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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3056-12T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SEAN TALIAFERRO,

Defendant-Appellant.

Submitted August 6, 2014 – Decided December 5, 2014

Before Judges Waugh and Accurso.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 05-09-2009.

Ferro & Ferro, attorneys for appellant (Nancy C. Ferro, on the briefs).

James P. McClain, Atlantic County Prosecutor, attorney for respondent (Julie H. Horowitz, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Sean Taliaferro appeals from the June 29, 2012 order of the Law Division denying his motion for new trial based on newly discovered evidence. We affirm.

Following a two-day trial, a jury convicted defendant in 2006 of second-degree robbery, N.J.S.A. 2C:15-1; third-degree receiving stolen property, N.J.S.A. 2C:20-7; and third-degree eluding, N.J.S.A. 2C:29-2(b). The judge imposed an aggregate twenty-two-year term of imprisonment, subject to an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

We affirmed defendant's conviction on direct appeal but remanded for reconsideration of the sentence in light of State v. Natale, 184 N.J. 458 (2005). State v. Taliaferro, No. A-6012-05 (App. Div. Jan. 11, 2008). The Supreme Court denied certification, State v. Taliaferro, 195 N.J. 419 (2008). On remand, the Law Division re-imposed the same sentence.

Shortly thereafter, defendant filed an application for post-conviction relief alleging that the presentation at trial of the victim's videotaped testimony at the Wade[1] hearing - in which she was dressed in prison garb - was unduly prejudicial to him. Defendant argued that his defense counsel was deficient in permitting the videotape to be presented to the jury, and his appellate counsel was likewise ineffective for not asserting that circumstance as a basis for reversal of the conviction.

[1] United States v. Wade, 388 U.S. 218, 87 S. Ct 1926, 18 L. Ed. 2d 1149 (1967).

The trial court denied defendant's petition. We affirmed, State v. Taliaferro, No. A-2055-09 (App. Div. Feb. 4, 2011), and the Supreme Court denied certification, State v. Taliaferro, 207 N.J. 35 (2011). Defendant's subsequent federal habeas petition was likewise denied, Taliaferro v. Balicki, No. 11-4714 (D.N.J. Oct. 7, 2013).

We summarized the facts on defendant's direct appeal.

> On July 23, 2005, at approximately 9:00 p.m., Tina Laspina was walking in Atlantic City when a man got out of an SUV, ran up to her and punched her in the face. The man, whom Laspina later identified as defendant, took her money, ran back to the vehicle, and drove away. Another individual was in the passenger seat. A few minutes later, Laspina gave Officer Dean Dooley a description of the person who robbed her and of the car he was driving. She described the man as a large black male with a bald head and beard wearing a white T-shirt. She described the car as a silver Lexus SUV.
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> Dooley radioed the description to police dispatch and then called for an ambulance for Laspina, who was visibly upset and bleeding from the mouth. She received medical attention on the scene, but refused to go [to] the hospital. She was taken from the scene in Officer Paul Aristizabal's police cruiser.
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> Sergeant Rodney Ruark heard the police dispatch of the robbery suspect's description. Approximately twenty minutes later, he observed a silver Toyota 4Runner turning into a gas station on Route 30. He saw a bald, black male with a full beard wearing a white t-shirt in the driver's seat. Ruark called Aristizabal and asked

him to confirm with Laspina whether there had been a passenger in the suspect's SUV and whether the suspect was bald. Laspina stated that the suspect was bald and she believed a passenger was in the SUV.

Ruark drove directly behind the SUV and turned on his overhead lights and side spotlight. The SUV did not stop. He then activated his siren and advised dispatch that the SUV was not stopping. Defendant stopped the vehicle approximately a mile later, and ran from the SUV to a nearby apartment complex where he was apprehended. He was placed in the back of Officer DePaul's police car.

Laspina was transferred to Dooley's car. Dooley and DePaul decided to perform a show-up in a nearby vacant lot. DePaul arrived first with defendant. When Dooley pulled into the lot with Laspina, DePaul placed defendant, in handcuffs, in front of Dooley's car headlights. Laspina, from inside Dooley's car, positively identified defendant as the man who had robbed her. The identification took place approximately thirty minutes after the robbery.

Defendant challenged the identification procedure and on February 1, 2006, the court conducted a Wade hearing. At the hearing, conducted just over six months after the incident took place, Laspina testified that she no longer remembered what the robber looked like, but she did recognize defendant at the time of her identification as the man who robbed her. She testified that the man the police showed her "looked just like [the robber]," but she was not one-hundred percent certain. Laspina testified that she had used heroin on the afternoon that she was robbed and that she had been "under the influence," but the drug's effects had worn off by the time she was assaulted.

Dooley testified that Laspina was afraid of defendant during the show-up identification and crouched down in the seat of the police car; that she was attentive throughout the process and did not appear to be under the influence of any substances. The court concluded that the identification was not impermissibly suggestive.

Trial commenced on February 15, 2006, and concluded the next day. Laspina was subpoenaed to testify at trial, but did not appear. The State moved to admit her statements to Dooley immediately after the robbery and at the show-up as excited utterances. The testimony would include Dooley's observations of Laspina's demeanor, that she was bleeding and crying, and that she was speaking so rapidly that the officer could barely understand her and had to tell her to slow down. The court admitted the statements as excited utterances over defendant's objection, but limited its ruling to those statements made to Dooley during their initial contact.

The State also attempted to have the court admit Laspina's response to Aristizabal after Ruark called him to confirm with Laspina the description of the driver, and whether a passenger was in the vehicle. The court did not rule on that request; the judge said he would hear an objection "at the time [Ruark testified] if it's appropriate." When the State later elicited that testimony from Ruark, defense counsel did not object.

Immediately after the court admitted Laspina's statements to Dooley, defense counsel moved for admission of the videotape of Laspina's Wade hearing testimony. The court did not immediately rule on its admissibility, stating that it would wait until after the State's case was completed to determine if Laspina was unavailable to

> testify. The next day, the issue was raised again and defense counsel asserted that he wanted to admit the tape because Laspina did not appear in court. Defense counsel stated that his cross-examination of her at the Wade hearing "suffice[s] with respect to its depth with respect to the . . . issues that are going to be before the jury." The court addressed defendant personally to confirm that he wanted the tape admitted, and defendant answered affirmatively. Prior to the tape being played for the jury, the court found that Laspina was unavailable to testify, and that defendant had a full and complete opportunity to cross-examine her during the Wade hearing.
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> [State v. Taliaferro, No. A-6012-05 (App. Div. Jan. 11, 2008) (slip op. at 3-7) (footnotes omitted).]

Defendant based his motion for a new trial on his arrest photo, which depicts him, not in a white T-shirt, but in a white dress shirt with blue stripes. In the photo, defendant's shirt collar is turned up. Defendant contended that he had attempted to obtain the photo without success both before his trial and during his post-sentence motions and only succeeded when he made an Open Public Records Act request in December 2011. Defendant, representing himself on the brief and at argument, contended that the arrest photo constituted newly discovered evidence

entitling him to a new trial and that the prosecutor's failure to turn over the photo constituted a Brady[2] violation.

The judge, who had presided over both the Wade hearing and defendant's trial, disagreed. A defendant seeking a new trial based on new evidence must show that "the evidence is 1) material, and not 'merely' cumulative, impeaching, or contradictory; 2) that the evidence was discovered after completion of the trial and was 'not discoverable by reasonable diligence beforehand'; and 3) that the evidence 'would probably change the jury's verdict if a new trial were granted.'" State v. Ways, 180 N.J. 171, 187 (2004) (citing State v. Carter, 85 N.J. 300, 314 (1981)). The burden on a defendant seeking a new trial to redress a violation of the State's obligation to provide exculpatory evidence is quite different. The defendant need not demonstrate that he acted with diligence to discover what the prosecutor should have disclosed and evidence useful to impeach a State's witness is not discounted.

The Due Process Clause obligates prosecutors to disclose evidence favorable to the defense of which they have actual or constructive knowledge. Brady, supra, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218. The obligation extends to

[2] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

evidence relevant to guilt or to punishment, ibid., and to evidence that can be used to impeach the State's witnesses, United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985). See State v. Knight, 145 N.J. 233, 245-46 (1996) (discussing both types of evidence). Defendant need not show that the prosecutor trying the case acted in bad faith in withholding the evidence. Brady, supra, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218. Even when that prosecutor is ignorant of the facts, if they are known to the police, then knowledge is imputed to the prosecutor. Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 1567-68, 131 L. Ed. 2d 490, 508-09 (1995).

To obtain relief for a Brady violation, the defendant need only show that: "(1) the prosecution suppressed evidence; (2) the evidence is favorable to the defense; and (3) the evidence is material." State v. Martini, 160 N.J. 248, 268-69 (1999); see Moore v. Ill., 408 U.S. 786, 794-95, 92 S. Ct. 2562, 2568, 33 L. Ed. 2d 706, 713 (1972). Evidence — whether relevant to guilt, punishment or impeachment of a witness for the prosecution — is "material" for Brady purposes "if there is a 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Martini, supra, 160 N.J. at 269 (quoting Bagley,

supra, 473 U.S. at 682, 105 S. Ct. at 3383, 87 L. Ed. 2d at 494). "A 'reasonable probability' is one that is 'sufficient to undermine confidence in the outcome.'" Ibid.

Because the defense did not raise the issue of defendant's dress at trial, the judge concluded that the prosecution did not provide defense counsel with defendant's booking photo.[3] The photo of defendant wearing a white, striped dress shirt with a turned-up collar could have been used to impeach Laspina's description of the robber as having worn a white T-shirt, as well as the testimony of the officers that defendant matched the description she provided in all particulars. Notwithstanding, the judge concluded that the evidence was not material.

The judge reasoned that "[t]he jury was fully informed of the witness identification issues . . . including the witness'

[3] Because we agree with the trial judge that the evidence is not material, we need not address the issue of whether Brady applies to information within a criminal defendant's knowledge based on lack of prejudice in the prosecution's failure to disclose the information. See Martini, supra, 160 N.J. at 270 n.5 ("We note without reaching the issue, that a number of United States Circuit Courts of Appeals have concluded that because the purpose of Brady is to assure that the accused is not denied access to favorable evidence known to the prosecution, there can be no Brady violation where the accused or his counsel knows before trial about the information and makes no effort to obtain its production.") (citing Gov't of V.I. v. Martinez, 831 F.2d 46, 48, 50 (3d Cir. 1987) (holding Brady violation cured where defendant had knowledge of information withheld by prosecution and willfully failed to disclose it to defense counsel)).

drug use and criminal history," and, further, that defendant's "pronounced scowl and clearly aggressive demeanor" in the photo posed a clear risk of an adverse jury reaction.[4] See Martini, supra, 160 N.J. at 269. Relying on "the clear guidelines provided by Bagley and Kyles," the judge determined that the photo "does not place [defendant's] case in a different light, nor does it undermine confidence in the verdict."

We agree, and reject defendant's contention that the judge erred in denying his motion for new trial. We fail to see how the photo could have affected the court's decision at the Wade hearing or the jury's decision at trial. If anything, the evidence undermined defendant's claim of suggestiveness in the identification procedure because defendant was brought to the show-up in clothing different from what she described. Although defendant's booking photo would certainly impugn Laspina's description of defendant's shirt, thus undermining the reliability of that aspect of her description, it also confirmed

[4] Defendant did not provide a certification from his trial counsel that the booking photo was not included in the discovery he was provided by the State. The State, while likewise not providing a certification from trial counsel, represents that nothing was withheld in discovery. Although the defense's failure to raise defendant's dress led the trial court to conclude that the photo was not provided, its marginal utility and risk of adverse jury reaction might also suggest a reason for not deploying it even if provided. We draw nothing from either possibility beyond the lack of any proof on this record that the photo was actually withheld.

the remainder of her description of the suspect as a large black male with a bald head and beard. The photo, in addition to posing a risk of adverse jury reaction based on defendant's countenance, also confirmed him as a very distinctive looking individual. Accordingly, we cannot say that it is reasonably probable that disclosure of the omitted evidence would have resulted in a different outcome as would undermine our confidence in the jury's verdict.

Affirmed.