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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/31/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0712
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
CHRISTINE RENE A KNIGHT,) Rule 111, Rules of the
) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Mohave County

Cause No. S8015CR201000938

The Honorable Steven F. Conn, Judge

AFFIRMED

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K E S S L E R, Judge

¶1 Christine Renea Knight ("Knight") appeals from
her conviction of one count of Possession of Dangerous
Drugs for Sale involving Methamphetamine and one count of

Possession of Drug Paraphernalia involving Methamphetamine. On appeal, Knight argues the trial court erred by denying her motion to compel and refusing to order the State to disclose certain material. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶12 On September 8, 2010, Bullhead City Police officers executed a search warrant at Knight's residence in Bullhead City. The probable cause supporting the search warrant resulted from a planned drug buy arranged by Bullhead City Police through the use of a reliable police informant ("T"). Earlier that day, T was told he could purchase methamphetamine from Robyn Udovich ("Udovich") at Knight's residence. T informed police and a police background check confirmed that Knight had previously been arrested on drug charges and was the subject of an outstanding, active arrest warrant for failure to pay fines on a charge of possession of drug paraphernalia. Police believed Knight possessed methamphetamine and might be involved in the sale of methamphetamine. Based on this information, Police obtained a warrant to search Knight's home.

¶13 Police executed the search warrant at the residence. When officers entered the residence, they found Knight and a man later identified as Michael Couch ("Couch") sitting

in Knight's bedroom on opposite sides of a bed. Officers searched their pockets and found several bills totaling one hundred dollars in Knight's pocket and a glass pipe used for methamphetamine in Couch's pocket. After locating Udovich in the bathroom, officers searched her purse and found a small metal canister and a make-up case which had white powder residue on it that later tested positive for methamphetamine. Police detained Knight, Udovich and Couch and then continued searching the home.

¶4 A search of Knight's bedroom revealed the following items: a small pay/owe ledger containing names and dollar amounts located on the bed; a plastic baggie containing white crystalline powder imprinted with "4:20" located in the trash can; a small clear baggie containing white crystalline powder located on the floor next to the trash can; two \$20 bills also located on the floor next to the trash can; a tin container containing two small straws, two empty baggies, and two baggies full of white crystalline powder; a black pouch containing a digital gram scale with residue and four baggies, two containing white crystalline powder; a glass pipe and a plastic bong containing residue; and a piece of mail addressed to Knight at the residence. In a hallway closet, police found a bag containing male clothing and envelope addressed to Couch. Officers

determined that Couch did not live at the residence. The evidence was taken to a crime lab where an analyst identified the white powder substance as methamphetamine, which had a combined weight of 3.22 grams. The baggies located in the tin container that Knight later admitted belonged to her contained a total of 2.08 grams of methamphetamine, the baggies containing .38 grams and 1.7 grams, respectively.

¶15 Based on the evidence collected, Knight was arrested and brought to the police station for questioning. The interview was recorded and admitted in evidence. During the interview, Knight admitted the digital gram scale and the tin container, which contained empty baggies, straws, and two baggies full of methamphetamine, belonged to her. However, Knight claimed the methamphetamine in the trash can and the methamphetamine on the floor next to the trash can did not belong to her. Knight also admitted during her interview to selling methamphetamine to pay her bills over the past several months. Specifically, she admitted she sold methamphetamine in smaller amounts to make more money, but she was concerned about the amount of traffic she was bringing to her home. Police testimony at trial confirmed that the items Knight admitted to owning were commonly associated with methamphetamine sales. Police testimony

also confirmed that the amount of methamphetamine Knight admitted belonged to her, 2.08 grams, weighed more than the amount a simple user would typically possess.

¶16 On July 25, 2011, eight days prior to the trial, Knight filed a motion to compel, motion for sanctions, motion to dismiss, and motion to continue. Knight argued the State failed to comply with its disclosure duty under both Arizona Rule of Criminal Procedure 15.1 and under *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, Knight claimed that the State failed to disclose copies of recorded police interviews of Couch and Udovich, recordings of the planned drug buy which gave rise to the warrant to search Knight's residence, and background information of any involved informant. Her motion to compel requested the court to require the State to disclose the above recordings and information.

¶17 Knight also requested a second opportunity to inspect all the State's evidence and a four-week continuance of the trial to have sufficient time to subpoena Udovich and Couch as witnesses.

