COURT OF APPEALS DECISION DATED AND FILED

January 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-0619-CR

Cir. Ct. No. 00 CF 1562

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NORMAN L. MALONE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Norman L. Malone appeals from the judgment of conviction for seven drug offenses and three counts of possession of a firearm by a felon, habitual criminality, following a jury trial, and from the order denying his motion for postconviction relief. He argues that he is entitled to a new trial because the State "deprived [him] of his constitutional rights of due process and to

a fair trial by not providing [him] with the search warrant return."[1] Alternatively, he argues that the charges should be dismissed with prejudice because of prosecutorial misconduct.[2]

¶2 We conclude that while the State's failure to provide Malone with the search warrant return may have constituted a discovery violation, it did not deprive him of a fair trial because he suffered no prejudice. We also conclude that the record establishes neither prosecutorial misconduct nor any prejudice arising from the alleged prosecutorial misconduct. Accordingly, we affirm.

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[1] While Malone refers to the document as the "search warrant return," the record shows that the document was a Milwaukee Police Department form—"In the Matter of: SEARCH WARRANT EXECUTION AT"—which the State characterizes as an "internal document" of the police department. The record and the parties' briefs, however, do not clarify whether the form in this case was the "search warrant return" filed with the search-warrant-issuing circuit court following execution of the warrant. *See* WIS. STAT. § 968.17 (1999-2000).

In this appeal, with a single exception we will identify in discussing Malone's second argument, neither party bases its theories on the possible distinction between the form, used only as an internal document of the police department, and the form, filed under WIS. STAT. § 968.17. Consequently, in this opinion, we, like Malone, will simply refer to the document as the "search warrant return."

[2] Malone also argues that trial counsel rendered ineffective assistance by failing to file a discovery demand for the search warrant return. We need not address Malone's ineffective-assistance-of-counsel argument, however, because the State, in its responses, does not rely on any theory of waiver that would trigger an ineffective-assistance issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 633 (1938) (only dispositive issues need be addressed).

Additionally, in response to Malone's claim of ineffective assistance, the State argues that there is "no reasonable probability that, had counsel filed the discovery demand, Malone would have been acquitted." The State is correct. For reasons we will explain in our discussion of Malone's other arguments, even if counsel's failure to obtain the document constitutes deficient performance, Malone was not prejudiced. Thus, Malone's ineffective-assistance claim merely rewraps his attempt to establish the materiality of Detective Bonilla's federal offense and Bonilla's role in executing the search warrant.

I. BACKGROUND

¶3 On four occasions from March 20 to March 25, 2000, Malone sold cocaine or heroin to a confidential informant in the presence of an undercover officer and, on two of those occasions, he did so within 1000 feet of a park. On March 26, 2000, the police executed a search warrant at the Milwaukee residence where police believed Malone was living. From a first-floor bedroom and bathroom, the police seized marijuana, heroin, and firearms.

¶4 The March 20-25 events led to four different charges of delivery-of-controlled-substance offenses. The March 26 events led to: one charge of possession with intent to deliver heroin (three grams or less) within 1000 feet of a park, second or subsequent offense; one charge of keeping a drug house, second or subsequent offense; possession of marijuana, second or subsequent offense; and three charges of possession of firearm by felon, habitual criminality. A jury convicted Malone of all ten charges, and the court sentenced him to various concurrent and consecutive prison terms totaling thirty-seven years (twenty-five years of confinement followed by twelve years of extended supervision).

¶5 No search warrant return, or any other form identifying the officers involved in executing the search warrant, had been provided to Malone in advance of trial. At Malone's trial, however, the parties briefly presented questions to several witnesses regarding whether Milwaukee Police Detective Edwin Bonilla had been among the officers involved in the search warrant execution. Both

Detective Mark Mathy and Detective Glen Bishop indicated that he was not.[3] Malone's sister, Gloria, however, testified that one of the officers she saw during the execution of the search warrant she later recognized in a photo accompanying a newspaper story about an officer stealing money.

