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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0996-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MALIK SHAKUR, a/k/a JAMES WALKER, JAMEY YOUNGBLOOD, JAMES A. BASHAWN, SHAKWOOR MALIK, JAMES A. WALKER, MALIK WALKER, BASHAWN WALKER, JAMES BASHAWN and MALIK SHAKWOR,

Defendant-Appellant.

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Submitted February 14, 2022 – Decided June 3, 2022

Before Judges Messano and Accurso.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 09-12-3254.

Joseph E. Krakora, Public Defender, attorney for appellant (Mark Zavotsky, Designated Counsel, on the brief).

Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney for respondent (Lucille M. Rosano, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A jury convicted defendant, and his co-defendants James Waldren and Benjamin Fulton, of various offenses arising from the robbery of a pharmacy on July 22, 2009, in West Orange. State v. Shakur, No. 4672-11 (App. Div. May 21, 2014) (Shakur I) (slip op. at 2). Co-defendant Orlando Arnold pled guilty before trial and testified for the prosecution. Id. at 4. Pursuant to the Persistent Offender Accountability Act, N.J.S.A. 2C:43-7.1(a), the judge sentenced defendant to a term of life imprisonment without parole on the conviction for first-degree armed robbery and imposed concurrent terms of imprisonment on the other convictions. Id. at 3. We affirmed defendant's convictions and sentence, id. at 2, and the Court denied his petition for certification. 220 N.J. 98 (2014).

Defendant filed a petition for post-conviction relief (PCR) alleging the ineffective assistance of trial and appellate counsel. State v. Shakur, No. A-1301-16 (App. Div. Sept. 28, 2018) (Shakur II) (slip op. at 9). We affirmed the denial of PCR relief, id. at 19, and the Court denied defendant's petition for certification. 237 N.J. 408 (2019).

Defendant filed a motion for a new trial, premised on newly discovered evidence and an alleged Brady violation by the State.[1] The Law Division judge, who was not the trial or PCR judge, considered argument and issued an oral decision denying defendant's motion. The judge entered a conforming order on June 21, 2019, and this appeal followed.

I.

Trial testimony regarding the pharmacy robbery, ensuing police chase of the getaway vehicle, a Jeep, and defendant's role in those events are extensively set forth in our prior opinions. Shakur I, slip op. at 5–9; Shakur II, slip op. at 4–7. Four pharmacy employees who were working that day, as well as the pharmacy owner, Robert Carlucci, testified at trial to events inside the pharmacy.

Because of its pertinence to issues now raised in this appeal, we quote at length from our summary of co-defendant Arnold's trial testimony.

> Consistent with his plea agreement, Arnold testified for the State. He acknowledged that he, Shakur, Waldren, and Fulton were in a Jeep on the day of the incident, but claimed to be unaware any of the others planned to commit a robbery when he entered the Jeep. When he, Waldren, and Shakur got out of the Jeep, Arnold was told they were going to rob the

[1] Brady v. Maryland, 373 U.S. 83 (1963).

> pharmacy of drugs and money. Arnold decided to participate and was given a mask. Arnold noted both Shakur and Waldren had guns.
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> Arnold testified that he and Shakur went into the pharmacy and then put on their masks. Thereafter, Waldren entered the store. Once inside, "guns were being pointed" and "directions were shouted." Arnold grabbed and threw drugs into a bag. When the three left, Arnold put the bag in the Jeep, and noticed two guns being placed into the center console. When they were only a block from the pharmacy, the police tried to obstruct them with their vehicles, but Fulton managed to maneuver around them. Fulton kept driving, despite being followed by the police with their sirens blaring. At one point, Waldren jumped out of the Jeep. Eventually the Jeep crashed and Arnold was pulled out of the vehicle by the police and arrested.
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> [Shakur II, slip op. at 6.]

Defendant included several exhibits in support of his motion for a new trial.[2] The first was a West Orange Police incident report prepared by Officer Lawrence Dominguez on July 22, 2009. It is unclear whether the report was ever used at trial, but defendant does not claim the State failed to produce it in discovery. The report summarized "a brief conversation . . . between two prisoners in the rear of [Dominguez's] marked radio car."

[2] The motion is not in the record. However, in a footnote in his brief, defendant indicates these exhibits were included as part of his motion for a new trial.

Dominguez explained that while transporting Waldren and Arnold to the Essex County Correctional Facility, Arnold initiated a conversation with Waldren, which Dominguez summarized as follows:

> Arnold stated to Waldr[e]n that he should have never . . . entered the vehicle that day because his girlfriend wanted him to stay home since he just got out of jail. <u>Waldr[e]n then advised Arnold not to worry about the charges because he was going to advise his attorney that they were set up by the man at the pharmacy. He further stated to Arnold that the robbery was an inside job and it was pre-planned between him and the man at the pharmacy</u>. Waldr[e]n stated that they were supposed to hit the pharmacy while the man was on vacation and trash the place[,] then rob them for the pills and take the money from the register. Waldr[e]n then went on to say that he knew they were set up because the police got to the scene to[o] quick. The conversation then continued on to the charges that they were facing. It should be noted that the conversation was initiated between both prisoners and they were not questioned by this officer at any time in regards to the statements made by both Waldr[e]n and Arnold. Also, both prisoners never mentioned any names specifically regarding any employees at the pharmacy.
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> [(Emphasis added).]

