COURT OF APPEALS
DECISION
DATED AND RELEASED

January 29, 1997

NOTICE

No. 95-3102-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONZELL THOMAS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Donzell Thomas appeals from a judgment of conviction as a habitual offender of delivery of cocaine base within a prison and from an order denying his motion for postconviction relief. He argues that he should have been allowed to inspect personnel records of the officer in charge of the "sting" operation inside the Racine Correctional Institution (RCI), that prosecutorial misconduct occurred because the prosecution failed to disclose efforts it was making to fulfill promises to an informant, and that his cross-examination of the informant was improperly limited. We conclude that any error was harmless and affirm the judgment and the order.

The case against Thomas was one of twenty-four prosecutions arising from an investigation and sting operation of drug trafficking within RCI. Captain Ronald Molnar ran the investigation on behalf of the institution. Michael Poivey, an RCI prisoner, served as an informant and conducted controlled drug buys.

Thomas moved to dismiss the prosecution on the ground of selective prosecution. He sought discovery of Molnar's personnel file because he believed that it would reflect that Molnar had been disciplined for racially biased conduct. The Department of Corrections moved to quash a *subpoena duce tecum* which sought production of Molnar's personnel file. The trial court ruled that the record did not exist and that it was exempt from the open records law.

Thomas argues that the trial court's finding that the record did not exist was clearly erroneous and that the record was subject to discovery regardless of the open records exemptions. We choose to address the claim of error under the harmless error analysis. We conclude that even if the personnel record would have disclosed that Molnar had been disciplined for racially motivated behavior, Thomas's motion to dismiss would have failed because he failed to establish that others similarly situated or of nonminority races were not prosecuted.

A defendant claiming that he or she was unconstitutionally singled out for prosecution has the initial burden to make out a prima facie case of discrimination. *See* ***State v. Johnson***, 74 Wis.2d 169, 175, 246 N.W.2d 503, 507 (1976). Three elements must be shown: (1) that other similarly situated violators are not ordinarily prosecuted; (2) that the defendant was intentionally singled out for prosecution; and (3) that the defendant was selected for invidious or unjustifiable reasons such as race. *See* ***Wayte v. United States,*** 470 U.S. 598, 608 (1985); ***Sears v. State***, 94 Wis.2d 128, 134-35, 287 N.W.2d 785, 788 (1980).

Thomas's motion to dismiss relied on the statistical differences between the racial composition of the prison and the racial composition of defendants charged as a result of the sting operation. He demonstrated that 84% of the prisoners prosecuted, including himself, were members of recognized racial minority groups while minorities comprised only 59 to 64% of

the prison population. We agree with the trial court that the statistical significance is slight and not enough to demonstrate a purposeful singling out of Thomas for prosecution. There was no proof that nonminority prisoners were dealing drugs at RCI and not being prosecuted. Molnar's personnel record was not relevant to that element. A prima facie case was not established.

Thomas argues that the trial was infected by prosecutorial misconduct. The misconduct he alleges is the prosecution's failure to disclose the immediacy of informant Poivey's rewards in exchange for his testimony. Thomas asserts that Poivey's and the Department of Justice (DOJ) investigator's testimony was perjured in that both were vague as to when the promises made would be carried out when in fact the promised letters in support of a sentence modification for Poivey were written a few days after Thomas's trial.

We conclude that even if there was a duty to disclose that the letters would be written shortly after trial, the failure to disclose was not material. A violation of the duty to disclose exculpatory evidence applies only when the evidence is both favorable to the accused and material to guilt or innocence. *See* ***State v. Garrity***, 161 Wis.2d 842, 848, 469 N.W.2d 219, 221 (Ct. App. 1991). "[E]vidence 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. A `reasonable probability' is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 850, 469 N.W.2d at 222 (quoting ***United States v. Bagley***, 473 U.S. 667, 682 (1985)).

The trial testimony clearly and repeatedly brought out that promises had been made for Poivey's cooperation. Poivey himself acknowledged that he was trying to buy his way out of prison. The testimony established that a letter was promised from both the prosecution and the DOJ which would outline the extent of Poivey's cooperation but would not make a sentencing modification recommendation. It was made clear that without the promised letters, Poivey would not be released from prison until 2000. The DOJ investigator indicated that he was going to carry out his promise even though Poivey violated the agreement. The immediacy of the expected reward, even if known to Poivey, was just another tier of impeaching testimony. Because Poivey's "overwhelming yen to regain his liberty," to use Thomas's words, was

brought out at trial, the revelation that the promises would be fulfilled in a matter of days would have been cumulative.

The final claim is that Thomas should have been able to cross-examine Poivey about the fact that Poivey wrote a letter to the DOJ decrying drugs and indicating that he did not use drugs. Thomas sought to impeach Poivey with this cross-examination because Poivey had admitted drug use in testimony at another proceeding. "The scope of cross-examination allowed for impeachment purposes is within the trial court's discretion." ***State v. Echols***, 175 Wis.2d 653, 677, 499 N.W.2d 631, 638 (1993). In the exercise of its discretion, the trial court may impose limits on cross-examination relating to a witness's bias. *See* ***State v. Whiting***, 136 Wis.2d 400, 422, 402 N.W.2d 723, 732 (Ct. App. 1987). The trial court properly exercises its discretion in limiting cross-examination which is repetitive or only marginally relevant. *See* ***id.***

We reject the State's claim that Thomas has waived the issue because the record fails to include the letter Thomas sought to use to cross-examine Poivey. The letter was presented at trial and speaks for itself as an offer of proof.

We do not address the specific grounds relied upon by the trial court in restricting cross-examination of Poivey. We conclude that cross-examination based on the letter to the DOJ was of minimal probative value in assessing Poivey's credibility. Therefore, the error, if any, was harmless. We have noted that Poivey's motivation for participating in the sting operation and giving trial testimony was fully explored. Additionally, a former prison roommate of Poivey's testified that the two smoked marijuana together once or twice a week. The roommate also saw Poivey shoot cocaine once. The DOJ investigator indicated that one of Poivey's motivations for helping was that Poivey disliked the drug traffic in prison. The investigator went on to reveal that Poivey himself delivered drugs within the prison and used marijuana in violation of his agreement to cooperate. Thus, there was testimony about Poivey's drug use in prison, and cross-examination about drug use or the falseness of Poivey's assertions in the letter to the DOJ was repetitive.

By the Court.—Judgment and order affirmed.

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