¶6 Following his trial, while in jail awaiting sentencing, Malone encountered another inmate who, apparently by coincidence, discovered a copy of the search warrant return among the materials in his own case. He provided it to Malone who, in turn, gave it to postconviction counsel. The search warrant return listed "Det Bonilla" among the twelve members of the "Search and Containment Team" for execution of the search warrant at Malone's home on March 26, 2000.

¶7 On January 18, 2001, a federal court entered a judgment convicting Detective Bonilla of crimes relating to the August 31, 2000 theft of crime-scene drug money used in a law enforcement sting operation. In his motion for postconviction relief, Malone maintained that the State had breached its duty to disclose exculpatory evidence by not revealing Bonilla's role. Thus, Malone maintained, he had lost an important opportunity to establish reasonable doubt. He explained:

> Det. Bonilla's presence during the search called the legitimacy of the search into question. An officer with Det. Bonilla's record of corruption participating in the execution of a search warrant is enough to raise reasonable doubt as

[3] As the State points out, however, some of the questions and answers related specifically to whether Detective Bonilla was a member of the "entry team." According to the search warrant return, he was not. The form lists seven other detectives comprising the "Entry Team"; it lists Detective Bonilla, two other detectives, and nine officers comprising the "Search and Containment Team." Thus, literally, Detectives Mathy and Bishop testified truthfully in answering that Bonilla was not on the entry team. Further, the record establishes that, in answering some of the questions on both direct and cross-examination, Detectives Mathy and Bishop were mindful of the distinction between the two teams.

> to the origins of the evidence seized in the search. In addition, two witnesses testified at trial that the police brought items into the bedroom where the contraband was found, and that the door to the bedroom was closed at times when officers were inside said room. These facts all create a basis for reasonable doubt.

(Citations omitted.)

¶8 In his postconviction motion, Malone conceded that, even without the evidence seized in the search, the evidence was sufficient to prove the first four offenses—the four drug sales during the days leading up to the search warrant. He argued, however, that all the charges be dismissed "as both a sanction and a message to the State." On appeal, while repeating his concession about the first four offenses, Malone expands his Bonilla-based argument to all ten offenses contending that "the cumulative effect of 'Bonilla' evidence … may call into question, in the minds of a jury, the accuracy and honesty of all of the State's witnesses … especially … where … two … detectives … implied that Detective Bonilla was nowhere near" the scene of the search warrant. Denying the postconviction motion, the trial court concluded that, even assuming a discovery violation, Malone had not been prejudiced.

II. DISCUSSION

A. The Bonilla Evidence

¶9 Malone maintains that because Detective Bonilla was convicted of federal charges relating to the theft of money from a crime scene, the search warrant return revealing his role in the instant case could have been used in two ways: to impeach the testimony of the detectives who allegedly denied his involvement; and to support the testimony of his sister and niece who said that, during the search, certain officers appeared to be bringing some items into the

house. While we agree that the search warrant return should have been provided to Malone in advance of trial, we conclude that even if Malone had utilized the Bonilla information as he indicates, it would not have made any difference.

¶10 "[S]uppression 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. 83, 87 (1963). To establish a ***Brady*** violation, a defendant must show that: (1) the State suppressed the evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the determination of guilt or punishment. ***Id.*** Here, even assuming that Malone has satisfied the first two criteria, he has not established that the search warrant return was material to the jury's determination of his guilt.

¶11 In determining whether a ***Brady*** violation has occurred, 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." ***State v. Garrity***, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991) (citation omitted). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. ***Id.*** Whether such a due process violation has occurred is an issue of constitutional fact subject to our independent review. ***State v. Sturgeon***, 231 Wis. 2d 487, 496, 605 N.W.2d 589 (Ct. App. 1999). A trial court's finding that the result of the trial would not have been different, however, will not be reversed unless it is clearly erroneous. ***State v. O'Brien***, 223 Wis. 2d 303, 322, 588 N.W.2d 8 (1999).

