ARIZONA SUPERIOR COURT

GILA COUNTY

Date: 12/3/2013
PETER J. CAHILL, JUDGE
Division One

K. ST. LAURENT
Judicial Assistant

STATE OF ARIZONA, Plaintiff, v. BRANDON LEE LEWIS, Defendant.	CR201200336

ORDER VACATING JUDGMENT AND CONVICTIONS

Re: Convictions Entered: August 8, 2013

Mr. Brandon Lewis ("Defendant") was charged with multiple felony offenses arising out of an October 2011 confrontation with Payson police officers. The case was tried to a jury. The jury returned verdicts of guilty on some but not all of the charges. Now, after convictions were entered on the verdicts, Defendant asks to have his convictions and sentences vacated. Furthermore, he argues that all of the charges against him should be dismissed. Meanwhile, an appeal is pending in the Court of Appeals.

Defendant argues that his trial was not fair because the prosecutors, Joy Riddle and Marc Stanley, failed to disclose information as is required by law. In response, the State acknowledges that mistakes were made. The State admits (*but only now, after convictions were entered*) that it "inadvertently missed" disclosing exculpatory evidence in its possession. It argues however that this was "nothing more than a simple oversight" while acknowledging that one of the convictions, felony criminal damage, cannot stand. Regarding the other convictions, it says that the reason why the evidence was not disclosed was that prosecutors never had it in their possession, they had never requested it from the police.

Defendant replies that not only should his convictions be vacated but that because of the lawyers' misconduct, all charges should be dismissed. He should not be put in jeopardy again, he argues; the State should not merely get a "do-over," the great benefit of a second chance to convict him—at his expense. Defendant says that the State's tactics forced him to "explain the usefulness" of his evidence, giving the State and its witnesses an unfair advantage and advance notice of his cross-examination strategy. This, he says, mandates a dismissal with prejudice.

The court reviewed Defendant's timely Motion to Vacate Judgment and exhibits, the State's response,[1] the reply, the arguments of counsel, and transcripts from relevant hearings. After review and with good cause appearing, Defendant's Motion to Vacate Judgment is granted for the following reasons. However, the court defers to later a decision on a dismissal of charges.

PROCEDURAL BACKGROUND.

Defendant was charged by the Grand Jury with three counts of aggravated assault on a peace officer, one count of resisting arrest, one count of criminal damage of $1,000 or more, and one count of criminal damage of $250 or less. The victims of the alleged aggravated assaults were Payson Police Officers Lorenzo Ortiz, Justin Deaton, and Jesse Davies.

These charges arose from contact the officers had with Defendant on the evening of October 30, 2011. Some facts were not in dispute: the officers and Defendant had a confrontation; Defendant was taken to the ground "hard" and then placed up against the police "Tahoe" cruiser; Officer Ortiz grabbed the hair on the back of Defendant's head; Defendant's face was repeatedly slammed against the hood of the Tahoe; and, his blood was on the officers. Other facts were hotly contested: Was the officers' use of force such that the jury would accept Defendant's self-defense claim? Who started the confrontation? Was Defendant's resistance justified by the police officers' actions? Were the officers justified in their "hard take-down"? Did Defendant voluntarily slam his face into

[1] Defendant's objection to Plaintiff filing and then relying upon at argument unsigned affidavits in support of its response is **SUSTAINED**.

the hood thereby committing criminal damage? Or, instead did Officer Ortiz deliberately and repeatedly slam Defendant's face into the hood? If Defendant is indeed criminally responsible for damaging the Tahoe, did the amount of damage make this a felony crime—did the damages equal or exceed $1,000.00? May a felony verdict stand when prosecutors admit that all along they had proof that the crime was not a felony?

The trial lasted eight days. The jury returned guilty verdicts on two of the aggravated assault counts *(upon Officers Deaton and Davies)*, the resisting arrest charge, the felony criminal damage *(damages to the Tahoe equaled or exceeded $1,000)*, and the misdemeanor criminal damage count. On one aggravated assault charge *(upon Officer Ortiz)* Defendant was found not guilty.

Sentencing was originally scheduled for June 3, 2013. However, a probation pre-sentence investigation revealed that the police had a repair shop estimate of the repair costs. [At trial, the State merely relied on what a police officer thought a shop would charge to do the repair.] All the while, as it turned out, a repair shop estimate was in the prosecutors' trial notebook. It had never been disclosed to the defense. The estimate was for $719.04 (written-down as $700.00)—misdemeanor damage only.

When the estimate was discovered, the June 3, 2013 sentencing was continued.

