IN THE COURT OF APPEALS OF IOWA

No. 9-081 / 98-74
Filed April 30, 1999

GLENDALE MORE, JR.,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Petitioner appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Thomas J. Jackowski of Elverson, Vasey & Peterson, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Cheryl A. Soich, Assistant Attorney General, William E. Davis, County Attorney, and Michael Walton, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Streit and Vogel, JJ. Zimmer, J., takes no part.

SACKETT, C.J.

Applicant-appellant Glendale More, Jr., appeals after the district court denied his application for postconviction relief seeking a new trial. More was convicted of first-degree murder for shooting his girlfriend, Wauneita Townsend, and setting on fire the car where her body lay. His conviction was affirmed on appeal. *State v. More*, 382 N.W.2d 718 (Iowa App. 1985). More contends, in this appeal, (1) the State failed to disclose Jeffrey Elmore, the only person testifying he witnessed the crime, received a reward from the Iowa Arson Alert Committee for information leading to More's arrest and this violated More's right to a fair trial; and (2) the district court erred in denying his application for a new trial based on newly-discovered evidence when Elmore recanted his trial testimony. We affirm.

Elmore, then thirteen years old and under the jurisdiction of the juvenile court, testified at More's trial that in the afternoon of August 28, 1983, he was casing the Schwinn Boeker parking lot in Davenport, Iowa. The lot was near where the victim's body was found in a burned car at about 5:35 p.m. Elmore testified he was planning to steal a car when he heard two big booms and saw a man get out of a white car, walk to another car, take out a white container, put it inside his shirt, and pour fluid from the container's contents inside the white car. Elmore said he next saw the man ignite the inside of the car. Elmore testified he slipped, made a noise, and the man shined a flashlight under cars looking for him before walking away. Elmore's testimony at trial was consistent with an earlier statement given to the police, except he identified

More at trial -- something he had been unable to do at an earlier police line-up and a pre-trial deposition.

In February of 1997, Elmore recanted his testimony and related he was never at the lot, never saw More there, and had no information about the murder of Townsend. He testified he got the information from a newspaper or from what the police told him. He further testified the police told him he would get a reward. He also testified he was told where More would be sitting in the courtroom, and when he identified More in the courtroom he was lying.

Detective Hammes testified that prior to More's trial he requested Iowa Arson Alert give Elmore a cash reward for testifying against More and he told Elmore that to get the reward he had to testify. A month after trial, the check that was Elmore's reward was made out to Hammes. Hammes gave the check to Elmore's probation officer, who gave it to Elmore. Hammes testified after Elmore was notified he was getting the money, he was able to identify More.

We first address More's claim he should have a new trial because the State failed to disclose Elmore would receive the reward. More's trial attorney testified he was never given the information and it would have made a difference in cross-examination.

More contends his constitutional rights were violated; consequently, we review the record de novo examining the totality of the circumstances. *See Conner v. State*, 362 N.W.2d 449, 458 (Iowa 1985).

A defendant's due process rights are violated when the prosecution fails to produce upon request evidence favorable to the accused where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963); *see also State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996). To establish a *Brady* violation, More must prove (1) the prosecution suppressed evidence, (2) the evidence was favorable to his defense, and (3) the evidence was material to the issue of guilt. *See Cornell v. State*, 430 N.W.2d 384, 385 (Iowa 1988).

We agree with More the evidence was suppressed. Not only was the evidence not made available to him, but Elmore testified in a pre-trial deposition there was no reward. And it was relevant to More's defense. The fact Elmore had an incentive to testify goes to the issue of the credibility of his testimony.

The question for us, then, becomes whether, if More had the evidence prior to trial, there is a reasonable probability the result of the proceeding would have been different. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985). The burden to establish the suppressed evidence was material and there is a reasonable probability the proceeding would have been different is More's. *See State v. Anderson*, 410 N.W.2d 231, 234 (Iowa 1987). Evidence is material only 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 3383, 87 L. Ed. 2d at 494. A reasonable

probability is a probability sufficient to undermine confidence in the outcome. Upon review of the postconviction court's ruling, we must consider any adverse effects the failure to disclose might have had on the preparation or presentation of More's case. *Anderson*, 410 N.W.2d at 234-35.

The *Brady* rule applies if evidence is discovered after trial that was known to the State but not known to the defendant. *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342, 349 (1976). However, exculpatory evidence is not considered to be suppressed if the defendant knew or should have known of the essential facts permitting him to take advantage of the evidence. *United States v. LeRoy*, 687 F.2d 610, 618 (2nd Cir. 1982).

