COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2009AP2446-CR
2009AP2447-CR

Cir. Ct. Nos. 2007CF31
2007CF194

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SATERUS S. GLASS,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Saterus Glass appeals from a judgment of conviction entered on his no contest plea to two counts of being a party to the crime of burglary and from a judgment of conviction of first-degree sexual assault

of a child, incest with a child, and second-degree sexual assault entered on a jury verdict. Regarding the sexual assault convictions, he argues that the trial court should have conducted an in camera review of redacted portions of police reports that the prosecution refused to disclose as part of discovery. He also claims entitlement to resentencing because the trial court did not utilize the sentencing guidelines. We reject his claims and affirm the judgments.

¶2 Glass filed a motion for additional discovery explaining that the police reports produced by the prosecution in response to his discovery request did not include "Narratives 15, 16, 17, 18 and 19." The prosecution had asserted that the information within those narratives was neither discoverable nor exculpatory. Glass asked the trial court to review the narratives in camera to determine whether they were discoverable or exculpatory. At the hearing on the motion, the trial court asked Glass to provide it with legal authority to require the narratives to be submitted for an in camera inspection. Defense counsel indicated a letter brief would be filed later in the week but it never was. The trial court's order denying the motion for an in camera review provided that the court would reconsider the ruling if the defense provided authority for an in camera review. During trial it was suggested that the narratives gave information about counseling the victim started after the crime.

¶3 Glass argues that as a matter of law the trial court erred in not conducting an in camera inspection of the withheld narratives. Glass did not establish in the trial court and does not establish on appeal an absolute right to an in camera review of documents withheld during discovery. This is not a case involving confidential records like ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, ***State v. Navarro***, 2001 WI App 225, 248 Wis. 2d 396, 636 N.W.2d 481, and ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App.

1993) *clarified by* ***Green***, 253 Wis. 2d 356, ¶¶28, 32-33, where the courts discussed the showing necessary to obtain an in camera review of confidential records. Rather, this case involves the prosecution's duty to disclose exculpatory evidence under WIS. STAT. § 971.23(1)(h) (2007-08),[1] and the due process clause as explained in ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). Glass must establish a ***Brady*** violation to obtain relief.

¶4 The application of WIS. STAT. § 971.23(1)(h) to a given set of facts presents a question of law that we review independently of the trial court. ***State v. Harris***, 2008 WI 15, ¶15, 307 Wis. 2d 555, 745 N.W.2d 397. Due process requires disclosure of evidence favorable to an accused where the evidence is material either to guilt or to punishment. ***Brady***, 373 U.S. at 87. The evidence is favorable to the accused if it tends to establish the defendant's innocence or because it impeaches the credibility of a prosecution witness. ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. In addition to being favorable, the withheld evidence must be "material" in that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. ***Id.***, ¶¶13-14. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, ¶14. However, a prosecutor is not required to share all useful information with the defendant and the mere possibility that information "might have helped the defense … does not establish materiality." ***Id.***, ¶16. Whether the prosecution violated a defendant's right to due process under ***Brady*** is a question of

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

constitutional fact that we review independently. *See* ***State v. DelReal***, 225 Wis. 2d 565, 571, 593 N.W.2d 461 (Ct. App. 1999).

¶5 Glass made no showing that the withheld narratives were favorable to him as bearing either on innocence or credibility of a witness. However, the potential materiality of the withheld narratives was suggested during the trial. During cross-examination of the victim, the defense elicited the victim's acknowledgement that she had not told anyone but the social worker and police that she had been touched. The victim also acknowledged that she was in counseling with someone on a regular basis. When the defense asked how often the victim sees her counselor the prosecutor objected. Out of the presence of the jury the prosecutor expressed concern that the defense was going to ask the victim about disclosures made during therapy which constitute confidential medical information. Defense counsel replied:

> I think she's going to testify that she's never disclosed to her therapist that anyone's touched her. Had the government produced these narratives for me, Judge, we may have been able to resolve this before trial. The fact of the matter is the government intentionally hid these narratives from us, intentionally didn't want us to know that she'd been with a therapist. Didn't want us to know, I believe, that she's never told anyone else that anyone touched her other than these two police officers and the two social workers in this case, neither of which the two social workers are testifying here. I think I can certainly ask her if she's ever told her therapist that anyone's touched her. The fact of the matter is I'm going to argue it already to the jury, because she said she hasn't told anybody else.

