STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1336

Laurence Matthew Sarber, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 4, 2009
Reversed
Ross, Judge

Washington County District Court
File No. 82-K7-04-001171

Theodore D. Sampsell-Jones, Special Assistant State Public Defender, William Mitchell College of Law, 875 Summit Avenue, St. Paul, MN 55105 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Douglas H. Johnson, Washington County Attorney, Michael Hutchinson, Assistant County Attorney, Washington County Government Center, 14949 62nd Street North, P.O. Box 6, Stillwater, MN 55082 (for respondent)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

ROSS, Judge

Laurence Sarber appeals a district court order denying his petition for relief from his 2004 conviction of first-degree controlled substance crime (possession). Sarber argues that the district court should have found a reversible *Brady* violation and a violation of his right to effective assistance of counsel because the prosecutor failed to disclose, and his trial counsel failed to discover, material exculpatory evidence. Because the prosecutor failed before trial to disclose material cooperation discussions between the state and a key witness, and because the nondisclosure prejudiced Sarber, we reverse.

FACTS

The circumstances leading to Sarber's arrest and conviction are described in this court's decision in his direct appeal. *State v. Sarber*, No. A04-2110, 2005 WL 3527121 (Minn. App. Dec. 27, 2005), *review denied* (Minn. Mar. 14, 2006). To summarize, Sarber was riding as a passenger in a car driven by Jeramy Corwin when Corwin was stopped by Cottage Grove police Officers Don Johnston and Timothy Morning. *Id.* at *1. Police searched the car and discovered 42.9 grams of methamphetamine. *Id.* at *2. Sarber was arrested, charged, and convicted of drug possession. *Id.* at *2–*3.

Corwin was the key witness in Sarber's trial. Corwin testified that the drugs belonged to Sarber. The jury convicted Sarber chiefly on Corwin's testimony. Sarber directly appealed his conviction, and this court affirmed. *Id.* at *1.

In the petition for postconviction relief that gives rise to this appeal, Sarber asserted that the prosecutor withheld material evidence from the defense. The district

court held an evidentiary hearing and found that Corwin was arrested for a separate drug offense in St. Paul Park six weeks before the traffic stop leading to Sarber's conviction. While in custody, Corwin engaged in discussions with Detective Brian Stroshane of the Washington County Drug Task Force. The two had several conversations exploring Corwin's offer to assist police in other drug investigations in exchange for leniency. The detective made no express promises to Corwin to secure his testimony against Sarber. The district court found that "[t]he only thing that the prosecution failed to disclose, whether aware of the fact or not, was Mr. Corwin's discussions with Detective Stroshane, which yielded no concrete cooperation agreement or arrangement and never progressed beyond the discussion stage."

The district court concluded that the evidence of Corwin's cooperation discussions with Detective Stroshane would not have led the jury to a different verdict, and it denied Sarber's petition for relief from his conviction. Sarber appeals.

D E C I S I O N

Sarber argues that his conviction is invalid because his trial counsel either failed to discover before trial, or to use during trial, evidence of Corwin's previous drug arrest and Corwin's related cooperation discussions with Detective Stroshane. Sarber also contends that the prosecutor's failure to disclose the extent of Stroshane's cooperation discussions with Corwin before trial violated Sarber's right to due process. This court generally reviews a postconviction court's denial of a new trial for abuse of discretion and for whether the evidence supports the court's findings. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997). We review legal determinations de novo. *Leake v. State*, 737 N.W.2d

531, 535 (Minn. 2007). Because they are so factually and procedurally intertwined, we consider Sarber's arguments together.

A prosecutor must disclose evidence favorable to a criminal defendant when it is material to guilt or punishment. *Pederson v. State*, 692 N.W.2d 452, 459–60 (Minn. 2005) (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963)); *see* Minn. R. Crim. P. 9.01. Failure to disclose violates a defendant's due process rights when (1) the evidence is "favorable to the accused, either because it is exculpatory or it is impeaching," (2) the state "either willfully or inadvertently" suppressed it, and (3) the failure to disclose prejudiced the defendant. *Pederson*, 692 N.W.2d at 459. The disclosure must occur before trial begins. *State v. Hathaway*, 379 N.W.2d 498, 506–07 (Minn. 1985). Evidence that casts doubt on the credibility of a prosecution witness satisfies the first element of a *Brady* violation. *Pederson*, 692 N.W.2d at 460. That a prosecution witness is testifying pursuant to a plea bargain bears on the witness's credibility and should be disclosed. *State v. Smith*, 541 N.W.2d 584, 588 (Minn. 1996).

