. Obviously they did not render a decision easily. In State v. Osborne, 345 S.E. 256, 258 (S.C. Ct. App. 1986) the court in assessing materiality considered the fact the jury deliberated almost ten hours. We consider the following factors:

(1) there is not overwhelming evidence in this record of appellant's guilt,
(2) the lengthy jury deliberations,
(3) evidence was suppressed impeaching the testimony of two of the only three witnesses connecting appellant to the crime.

We note but do not consider on this issue that the third witness's testimony has now been recanted. If the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. United States v. Agurs, 427 U.S. 97, 113, 96 S.Ct. 2392, 2402, 49 L.Ed.2d 342, 355 (1976); Cannon, 558 F.2d at 1216. Considering the cumulative effect of these factors, we determine the suppressed evidence was material to appellant's guilt. See Brogdon, 790 F.2d at 1167.

While not relevant to our determination, we agree with the trial court's concern about the suppression of the evidence by the State. The Brady rule is not meant to displace the adversary system as the primary means by which truth is uncovered but is to ensure a miscarriage of justice does not occur. Bagley, 473 U.S. at 675, 105 S.Ct. at 3380, 87 L.Ed.2d at 489. The State is

as responsible for the exoneration of the innocent as it is for the conviction of the guilty. Appellant is entitled to a new trial.

REVERSED AND REMANDED.

Oxberger, C.J., and Schlegel and Sackett, JJ., concur; Habhab and Donielson, JJ., dissent.

HABHAB, J. (dissenting)

I respectfully dissent. Defendant claims that he is entitled to postconviction relief because the prosecution suppressed exculpatory evidence. This evidence included: (1) a supplemental report containing a typewritten summary of an interview Special Agent Robert Pontius had with Sheldon Bryce Oliver and Jody Seidenkranz, and (2) a BCI file indicating Sheldon Bryce Oliver admitted threatening Kenneth Crow with a razor-sharp instrument one week prior to Crow's death.

The interviews between Special Agent Pontius and Sheldon Bryce Oliver and Jody Seidenkranz are exculpatory evidence because they suggest Kenneth Crow was alive after August 30, 1976, when he was allegedly killed. This evidence would have impeached the testimony of Glen Albert Oliver, who testified that Cornell shot Crow on August 30, 1976. The interview with Jody Seidenkranz also impeached Glen Albert Oliver's testimony for she stated:

> MRS. SEIDENKRANZ advised the reporting agent that on August 30, 1976, she did go to her mother's residence at 1303 Harrison in Des Moines, Iowa, at which time ALBERT OLIVER and ROBERT CORNELL had just returned from San Antonio, Texas.
>
> When questioned regarding where KENNETH CROW was, ROBERT CORNELL stated that he had gotten out around Mount Ayr and stolen ROBERT'S gun. She stated that ALBERT agreed with this and that nothing more was said at this time.

There is no argument that this evidence was withheld by the State in violation of a court order. However, to establish a claim that the State unlawfully withheld exculpatory evidence, the proponent must prove the prosecution suppressed evidence and the evidence was material to the issue of guilt. Brogdon v. Blackburn, 790 F.2d 1164, 1167 (5th Cir. 1986).

On the issue of suppression, the trial court properly held that the statements by Sheldon Bryce Oliver and Jody Seidenkranz, in their interviews with Special Agent Pontius, were not suppressed because Cornell, his investigator, and his counsel had knowledge of the statements. Evidence is suppressed when it is

discovered after trial and "had been known to the prosecution but unknown to the defense." United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342, 349 (1976) (emphasis added); State v. Nunn, 356 N.W.2d 601, 605 (Iowa App. 1984). Following this rule of law, it is clear that the withheld evidence (Seidenkranz's interview), which impeached Glen Albert Oliver, cannot even be considered to have been legally suppressed.

On the issue of materiality, evidence is material "only if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceedings would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3384, 87 L. Ed. 2d 481, 494 (1985). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id. The Bagley inquiry requires consideration of the totality of the circumstances, including the possible effects of nondisclosure on defense counsel's trial preparation. Id. The State is not required "to make a complete and detailed accounting to the defense of all police investigatory work on a case." Moore v. Illinois, 408 U.S. 786, 795, 92 S. Ct. 2562, 2568, 33 L. Ed. 706, 713 (1972); see Bagley, 473 U.S. at 675, 105 S. Ct. at 3380, 87 L. Ed. 2d at 489; see also United States v. Jackson, 579 F.2d 553, 560 (10th Cir. 1978), cert. denied, 439 U.S. 981, 99 S. Ct. 569, 58 L. Ed. 2d 652 (1978) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of trial, does not establish 'materiality' in the constitutional sense").

With regard to the impeachment evidence on time of death and its materiality, the trial court properly concluded that the interviews conducted by Pontius with Oliver and Seidenkranz were not material. They did not affect Cornell's trial preparation because these seemingly impeaching statements were later disproved by defense's own investigation. The trial court further found that their statements were easily rebuttable. Therefore, the evidence was not suffi-

cient to create a reasonable probability that the outcome of the trial would have been different.

The majority states that the suppressed evidence casts additional doubt on Albert's testimony and that it shows an acquiescence in appellant's testimony before Albert had been subject to the influence of others. The record reveals, however, that Albert was already under the influence of the defendant. Specifically, the defendant had threatened and frightened him. It was under this influence, and in the presence of the defendant, that Albert acquiesced to defendant's version of what happened to Crow. Afterwards, Albert told authorities that Cornell had shot Crow and led them to the body.

Defendant claims that the State improperly suppressed evidence in the BCI file indicating Sheldon Bryce Oliver admitted threatening Kenneth Crow with a razor-sharp instrument one week prior to Crow's death. Cornell's defense at trial was that Crow was killed by Oliver. Therefore, this evidence was exculpatory.

Defendant knew about the fight between the two, but did not know that Oliver had made a statement admitting that he threatened Crow with a razor-sharp instrument during the argument. This statement is inconsistent with Oliver's deposition and trial testimony. As appellee here, and the trial court point out, this evidence, which was suppressed, had obvious impeachment value. It corroborated Cornell's defense theory.

The question of materiality still remains. Was evidence of Sheldon Bryce Oliver's inconsistent statement concerning his fight with Crow sufficient to create a reasonable probability that the outcome of the trial would have been different had it been disclosed?

Defendant argues that evaluation of the non-disclosed information in light of the totality of the trial circumstances can only lead this court to conclude that confidence in the outcome of Mr. Cornell's trial in 1976 is undermined.

Suppressed evidence is material if it would create a major change in the defense. See Hasar v. Sissel, 792 F.2d 119, 122 (8th Cir. 1986). The trial court concluded that Oliver's inconsistent statements were merely cumulative of other evidence already in the record. I agree and hold that had this evidence been disclosed it would not have constituted a major change in Cornell's defense. Therefore, defendant's due process rights were not violated.

In addition, the trial court properly noted that Oliver's inconsistent statements bore no relation to the crucial evidence indicating defendant murdered Crow. See Trujillo v. Sullivan, 815 F.2d 597, 614 (10th Cir. 1987) (Trial court committed no constitutional error in declining to order a new trial where request was based on evidence not directly related to crime with which defendant was charged.). This evidence does not negate essential prosecution evidence. For examples of Brady violations warranting new trials, i.e., where the suppressed evidence was substantial and material, see Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985); United States ex rel. Smith v. Fairman, 769 F.2d 386 (7th Cir. 1985).

Donielson, J., joins this dissent.