IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK POWELL,	)	No. 310, 2016
	)	
Appellant	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE IN
	)	ID No. 0909000858
STATE OF DELAWARE,	)	
	)	
	)	
Appellee	)	

ON APPEAL FROM THE SUPERIOR COURT OF

THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

APPELLANT'S REPLY BRIEF

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<u>CLAIM I:</u> THE SUPERIOR COURT ERRED IN FINDING THAT THE STATE DID NOT COMMIT A *BRADY*[1] VIOLATION WHEN IT DELIBERATELY DELAYED DISCLOSURE OF AN EYEWTINESS UNTIL AFTER CLOSE OF EVIDENCE AND THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE ISSUE ON APPEAL.

The State argues in its Answering Brief that this claim is barred by operation of Rule 61(i)(4) and Rule 61(i)(3),[2] that the court below correctly held that the State did not violate *Brady*,[3] and that appellate counsel was not ineffective for failing to raise this claim on appeal.[4] The State does not dispute the fact that it deliberately delayed disclosure of eyewitness Damion Coleman until after the defense had rested.

Specifically, the State has not disputed that the detective spoke to Coleman on January 28, 2011,[5] or that a prosecutor and the detective met with Coleman on January 30, 2011.[6] The State does not dispute that it sent the information about Coleman by letter on the afternoon of Friday, February 4, 2011, despite being

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

[2] *Ans. Br.* at 14-16.

[3] *Ans. Br.* at 17-26.

[4] *Ans. Br.* at 27-30.

[5] A3201.

[6] A3199.

together in court all day every day that entire week.[7] The State's decision to delay disclosure of eyewitness Coleman until *after* the defense rested on February 3, 2011 was conscious and deliberate.

The State offers no explanation for the prosecutors' excuse that they were waiting for the detective's police report to be drafted before disclosing the Coleman information. The report was drafted and approved on February 2, 2011, before the defense case even began.[8]

1. This claim is not procedurally barred.

The State contends that the Superior Court did not consider the procedural bars to this claim.[9] The State is incorrect. In its Opinion denying postconviction relief, the court set forth the procedural bars and their exceptions.[10] The court stated the bars would be discussed when applicable to the claims.[11] The court addressed the *Brady* claim on its merits, and as such, found the procedural bars

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[7] A5875, A3296.

[8] A2393-2394.

[9] *Ans. Br.* at 14, fn. 20.

[10] *State v. Powell,* 2016 WL 3023740 at *6 (Del. Super. Ct.).

[11] *Id.*

inapplicable. The State has not articulated any reason why the judge's affirmative finding that the claim was not barred should be reversed by this Court.

The State next contends that this claim is barred by Superior Court Rule of Criminal Procedure 61(i)(4) because it has been previously adjudicated—while at the same time admitting, "trial counsel did not specifically object to the State's disclosure of Coleman's existence as a *Brady* violation…"[12] Moreover, the State posited that the disclosure was "not in the nature of *Brady*."[13] Now the State contends that the judge agreed, but that is not what the record shows. The judge actually said, "I understand it *may* not be in the nature of *Brady* because you have four witnesses and got Powell coming out of three different doors."[14]

Rule 61(i)(4) does not apply. Trial counsel did not assert a *Brady* violation. The State did not concede—and still does not concede—that the Coleman disclosure was *Brady* material. Because the State deliberately withheld the existence of this eyewitness until the day of closing arguments, what occurred on February 7, 2011, was an urgent scramble for defense counsel to figure out what to do about the witness. Trial counsel had to decide whether to take the extraordinary

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[12] *Ans. Br.* at 15.

[13] A2394.

[14] *Id.* (emphasis added).

step of moving to reopen the case for one witness. There was no time or capacity for the defense to make cogent applications to the court. The judge wanted to get on with closing arguments. The record is devoid of any analysis of a potential *Brady* violation under the rubric established in *Michael v. State*.[15]

As the State points out, Rule 61(i)(4) is based on the law of the case doctrine, and forbids reexamination of claims already decided.[16] The claim that the State deliberately withheld disclosure of an eyewitness, and in doing so committed a *Brady* violation, was never presented to the court at trial or on appeal. There is no law of the case to apply. As such, this claim is not barred by Rule 61(i)(4).

