COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP504-CR **Cir. Ct. No. 2002CF5523**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER J. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Order denying motion seeking in camera review reversed and cause remanded with directions*.

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. A jury found Christopher J. Anderson guilty of possessing more than fifteen but fewer than forty grams of cocaine with the intent to deliver that cocaine. *See* WIS. STAT. § 961.41(1)(cm)3. He appeals, *pro se*, and claims,

inter alia, that the trial court erred when it denied his motion for an *in camera* review of the arresting officers' personnel files. We agree, reverse the trial court's order denying Anderson's motion seeking to have the trial court review *in camera* the personnel files, and remand with directions for the trial court to conduct an *in camera* review of the files to determine whether they contain any exculpatory or impeachment evidence relevant to this case. Inasmuch as Anderson would be entitled to a new trial if the State withheld exculpatory evidence that affected the reliability of his conviction, *see* ***State v. Harris***, 2004 WI 64, ¶14, 272 Wis. 2d 80, 97, 680 N.W.2d at 737, 746 (The withholding of exculpatory material warrants a new trial "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'") (quoted source omitted), we do not address the myriad other issues he argues in his appellate submissions.

I.

¶2 Anderson was arrested by City of Milwaukee Police Officers Bodo Gajevic and Mitchell Ward for possessing approximately thirty-six grams of cocaine. After he was arrested, Anderson filed a complaint with the Internal Affairs Division of the Milwaukee Police Department, claiming that Gajevic and Ward planted the drugs and asked Anderson to set up drug transactions.

¶3 Before his trial, Anderson filed several demands for discovery and inspection, requesting, among other things:

> [A] list of the names and addresses of persons known to the State or any of its investigative agencies whom the State intends to call as witnesses at any hearing or trial in this case, together with copies of any and all of their oral, written, or recorded statements within the possession,

> knowledge, or control of the State, as they relate to this case.
>
> ….
>
> Any relevant written or recorded statements of a witness whom the district attorney intends to call at trial, including but not limited to:
>
> a. Any written or recorded statements of a witness who appears on the district attorney's witness list, including, but not limited to all police officers' reports and memorandum book entries.

See WIS. STAT. § 971.23(1)(e) (discovery and inspection; written or recorded statements of witness). Anderson also sought:

> Any other information which would affect the weight and credibility of evidence or the credibility of witnesses (including possible rebuttal witnesses) used against the defendant; Negate or call into question the guilt of the defendant; Militate the degree of the offense charged or reduce the defendant's punishment therefore; or form the basis for further investigation.

See ***Brady v. Maryland***, 373 U.S. 83, 87 (1963) (State obligated to disclose evidence favorable to accused).

¶4 The Milwaukee County District Attorney's Office turned over to Anderson a police-department memorandum recommending that Anderson's complaint against the officers be cleared as unfounded, an internal affairs report in connection with the officers, and Anderson's handwritten statements. The district attorney's office refused to turn over the officers' personnel files, however, claiming that the files were privileged.

¶5 Anderson sought an *in camera* inspection of the personnel files under ***Brady***, contending that they might contain inconsistent statements of the arresting officers or evidence corroborating Anderson's version of the arrest. The

trial court, the Honorable Elsa C. Lamelas, denied Anderson's request, concluding that the district attorney's office did not have an "obligation … to obtain those personnel records and to make them available to the defense":

> From everything that I have learned during the course of the defense of these cases this is not information that the prosecutor presently has access to. The personnel files of these officers are not in the possession of the assistant district attorneys.
>
> Given the information that's available to me and ***Kyles*** [***v. Whitley***, 514 U.S. 419 (1995)] as I understand it, there is no obligation on the part of the assistant district attorneys to obtain those personnel records and to make them available to the defense; and so that request for an in-camera inspection of the officer's personnel files is denied.

(Underlining omitted; bolding and italics added.)

¶6 Gajevic and Ward were on the State's witness list and the officers testified at Anderson's trial.[1] The officers told the jury that they stopped Anderson after they saw him take a part from a car that appeared to be abandoned. According to Ward, as he got out of the officers' squad car, Anderson began to move away and put his hand in the front left pocket of his pants. Gajevic testified that Anderson then took what looked like a bag of cocaine out of his pocket and put the bag in the front wheel well of the car. According to the officers, Gajevic went up to the car's wheel well and took out a bag that had approximately thirty-six grams of cocaine.

¶7 The officers testified that after Gajevic found the drugs, they put Anderson in the back of their squad car. According to Ward, Anderson told the

[1] Anderson was tried twice. The jury was unable to reach a verdict in the first trial. The testimony we recount is from Anderson's second trial.

officers that he wanted to cooperate and admitted that the cocaine was his. The officers told the jury that Gajevic wrote a statement but refused to sign it because he wanted the officers to let him go. Ward testified that Anderson then told the officers that he would call his supplier to arrange a drug transfer. According to the officers, Anderson's supplier would not provide the drugs unless Anderson showed up in person. When it became apparent that a drug deal was not going to happen, other officers came and took Anderson to jail.

¶8 Anderson testified at the trial and contended that the officers framed him. He told the jury that he was on his way to a restaurant when he was pulled over by a police car. According to Anderson, Gajevic told him to get out of the car, handcuffed him, and told him that he was being arrested for drugs. Anderson testified that the officers then put him in the back of their squad car, told him they saw him with drugs, and tried "to get me to cooperate with them about some drugs." Anderson further told the jury that Gajevic had a plastic bag and told him it was "insurance for [Anderson] to come through." Anderson claimed that he did not take a car part or have any cocaine when the officers stopped him.