Sarber argues that evidence of Corwin's discussions with Detective Stroshane would have been admissible to impeach Corwin's testimony. He specifically contends that seven pieces of material, exculpatory evidence were neither disclosed before trial nor discovered and used by his defense counsel during trial: (1) that Corwin had previously been arrested for a drug offense in St. Paul Park, (2) that during the St. Paul Park incident, Corwin tried to blame his drug possession on his companion, (3) that during the St. Paul Park incident Corwin tried to hide his drugs, (4) that after Corwin and Sarber were arrested, Corwin "agreed" to become a confidential informant for the Washington

County Drug Task Force, (5) that Corwin met on multiple occasions with Detective Stroshane to discuss cooperating, (6) that during his discussions with Detective Stroshane, Corwin was told that if he cooperated as an informant, "Detective Stroshane would assist him with his pending criminal matters," and (7) that when Corwin testified against Sarber, Corwin believed the St. Paul Park charges were still pending against him.

The state does not refute Sarber's claim that none of this information was disclosed to Sarber before trial. The apparent concession is curious, because our review of the record reveals that at least some of this information was known to Sarber's defense attorney before trial began. For example, Sarber's attorney clearly discussed Corwin's St. Paul Park arrest at trial, saying, "[T]his is in the police report that was given to me in discovery at the Rule Eight Hearing months ago. It's something that I know because I read the police report." It seems that the facts of Corwin's St. Paul Park arrest and of Corwin's attempt to hide drugs during that incident were known to Sarber's trial attorney before the time of trial, evidenced by his reading of a police report describing them. But the arguments on appeal are muddled because the state fails to contest Sarber's claim on appeal that *none* of the information was disclosed or discovered before trial, or to address the timing of any actual disclosure. We therefore cannot determine accurately whether any of the other purportedly withheld information was disclosed, and if so, when. We therefore accept as unchallenged the district court's finding that the state failed to inform Sarber's trial attorney before trial that Detective Stroshane engaged Corwin in cooperation discussions.

Stroshane claims, and the district court found, that "[n]othing came out of these discussions," in the sense that they led to no state action that benefitted Corwin. But the record and the district court's other findings belie this claim. At the time Corwin testified against Sarber, Corwin believed that he faced potential criminal charges in the prior drug incident. Corwin also knew that Detective Stroshane had proposed that in exchange for Corwin's participation in controlled drug buys in other investigations, Stroshane "would be willing to go to the county attorney or the courts on his behalf . . . and [] would recommend some sort of consideration on his behalf." And although the district court found that "at no time did Detective Stroshane *do anything* on Mr. Corwin's behalf" as a result of Corwin's cooperation with the police, that finding cannot stand in light of Detective Stroshane's testimony that he indeed followed through with his promise by visiting the prosecutor who was handling Corwin's pending charges.

Had Stroshane and Corwin come to a formal cooperation agreement, evidence of that agreement would undoubtedly bear on Corwin's credibility as a witness against Sarber. *See Giglio v. U.S.*, 405 U.S. 150, 155, 92 S. Ct. 763, 766 (1972) (reasoning that "evidence of any understanding or agreement as to a future prosecution would be relevant" to witness credibility). But a formal agreement is not the only way to leverage an informant's cooperation. Even with no formal agreement, and perhaps *because* he had not yet secured a formal agreement, Corwin had the incentive to testify against Sarber in a manner that would not only clear himself, but that would impress prosecutors and police. Corwin understood that by cooperating with police, he might receive lenient treatment in his own pending criminal prosecution. By engaging in cooperation

discussions with Corwin, the state put Corwin in a position in which he could reasonably believe that the content of his testimony against Sarber might lead to favorable prosecutorial treatment in pending cases. *See Davis v. Alaska*, 415 U.S. 308, 320, 94 S. Ct. 1105, 1112 (1974) (acknowledging that a witness might be influenced by expectation of immunity). So whether or not the investigator's cooperation discussions with Corwin—a key witness and the only alternative suspect in the offense underlying Sarber's trial—resulted in an *express* quid-pro-quo agreement, the discussions bear substantially on Corwin's credibility and therefore constitute the kind of evidence described by the first element of a *Brady* violation; this evidence clearly was favorable to Sarber.

Our concern is amplified here. Not only did the investigator actually work on Corwin's behalf by discussing Corwin's cooperation with the attorney assigned to Corwin's pending criminal case, Corwin's offer to cooperate apparently was fruitful because he was never prosecuted in any case that was pending against him when he testified against Sarber. If only formal quid-pro-quo cooperation agreements between key witnesses and the state must be disclosed to defendants, creative prosecutors could avoid disclosing relevant witness-state relationships and obtain witness cooperation *informally*, through innuendo or strong suggestion that the witness may receive favorable treatment. We do not imply this sort of mischief occurred in this case, but the facts precipitating Corwin's testimony and his subsequent relief from any potential charges against him highlights the need to treat this circumstance as we would treat a formal cooperation agreement.