Defendant also submitted a copy of a December 2013 consent order between the New Jersey State Board of Pharmacy and the pharmacy owner, Robert Carlucci. In the order, the Board stated that it opened "[t]his matter . . . upon receipt of information that [Carlucci] was the subject of a grand

jury indictment filed on or about August 6, 2013[,] in the United States District Court." The order further stated,

> between 1997 and December 2012, . . . Carlucci conspired with [his brother] William . . . to execute an elaborate, multifaceted scheme, in which the . . . co-conspirators submitted and caused West Orange Pharmacy to submit claims to Medicaid and to private insurers that fraudulently represented that healthcare benefits, namely prescriptions, had been provided to beneficiaries.

The order summarized details of the conspiracy and specifics of the fraud, but it made no mention of the July 2009 robbery. Pursuant to the order, Robert Carlucci agreed to surrender his license to practice pharmacy in New Jersey.

Defendant also submitted a copy of a short March 2014 article from the Star-Ledger. It reported that both Carlucci brothers pled guilty in Federal District court "to conspiring to commit health care fraud" and were sentenced to three-and-a-half years in prison. The article did not mention the July 2009 robbery.

Before the motion judge, defendant contended that the prosecution's failure to disclose the federal investigation of Carlucci, ongoing at the time of trial, violated Brady and justified a new trial. In her oral decision denying defendant's new trial motion, the judge recounted the substantial evidence of defendant's guilt adduced at trial, but, noting the federal investigation was

"ongoing when the robbery . . . occurred," the judge determined the newly discovered evidence had some "slim materiality." The judge recognized that because "information about the ongoing . . . investigation was not available at all times during the trial," defendant was unable to cross-examine Carlucci about the fraud investigation during his testimony.

However, the judge determined there was "no firm basis for the [c]ourt to find that the State had knowledge of an ongoing investigation." She further concluded "the State did not purposely or inadvertently suppress the evidence" as there is "no clear indication that the evidence was within the control, either actually or constructively[,] of the State." The motion judge also found "even if" the evidence was "deemed material, . . . timely production would not necessarily [have] led to a different result at trial[,]" as "there [wa]s overwhelming evidence to support the verdict returned by the [j]ury."

II.

Before us, defendant reiterates the State violated Brady because it failed to disclose the ongoing investigation of Carlucci by federal authorities. Alternatively, defendant contends he satisfied the standards justifying the grant of a new trial based on newly discovered evidence. Having considered these arguments in light of the record and applicable legal standards, we affirm.

Before addressing defendant's two contentions, we recognize that "[a] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Armour, 446 N.J. Super. 295, 306 (App. Div. 2016) (alteration in original) (quoting State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000)).

A.

Courts must consider "[t]hree essential elements" to determine whether a Brady violation occurred: "(1) the evidence at issue must be favorable to the accused, either as exculpatory or impeachment evidence; (2) the State must have suppressed the evidence, either purposely or inadvertently; and (3) the evidence must be material to the defendant's case." State v. Brown, 236 N.J. 497, 518 (2019). "The existence of those three elements evidences the deprivation of a defendant's constitutional right to a fair trial under the due process clause." Ibid.

Here, defendant presumably established the first element. Defense counsel could have impeached Carlucci during his trial testimony with evidence of the federal fraud investigation. For example, defense counsel could have inquired whether Carlucci was cooperating with the State in anticipation of more favorable treatment from federal prosecutors. See, e.g., State v. Parsons, 341

N.J. Super. 448, 458 (App. Div. 2001) ("[A] defendant has a right to explore evidence tending to show that the State may have a 'hold' of some kind over a witness, the mere existence of which might prompt the individual to color his testimony in favor of the prosecution." (quoting State v. Holmes, 290 N.J. Super. 302, 312 (App. Div. 1996))).

However, the motion judge found that defendant failed to establish the second Brady element. "The Brady disclosure rule applies only to information of which the prosecution is actually or constructively aware." State v. Nelson, 155 N.J. 487, 498 (1998); see also State v. Washington, 453 N.J. Super. 164, 184 (App. Div. 2018) ("[A] prosecutor's constitutional obligation to provide exculpatory information 'extends to documents of which it is actually or constructively aware, including documents held by other law enforcement personnel who are part of the prosecution team.'" (quoting State v. Robertson, 438 N.J. Super. 47, 69 (App. Div. 2014))).

Our courts have charged the trial prosecutor with constructive awareness of Brady material when it was known by or possessed by the investigating agency. State v. Womack, 145 N.J. 576, 589 (1996). In State v. Engel, we acknowledged federal precedent that imputed awareness of information possessed by a state investigator to a federal prosecutor when there had been

"extensive cooperation between different investigative agencies." 249 N.J. Super. 336, 396 (App. Div. 1991).

