

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON ANTHONY WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

July 15, 2010

No. 292126

Wayne Circuit Court

LC No. 08-015571-FH

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of carrying a concealed weapon, MCL 750.227, fleeing and eluding, third degree, MCL 257.602a(3), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to two years' imprisonment for felony-firearm and two years' probation for the other counts, all sentences to be served concurrently. Defendant now appeals as of right. We affirm but remand for correction of the judgment of sentence.

Defendant argues that the trial court erred by denying his counsel's motion for dismissal based on the prosecution's failure to provide the police vehicles' dashboard videotapes of the incident. Due process requires the prosecution to provide exculpatory evidence in its possession to the defendant. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In order to establish a violation of *Brady*, a defendant must establish that (1) the state possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence or could not have obtained it; (3) the prosecution suppressed the favorable evidence; and (4) with the evidence, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

To satisfy the first three prongs under *Brady*, defendant demonstrated that the police were in possession of the dashboard videotapes shortly after the incident, that he did not have access to them, and that he could not have obtained them. However, defendant did not prove that the evidence was favorable to his case, as required by the first prong, nor did he prove that the prosecution suppressed the evidence, as required by the third prong.

Nonetheless, assuming arguendo that the first three prongs of *Brady* were fulfilled, the problem for defendant is the last requirement—that there was a reasonable probability that the

outcome of the proceedings would have been different had the evidence been provided. No one knows what the videotapes would show. One officer testified that the gun was thrown out of the driver's window, but he was involved in a high-speed chase when this occurred. Defendant's brother testified that he threw the gun up and over the vehicle from the passenger window, which is not credible. Trial counsel asked that the court not view the tapes without the defense first seeing them, because they might be prejudicial to defendant.

The crimes that defendant was convicted of all required possession of a weapon. Carrying a concealed weapon can be established if the weapon was in a vehicle operated by the defendant, the defendant was aware the weapon was present in the vehicle, and the defendant was carrying the weapon. "Carrying" can be established if the defendant was aware of the weapon's location and in control of the vehicle. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999).

The outcome of the trial would not have been different if the videotapes showed the gun being tossed by defendant's brother, up and over the vehicle. Officer Bristol's testimony that he saw the gun under defendant's seat and defendant taking off after Officer Bristol yelled are consistent with defendant knowing of the gun and its location. Further, defendant could have passed the gun to his brother for his brother to throw out the window. Therefore, defendant did not establish a *Brady* violation because he did not establish that there was a reasonable probability that the videotapes would have changed the outcome of the trial. He also has not established ineffective assistance of counsel based on counsel's supposed failure to press further to dismiss because there was no *Brady* violation.

Defendant contends, and the prosecution acknowledges, that the trial court clearly imposed a two-year probationary term and the judgment of sentence indicates a 36-month term. Therefore, we remand this case for correction of the judgment of sentence to reflect defendant's actual sentence of two years' probation to run concurrent with two years' imprisonment. MCR 6.435(A); MCR 7.208(A).

Affirmed but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Patrick M. Meter

/s/ Donald S. Owens