Defendant then obtained possession of even more undisclosed evidence. Though discovery in his civil action against the Town, he obtained witness statements made shortly after the events. The statements include: Use of Force Memoranda to the Payson Chief of Police by Officer Deaton (dated November 1, 2011), Officer Ortiz (dated October 31, 2011), and Officer Davies (dated November 1, 2011); and Officer Deaton's Use of Force Report (dated October 30, 2011).

At the rescheduled sentencing held August 8, 2013, counsel alerted the court to the existence of the undisclosed statements, stated that they would file this motion to vacate, and withdrew their motion for a new trial. With the consent of the parties, the court proceeded with sentencing. Defendant was sentenced to a term of probation with 30 days jail, deferred.

After sentencing, Defendant filed this timely Motion to Vacate Judgment pursuant to Rule 24.2, *Ariz. R. Crim. P.* Defendant argues in his motion that the judgment should be vacated because newly discovered, material facts exist, and that his convictions were obtained in violation of the United States and Arizona Constitutions. Without filing a separate, written motion, he asks that all of the charges be dismissed with prejudice.

DISCUSSION.

Under Rule 24.2, there are three potential avenues for relief: 1) that the court was without jurisdiction of the action; 2) that newly discovered material facts exist, under the standards of Rule 32.1; or 3) that the conviction was obtained in violation of the United States and Arizona Constitutions. *Ariz. R. Crim. P.* Rule 24.2. Defendant raises claims under 24.2(a)(2) and (a)(3), citing both newly discovered evidence and that his convictions were obtained in violation of the United States and Arizona Constitutions.

A. Rule 24.2(a)(2) - Newly Discovered Material Facts.

Defendant claims that there are newly discovered material facts which probably would have changed the verdicts. Before relief may be granted on this basis, the evidence must, in fact, be "newly discovered," that is, discovered after the trial, the motion must allege facts from which the court can infer due diligence, the evidence relied on must not be merely cumulative or impeaching, the evidence must be material to the issue involved, and it must be evidence that would probably change the verdict if a new trial were ordered. *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750 (1984), *see also State v. Saenz*, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000).

Defendant says that the statements not properly disclosed per Rule 15.1, *Ariz. R. Crim. P.,* went to the crux of his defense on all of the charges. The statements were created between October 30 and November 1, 2011, over a year before the trial. They were not disclosed prior to trial and were not discovered until after the jury had returned their verdicts—only just before sentencing.

Defendant has made a sufficient showing that the evidence contained in the statements would not merely be cumulative and that the evidence would not have been used solely for impeachment. There are, just as Defendant points out, inconsistencies between the testimony of the officers and their undisclosed statements. Many of these inconsistencies are related to the key facts in dispute during the trial, such as whether the "take-down" of Defendant was justified, whether Defendant's resistance was justified, and how certain injuries occurred. He argues persuasively that the undisclosed statements could have been used to discredit the witness' claims on these key facts and as to the dispute whether there was an internal investigation of what happened.

In opposing the motion, the State argues that the defense lawyers actually did receive disclosure of the statements. The State acknowledges that Defendant's claim of a disclosure-violation is correct, " . . . as far as the criminal damage case is concerned" but says there was a disclosure in the civil case of one of the three statements, Officer Ortiz' Use of Force Memorandum. "Exhibit E," attached to the State's response, was an email message from the Town of Payson's defense attorney, Michael Warzynski. Mr. Warzynski had forwarded by email the "Use of Force Memorandum" to Mr. Harper, one of Defendant's lawyers. However, Exhibit E was only an email message from Mr. Warzynski. It does <u>not</u> include a "Use of Force Memorandum," or any part thereof, or any attachment. As the court understands it, Mr. Warzynski's email had forwarded to Mr. Harper Officer Ortiz's "Use of Force Report" <u>only</u>—and not his "Use of Force Memorandum" or other officers' statements.

The court assumes that the statements at issue here, the *Use of Force Memoranda* prepared by Officers Deaton, Ortiz, and Davies and Officer Deaton's *Use of Force Report*, were not disclosed to defense counsel. At the hearing on this motion, counsel for Defendant said this, that only one statement had been disclosed in the civil case with the email message from Mr. Warzynski: Officer Ortiz' "Use of Force Report." The State does not contradict the claim that only the Ortiz "Use of Force Report" was disclosed in the civil case.

Defendant points out that his receipt of the single witness statement did affect the verdict. He used Officer Ortiz' statement to impeach him and—not coincidently—the verdict was "not guilty" on the charge of assaulting Officer

Ortiz. But, deprived by the State from the ability to utilize prior statements by Deaton and Davies, he was found "guilty" on those charges.