¶18 The State filed a response to Knight's motion, arguing it had no obligation to disclose the requested information. The State argued it already disclosed all statements made by Udovich and Couch via the police report

and disclosed T's informant status. The State also claimed any information Knight sought relating to the possible informant status of Couch and Udovich was not relevant.¹

¶19 The trial court denied Knight's motion, except with respect to one item not relevant to this appeal. The trial court found that any recorded interviews with Udovich and Couch, if they existed, would not be relevant. Further, the court held that recordings of the planned drug buy arranged by T and background information concerning drug deals made by T, Couch, or Udovich would likewise be irrelevant.

[T]he defendant in this case is charged with possession of dangerous drugs for sale and possession of drug paraphernalia, based upon things that were found during the execution of a search warrant. There has been no motion to suppress, so the qualifications of the informant, how he came to know his information, whether he was reliable, that's not an issue.

I understand that if people are present during a search warrant, or if they have knowledge about things that were found and are able to say those were my drugs, that that's something that is relevant that would be helpful to the defense; but I don't even know that that's what these people would say.

. . . .

¹ It is unclear from the record whether recorded police interviews with Couch and Udovich actually exist or whether recordings of the planned drug buy arranged by T exist. The police report indicates that a recording was made of Knight's interview with police, but it does not establish that any recordings were made of police interviews with Couch or Udovich.

[I]t just seems to me that this talk about [T], Couch and Udovich, as to other things that they might know about other activity that they were involved in, maybe how the search warrant came to be obtained, that these are all peripheral issues which really just don't have anything to do with the issues that are going to have to be addressed in this case.

¶10 At trial, Knight testified she sold drugs in the past but claimed she was not selling drugs at the time of her arrest. Knight testified that when she admitted to selling drugs during her interview with police, she was referring to the past. Knight admitted to owning two plastic baggies, which police determined contained a total of 2.08 grams of methamphetamine, the digital gram scale, empty baggies, the methamphetamine pipe, and the methamphetamine bong. Knight denied owning the plastic baggie found on the floor of her bedroom, the baggie in the trash can, and the pay/owe ledger. Knight testified that during her recorded interview, she was under the influence of medication and she did not remember telling the police officer that she sold methamphetamine to pay her bills. She further testified that the money police found in her pocket was money she borrowed from a friend to pay her electric bill. At the conclusion of trial, a unanimous jury found Knight guilty on both counts.

¶11 Knight filed a timely notice of appeal from the judgment. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2011).

ISSUES ON APPEAL AND STANDARD OF REVIEW

¶12 On appeal, Knight claims the superior court erred by refusing to order the State to disclose recorded police interviews of Couch and Udovich, information regarding their alleged confidential informant status, and a recording of the proposed buy between Couch and T. Knight argues the State failed to comply with its disclosure duty under Arizona Rule of Criminal Procedure 15.1, and therefore, she was deprived of the opportunity to present a complete defense, violating her due process rights under *Brady v. Maryland*.

¶13 This Court will not disturb a trial court's ruling on a discovery request absent an abuse of discretion. *State v. Conner*, 215 Ariz. 553, 557, ¶ 6, 161 P.3d 596, 600 (App. 2007). "To the extent Defendant sets forth a constitutional claim in which [she] asserts that the information is necessary to [her] defense, however, we conduct a de novo review." *Id.*

DISCUSSION

I. Constitutional Right to Disclosure

¶14 There is no general federal constitutional right to discovery in a criminal case. *State v. Tucker*, 157 Ariz. 433, 438, 759 P.2d 579, 584 (1988). "However, the Constitution does impose on the prosecution a due process obligation to disclose exculpatory evidence that is material on the issue of guilt or punishment." *Id.* (citing *Brady*, 373 U.S. 83, 87-88 and *United States v. Bagley*, 473 U.S. 667, 676-84 (1985)). A defendant is denied due process "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." *Bagley*, 473 U. S. at 682. A showing of materiality does not require the defendant to demonstrate by a preponderance of the evidence that disclosure would have resulted in an acquittal. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

¶15 Knight incorrectly relies on *State v. Gibson*, 202 Ariz. 321, 44 P.3d 1001 (2002) to argue evidence the State failed to disclose would have been relevant and admissible as third party culpability evidence, and therefore its suppression constituted a *Brady* violation. Knight argues recorded interviews of Couch and Udovich and the recording of the planned buy between T and Couch were material

because they might yield evidence of Couch's and Udovich's possible involvement in the sale of methamphetamine and would have created reasonable doubt as to Knight's guilt.

