

December 30, 2002

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**Re: State of Delaware v. Julian Bodnari
ID No. 9909027880**

Date Submitted: September 30, 2002

Dear Counsel:

This is my decision on defendant Julian Bodnari's ("Bodnari") Motion for a New Trial based on newly discovered evidence and a violation of Brady v. Maryland, 373 U.S. 83 (1963). The Motion is denied for the reasons stated herein.

Nature and Stage of Proceedings

Bodnari was arrested and indicted on charges relating to a traffic stop and subsequent seizure of cocaine. A jury found Bodnari guilty of sixteen charges: trafficking in cocaine, possession of a firearm during the commission of a felony, possession with the intent to deliver cocaine, carrying a concealed deadly weapon, six counts of forgery in the second degree, conspiracy in the second degree, criminal impersonation, failure to carry insurance, driving

without a license, possession of a fictitious license, and speeding.¹ During the presentence investigation, Bodnari's counsel acquired a letter (the "Letter") addressed to Adam Gelof, the Deputy Attorney General assigned to Bodnari's case. The Letter, written by an inmate who was incarcerated with Bodnari and Herman Garcia² ("Garcia"), stated the author (the "Author") had information relevant to the Bodnari and Garcia cases.³ In spite of requests for Brady material, Bodnari had no prior knowledge of the Letter. Bodnari filed a motion for a new trial, alleging the Letter was newly discovered evidence or suppressed by the State in violation of Brady.

¹Bodnari was found not guilty on the charges of maintaining a vehicle for keeping controlled substances and possession of drug paraphernalia.

²Garcia was a passenger in the vehicle driven by Bodnari and was arrested with him.

³The Letter stated:

Please be informed the following information in the case of State of Delaware vs. Herman Garcia and Mike L. Allen A/K/A Julian Bodnari including associates and other pertinent facts that happened on September 19, 1999 is only the tip of events that led to the arrest of both defendants. I have a [sic] insider perspective persuasively documented wealth of information concerning both defendants that would be of assistance to your investigation of Garcia and Bodnari and there [sic] associates.

To date, Mr. Vickers will be dismissed, Ed Gill has been payed [sic] to take the case, Joe Hurley is also being sought. I have been instructed to write a letter to [deleted] with a money offer to leave town, if he refuses to find someone to "murder" him up to ten thousand dollars, or locate [deleted] so that individuals from P.A. can dispose of him. This decision is the result of Garcia discussing the plea with Bodnari, the plea will also be rejected.

In sum, I have additional information as to the ties of conspiracy between the defendants, where the money comes from, who [sic] cocaine it really is, where it was going, where it came from, who hid it in the Suburban, who Samuel Stumhopper [sic] is, the gun etc.

There is still cocaine not found in this case that remains hidden. Both Garcia and Bodnari, have assured me for my help and assistance I will be payed [sic] a large amount of cash and access to any amount within reason to cocaine and counterfeit money if I make [deleted] disappear for good.

Before the current motion, Bodnari moved for Judgment of Acquittal at the conclusion of the State's case-in-chief.⁴ This motion was denied. Bodnari resurrected this motion on July 26, 2000, after the jury announced its verdict.⁵ Bodnari also sought a new trial on two grounds: (1) the trafficking in cocaine and possession with the intent to deliver cocaine convictions were inconsistent with the jury's exoneration on the charges of using a vehicle for keeping controlled substances and possession of drug paraphernalia, and (2) the State violated Bodnari's Fifth Amendment rights. After a long delay caused by counsels' heavy trial schedules, this Court denied the motions on June 14, 2002. Sentencing was set for July 19, 2002. Due to the discovery of the Letter, sentencing did not occur on the scheduled date and was deferred pending decision on this motion.

Facts

Delaware State Police Officer Andrel Martinez ("Martinez") stopped a black Chevy Suburban (the "Suburban") for speeding on Route 113 near Millsboro on September 19, 1999 at 9:50 p.m.⁶ Upon approaching the Suburban, Martinez observed a driver and passenger, the smell of marijuana, numerous air fresheners, cigar tubes and cigar shavings. Bodnari, the driver, produced a Pennsylvania driver's license falsely identifying him as "Mike Allen" and vehicle registration showing Sam Stumhofer ("Stumhofer") as the Suburban's owner. Bodnari, who did

⁴On the grounds of insufficient evidence, Bodnari sought acquittal on the trafficking cocaine, possession with the intent to distribute cocaine, possession of a firearm during the commission of a felony, carrying a concealed deadly weapon, and four counts of forgery convictions.

⁵The motion originally was filed in New Castle County on July 21, 2000.

⁶The Suburban was traveling 72 miles per hour in a 55 mile per hour zone.

not have a valid driver's license, possessed other official documents supporting his fraudulent identity. When questioned by Martinez, Bodnari was unable to provide his destination, passenger's name, or the Suburban's owner's name.

