COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3139-CR **Cir. Ct. No. 2007CF1295**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BYRON RAMON STEWART,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Byron Stewart appeals from a judgment convicting him of first-degree intentional homicide, as party to a crime, and from an order denying his postconviction motion. Stewart contends that he is entitled to a new trial because: (1) the State failed to disclose impeachment evidence as to their

central witness, violating his due process rights under ***Brady v. Maryland***, 373 U.S. 83 (1963); and (2) the State's subsequent dismissal of charges pending against that witness constitutes newly discovered evidence establishing a reasonable probability of a different result at a new trial under ***State v. Plude***, 2008 WI 58, ¶¶32-33, 310 Wis. 2d 28, 750 N.W.2d 42. We reject both of these contentions, and we affirm.

BACKGROUND

¶2 On April 2, 2007, police responded to a complaint of gunfire from a house in Beloit, Wisconsin. Officers located the body of the gunshot victim, Carlos Lak, inside the house. They obtained reports from witnesses that two African American males had entered the house shortly before the shooting and exited shortly after. The police also obtained a description of the vehicle used by the men to drive away from the house and located a vehicle in the area matching that description. The vehicle accelerated through a red light when it was approached by a marked police squad car with activated emergency lights, and continued at a high speed, weaving through traffic, as it was pursued by police. The vehicle then struck a tree. The passenger, Thomas Conner, fell out of the vehicle with an injured leg. The driver, Stewart, fled on foot. A handgun, later identified as the gun used to shoot Lak, was located in the grass near the vehicle.

¶3 After fleeing from the car crash, Stewart broke into a nearby house. Police surrounded the house, and Stewart eventually surrendered to police custody. Stewart, who had blood on his pants and shoes, stated he had been sleeping in the house and did not know why he was being arrested. The shirt Stewart had been wearing was located in the washing machine and had been damaged with several burn holes.

¶4 The State charged both Stewart and Conner with first-degree intentional homicide, as party to a crime.[1] *See* WIS. STAT. §§ 940.01(1)(a) and 939.05 (2007-08).[2] Stewart's jury trial was held December 17 to December 21, 2007. Conner testified at Stewart's trial that he and Stewart were together on the day of the homicide; that Conner received a phone call from Lak, who was his friend, inviting him to his residence; that Stewart and Conner then went to Lak's residence; and that a short time after they arrived, Stewart shot Lak three times. Conner testified that he had been promised nothing for his testimony, but only wanted to tell the truth about what had happened. Stewart testified that Conner shot Lak after Conner and Lak had an argument over money. The jury found Stewart guilty of first-degree intentional homicide. The State subsequently dismissed the first-degree intentional homicide charge pending against Conner.

¶5 Stewart filed a postconviction motion, arguing that he was entitled to a new trial based on: (1) a ***Brady*** violation, because the State failed to disclose evidence of an understanding between Conner and the State that the homicide charge against Conner would be dismissed if Conner testified at Stewart's trial; and (2) newly discovered evidence, because the State's dismissal of the charges against Conner after Stewart was convicted was new evidence that established a reasonable probability of a different result at a new trial. The circuit court held a hearing on the motion. Conner, his attorney, and the prosecutor for Stewart's and Conner's cases all testified that there was no agreement between Conner and the

[1] The State also charged Stewart with several other crimes based on the conduct underlying this case, but only the conviction for first-degree intentional homicide is before us in this appeal.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

State when Conner testified at Stewart's trial. The circuit court found that all three witnesses were credible, and that there was no agreement between Conner and the State when Conner testified. The court also concluded there was not a reasonable probability of a different result, even if the jury had been told of a plea agreement between Conner and the State, based on the other evidence at trial. Stewart appeals from the judgment of conviction and the order denying his postconviction motion.

STANDARD OF REVIEW

¶6 Whether the State violated a defendant's due process rights under ***Brady*** presents questions of historical fact, which we review under the clearly erroneous standard, and questions of ultimate constitutional fact, which we review de novo. *See* ***State v. Harris***, 2004 WI 64, ¶11, 272 Wis. 2d 80, 680 N.W.2d 737. We review a circuit court's decision to grant or deny a motion for a new trial based on newly discovered evidence for an erroneous exercise of discretion, which includes an independent review of whether the newly discovered evidence establishes a reasonable probability of a different result at a new trial. *See* ***Plude***, 310 Wis. 2d 28, ¶¶31, 33.

DISCUSSION

¶7 Stewart contends that he is entitled to a new trial based on either a ***Brady*** violation or newly discovered evidence. First, under ***Brady***, he contends that the State violated his due process rights by suppressing evidence of the understanding between Conner and the State that the State would dismiss the first-degree intentional homicide charge against Conner if he testified against Stewart. Next, under ***Plude***, he contends that the State's dismissal of the first-degree intentional homicide charge against Conner after Stewart was convicted is newly

discovered evidence that would probably lead to a different result at a new trial. We address each argument in turn.