¶16 In *Gibson*, the court addressed the defendant's claim that the trial court improperly precluded evidence that someone else may have committed the crime. 202 Ariz. at 322, ¶ 1, 44 P.3d at 1002. The court held a defendant may introduce third party culpability evidence as long as it is relevant and its probative value is not outweighed by the danger of unfair prejudice. *Id.* at 324, ¶ 19, 44 P.3d at 1004 (citing Arizona Rules of Evidence 401, 402, and 403). Third-party culpability evidence is relevant if it tends to create a reasonable doubt as to the defendant's guilt. *Id.* at 324, ¶ 16, 44 P.3d at 1004. However, a trial court can properly preclude third-party culpability evidence when it affords only a "possible ground of possible suspicion against another person." *State v. Renteria*, 21 Ariz. App. 403, 404, 520 P.2d 316, 317 (1974).

¶17 *Gibson* is not applicable for several reasons. First, Knight was never denied the opportunity to present third-party culpability evidence. Knight was free to interview Couch and Udovich or call them as witnesses at trial. In fact, the record indicates defense counsel notified the prosecutor for the first time on July 18, 2011

that he would be calling Udovich and Couch as witnesses. Yet, at the July 28, 2011 hearing, just five days before trial, no arrangements had been made to subpoena either witness. The trial court noted this during the hearing:

I understand that the defense is saying we are going to call these people as witnesses at trial; and I don't think I really understood, until I came in here today, that you really aren't going to, because you have no idea where these people are, or you can't do what you need to do to get them.

. . . .

This case has been pending for a while I just can't imagine that if [T], Couch and Udovich were viewed as this important, that we are discussing this for the first time on the Thursday before the Tuesday that this trial starts.

¶18 Second, Knight has not alleged that recorded interviews, if they exist, actually contain statements that demonstrate Couch's or Udovich's culpability.² On the contrary, according to the police report, both Couch and Udovich told police officers that none of the methamphetamine found in Knight's bedroom belonged to them. Nothing in the record supports the assertion that Couch and Udovich admitted to any involvement in either the sale or

² The State argues in its answering brief that tapes of recorded police interviews of Couch and Udovich "did not exist." However, the State did not argue this below, nor did it provide any testimony or affidavits to the trial court supporting this assertion.

possession of methamphetamine. Knight's unsupported inferences regarding the possible substance of recorded interviews would not be considered relevant or admissible under *Gibson*.

¶19 In addition, Knight cannot rely on *Brady* to argue the State had a duty to disclose recorded interviews of Couch and Udovich. A defendant's mere speculation that evidence contains exculpatory material does not impose a disclosure duty upon the State. See *State v. Acinelli*, 191 Ariz. 66, 71, 952 P.2d 304, 309 (App. 1997). A true *Brady* violation requires the defendant show the non-disclosed evidence (1) is favorable, either because it is exculpatory or impeaching, (2) was suppressed by the State, either willfully or inadvertently, and (3) resulted in prejudice. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-110 (1976), modified by *Bagley*, 473 U.S. 667 (1985).

¶20 Fourth, any such evidence would not be material to the charges against Knight. She was not arrested for selling illegal drugs in a buy with undercover agents or

informants. Rather, she was arrested for possession of drugs for sale and drug paraphernalia, which she admitted to police and at trial were hers. Police testimony also showed that possession of that material was consistent with possession for sale. Any evidence of the proposed buy and what Couch or Udovich told police would be irrelevant and immaterial to the basis for the charges against Knight.

¶21 We conclude our supreme court's holding in *Acinelli* dictates the result in this case. In *Acinelli*, the defendant sought review of evidence "without even a hint that impeaching material was contained therein." 191 Ariz. at 71, 952 P.2d at 309 (quoting *United States v. Andrus*, 775 F.2d 825, 843 (7th Cir. 1985)). The court held defendant's request was effectively a "blind fishing expedition." *Id.* (quoting *Jencks v. United States*, 353 U.S. 657, 667 (1957)). Like the defendant in *Acinelli*, Knight has not demonstrated the evidence she seeks contains any exculpatory or impeaching statements, and therefore, she has failed to show the materiality of any recorded interviews of Couch and Udovich or any prejudice that ensued as a result of their alleged suppression.

¶22 Knight claims her due process rights were also violated when the State refused to disclose the alleged confidential informant status of Couch and Udovich and the

recording of a planned drug buy between T and Couch. Knight believes Couch and Udovich, as confidential informants, were involved in the planned drug buy that gave rise to the search warrant, and that this evidence is exculpatory. In response, the State argues that even if Couch and Udovich did act as confidential informants, it had no duty to disclose this evidence because the events prior to the execution of the search warrant, including information related to the planned drug buy, was irrelevant to the question of whether Knight possessed drug paraphernalia and methamphetamine for sale. The trial court agreed:

[T]his talk about [T], Couch and Udovich, as to other things that they might know about other activity that they were involved in, maybe how the search warrant came to be obtained, that these are all peripheral issues which really just don't have anything to do with the issues that are going to have to be addressed in this case.

