

IN THE COURT OF APPEALS OF IOWA

No. 1-516 / 91-204

FILED

JAN 29 1992

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

KEVIN FRAZIER,

Appellant.

725

Appeal from the Iowa District Court for Story County,
Carl D. Baker, Judge.

The defendant appeals his conviction of delivery of a
schedule II controlled substance (cocaine) in violation of
Iowa Code section 204.401(1)(a) (1989). **AFFIRMED.**

Alfredo Parrish and Andrew J. Dunn of Parrish &
Kruidenier, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber,
Assistant Attorney General, Mary E. Richards, County
Attorney, and Stephen H. Holmes, Assistant County Attorney,
for appellee.

Considered by Donielson, P.J., and Hayden and Sackett,
JJ.

HAYDEN, J.

The charge in this case stemmed from defendant's alleged sale of cocaine to a confidential informant. Pursuant to a written agreement, the informant, a cocaine dealer, promised to provide the police evidence on ten prosecutable cases against drug dealers. In exchange the police agencies agreed to recommend reduction of charges against the informant and to take no action to forfeit any of his assets. The conversation leading to this agreement was tape recorded.

Prior to trial, defendant filed a motion to produce requesting any recordings of statements made by witnesses or of transactions which formed the basis of his prosecution. In addition, defendant filed a supplemental motion to produce requesting evidence or information concerning the informant's duties, his drug use, and any contract between the informant and law enforcement officials. In response, the State produced the contract between the officers and the informant. However, because the prosecutor did not know about the tape recording leading to the contract, the recording was not produced.

On the second day of trial, and after the State had called three of its witnesses, the prosecutor learned of the existence of the tape recording. The prosecutor then informed defendant of its existence.

Defendant moved for a dismissal of the charges or a mistrial claiming the prosecutor's failure to disclose the

existence of the recording was a violation of the State's duty to disclose exculpatory evidence. Defendant's motions were denied. The district court determined the recording merely corroborated in more detail defendant's existing knowledge of the case. The district court also noted defendant would still have the opportunity to cross-examine the informant and to recall any previous witness for additional cross-examination in light of the discovery of the recording. The jury found defendant guilty of delivery of a controlled substance. Defendant was sentenced to a prison term not to exceed ten years.

Defendant appeals, claiming favorable material evidence was improperly suppressed in violation of the disclosure rule set forth in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Because constitutional rights are implicated, we review the record de novo and evaluate the totality of the circumstances. Conner v. State, 362 N.W.2d 449, 458 (Iowa 1985).

To successfully challenge a conviction on the basis of an alleged Brady violation, defendant must prove by a preponderance of the evidence that: (1) the prosecution suppressed evidence, (2) the evidence was favorable to the accused, and (3) the evidence was material to the issue of guilt. Cornell v. State, 430 N.W.2d 384, 385 (Iowa 1988).

Focusing on the first Brady requirement, we determine the recording of the meeting between the informant and the officers was properly within the scope of defendant's

discovery motions. Although the prosecutor did not disclose the recording because he did not know of its existence until the second day of trial, this ignorance does not operate as a legal excuse. Information in the possession of police officers or other members of the prosecution team is attributed to the prosecutor. Fryer v. State, 325 N.W.2d 400, 407 (Iowa 1982); Hamann v. State, 324 N.W.2d 906, 909-10 (Iowa 1982). In addition, suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218; State v. Anderson, 410 N.W.2d 231, 232-33 (Iowa 1987). We conclude the first Brady requirement was met in the present case.

Turning to the second Brady requirement, we determine the recording constituted evidence favorable to defendant. The recording revealed the informant was a drug dealer and user and he contracted to develop ten prosecutable cases in return for the officers' recommendation of lenient treatment. This information could have been used to attack the informant's credibility. The Brady rule applies to both exculpatory and impeachment evidence. Anderson, 410 N.W.2d at 233. We conclude defendant successfully met his burden with respect to the second Brady requirement.

The question of materiality in accordance with the third Brady requirement is whether the claimed violation can be said to have probably changed the outcome of the case. Cornell, 430 N.W.2d at 386. This inquiry requires consideration of the totality of circumstances, including the possible effects of nondisclosure on defense counsel's trial preparation. Id.

Defendant first claims disclosure of the recording would have provided impeachment evidence against the informant and two of the State's witnesses. We agree the recording contained impeachment evidence; however, most of the evidence simply duplicated or added details to what defendant already knew. We also note the district court provided defendant opportunity to take advantage of any new information which may have been gained from the recording by allowing defendant to conduct a second deposition of the informant before he testified. Furthermore, the district court offered to recall the witnesses who had already testified so defendant could cross-examine them in light of any information gained from the recording. In fact, the two State witnesses were recalled thus providing defendant the opportunity to cross-examine them. Therefore, defendant had ample opportunity to use in his defense any impeachment evidence contained in the recording.

Defendant also claims because of the late disclosure he was denied the opportunity to assert a defense different from entrapment, the defense he asserted at trial.

Specifically, defendant argues he could have pursued the defense informant already had the cocaine in his apartment and defendant was "set up" by the informant as one of the prosecutable cases. Defendant's argument, however, flies in the face of persuasive evidence which shows it was defendant, not the informant, who had the cocaine. Defendant admitted he had cocaine but complained he had no scale to weigh it. It was defendant who took \$180 in exchange for four half gram packets of cocaine. It was defendant who bragged he was practically the only person in town with any cocaine and the previous evening he came home with a "big old pocket full of . . . money." (Explicative deleted.) It was defendant who stated he was planning to sell more cocaine in the bars after his meeting with the informant.

In light of this evidence, we find no reasonable probability disclosure of the recording would have changed the result. We conclude defendant failed to meet the materiality requirement of Brady. Accordingly, we affirm the decision of the district court.

AFFIRMED.