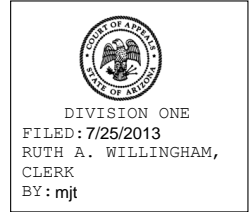


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 12-0462
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
ENRIQUE MURILLO SOTELO,) Arizona Supreme Court)
)
Appellant.)
)
)
)
)
_____)

Appeal from the Superior Court in Yuma County

Cause No. 1400CR201200163

The Honorable Lawrence C. Kenworthy, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
by Joseph T. Maziarz, Acting Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Andrew Reilly, Assistant Attorney General
Attorneys for Appellee

Yuma County Public Defender's Office Yuma
by Edward F. McGee, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Defendant Enrique Sotelo appeals his conviction and sentence for transportation of marijuana, a class two felony. He contends the trial court erred by denying his motion to compel. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Sotelo was observed driving a commercial utility truck in an unusual manner near Interstate 8. He was stopped by a U.S. Border Patrol Agent after learning from dispatch that there was a Treasury Enforcement Communications Systems ("TECS") alert associated with the truck. The agent became suspicious about Sotelo's story and requested assistance from a canine agent. The dog alerted on the truck indicating the presence of illegal drugs, and the truck was taken to a Border Patrol checkpoint for x-raying. The x-rays revealed some bundles and a hidden compartment in the auxiliary gas tank. After the search, more than 700 pounds of hidden marijuana were discovered.

¶3 Sotelo was charged, tried, and convicted of transportation of marijuana for sale. This appeal followed.

DISCUSSION

¶4 Sotelo contends the court erred by denying his motion to compel disclosure of the unredacted TECS message and the agent's training records. Specifically, he contends that because the TECS message contained material tending to exonerate

him, disclosure was required under *Brady v. Maryland*, 373 U.S. 83 (1963), and Arizona Rule of Criminal Procedure ("Rule") 15.1. We review a ruling on discovery matters for an abuse of discretion, *Cervantes v. Cates*, 206 Ariz. 178, 181, ¶ 11, 76 P.3d 449, 452 (App. 2003); see also *State v. Robles*, 182 Ariz. 268, 272, 895 P.2d 1031, 1035 (App. 1995) (applying abuse of discretion to challenges under *Brady*), keeping in mind that the "trial court is in the best position to rule on discovery requests." *State v. Fields*, 196 Ariz. 580, 582, ¶ 4, 2 P.3d 670, 672 (App. 1999).

¶15 "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. at 87-88, and *United States v. Bagley*, 473 U.S. 667, 676-84 (1985)). "Under this doctrine, the defendant is denied a fair trial only if there is a reasonable probability that, had the exculpatory evidence been disclosed, the result of the proceeding would have been different." *Tucker*, 157 Ariz. at 438, 759 P.2d at 584 (citing *Bagley*, 473 U.S. at 682). Because "the Constitution is not violated every time the government fails . . . to disclose evidence that might prove helpful to the defense," *Kyles v.*

Whitley, 514 U.S. 419, 436-37 (1995), a defendant alleging a *Brady* violation must demonstrate that the exculpatory evidence has been suppressed by the State, and that prejudice has ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). "Mere speculation that a government file may contain *Brady* material is not sufficient to require . . . reversal for a new trial." *State v. Acinelli*, 191 Ariz. 66, 71, 952 P.2d 304, 309 (App. 1997) (quoting *United States v. Navarro*, 737 F.2d 625, 631 (7th Cir. 1984), *cert. denied*, 469 U.S. 1020 (1984)). And, the prosecutor's duty to disclose extends to "any favorable evidence known to the others acting on the government's behalf," *Kyles*, 514 U.S. at 437, or evidence within its possession. *State v. O'Dell*, 202 Ariz. 453, 457, ¶ 11, 46 P.3d 1074, 1078 (App. 2002) (holding that "the state did not violate *Brady* by failing to disclose evidence it no longer had . . . [and] never possessed . . . in any useable form"); see also *State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987) (holding that defendant's due process rights were not violated because "the State chose not to gather [potentially exculpatory] evidence" to prove its case).

¶16 Here, Sotelo sought disclosure of the federal government's TECS alert to demonstrate that he had been an innocent driver with no knowledge of the hidden compartment. The State received the redacted TECS alert from Border Patrol

and provided an identical copy of the document to Sotelo. The State never saw or possessed the unredacted version, despite its numerous attempts to procure it. Sotelo has not demonstrated that the unredacted version of the TECS alert contained exculpatory evidence or that any prejudice ensued by the State's failure to disclose that version of the TECS alert. Moreover, because the State cannot disclose evidence it never possessed, see *supra* ¶ 6, we find no *Brady* violation here.

¶7 Additionally, we find no discovery violation under Rule 15. Although Rule 15.1(b) requires a prosecutor to disclose all reports "prepared by a law enforcement agency in connection with the particular crime with which the defendant is charged," the requirement is specifically limited to law enforcement agencies "under the prosecutor's direction or control." Rule 15.1(f)(2). Because Border Patrol and the U.S. Department of the Treasury are not under the direction and control of the State and because the State did not have "any better access" to the unredacted version, we find no abuse of discretion in the court's order. See *State v. Rienhardt*, 190 Ariz. 579, 585, 951 P.2d 454, 460 (1997).

CONCLUSION

¶18 Finding no error, we affirm Sotelo's conviction and sentence.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

SAMUEL A. THUMMA, Judge

/s/

DONN KESSLER, Judge