Here, nothing in the record suggests that any person in the county prosecutor's office had knowledge of the pending federal investigation against Carlucci. Nor has defendant produced any information indicating "extensive cooperation" between the two law enforcement agencies, as to the robbery of the pharmacy, the fraudulent health care scheme or any other matter involving Carlucci. The consent order noted that Carlucci was not indicted until 2013, nearly two years after defendant's trial. The newspaper article did not appear until 2014.

"The third Brady element requires that the suppressed evidence be material to defendants' case." Brown, 236 N.J. at 520. "The significance of the nondisclosure 'depends primarily on the importance of the [evidence] and the strength of the State's case against [a] defendant as a whole.'" Ibid. (alterations in original) (quoting State v. Marshall, 123 N.J. 1, 200 (1991)). Defendant asserts that had he known of the federal investigation, he not only could have impeached Carlucci, but the existence of the investigation would have lent credence to Waldren's overheard conversation with Arnold that the robbery was "an inside job . . . preplanned between him and the man at the pharmacy."

Initially, we note that Carlucci's trial testimony was of little importance. He could not identify his assailants, and the State produced four other pharmacy employees who were present during the robbery and accosted by defendant, Arnold and Waldren. The State's other evidence was overwhelming. See Shakur I; Shakur II.

In addition, presumably defendant had Officer Dominguez's report and could have used it at trial during Arnold's testimony. Even if the robbery was an "inside job" and Waldren's "man at the pharmacy" was Carlucci, defendant failed to suggest any connection between the robbery and the pending federal investigation.

Nor would Carlucci's alleged involvement in the robbery serve to exculpate defendant. In conclusory fashion, defendant asserts that because only drugs were stolen from the pharmacy, Carlucci's involvement would mean there was no theft, and, presumably, no robbery, because "the property was taken with consent." However, the indictment charged defendant and his cohorts with "commit[ting] an act of robbery upon employees of West Orange Pharmacy." Evidence at trial demonstrated defendant took money from one of the other pharmacy employees at gunpoint after commanding him to get on the ground,

and there is no suggestion by defendant that the employee consented to his because he, too, knew it was an "inside job."

In short, defendant failed to establish a Brady violation, and we affirm the motion judge's order in this regard.

B.

The motion judge did not specifically address defendant's claim that he was entitled to a new trial based on newly discovered evidence, specifically, the consent order, and the concomitant evidence of the federal fraud investigation. However, it is apparent from the transcript of the oral argument on defendant's motion that the issue was raised in the Law Division.

As the Court recently restated:

> [T]he movant seeking a new trial based on newly discovered evidence must demonstrate that the evidence is, indeed, newly discovered; a new trial is warranted only if the evidence is "(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted."
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> [State v. Szemple, 247 N.J. 82, 99 (2021) (quoting State v. Nash, 212 N.J. 518, 549 (2013)).]

All three prongs must be satisfied before a new trial is granted. State v. Ways, 180 N.J. 171, 187 (2004).

Defendant satisfied the second prong because evidence of the federal fraud investigation was not discovered, and could not have been discovered with reasonable diligence, before trial. However, the ability to impeach Carlucci at trial with this evidence is insufficient under the first prong, and defendant has failed to explain how the existence of the federal investigation was material to his defense at trial.

Defendant had access to the police incident report documenting the conversation between Waldren and Arnold about the robbery being an "inside job," so we fail to see how that evidence qualifies as "newly discovered." In any event, Arnold and Carlucci testified for the State, but neither was asked anything about the allegation.[3] For reasons already expressed, we are hard-pressed to see how the information, if true, was material to the defense and served to exculpate defendant.

Finally, even if the consent order and evidence of the federal investigation were material, defendant failed to demonstrate the newly discovered evidence

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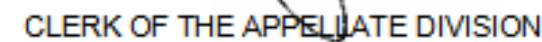
[3] Throughout the post-trial proceedings, defendant has never explained whether he did or did not have knowledge that the robbery was "an inside job." Certainly, if defendant was "in on it," he was already aware of Carlucci's alleged involvement in the pharmacy robbery even without any knowledge of the pending federal investigation. Nothing stopped defendant from arguing at trial that the robbery was staged and pre-planned with the pharmacy owner.

was "of the sort that would probably change the jury's verdict if a new trial were granted." Szemple, 247 N.J. at 99. The third prong is intertwined with the first, as "evidence that would have the probable effect of raising a reasonable doubt as to the defendant's guilt would not be considered merely cumulative, impeaching, or contradictory." Ways, 180 N.J. at 189. "The power of the newly discovered evidence to alter the verdict is the central issue, not the label to be placed on that evidence." Id. at 191–92.

Giving the substantial evidence of defendant's guilt, none of the newly discovered evidence would have changed the jury's verdict in this case.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION