STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0138

State of Minnesota,
Respondent,

vs.

Johnathon Gregory Maio, Jr.,
Appellant.

Filed October 19, 2020
Affirmed
Connolly, Judge

Carlton County District Court
File No. 09-CR-18-729

Keith Ellison, Attorney General, Edwin W. Stockmeyer, III, Assistant Attorney General, St. Paul, Minnesota; and

Lauri A. Ketola, Carlton County Attorney, Carlton, Minnesota (for respondent)

Mark D. Nyvold, Fridley, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Worke, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

A jury convicted appellant of first-degree and second-degree controlled-substance crimes. He sought postconviction relief, arguing that he was entitled to a new trial because the state had failed to disclose *Brady* evidence until after the trial. Because the evidence the state failed to disclose was not material to appellant's conviction, we affirm.

FACTS

In 2018, appellant Johnathon Maio made three sales of controlled substances to a confidential informant (the CI) who was working with Officer H. On March 1, he sold the CI a quarter-ounce of methamphetamine for $350; on March 3, he sold the CI a half-ounce of methamphetamine for a total of $500, of which $350 was paid that day and $150 the next day; and on April 10, he sold the CI five grams of heroin for $900. Appellant was charged with one count of first-degree sale of a controlled substance and one count of second-degree sale of a controlled substance.

At appellant's trial in August 2018, both Officer H. and the CI testified about their roles in the sales. Tapes of appellant's conversations with the CI during the sales were played for the jury, which found appellant guilty on both counts.

In June 2019, the county attorney's office disclosed to appellant's attorney information on disciplinary incidents in Officer H.'s history. One had occurred in 2004, when he was seen out drinking at night after having obtained an excuse for a cold-weather shoot because of illness; another occurred in 2005, when he committed a truthfulness

violation in regard to whether his handgun was unsecured at the time of a domestic disturbance involving himself and his fiancée.[1]

Based on this disclosure, appellant filed a petition for postconviction relief in which he requested a new trial. His petition was denied. He challenges the denial, arguing that he is entitled to a new trial because the evidence the state failed to disclose was material within the meaning of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963) and Minn. R. Crim P. 9.01.

D E C I S I O N

A convicted defendant seeking a new trial because the state failed to disclose evidence must demonstrate that: (1) the evidence is favorable to the defendant as either exculpatory or impeaching, (2) the state suppressed the evidence, and (3) the suppressed evidence is material. *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010). The state concedes the first two elements, *i.e.*, that the evidence of Officer H.'s disciplinary record was favorable to appellant and that the state inadvertently suppressed the evidence, but argues that the suppressed evidence was not material.

Whether undisclosed evidence is material under *Brady* is a mixed question of law and fact that this court reviews de novo. *Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005). When undisclosed evidence is not material, this court should affirm the conviction. *Walen*, 777 N.W.2d at 218. "A new trial is not required simply because a defendant

[1] The county attorney also disclosed that in 2017, Officer H. made two false statements on Facebook about a former police chief. These were not the subject of a disciplinary proceeding.

uncovers previously undisclosed evidence that would have been possibly useful to the defendant but unlikely to have changed the verdict." *Id.* at 216; *see also State v. Radke*, 821 N.W.2d 316, 326 (Minn. 2012) (holding that, to establish prejudice under *Brady*, "the defendant must show a reasonable probability that, had the evidence been disclosed, the outcome of the trial would have been different"). The defendant in *Radke* could not show prejudice because "the [s]tate proved that [he] was the aggressor and provoked the circumstances leading to [the victim] being shot, which would be unaffected by the evidence that the State . . . failed to disclose"). *Id.*

Here, the state proved that appellant had conversations with the CI on three occasions by playing recordings of the conversations, and appellant testified that the voice of the buyer on the recordings was his. The CI testified that he made three controlled buys from appellant, on March 1, March 3, and April 10, 2018. An analyst testified that she analyzed the substances purchased from appellant, a total of 21.188 grams of methamphetamine and 4.674 grams of heroin. The CI testified about the procedure used before and after the buys.

Specifically, he testified that, before the buys, he contacted an officer to say that the buy had been arranged with appellant and that officers, including Officer H., searched the CI, gave him a recording device, photographed the cash to be used, gave the CI the cash, transported him near appellant's girlfriend's apartment, and watched the CI walk the rest of the way directly to the apartment. The CI testified that, after the buys, he gave the officers the drugs he had purchased and the recording device and was searched again.

Thus, the CI's testimony supports the jury's verdict that appellant was guilty of first-degree and second-degree sale of controlled substances.

Information that Officer H. had disciplinary incidents 13 and 14 years prior to his involvement with the CI's three drug purchases from appellant would not have been material to the jury's conviction of appellant, based as it was on the CI's testimony and the recordings of appellant's conversations with the CI at the time of the sales. There is no "reasonable probability that, had the evidence been disclosed, the outcome of the trial would have been different." *See id.*

Affirmed.