Considering Bodnari and Garcia suspicious, Martinez called for assistance. Additional police officers arrived on the scene, including Corporal Evans ("Evans") and his dog trained in drug detection. After Bodnari consented to a search of the Suburban, the dog examined the vehicle's exterior and interior. When the dog could not pinpoint a source for the scent of drugs, Evans and Martinez manually searched the Suburban.⁷ The search revealed one suitcase and one pillow for two men, a mismatched spare tire with a large gash, loose screws and panels, marijuana roaches, air fresheners and a straightedge razor with cocaine residue. Inside a secret compartment in the Suburban's center console, Martinez discovered a football-sized brick of cocaine weighing 1061.5 grams and a loaded 9 mm handgun. Bodnari and Garcia were arrested and transported to Delaware State Police Troop 4.

Subsequently, Garcia pled guilty and testified for the State at Bodnari's trial. Garcia characterized his relationship with Bodnari as a partnership, but described Bodnari as the leader and decision-maker. According to Garcia, Bodnari organized the trip to Virginia Beach to complete a drug transaction. Garcia decided to accompany Bodnari after he was offered \$2,500 to count money. In preparation for the trip, Garcia arranged for the use of Stumhofer's Suburban, wrapped the cocaine after obtaining it from a "friend" of Bodnari's, and hid the cocaine in the Suburban. Garcia slept while Bodnari drove from Reading, Pennsylvania toward Virginia and

⁷Evans testified the dog's behavior indicated that the dog perceived a familiar scent, such as drugs. Evans believed the smell of marijuana overpowered the dog's senses.

his memory of the stop was clouded by his use of marijuana during the drive. Garcia admitted he owned the gun, was a drug dealer and had lied to the police during the stop and in post-arrest interviews. Other witnesses testified Bodnari did not drive the Suburban the weekend of the arrest and Garcia wanted to implicate Bodnari as a drug kingpin to shorten his own sentence.

Discussion

A. The Letter as a Brady Violation

Bodnari claims the State's failure to provide him with the Letter was a Brady violation. He contends the State intentionally suppressed evidence material to his defense. Bodnari believes there is a probability that the Letter would have allowed him to impeach Garcia. Also, Bodnari complains about the State's refusal to reveal the identity of either the Author or witnesses referred to in the Letter.

According to the State, Brady entitles a criminal defendant only to "evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." Michael v. State, 529 A.2d 752, 755 (Del. 1987). Thus, even if the suppressed evidence is favorable, Bodnari is entitled to a new trial only if there is a reasonable probability that disclosure would have resulted in a different verdict. United States v. Bagley, 473 U.S. 667 (1985). The State contends an examination of the totality of the circumstances reveals that the Letter would not have impacted Bodnari's defense strategy or the trial's outcome. Furthermore, Bodnari never showed how the Letter could impeach a witness or lead to exculpatory evidence. Lastly, the Letter's accusations of a murder-for-hire scheme, conspiracy, and drug dealing are inculpatory.

"[A] Brady violation concerns evidence that existed at the time of trial but was not known to the defendant." Webb at 12. The facts of this case require analysis under Brady, 373 U.S. at

87, which held “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Brady’s reach was expanded, creating a prosecutorial duty to provide a defendant with evidence that may aid his defense. United States v. Agurs, 427 U.S. 97, 107 (1976). Thus, a defendant must be provided with exculpatory or impeaching evidence held by the State. See Webb at 10. A prosecutor’s failure to provide this evidence to a defendant does not automatically entitle him to a new trial. See Moore v. Illinois, 408 U.S. 786, 795 (1972) (arguing a prosecutor is not required to “make a complete and detailed accounting to the defense of all police investigatory work on a case”). Suppression, whether accidental or intentional, demands a new trial only when the “omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.” Agurs, 427 U.S. at 108. Thus, to obtain a new trial based on a Brady violation, a defendant must show the evidence was (a) suppressed, (b) favorable to the defense, and (c) material. Moore, 408 U.S. at 794-95.

The State had possession of the Letter and failed to provide it to Bodnari. Undeniably, the Letter was suppressed. The suppression of evidence does not always equate to a Brady violation. Therefore, the Court must first examine whether the letter is favorable to Bodnari’s defense. See United States v. Hauff, 473 F.2d 1350 (7th Cir. 1973) (discussing the favorability element of Brady). In his submissions to the Court, Bodnari failed to explain how the Letter would have exculpated him. See United States v. Boone, 279 F.3d 163, 190 (3rd Cir. 2002). The evidence Bodnari asserts entitles him to a new trial, the Letter, is addressed to the prosecutor and states the Author has “information concerning both defendants that would be of assistance to [the State’s] investigation of Garcia and Bodnari.” Furthermore, the Letter discusses a murder-

for-hire plot involving Bodnari and Garcia and mentions the Author has “additional information as to the ties of conspiracy between the defendants.” References to illegal behavior are not favorable. Other statements, including the Author’s claim to know who hid the cocaine in the Suburban, the identity of Stumhofer, and the location of additional cocaine, are not as damaging to Bodnari’s defense, but are not exculpatory. See United States v. Perdomo, 929 F.2d 967, 971 (3rd Cir. 1991) (finding a witness’s undisclosed criminal record to be favorable evidence).