Concerning the second *Brady* factor, there is no evidence that the prosecutor deliberately failed to disclose Detective Stroshane's cooperation discussions with Corwin. But even inadvertent failures to disclose satisfy the second requirement of a *Brady* violation. *Pederson*, 692 N.W.2d at 459. A prosecutor's obligation to disclose extends to information known by other prosecutors in the same office. *Smith*, 541 N.W.2d at 588. Detective Stroshane acknowledged relaying his cooperation-related conversations with Corwin to a prosecutor, and his affidavit strongly suggests that the intent was to impact Corwin's outstanding drug charge. Sarber's prosecutor therefore was obliged to disclose the Corwin–Stroshane cooperation discussions to Sarber before trial even if the prosecutor was not personally involved with them.

We also conclude that Sarber was prejudiced by the prosecutor's failure to disclose the cooperation discussions. A party is prejudiced by a *Brady* violation when a reasonable probability exists that disclosure would have resulted in a different outcome. *Pederson*, 692 N.W.2d at 461. That reasonable probability exists here. Corwin's credibility meant everything to the state's case against Sarber. Corwin was Sarber's chief accuser and the only other occupant of the car where police found the methamphetamine. *Sarber*, 2005 WL 3527121, at *1. Conflicting statements in a police report opened some doubt about whether police found the drugs in the center console between Sarber and Corwin or under Corwin's seat. If Sarber knew before trial of Corwin's effort to cooperate with police in exchange for leniency, he could have communicated this cooperation to the jury, and the jury may have been more skeptical of Corwin's testimony. We conclude that if the prosecutor had disclosed the evidence of Corwin's

interest in cooperating with the police in other drug investigations to obtain favorable prosecutorial treatment, then it is reasonably probable that the verdict might have been different.

Sarber also accuses his trial counsel of failing to discover and use the evidence. Sarber's claim is unnecessarily confused by the state's failure to explain which of Sarber's allegations of nondisclosure are accurate and which are not. We conclude that if the prosecutor actually notified Sarber's trial counsel about the contested information in time for Sarber to present the evidence of Corwin's bias, his counsel's failure to present the evidence in this case constitutes ineffective assistance of counsel. *See Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (ineffective assistance is established when representation is objectively unreasonable and prejudices a defendant). According to the district court, Sarber's attorney could express no strategic basis for the failure to pursue defenses that arise from the evidence: "He did not have any strategic reason for failing to investigate these matters further, or for failing to procure and present evidence regarding [cooperation discussions] . . . but rather it was based on the state's late disclosures and his misunderstandings of the court's various evidentiary rulings." For the reasons stated above, evidence of Corwin's cooperation discussions would have served as evidence of bias by the state's central witness. If trial counsel learned of Corwin's cooperation discussions during the trial, he should have framed the issue for the district court and attempted to highlight Corwin's cooperation efforts to illuminate Corwin's potential bias.

Because the briefing and record obscure the timing and extent of the required disclosure, we are unable to pinpoint whose deficiency deprived Sarber of a fair trial. We

conclude that either the state's failure to disclose or Sarber's trial counsel's failure to discover and exploit Corwin's cooperation discussions violated Sarber's due process rights and prejudiced him at trial. We therefore reverse the district court's denial of Sarber's petition for postconviction relief.

We emphasize that although Sarber has already pursued a direct appeal of his conviction, this postconviction action is not barred by *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976). The state does not assert that *Knaffla* bars the petition. And the postconviction court accurately found that in Sarber's direct appeal this court "did not address the alleged cooperation agreement between the state and the prosecution's key witness, Jeramy Corwin." In that appeal, we noted that Sarber "presented significant testimony and argument that Corwin was a liar, could not be trusted, and was the possessor of the drugs." *Sarber*, 2005 WL 3527121, at *5. We concluded that "the jury was presented with the facts necessary to make a 'discriminating appraisal' of Corwin's alleged bias." *Id.* The evidence of Detective Stroshane's discussions with Corwin, however, was not presented to us at the time of Sarber's direct appeal. Because this court's prior decision arose in the context of a Sixth Amendment right-of-confrontation challenge and did not contemplate the undisclosed evidence that Corwin had discussed cooperating with police on multiple occasions, our previous analysis does not bear on our present decision that the state failed to satisfy its *Brady* disclosure obligation. The extent to which Corwin's credibility was vulnerable was not fully known until Sarber sought postconviction relief and developed a record establishing that Corwin gave his

inculpatory testimony as he engaged in, and seemingly benefited from, his cooperation with police. Sarber is therefore entitled to a new trial.

Reversed.