¶9 As we have seen, the jury found Anderson guilty. Anderson filed a *pro se* postconviction motion, claiming, among other things, that his due-process right to ***Brady*** evidence and WIS. STAT. § 971.23(1)(e) were violated by the State's failure to turn over the officers' personnel files. In a related motion, Anderson again sought an *in camera* review of the personnel files. The trial court, the Honorable Timothy M. Witkowiak, denied both motions "for the same reasons set forth by Judge Lamelas in her oral decision."

II.

¶10 Anderson claims that the trial court erred when it denied his request for an *in camera* review of the personnel files because he had both a constitutional and statutory right to any exculpatory or impeachment evidence in the files. We agree.

¶11 Under the Fourteenth Amendment to the United States Constitution, the State's suppression of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. *See* ***Brady***, 373 U.S. at 87. To establish a ***Brady*** violation, the defendant must show that: (1) the State suppressed the evidence in question; (2) the evidence was favorable to the defendant, either because it was exculpatory or impeaching; and (3) the evidence was material to the determination of the defendant's guilt or punishment. *See* ***Strickler v. Greene***, 527 U.S. 263, 281–282 (1999); *see also* ***United States v. Bagley***, 473 U.S. 667, 676 (1985) ("Impeachment evidence … as well as exculpatory evidence, falls within the *Brady* rule."). Whether the State violated a defendant's right to due process under ***Brady*** is a question of constitutional fact that we review independently. *See* ***State v. DelReal***, 225 Wis. 2d 565, 571, 593 N.W.2d 461, 464 (Ct. App. 1999).

¶12 It is undisputed that, although the personnel files were not in the possession of the district attorney's office, it had a duty to determine whether they had exculpatory material relevant to this case. *See* ***Kyles***, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). The district attorney's office, however, did not get the files from the police department. Accordingly, the prosecution violated its duty as recognized by ***Kyles***. The issue

is thus whether any information in the personnel files was potentially favorable to Anderson.

¶13 "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the *Brady*] rule." ***Giglio v. United States***, 405 U.S. 150, 154 (1972) (quoted source omitted). As we have seen, Anderson's theory of defense was that the arresting officers planted the drugs despite their testimony to the contrary. He had complained about the officers' conduct, and an internal affairs investigation was conducted. The officers denied the conduct. Credibility was thus an essential element of the case. If the personnel files have impeachment material that in the context of this case and the internal affairs proceeding casts doubt on the officers' veracity, that material would be exculpatory, given the conflict between the officers' testimony and Anderson's testimony. *See* ***State v. Harris***, 2004 WI 64, ¶30, 272 Wis. 2d at 108, 680 N.W.2d at 752 (child sexual assault victim's statement that she was previously sexually assaulted by her grandfather "favorable to the accused because it casts doubt on the credibility of the State's primary witnesses and may have supported an inference that [the victim] was projecting her grandfather's assaults onto [the accused]"); ***DelReal***, 225 Wis. 2d at 571, 593 N.W.2d at 464 ("Impeachment evidence casting doubt on a witness's credibility is material and subject to disclosure."). Accordingly, the failure to provide the personnel files for an *in camera* inspection violated Anderson's due-process right to have the State produce all potentially exculpatory material.

¶14 Further, the State was required by WIS. STAT. § 971.23(1)(e) to disclose to the defendant, within a reasonable time before trial, any relevant

written or recorded statements of a named witness.[2] There has been an internal affairs inquiry in connection with the charges against Anderson. Thus, the district attorney's office had a duty to discover and disclose any written or recorded statements Ward and Gajevic may have made in connection with those charges. *See* ***State v. Harris***, 2008 WI 15, ¶¶2, 32, 307 Wis. 2d 555, 564, 573–574, 745 N.W.2d 397, 401, 406 (written police reports "stating that law enforcement officers unsuccessfully attempted to obtain identifiable fingerprints from a plastic baggie containing cocaine allegedly belonging to the defendant" discoverable under § 971.23(1)(e)); ***State v. DeLao***, 2002 WI 49, ¶21, 252 Wis. 2d 289, 301, 643 N.W.2d 480, 486 ("Under § 971.23, the State's discovery obligations may extend to information in the possession of law enforcement agencies but not personally known to the prosecutor."). Knowing that there was an internal affairs inquiry, the State had to determine whether any personnel action resulted from that

[2] WISCONSIN STAT. § 971.23(1)(e) provides:

> **(1)** WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> ….
>
> (e) Any relevant written or recorded statements of a witness named on a list under par. (d), including any audiovisual recording of an oral statement of a child under s. 908.08, any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.

inquiry and to disclose that and other relevant information to the defendant, who properly requested it in discovery.

¶15 In sum, the district attorney's office's failure to produce the personnel files for *in camera* review deprived Anderson of potentially exculpatory material. Accordingly, we remand to the trial court for an *in camera* inspection of the files. *See* ***State v. Navarro***, 2001 WI App 225, ¶10, 248 Wis. 2d 396, 403, 636 N.W.2d 481, 485 (defendant does not have unlimited access to confidential personnel records; "a trial court's in camera review is a limited intrusion that often provides the best tool for resolving conflicts between the sometimes competing goals or confidential privilege and the right to put on a defense") (internal quotation marks and quoted source omitted). If the trial court determines that the files have exculpatory or impeachment material, those parts shall be disclosed to Anderson and he may seek a new trial. *See, e.g.*, ***Giglio***, 405 U.S. at 154 (***Brady*** violation warrants new trial where concealed evidence is material); ***DeLao***, 2002 WI 49, ¶¶59–60, 252 Wis. 2d at 316–317, 643 N.W.2d at 493–494 (new trial for violation of § 971.23 if error prejudicial).

By the Court.—Order denying motion seeking *in camera* review reversed and cause remanded with directions.

Publication in the official reports is not recommended.