While the Author could have provided evidence exculpating Bodnari or impeaching Garcia, the Letter’s tone makes this unlikely. The Author wrote the Letter to the prosecutor, not Bodnari, and stated he had evidence that could assist the State. The references to murder and conspiracy add to the Letter’s inculpatory tone.

Even if the Letter leads to exculpatory or impeaching evidence, Bodnari will not be awarded a new trial because the evidence is not material to his defense. “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.” Agurs, 427 U.S. at 109-10. The defendant must demonstrate to the Court that “the suppressed evidence might have affected the outcome of the trial,” Id. at 104, or a “reasonable probability” that disclosure would have produced a different outcome, Kyles v. Whitley, 514 U.S. 419, 434 (1995) (explaining “reasonable probability” of a different outcome occurs when the prosecution’s suppression “undermines confidence in the outcome of the trial” (quoting Bagley, 473 U.S. at 678)). The defendant may show “any adverse effect that the prosecutor’s failure to disclose might have had on the preparation or presentation of the defendant’s case [and] the effect of the nondisclosure given the totality of the circumstances.” Michael, 529 A.2d at 757. Therefore,

[i]f there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Agurs, 427 U.S. at 112-13.

The test for materiality includes an examination of such factors as the “admissibility of the evidence at trial, extent of its probative value, the cumulative nature of the evidence, and the weight of other evidence at trial.” Turner v. State, Del. Super., No. 91-08-0126, 91-08-0127, 91-08-0128, Graves, J. (May 20, 1993), at 20. For Bodnari to succeed on his Brady claim, he must prove the evidence is admissible or successfully show the court “on the record (trial or post-trial) that [the suppressed evidence] would have, or could have led to admissible evidence.” Stokes v. State, 402 A.2d 376, 381 (Del. 1979). As the Author lacks first-hand knowledge of many claims made in the Letter, his testimony would be inadmissible as hearsay. Furthermore, Bodnari has not shown this Court how the Letter would have led to admissible evidence.

The Author’s information is cumulative. First, the Author claims to know who hid the cocaine. Garcia admitted hiding the cocaine in the Suburban. Second, the Author states he knows Stumhofer’s identity. The evidence unequivocally demonstrated Stumhofer owned the Suburban. Third, the Author alleges cocaine related to the case remains hidden. The State Police extensively searched the Suburban and found no additional drugs. Fourth, Bodnari asserts he could have used evidence from the Letter to impeach Garcia. Garcia’s credibility as a witness was questioned during Bodnari’s trial. See Boone, 279 F.3d at 191. Garcia admitted wrapping and hiding the drugs, receiving a favorable plea agreement from the State, wanting to shorten his

prison sentence, and lying to the police during previous interviews. Unlike Perdomo, 929 F.2d at 972, where the defendant believed that the prosecution's witness was unimpeachable, the defense knew Garcia had a history of lying and had reasons to lie. Bodnari had ample opportunity to inform the jury of these facts. See Landano v. Rafferty, 856 F.2d 569, 573 (3rd Cir. 1988) (holding that evidence of a witness's involvement in other crimes immaterial when jury knew witness was a convicted felon).

The statements in the Letter are either unfavorable to Bodnari or not material to his defense. Therefore, Bodnari's motion for a new trial based on a Brady violation is DENIED.

B. Motion for a New Trial Based on Newly Discovered Evidence

Bodnari's motion for a new trial alleges the Letter is newly discovered evidence entitling him to a new trial. Bodnari argues the Letter would have provided him with evidence to impeach Garcia, making his acquittal more likely.

In State v. Hamilton, 406 A.2d 879, 880 (Del. Super. 1974) (quoting State v. Lynch, 128 A. 565 (Del. Term. R. 1925), this Court enunciated the standard for granting a trial based on newly discovered evidence. For a defendant to be granted a new trial

it must appear (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial and could not have been discovered before by the exercise of due diligence; (3) that it is not merely cumulative or impeaching.

This test is appropriate when the claim "concern[s] evidence that is discovered after trial but was not known and could not have been known prior to trial, even through the exercise of due diligence." State v. Webb, Del. Super., No. 9907021071, Stokes, J. (Oct. 23, 2000), at 9. While Bodnari remained ignorant of the Letter's existence throughout his trial, the State did not. When

evidence is not newly discovered but suppressed by the prosecution, Brady becomes the relevant analysis. See id. Therefore, a motion for a new trial based on newly discovered evidence is inappropriate. Furthermore, under Hamilton's test Bodnari would not be entitled to a new trial. As discussed above, the evidence either mentioned or alluded to in the Letter is cumulative, impeaching or unfavorable to Bodnari's cause and would not change the result of the trial. The motion is DENIED.

Conclusion

In summary, Bodnari's Motion for a New Trial based on a Brady Violation and New Evidence is denied.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary's Office