Defendant has shown that the undisclosed statements are newly disclosed material facts that would have probably changed the verdicts.

B. Rule 24.2(a)(3) - Conviction in Violation of U.S. Constitution.

Brady v. Maryland, 373 U.S. 83 (1963), requires the prosecution to turn over evidence favorable to the accused which is material to guilt or punishment. *Brady*, 373 U.S. at 87. In order to establish constitutional error due to failure to disclose evidence, the favorable evidence must be not only material to guilt or punishment; its suppression must also establish a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). The defendant must show that the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." *Kyles*, 514 U.S. at 435. In order to show that there has been a *Brady* violation, a defendant must show that the evidence was favorable to him, as either exculpatory or impeaching; that it was suppressed by the state, that that the failure to disclose the evidence prejudiced the defendant. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

Thus, the question here is whether there is a reasonable probability that, had the statements been disclosed, the result of Defendant's trial would have been different. *Cone v. Bell*, 556 U. S. 449, 469-470 (2009). A "reasonable probability" does not mean that Defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to "undermine confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U. S. 419, 434 (1995).

Rule 15.1, *Ariz. R. Crim. P.*, protects a defendant's constitutional rights to material evidence in possession of the State. The rule requires the State to produce "all then existing material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment therefor." Rule 15.1(b)(8).

Evidence that impeaches an eyewitness may not be so-called "*Brady* material" if the prosecution's other evidence is strong enough to sustain confidence in the verdict. *See United States v. Agurs*, 427 U. S. 97, 112-113, and n. 21 (1976). But this is not the case here. Testimony by the officers was the only evidence that established that Defendant committed crimes; there really was no "other evidence." The undisclosed statements were plainly "material."

It is clear that, had jurors been presented with Officers Deaton and Davies' statements, they might have believed that Defendant was not the aggressor here and that his actions were justified. With the defense having the Ortiz' statement, it was able to convince the jury that the State had not met its burden of proof. As Justice Thomas pointed out in his dissent in *Smith v. Cain*, "the possibility of a different verdict is insufficient to establish a *Brady* violation," referring to *Strickler v. Greene*, 527 U.S. 263, 291 (1999). S*ee also United States v. Agurs*, 427 U. S. 97, 109-110 (1976) ("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").

In *Smith v. Cain*, the Chief Justice spoke for a near unanimous court, with Justice Thomas as the only dissenting vote to uphold the conviction in a "*Brady* case." 132 S. Ct. 627 (2012). Justice Thomas gave a detailed analysis why the undisclosed statement in *Smith* was not material. *Id.* at 631. When that same rigorous *(and appropriately skeptical)* analysis is applied here however, the result compels a finding that this non-disclosed evidence was indeed "material." Justice Thomas pointed out that the undisclosed evidence in *Smith* would have had "minimal impeachment value" because it was "ambiguous in light of the context in which the statement was made." *Id.* at 636. Here however, as shown by the result in the count involving Officer Ortiz, the value of the officers' prior statements was hardly minimal. The fact that counsel were deprived of this key evidence is more than enough to "undermine [any] confidence in the outcome of the trial." *Kyles.*

Defendant's burden was to establish a reasonable probability of a different result. The court listened to the trial testimony, observed the witnesses and is well aware of the arguments made to the jury. It is mindful too of the result

where the Ortiz statement was disclosed. The court concludes that Defendant has met his burden.

1. *Vehicle Damage Estimate Report*

Defendant alleges, and the State concedes, that the State possessed the January 1, 2012 Estimate for Vehicle Repair prior to, and at the time of trial. Furthermore, it is conceded that the prosecutors failed to disclose this obviously exculpatory evidence. Based on the State's Response to Defendant's Motion to Vacate and oral arguments, it appears as if the State supports vacating the felony conviction for criminal damage. It suggests that the offense be designated a misdemeanor, or, in the alternative, that the criminal damage conviction be vacated.

The Estimate for Vehicle Repair was favorable to Defendant in reference to guilt or innocence. It is at the very least reasonably probable that, had it been properly disclosed, Defendant would not have been found guilty of felony criminal damage. Because of this *Brady* violation, the judgment on Count 6 is vacated. The conviction ought not to have been entered in the first place.

2. *Sergeant Garvin's Administrative Findings re Credibility*

Brady also requires the prosecution to disclose evidence, both incriminating and exculpatory, that could be used to impeach the credibility of witnesses. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). In the context of impeachment evidence, "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' the nondisclosure of evidence affecting credibility falls within" the *Brady* rule requiring a new trial. *Giglio*, 405 U.S. at 154.