¶12 Denying Malone's postconviction motion, the trial court concluded that the information about Detective Bonilla's participation was not material to the determination of Malone's guilt. The court explained:

> The fact that Detective Bonilla's name is set forth as part of the search and containment team is not, in and of itself, material to the defendant's guilt. His vague inference that the drugs may have been planted there is entirely inconsistent with the type of activity for which Bonilla was convicted. The defendant cannot claim that Bonilla's presence at the residence renders Officer Drajkowski's testimony about the individual drug buys *prior to the execution of the search warrant* less credible. Even assuming that Bonilla's name on the document is evidence that the defense could have utilized for credibility purposes during the trial proceedings, the court fails to perceive how this would have impacted on the outcome of the trial.
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> ….
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> … Bonilla may very well have been part of the search team, but the defendant has not connected his presence with any showing that he committed another crime at the scene. There is simply no showing that the outcome of the trial would have been any different *specifically because of* Bonilla's presence in the home. The defendant has merely inferred that the search must have been tainted if Bonilla was there. Bonilla's mere presence is insufficient to undermine confidence in the outcome, particularly where the events underlying the first four counts had nothing to do with the [Malone] residence …, and the factual bases for the remaining counts have no apparent connection with Bonilla's presence. There was absolutely no testimony, and no credible evidence … that Bonilla was present in the middle bedroom where the search was performed. Absent such evidence, only speculation is left to support the defendant's contentions.

¶13 The court's conclusion is not clearly erroneous; indeed, it is well-reasoned. Detective Bonilla never testified at Malone's trial; thus, his credibility had no bearing on the jury's verdict. Malone's contention that Bonilla's criminal history could have had some bearing on the jury's view of his sister's and niece's implication that police might have planted evidence at the scene, while not

absolutely impossible, is mostly "smoke and mirrors." Bonilla was not convicted of planting evidence anywhere; he was guilty of stealing from a crime scene.

¶14 Malone's suggestion that the "cumulative effect of 'Bonilla' evidence" could have undermined the testimony of all the State's witnesses is purely speculative and, under the facts of this case, wholly illogical. After all, as Malone concedes, testimony on the first four counts had no relationship to the crimes uncovered in the search. And, regarding the six crimes coming from the search, Malone's theory would mean not only that Bonilla planted evidence, but also that numerous other officers executing the search warrant joined in his scheme. Malone offers nothing to even hint at such a proposition. Accordingly, we, like the trial court, conclude that the Bonilla evidence was immaterial to the jury's determination of Malone's guilt.

B. Prosecutorial Misconduct

¶15 Malone also argues that all the charges should be dismissed because of prosecutorial misconduct. He contends that the prosecutor knew that Detective Bonilla had participated in the search but asked questions of Detectives Mathy and Bishop to suggest otherwise. The trial court, denying Malone's postconviction motion, rejected Malone's argument as "baseless," "completely speculative," and "wholly without support."

¶16 Prosecutorial misconduct can violate a defendant's due process right to a fair trial if it "'poisons the entire atmosphere of the trial.'" ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996) (citation omitted). A trial court exercises discretion to determine whether prosecutorial misconduct occurred and whether it warrants a new trial. ***State v. Bembenek***, 111 Wis. 2d 617, 634, 331 N.W.2d 616 (Ct. App. 1983). We will not reverse a trial court's

determination absent an erroneous exercise of discretion. ***Lettice***, 205 Wis. 2d at 352. Here, we see no erroneous exercise of discretion.

¶17 First, Malone points to nothing to establish that the prosecutor knew that Detective Bonilla had participated in the search. While the fact that the search warrant return may have been an internal police department document may not alter the analysis of whether it was a discoverable document within the State's exclusive control, *see* ***State v. DeLao***, 2002 WI 49, ¶¶21-22, 24, 252 Wis. 2d 289, 643 N.W.2d 480 (State's discovery obligation may extend to information in possession of law enforcement agencies but not known to prosecutor), it does support the prosecutor's claim that he had not seen the form until it was provided as an exhibit in support of Malone's postconviction motion.

¶18 Second, for the reasons we have explained, such alleged misconduct could have had no bearing on the outcome of Malone's trial. Indeed, it is noteworthy that, on appeal, Malone offers absolutely no reply to any of the State's no-prejudice/harmless-error arguments. *See* ***State v. Peterson***, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998) (unrefuted arguments deemed admitted). Accordingly, we see no basis for overturning the trial court's rejection of Malone's claim of prosecutorial misconduct.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.