¶8 Under ***Brady***, due process requires the State to disclose evidence that is favorable to the defense. ***Harris***, 272 Wis. 2d 80, ¶12. The disclosure requirement covers both exculpatory and impeachment evidence. ***Id.*** Here, the evidence at issue is impeachment evidence against Conner: an agreement or understanding between Conner and the State that the State would dismiss the homicide charge against Conner in exchange for his testimony at Stewart's trial.

¶9 Stewart contends that the circuit court's finding that there was no plea agreement between Conner and the State was clearly erroneous because the circumstantial evidence overwhelmingly established that there must have been some agreement or understating when Conner testified. *See* ***State v. Quarzenski***, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844 (generally, whether a plea agreement exists and the terms of any plea agreement are questions of historical fact).[3] Stewart points to the following. Both Stewart and Conner were charged with first-degree intentional homicide, as party to a crime, based on the same facts. Conner's trial was originally scheduled before Stewart's, but Conner's attorney was able to reschedule Conner's trial to take place after Stewart's. Conner then testified for the State at Stewart's trial; and, after Stewart's conviction, the State dismissed the first-degree intentional homicide charge against Conner. In light of these facts, Stewart contends, the testimony at the

[3] The issue in ***State v. Quarzenski***, 2007 WI App 212, 305 Wis. 2d 525, 739 N.W.2d 844, was whether the prosecutor materially breached a plea agreement with the defendant. Both parties to this appeal treat the issue of whether Conner had a plea agreement or understanding with the State as a question of fact, and we agree that this standard of review follows logically from the case law.

postconviction motion hearing that there was no agreement between Conner and the State was incredible as a matter of law. We disagree.

¶10 The flaw in Stewart's argument is that the circuit court is the ultimate arbiter of the credibility of witnesses. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). Here, the circuit court found the following testimony credible: (1) Conner testified that he did not have an agreement with the State, and that he testified at Stewart's trial to tell the truth; (2) Conner's attorney testified that Conner did not have an agreement with the State, and that his reasoning in rescheduling Conner's trial was that he wanted Conner to have the opportunity to testify before they determined whether it would be better to go to trial in Conner's case; and (3) the prosecutor testified that Conner did not have an agreement with the State, that the State determined after Conner testified at Stewart's trial that the State would not be able to prove Conner's guilt beyond a reasonable doubt, and that the State was ethically required to dismiss the first-degree intentional homicide charge against Conner in the interest of justice. Because the court found the testimony by Conner, his attorney, and the prosecutor credible, we reject Stewart's claim of a ***Brady*** violation.

¶11 Stewart argues that even if there was no ***Brady*** violation, he is entitled to a new trial based on newly discovered evidence. He contends that the State's dismissal of the homicide charge against Conner after Stewart was convicted is new evidence that establishes a reasonable probability of a different result at a new trial. We disagree.

¶12 As a threshold matter, a defendant moving for a new trial based on newly discovered evidence must establish the following: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the

evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***Plude***, 310 Wis. 2d 28, ¶32 (citation omitted). Next, "[i]f the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***Id.*** The State does not dispute that the threshold factors have been met in this case; it disputes that there is a reasonable probability of a different result at trial with the new evidence. We agree with the State that the evidence of the State's dismissing the homicide charge against Conner does not establish a reasonable probability of a different result at a new trial.

¶13 To establish Stewart's right to a new trial based on newly discovered evidence, Stewart would have to establish that the State's dismissal of the homicide charge against Conner would have "a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to [his] guilt." ***Id.***, ¶33. We conclude that Stewart is unable to make that showing. First, at trial, Stewart's counsel highlighted Stewart's theory as to Conner's motivation for testifying. Defense counsel elicited testimony from Conner that he, too, was charged with first-degree intentional homicide in this case, and then argued in closing: "[Conner] has a motive to lie. Well, he said … he is worried about going back to prison for life. He said he just did 12 years, and his motive to lie is substantial. That's something else that should cause you to pause or hesitate." Thus, the jury at Stewart's trial already knew that Conner had a motive to lie at Stewart's trial, and we do not agree that the fact that the homicide charge against Conner was subsequently dismissed would have significantly altered the landscape for the jury. Moreover, it would have been obvious to the jury that the prosecutor

or a judge might treat Conner more favorably if he helped convict the shooter in this case, namely, Stewart.

¶14 Additionally, we agree with the State that the evidence beyond Conner's testimony was sufficient to outweigh an additional challenge to Conner's credibility. *See* ***id.***, ¶33 (analysis of whether there is a reasonable probability of a different result with the new evidence requires determining impact of new evidence on evidence presented at trial). The State's evidence against Stewart at trial included the following: shortly after the shooting, Stewart led police on a high speed car chase, driving a car matching the description of the car leaving the shooting scene provided by witnesses; he then fled on foot from police officers, broke into a house and attempted to destroy his clothing; Stewart's DNA was on the gun used in the shooting, which was located near his car; and Stewart's description of how the shooting occurred conflicted with other physical evidence presented at trial. We conclude that, in light of the evidence as a whole, there is not a reasonable probability of a different result at a new trial with evidence that the State dismissed the homicide charge against Conner after he testified at Stewart's trial. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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