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2011 IL App (3d) 090835–U

Order filed August 19, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court
	) of the 10th Judicial Circuit,
	) Tazewell County, Illinois,
Plaintiff-Appellee,	)
	) Appeal No. 3–09–0835
v.	) Circuit No. 08–CF–510
	)
GREGORY L. DABBS,	) Honorable
	) Richard E. Grawey,
Defendant-Appellant.	) Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Wright and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* Evidence withheld from defendant was neither favorable nor material. Therefore, defendant has failed to establish a *Brady* violation.

¶ 2 Following a jury trial, defendant, Gregory L. Dabbs, was found guilty of violating an order of protection (720 ILCS 5/12–30(a)(1) (West 2008)) and was sentenced to five years imprisonment. Prior to sentencing, but after trial, defendant received a presentence investigation report (PSI) that contained a report prepared by a correctional officer that

was not previously disclosed to defendant. The report related to defendant's order of protection. Defendant appeals his conviction, arguing that the State's failure to disclose the report violated the rule of *Brady v. Maryland*, 373 U.S. 83 (1963). We affirm.

¶ 3 FACTS

¶ 4 On April 14, 2008, an order of protection was filed that included a "stay away" provision that prohibited defendant from contacting the petitioner, Katie Bailey-Dabbs. On September 11, 2008, the State filed a one-count indictment against defendant for felony violation of the order of protection (720 ILCS 5/12–30(a)(1) (West 2008)). The indictment alleged that defendant called Bailey-Dabbs on or about July 25, 2008, after he had been served with notice of the contents of the order of protection.

¶ 5 Prior to trial, the State filed a motion *in limine* to preclude defendant from making any argument or asking any question relative to Bailey-Dabbs' alleged permission to contact her or otherwise violate the order of protection. That motion was granted by the trial court, and the cause proceeded to a jury trial.

¶ 6 At trial, Henderson County Sheriff's Deputy Steve Henshaw testified that he personally served defendant with the order of protection at 12:10 p.m. on April 14, 2008, at the Henderson County courthouse. Henshaw identified the order of protection and the proof of service that he signed, as well as the defendant in open court. He further testified that he knew whom defendant was before he served him, because he had observed defendant in court.

¶ 7 Bailey-Dabbs testified that she was the petitioner in the order of protection filed against defendant. She testified that defendant was present at the Henderson County

courthouse on April 14, and that he took part in the hearing regarding the order of protection. She stated that the trial court told defendant, on that date, that he had to stay away from her pursuant to the contents of the order of protection. Bailey-Dabbs further testified that defendant telephoned her at her home on July 25, 2008. During the conversation, she told defendant that he was not supposed to be calling. Defendant responded that it did not matter and that he was not going to get into any trouble for calling. A recording of the telephone conversation was played in court and confirmed Bailey-Dabbs' testimony that she had told the defendant that he was not supposed to call.

¶ 8 After the State rested, defendant took the stand. He testified that he was at the Henderson County courthouse on April 14, 2008, but that he left around 10:45 a.m., following a hearing regarding his divorce from Bailey-Dabbs. He claimed that he was never served with and never saw the order of protection until the day of the jury trial. He admitted contacting Bailey-Dabbs dozens of times, but claimed that he knew nothing about the order of protection. Defendant also admitted that he told Bailey-Dabbs, during their conversation on July 25, that "they are not going to do anything about it[.]"

¶ 9 The State recalled Officer Henshaw in rebuttal. Henshaw again testified that he personally served defendant a copy of the order of protection and that he had no doubt that defendant was the individual he served. The jury returned a verdict of guilty against defendant, and the cause proceeded to sentencing.

¶ 10 Prior to the sentencing hearing, defendant received the PSI, which included a report dated June 18, 2008, prepared by correctional officer Rhonda Spracklen (Spracklen Report). The Spracklen Report noted that defendant's outgoing mail raised some

concerns which led Spracklen to check if defendant was subject to an order of protection. It further noted that after discovering that an order of protection was in effect, Spracklen discussed the order of protection with defendant, and he claimed that he did not know of its existence. At that time, Spracklen informed defendant, that he was to have no future contact with Bailey-Dabbs. The report also noted that defendant admitted to calling Bailey-Dabbs and that she had visited defendant in jail.

¶ 11 Defendant was sentenced to five years imprisonment. Following the sentencing hearing, defendant filed motions for a new trial and to reconsider sentence. In the motions, defendant first alleged that a *Brady* violation had occurred. The trial court denied the motions. Defendant now appeals the trial court's final judgment.

¶ 12 ANALYSIS

¶ 13 Defendant appeals his conviction, alleging a *Brady* violation occurred when the State failed to disclose the Spracklen Report prior to trial. *Brady* established that a prosecutor has an affirmative duty to disclose evidence that is favorable to a defendant. *Brady*, 373 U.S. 83. A *Brady* violation occurs when a prosecutor fails to turn over evidence that is both favorable to a defendant and material. *People v. Barrow*, 195 Ill. 2d 506 (2001). Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Id.* A reasonable probability that the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome. *People v. Hickey*, 204 Ill. 2d 585 (2001). Defendant has the burden of establishing the existence of a *Brady* violation. *People v. Goldsmith*, 259 Ill. App. 3d 878 (1994).

¶ 14 Here, defendant has failed to establish that a *Brady* violation occurred. Based on our review of the Spracklen Report, we do not believe that the information contained therein was favorable to defendant. Defendant claims that the report was favorable because it: (1) contained a prior statement that was consistent with defendant's trial testimony that he was never served with the order of protection and, therefore, he did not knowingly violate the order; and (2) showed that Bailey-Dabbs did not complain about defendant's contacts and was freely contacting him. We find these arguments unpersuasive and conclude that the report is more detrimental to defendant than it is favorable.

¶ 15 First, while the report may contain a prior statement that was consistent with defendant's trial testimony, that statement probably would not have been admissible. Prior consistent statements are admissible only to rebut a recent fabrication or motivation to testify falsely. *People v. Davis*, 130 Ill. App. 3d 41 (1984). However, even if the prior statement was admissible, the report specifically states that defendant was made aware of the order of protection on June 18, 2008, over one month before he contacted Bailey-Dabbs. This information rebuts defendant's claim that he did not knowingly violate the order of protection. Thus, from defendant's perspective, the report is a blade that cuts both ways: while it does support his claim that he was unaware of the order of protection prior to the interview with Spracklen, it also shows that he was made aware of it on that date. Therefore, taken as a whole, defendant's statement to Spracklen would not be favorable to defendant.

¶ 16 Second, the information that Bailey-Dabbs did not complain of the contact and

may even have consented to it would not have been favorable to defendant. We note that this information does not relate to any possible legal defense. Further, this type of information would have been precluded from trial pursuant to the State's motion *in limine* to exclude this type of evidence. Since this information could not have been offered at trial, it cannot be said to be favorable to defendant.

¶ 17 Our finding that the Spracklen Report was not favorable to defendant makes the question of materiality moot. We note, nonetheless, that the evidence in the case was overwhelming that defendant would not have been able to prove that the Spracklen report was material merely with the evidence contained in the report. We therefore find that defendant has failed to meet his burden of establishing a *Brady* violation, and his conviction is affirmed.

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Tazewell County is affirmed.

¶ 20 Affirmed.