The State also argues the opposite: that, by operation of Rule 61(i)(3), this claim was not raised before so it cannot be raised now.[17] In doing so, the State disregards the fact that the Superior Court did not find the claim barred by Rule 61(i)(3) or by any other bar. Moreover, the State concedes this Court's holdings that *Brady* violations fall within the ambit of the Rule 61(i)(5) exception for constitutional violations that undermine the fundamental legality, reliability,

[15] 529 A.2d 752, 756 (Del. 1987).

[16] *Ans. Br.* at 14-15.

[17] *Ans. Br.* at 16-17.

integrity or fairness of the proceedings leading to the judgement of conviction.[18] In fact, as this Court recently held, "the touchstone of either test, *Strickland*[19] or *Brady*, is the fairness of the trial.[20]

The State appears to argue that this Court should bar consideration of the claim because it lacks merit.[21] The substantive merits of the claim are a separate issue. To overcome the procedural bars, Appellant need only demonstrate that a colorable constitutional violation in the nature of *Brady* and ineffective assistance within the meaning of *Strickland* pertains. Mr. Powell has amply done so—an allegation of a *Brady* violation meets the standard for a colorable constitutional violation.[22] This Court should reject the State's assertions of procedural bars and grant relief on the merits of the claim.

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[18] *Ans. Br.* at 17.

[19] *Strickland v. Washington,* 466 U.S. 668 (1984).

[20] *Starling v. State,* 130 A.3d 316, 336 (Del. 2015).

[21] *Ans. Br.* at 17.

[22] *Starling* at 332.

2. The Superior Court erred in finding no *Brady* violation.

The claim presented in this appeal meets the standard for a finding of prejudice flowing from a violation of *Brady.* The existence of the eyewitness Coleman was exculpatory and impeaching, it was suppressed by the State, and a reasonable probability of a different result flows from the violation.[23]

The State asserts that the Coleman information was only marginally exculpatory or impeaching, and moreover, it was cumulative.[24] The State claims that "Powell's placement in the back seat of the car was not going to tip the scales for guilt or innocence much one way or the other."[25] In the context of this trial, however, a reasonable likelihood exists that it would have. As the State knew, the gravamen of the defense was that reasonable doubt existed that Mr. Powell was the shooter, and that the evidence pointed more towards Flores than Powell. Flores had gunshot residue on his hands and clothes. Flores was the major contributor to the DNA on the trigger of the handgun. Flores was not charged at all in the case. Flores alone testified that Mr. Powell shot the victim. Flores alone testified that Mr. Powell exited the driver's side rear passenger seat.

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[23] *Starling* at 332-33.

[24] *Ans. Br.* at 18.

[25] *Ans. Br.* at 18-19.

Any evidence that diminished Flores' credibility was material and relevant to exculpation and impeachment. Perhaps the State knew that when deciding to sit on the information until after the defense rested. Perhaps not—the State never explains why it suppressed the information. And it was suppressed, not delayed, as the State argues.[26] Even the judge asked, "what is the point of giving it to them? How can they use it?"[27] The judge's question is a good one, since the defense case was closed and the prosecutor stated on the record that the disclosure was not a *Brady* disclosure.

The State argues the evidence was merely delayed and that the defense was not denied an opportunity to use the material effectively.[28] The defense was clearly denied that opportunity in this case. In not one case cited by the State for its proposition of "delayed disclosure" had the defense already rested. That adds a different dimension and placed trial counsel in an unfair quandary. They had to split up while one lawyer interviewed the witness and the other lawyer worked on her closing argument—the jury was waiting during the Coleman incident.

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[26] *Ans. Br.* at 24-27.

[27] A2393.

[28] *Ans. Br.* at 25.

The lawyer who did interview Coleman testified at the evidentiary hearing that he was concerned Coleman would identify Mr. Powell,[29] a contention that makes little sense, since the police report stated that Coleman could not describe the subject with the gun, who the State alleged was Mr. Powell. Moreover, all that attorney had to do was show a photo of Mr. Powell to Mr. Coleman and he would have had his answer. But such misjudgments are borne out of rushed and hasty due diligence.

