

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	No. 29751-9-III
)	consolidated with
Respondent,)	No. 29798-5-III
)	
v.)	
)	
JOEL MATTHEW GROVES,)	UNPUBLISHED OPINION
)	
Appellant.)	
)	

Brown, J. • Today, we review a post trial motion under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). A jury found Joel Matthew Groves guilty of felony harassment-domestic violence, possession of marijuana under 40 grams, possession of methamphetamine, and use of drug paraphernalia. He appealed to this court. (See No. 28838-2-III). Appellate counsel filed an *Anders*¹ brief, stating she had determined that her client’s appeal was wholly frivolous. After reviewing the record, a commissioner of this court could not identify any meritorious issues. Therefore, Mr. Groves’ convictions were affirmed. Pending this decision, however, Mr. Groves, pro se, unsuccessfully filed his *Brady* motion. Mr. Groves appeals, contending the State did not

¹ *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

disclose mitigating, probative or exculpatory evidence relative to his guilt or innocence. In his statement of additional grounds for review (SAG), Mr. Groves complains he received ineffective attorney assistance. We affirm.

FACTS

An officer stopped Mr. Groves' vehicle after receiving a tip that Mr. Groves threatened his former girl friend with physical violence. A friend of his former girl friend told police that there was a warrant for Mr. Groves' arrest and that he had drugs in his possession. Mr. Groves initially refused to stop the car, moving about inside the car as if he was trying to conceal something. Mr. Groves stopped and the officer ordered him out of the car. He advised Mr. Groves of his constitutional rights, handcuffed him, and placed him in the patrol car.

The officer's vehicle had two cameras: one pointed to the rear and one pointed to the front right corner. The officer angled the front camera so that if he pulled in at an angle behind a suspect's car, as he usually did, it would capture the arrest. The officer noted since he pulled up directly behind Mr. Groves' vehicle, the camera would have pointed solely to the right rear of Mr. Groves' car and toward a convenience store, not capturing the driver's door or any of the stop. In Kittitas County, video recordings are purged after 90 days if not needed for trial. While in custody, Mr. Groves asked an officer to retrieve his wallet from the back seat of the car. While looking for the wallet,

the officer found a glass pipe containing burned white residue. The officer secured the car and applied for a search warrant that led to the discovery of marijuana and methamphetamine.

The State charged Mr. Groves with felony harassment, possession of marijuana, possession of methamphetamine, and use of drug paraphernalia. A jury found him guilty of all charges. Mr. Groves appealed and this court affirmed. During the initial appeal, Mr. Groves filed a pro se post-conviction *Brady* motion, alleging destruction of material evidence favorable to the defense, specifically the video-taped recording from the officer's patrol car. Mr. Groves learned of the video tape after he made a public disclosure request.

The trial court appointed counsel for Mr. Groves and scheduled a hearing to decide the *Brady* motion. At the hearing, Mr. Groves testified the officers were looking in the car because the driver's side door was open. Based on that testimony, Mr. Groves' attorney questioned whether a *Brady* issue was presented. He suggested that if the officers did not break the door plane, then they must have discovered the pipe in open view and any tape, if it existed, would not have been material to Mr. Groves' defense, unwitting possession. The trial court denied the motion, entering findings of fact and conclusions of law. Mr. Groves appealed.

ANALYSIS

A. *Brady* Motion

The issue is whether the trial court erred in denying Mr. Groves' *Brady* motion. He contends an alleged video recording of his stop was material exculpatory evidence that the State should have disclosed.²

We review de novo a motion denying a new trial based on an alleged *Brady* violation. *State v. Mullen*, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011).

Under *Brady*, 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*, 373 U.S. at 87. The duty to disclose favorable evidence to the defense encompasses impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). The evidence is material if a reasonable probability exists that the result of the proceeding would have been different if the evidence had been disclosed. *Bagley*, 473 U.S. at 682. A true *Brady* violation, therefore, has three components: "The evidence at issue must be favorable to the accused,

² Both parties acknowledge that portions of the *Brady* motion transcript were lost by the reporter. Our record, however, contains Mr. Groves' testimony and findings of fact relating to the officers' testimonies. Accordingly, our record is adequate to address Mr. Groves' contentions.

either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

The State does not need to “disgorge every piece of evidence in its possession.” *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997). Rather, the State must disclose evidence that is favorable to the accused and material to guilt. *Id.* When deciding if evidence is material under *Brady*, the question is whether the evidence could reasonably be taken to put the whole case in a different light, thereby undermining confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 434-35, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). “For example, where the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material.” *United States v. Avellino*, 136 F.3d 249, 257 (2d Cir. 1998). Similarly, the government is not obligated under *Brady* to communicate preliminary or speculative information. *United States v. Diaz*, 922 F.2d 998, 1006 (2d Cir. 1990).

Here, no evidence shows a video actually existed. The record solely contains evidence showing a camera on the officer’s vehicle may have recorded the side of Mr.

Groves' vehicle. Based on the testimony at the motion hearing, Mr. Groves' attorney essentially conceded no *Brady* issue existed; instead, he reasoned that if the officers did not break the door plane, then they must have discovered the pipe in open view. Thus, it would not have been material to Mr. Groves' defense. Moreover, Mr. Groves' defense was unwitting possession. Accordingly, Mr. Groves cannot show the evidence at issue was favorable to him because it was exculpatory or because it was independently impeaching. The trial court did not err in denying his *Brady* motion.

B. Ineffective Assistance of Counsel

Mr. Groves raises several contentions in his SAG mostly relating to his *Brady* motion. Since this issue was adequately addressed by counsel, it will not be reviewed again. *See* RAP 10.10(a) (purpose of SAG is to permit appellant, "to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel"). The remaining issue is whether Mr. Groves was denied effective assistance of counsel. He contends counsel was ineffective for failing to obtain the recording from the officer's vehicle.

To prevail on an ineffective assistance claim, Mr. Groves must demonstrate deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient where it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668,

705, 940 P.2d 1239 (1997). This court's scrutiny of defense counsel's performance is highly deferential and employs a strong presumption of reasonableness. *Strickland*, 466 U.S. at 689. A failure to make the necessary showing on either prong of the test defeats an ineffective assistance claim. *Strickland*, 466 U.S. at 697.

As discussed above, no evidence shows the evidence was wrongly concealed, and if so, Mr. Groves fails to explain how the recording would have aided his unwitting-possession defense. Thus, any objection by counsel would have been futile, even if he could establish deficient performance. In any event, Mr. Groves cannot establish prejudice. His ineffective assistance of counsel claim, therefore, fails.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Korsmo, C.J.

Siddoway, J.

No. 29751-9-III cons. w/ 29798-5-III
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