The suppressed evidence was impeachment evidence. Impeachment evidence can be included in the *Brady* rule. *Romeo*, 542 N.W.2d at 551. But to succeed on this issue, More must show if the evidence had been disclosed and used, it may have made the difference between his being convicted and acquitted. *See State v. Pieper*, 432 N.W.2d 701, 703 (Iowa App. 1988).

The district court rejected More's claim finding (1) Elmore's trial testimony was consistent with an earlier statement; (2) Elmore gave information not known to the public; (3) Elmore was impeached with other evidence, and (4) even excluding Elmore's testimony, the evidence establishing More's guilt was strong.

The State advances Elmore gave evidence to the police ten days after the murder and a considerable time before the reward became a factor.

Elmore had testified that several days after he saw the man pour fluid on the white car he heard a woman had been murdered at the Schwinn Boeker parking lot that day. He said he spoke to his juvenile court officer in Burlington and later talked to Detectives Graff and Hammes of the Davenport police department. Elmore described the incident he allegedly saw and related the man he saw walked with a limp, had dark hair, and wore a red or maroon shirt and blue jeans. At an initial photographic line-up, Elmore was unable to identify More and was later unable to identify him during interrogation at the Davenport police station. At trial, Elmore identified More as the person he saw in the parking lot on the date in question.

The record shows the victim was engaged to be married to More and had told a friend a short time before the murder it was not going to work out and she would need help in telling More. More went to the police station on the night of the murder to talk to police. He was taken to the hospital claiming angina. A bullet that had not been fired was found in his pocket. Using a neutron activation analysis, the bullet was found to have been manufactured and packaged in the same box and on the same day as the bullets found in the victim's body and in her car. More's fingerprints were found on the outside of the car. More admitted he saw the victim at 4:30 p.m. in a Bettendorf parking lot. More purchased a $100,000 life insurance policy on the victim three months before her death naming himself beneficiary of $50,000 of the insurance. More testified in his own behalf and presented an alibi defense which was discounted by the State's evidence.

The credibility of Elmore's testimony at trial was attacked by (1) his status as a juvenile offender on probation; (2) his testimony he observed the crime while he was contemplating stealing a car, and (3) his failure to identify More at the line-up and at a pre-trial deposition. Furthermore, there was substantial circumstantial evidence connecting More to the crime. We agree with the district court More has not shown that had Elmore's testimony been further impeached by the fact he was receiving a $300 reward, there is a substantial probability More would not have been found guilty. We affirm on this issue.

We next address More's claim he should have a new trial because of newly-discovered evidence in the form of Elmore's recanting his trial testimony.

It was in February of 1997 when More's postconviction counsel interviewed Elmore and he recanted his trial testimony. At that time, Elmore said he was never at the parking lot the day of the alleged murder. He stated he never saw More at the parking lot and had no information regarding the murder. Elmore testified on the day in question he had cashed in a bus ticket given to him by his grandmother and spent the day drinking alcohol with persons he referred to as "bums" near the Davenport levee. He stated most of the information he had about the case was obtained through newspapers and the police. Elmore further stated he was told by the Davenport police he would likely receive a reward but not to mention it to anyone. He testified the police told him where More would be sitting at trial.

The postconviction court discounted Elmore's recantation, finding it "completely incredible." The court ruled the testimony was precipitated by Elmore's

encounter with More while in prison at Fort Madison. The court further concluded the circumstantial evidence in the case against More was strong.

To prevail on a claim of newly-discovered evidence, More must show (1) the evidence was discovered after the verdict; (2) the evidence could not have been discovered earlier even if More had exercised due diligence; (3) the evidence is material to issues in the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the results of the trial. *See Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991).

The State concedes More showed the first three things. The State contends the postconviction court's conclusion Elmore's recanted testimony is not credible is reasonable and would not change the results of the trial.

Recanted testimony is looked at with suspicion. *Jones*, 479 N.W.2d at 275; *State v. Tolck*, 325 N.W.2d 368, 377 (Iowa 1982). The trial court is in a better position than are we to determine if newly-discovered evidence would lead to a different result after another trial. *State v. Compiano*, 154 N.W.2d 845, 849 (Iowa 1967). We will interfere only on a finding the district court abused its discretion. *Id.*

Elmore's initial statement to the police included references to facts of the case not known to the public, including (1) the man he saw walked with a limp and More walked with a limp; (2) a description of the paint thinner can in the victim's car; and (3) a description of More's car. We affirm on this issue.

AFFIRMED.