Had the Coleman disclosure been made anytime between January 30 and February 2, 2011, defense counsel could have conducted a proper interview of Coleman and asked more and better questions than the State detective did. Only then could counsel have made an intelligent and rational decision about calling him as a witness in the defense case, which had not started yet. As trial counsel testified, "the timing was horrific."[30]

The State's assertion that the disclosure was just a bit late and the defense had "ample" time to interview Coleman should be rejected by this Court. The State engineered the timing of the disclosure in such a way that it was a suppression, not a delay. This Court has held so in similar circumstances. In *Charbonneau v.*

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[29] A3536.

[30] A3299.

State,[31] the prosecutor obtained pleas and proffers from two codefendants and represented on the record that both would be testifying. The prosecutor knew for six months before the trial that the proffers were inconsistent.[32] Yet the prosecutors waited until four days into jury selection—"the thirteenth hour"—to tell the defense that one of the two codefendants would not be testifying.[33]

Because defense counsel knew that the extremely delayed disclosure "would eviscerate their defense strategies," they sought relief in the form of a missing witness instruction and the admissibility of the codefendant's proffer.[34] The denial of those applications resulted in a reversal by this Court, which held that "the State's tactics exacerbated the prejudice to Linda [Charbonneau]."[35]

So too here. An unbiased eyewitness came forward in a case where the defense was clearly exposing inconsistencies among the eyewitness accounts. The State waited six days to disclose—waiting until the defense put on its case and rested. The State timed its disclosure to place the defense squarely between the

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[31] 904 A.2d 295 (Del. 2006).

[32] *Id.* at 303.

[33] *Id.* at 299.

[34] *Id.*

[35] *Id.* at 309.

Scylla and Charybdis of reopening its case for Coleman or going to closing arguments without the benefit of Coleman's testimony. All this occurred with the jury in the jury room waiting for closing arguments to start. Under all these circumstances, the Coleman information was suppressed.

The State's violation was prejudicial to Mr. Powell. The defense was a strong one that resulted in a not guilty verdict as to one of the two Murder First Degree counts. The forensic evidence of gunshot residue and DNA pointed more to Flores as the shooter than Mr. Powell. As such, the contrasting and contradictory eyewitness statements—particularly those of Flores—were crucial. As trial counsel testified, Coleman was not a "slam dunk" witness.[36] Few witnesses are. But he was a witness that would have provided an unbiased eyewitness account that contradicted Flores' self-serving version of events.

A reasonable probability of a different outcome exists due to the State's violation of *Brady*. As such, the State's contentions should be rejected and this Court should find error in the Superior Court's decision.

[36] A3298.

3. Appellate counsel was ineffective for failing to raise a *Brady* claim.

The State concludes that the *Brady* claim would not have been successful, so no ineffective assistance claim pertains.[37] The State's basis for saying so relies upon its assertion that Coleman was only "marginally exculpatory or impeaching."[38] Despite the State's attempt to marginalize the importance of the eyewitness Coleman, he was an essential eyewitness in the context of the overall trial and defense strategy.

The State does not address appellate counsel's admission that they failed to discuss the Coleman issue with trial counsel before deciding what claims to present on appeal.[39] That failure led appellate counsel to miss an important appellate claim—one that, if raised, reasonably likely would have resulted in a different outcome of the appeal.

The Superior Court's finding that "not knowing that any information had been withheld, appellate counsel cannot be faulted for failing to raise alleged *Brady* claims on appeal,"[40] perhaps unintentionally underscores appellate counsel's

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[37] *Ans. Br.* at 29.

[38] *Id.*

[39] *See,* A3487-3489.

[40] *State v. Powell,* 2016 WL 3023740 at *44 (Del. Super. Ct.).

lack of due diligence. It is appellate counsel's role to ascertain what claims are relevant and meritorious. Appellate counsel failed to do so in this case, resulting in prejudice to Mr. Powell.

CONCLUSION

For the reasons stated in this Reply Brief and the Opening Brief, Derrick Powell respectfully asks this Court to reverse the finding of the Superior Court.

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