¶6 When pressed by the trial court to explain the purpose of asking the victim about counseling the defense indicated that it wanted the jury to hear that the victim never told her therapist that anyone touched her. The trial court

allowed the defense to ask whether the victim had told her therapist. Defense counsel said that was good enough.[2]

¶7 At trial Glass was allowed to present the evidence he claims the withheld narratives would have revealed—that the victim had not told her therapist she had been touched. Where, as here, the jury received the information that the defense sought to discover, there is no prejudice. Pretrial disclosure of the narratives would not have changed the outcome. There was no ***Brady*** violation.

¶8 The other issue on appeal is whether Glass is entitled to resentencing because the sentencing court failed to consider applicable sentencing guidelines as required by WIS. STAT. § 973.017(2), and ***State v. Grady***, 2007 WI 81, ¶44, 302 Wis. 2d 80, 734 N.W.2d 364, *on reconsideration*, 2007 WI 125, 305 Wis. 2d 65, 739 N.W.2d 488, when sentencing Glass on the burglary and sexual assault convictions. Glass was sentenced March 6, 2009. WISCONSIN STAT. § 973.017(2)(a), requiring the sentencing court to consider applicable sentencing guidelines, was repealed effective July 1, 2009. 2009 Wis. Act 28, § 3386m. Prior to repeal of that provision, the Wisconsin Sentencing Commission was defunded. ***State v. Barfell***, 2010 WI App 61, ¶4, 324 Wis. 2d 374, 782 N.W.2d 437, *petition for review pending* (Wis. 2009AP1568). ***Barfell***, ¶8, holds that the repeal of § 973.017(2)(a) is applied retroactively. Further, because the sentencing guideline commission was defunded and the guidelines have become outdated, it is now impossible to order a defendant resentenced and to have the sentencing guidelines considered. ***Id.***, ¶9. The issue Glass raises on appeal is moot. *See* ***id.***

[2] Glass asked the victim whether she had told her counselor that anybody touched her and the victim responded, "I'm not sure about that one."

Even though the failure to consider the sentencing guidelines was error, Glass is not entitled to any relief. ***Id.***, ¶14.

¶9[3] The appellant's brief contains the required certification by counsel, Attorney Robert Haney, that the appendix contains the "portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues." *See* WIS. STAT. RULE 809.19(2)(a). However, the appellant's appendix fails to include the transcript of the hearing on the motion for an in camera review of redacted portions of the police records which includes the trial court's oral ruling on the motion. The transcript of the hearing is essential to understand the issues. We question whether the omission from the appendix violates RULE 809.19(2) and if a penalty should be imposed. See ***State v. Bons***, 2007 WI App 124, ¶25, 301 Wis. 2d 227, 731 N.W.2d 367 (counsel's false certification and omission of essential record documents in the appendix places an unwarranted burden on the court and is grounds for imposition of a penalty under RULE 809.83(2)). In accordance with ***State v. Nielsen***, 2011 WI 94, ___ Wis. 2d ___, ___ N.W.2d ___, by separate order we will require attorney Haney to show cause in writing why a violation of RULE 809.19(2)(a) and (b), should not be found and why counsel should not be required to pay $150 to the Clerk of the Court of Appeals as a sanction for failing to include in the appendix portions of the record that may have

[3] This paragraph is modified pursuant to a December 14, 2011 order of the Wisconsin Supreme Court granting a petition for review in appeal No. 2009AP2447-CR, and remanding our original decision for the purpose of modifying paragraph nine consistent with ***State v. Nielsen***, 2011 WI 94, ___ Wis. 2d ___, ___ N.W.2d ___. Because these appeals are consolidated and a petition for review was pending in appeal No. 2009AP2447-CR, modification of the opinion as to appeal No. 2009AP2446-CR is proper.

been essential to an understanding of the appellate issues.[4] Alternatively, counsel will be permitted to proceed without showing cause within thirty days and the $150 sanction will be retained by the court.

By the Court.—Judgments affirmed.

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

[4] Attorney Haney has paid a $150 sanction imposed by the court's original decision. If the sanction is imposed, the $150 will not be returned to Attorney Haney.