After trial, Defendant discovered that the State had prior knowledge of information that could potentially impact the credibility of Sergeant Garvin and his testimony. Defendant argues that the State had made it a practice in other cases to disclose findings regarding Sergeant Garvin's credibility, but failed to disclose those findings in this case. The State responded that while Sergeant Garvin had been on the previous County Attorney's *Brady* list, he was not on

the current County Attorney's list and so therefore, the failure to disclose was not improper.

Although the issues of credibility with Sergeant Garvin were not disclosed to Defendant prior to trial, they do not rise to a level determinative of guilt or innocence. This violation is in itself insufficient to warrant relief; however, it is relevant when considered with the other undisclosed information.

3. Prosecutorial Misconduct

In reviewing for prosecutorial misconduct, it is important to focus on whether it affected the proceedings in such a way as to deny the defendant a fair trial. *State v. Atwood*, 171 Ariz. 576, 607, 832 P.2d 593, 624 (1992). Prosecutorial misconduct is harmless error if it can be found, beyond a reasonable doubt, that it did not contribute to or affect the verdict. *State v. Towery*, 186 Ariz. 168, 185, 920 P.2d 290, 307 (1996); *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). Furthermore, prosecutorial misconduct "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial." *Pool v. Superior Court*, 139 Ariz. 98, 108–09, 677 P.2d 261, 271–72 (1984).

Defendant alleges that the legal standard for prosecutorial misconduct should apply here because of the State's failure to disclose statements and *Brady* material to Defendant prior to trial. The State concedes it possessed some documents and cites mistake as the reason for failure to disclose. Additionally, the State argues that it did not have knowledge or possession of other documents prior to trial.

A failure to disclose statements *not* in possession is not intentional conduct where the prosecutor had no knowledge of the statements. But, *Brady* encompasses evidence even if it is "known only to police investigators and not to the prosecutor." *Kyles*, 514 U.S. at 438.

The prosecution's attempt to excuse its shortcomings is not at all persuasive. *Brady* applies "irrespective of the good faith or bad faith of the

prosecution." 373 U.S. at 87. Under *Brady*, the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," and to disclose that evidence to the defense. *Kyles*, 514 U.S. at 437. While the State claims that the mistakes here were "inadvertently" made, they are clear *Brady* violations nevertheless. Claimed good faith on the part of the prosecution is irrelevant to the determination of whether *Brady* has been violated. Therefore, the failure to disclose the Vehicle Damage Estimate Report, Sergeant Garvin's Administrative Findings of Dishonesty and the witness statements violated *Brady*.

CONCLUSION

Based on the court's assessment of the evidence presented at trial, the dynamics of the presentation before the jury and the verdicts rendered, the court finds that the cumulative evidence of the undisclosed witness statements, the Vehicle Damage Estimate Report, and information regarding Sergeant Garvin's credibility all justify an order vacating Defendant's convictions in their entirety. It is an injustice that so many important and legally relevant documents were not properly disclosed prior to trial. The failure of due process here is clear. Accordingly, Defendant's Motion to Vacate Judgment will be granted.

Defendant argued in oral argument that the proper remedy here is a dismissal of all charges with prejudice. It was his contention that the constitutional violations and the "totality of actions by prosecutors" regarding the undisclosed material favor a dismissal with prejudice. *See* Motion to Vacate Judgment Hearing, Oct. 28, 2013. However, the motion now before the court is a motion to vacate, not a motion to dismiss.

The proper remedy is what was requested, to vacate the convictions and sentences that resulted from an unfair trial. *State v. Hickle*, 133 Ariz. 234, 650 P.2d 1216 (1982) (trial court did not abuse its discretion in granting new trial on ground of newly discovered evidence).

Therefore,

IT IS HEREBY ORDERED vacating Defendant Brandon Lewis' judgment and convictions entered August 8, 2013.

IT IS FURTHER ORDERED setting a Pre-Trial Conference: **Monday, December 16, 2013, 11:00 AM** in **Payson**. A prompt, new trial date will be set. Counsel are requested to consult with Calendar Administrator Arlene Ramirez (928-472-5331 or arlramir@court.az.gov) regarding a suggested date.

cc: MICHAEL J. HARPER WALKER & HARPER PC 111 WEST CEDAR LANE, SUITE C PAYSON AZ 8554	Office Distributions: COUNTY ATTORNEY COURT ADMINISTRATION PAYSON CALENDAR PROBATION DEPARTMENT VICTIM ADVOCATE