¶123 We agree with the trial court that Knight was not entitled to information regarding the possible confidential informant status of Couch and Udovich, nor was she entitled to information regarding a planned drug buy that gave rise to the search warrant. Knight was not charged with selling methamphetamine; she was only charged with possessing methamphetamine with the intent to sell. Thus, evidence of any involvement Couch or Udovich had in the sale of

methamphetamine does not exculpate Knight of the crimes for which she was charged.

¶124 Nor do we see how non-disclosure of the alleged informant status of Couch and Udovich or information about the planned buy was prejudicial. Knight testified and told the police that she possessed methamphetamine and drug paraphernalia involving methamphetamine. Although at trial she denied selling methamphetamine, during her police interview she admitted that she was currently selling methamphetamine at the time of her arrest to pay her bills. In addition, she admitted to owning the tin container, empty baggies, straws, and digital scale, items which police testified were indicative of an intent to sell methamphetamine. Any evidence of Couch's and Udovich's involvement in the sale of drugs prior to the execution of the search warrant would not have the tendency to make the existence of any of the above facts more or less probable.

II. Arizona Disclosure Rules

¶125 Knight also argues the State violated Arizona Rule of Criminal Procedure 15.1. Rule 15.1(b) provides:

[T]he prosecutor shall make available to the defendant . . . (8) All then existing material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment therefor.

¶126 The disclosure required of the State under Rule 15.1 is "broader than the requirements of Brady." *State v. Jessen*, 130 Ariz. 1, 4, 633 P.2d 410, 413 (1981). "There may be violations of Rule 15.1, although arguably harmless, where there is no Brady violation." *Id.* Rule 15.1 requires production of recorded statements of prosecution witnesses. *State v. LaBarre*, 114 Ariz. 440, 446, 561 P.2d 764, 770 (App. 1977). However, Rule 15.1 does not require the State to call witnesses at trial who the defendant could call herself. See *State v. Tresize*, 127 Ariz. 571, 576, 623 P.2d 1, 6 (1980) ("Appellant could have called the witnesses at trial as part of his defense, but did not. The State complied fully with the pretrial disclosure requirements of Rule 15"). Furthermore, the State's non-disclosure of evidence is not prejudicial if it would not have affected the jury's determination of guilt. See *Jessen*, 130 Ariz. at 4, 633 P.2d at 413; see also *State v. Schreiber*, 115 Ariz. 555, 558, 566 P.2d 1031, 1034 (1977). ("If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.").

¶127 Knight claims that information relating to the alleged involvement of Couch and Udovich in a planned drug buy and information about what Couch and Udovich told

police in recorded interviews would have tended to mitigate her guilt. Knight argues this information could have led the jury to conclude someone else was involved in the drug sales, and that he, not Knight, discarded the empty baggies, which police testified were indicative of drug sales. We disagree.

¶128 If the alleged evidence exists, the State was not required to disclose it because the evidence would not have tended to mitigate or negate Knight's guilt. Substantial evidence supports Knight's conviction of possession for sale. Knight admitted to possessing 2.08 grams of methamphetamine and paraphernalia involving methamphetamine, and she admitted to police she sold methamphetamine to pay her bills. She also admitted to owning a digital gram scale, which is commonly associated with the sale of methamphetamine. Additionally, police found a pay/owe ledger in her room on her bed.

¶129 Even if the State's failure to disclose this information violated the requirements of Rule 15, the non-disclosure was not prejudicial. A jury would have convicted Knight based solely on her own testimony and the officers' testimony regarding drug sales, regardless of any additional evidence of Couch's, Udovich's, or T's alleged involvement.

¶30 Furthermore, any evidence of Couch's or Udovich's alleged involvement would not have mitigated Knight's punishment. Although Knight does not make this argument on appeal, her sentence was not increased based on an inference that all of the methamphetamine belonged to her. Knight was given the absolute minimum sentence permissible under the law, despite evidence of her prior convictions. In fact, the court identified the following mitigating factors: (1) only a small amount of methamphetamine was involved; and (2) there was no evidence of actual sale. Thus, Knight would not have received a lesser sentence even if the State had disclosed evidence of Couch's and Udovich's involvement.

CONCLUSION

¶31 For the foregoing reasons, we affirm the conviction and sentence.

/S/

DONN KESSLER, Judge

CONCURRING:

/S/

ANN A. SCOTT TIMMER, Presiding Judge

/S/

PATRICIA K. NORRIS, Judge