2011 IL App (1st) 093570-U

FIRST DIVISION
FILED: September 30, 2011

No. 1-09-3570

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 C 330219
	)	
WILSON ZERVOS,	)	Honorable
	)	Thomas Fecarotta,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant is not entitled to a new trial based on the State's alleged violation of Supreme Court Rules 412(c) and 415(b) by failing to provide timely disclosure of potentially exculpatory information.

¶ 2 Following a bench trial, the defendant, Wilson Zervos, was convicted of one count of aggravated unlawful restraint (720 ILCS 5/10-3.1 (West 2008)) and two counts of aggravated battery (720 ILCS 5/12-4 (West 2008)) and was sentenced to two years' probation and 100 hours of community service. On appeal, the defendant claims that he is entitled to a new trial based on the prosecution's failure to provide timely disclosure of potentially exculpatory information as mandated

by Supreme Court Rules 412(c) (eff. March 1, 2001) and 415(b) (eff. Oct. 1, 1971). For the reasons that follow, we affirm the defendant's convictions and sentence.

¶ 3 The record reveals that the defendant and co-defendant Matthew Eichhorst were charged with attempted first degree murder, aggravated unlawful restraint, and multiple counts of aggravated battery in connection with the February 21, 2009, beating of Christopher Nessel. The defendant and co-defendant elected to proceed with simultaneous but severed bench trials.

¶ 4 On April 20, 2009, the State filed an answer to discovery, which was accompanied by police reports. On May 18, 2009, the defendant filed a motion for discovery seeking full disclosure of information pertaining to any civil or criminal actions pending against its previously identified witnesses. On June 30, 2009, the defendant filed a motion for additional discovery, requesting that the prosecution disclose "all agreements, understandings, or other actions by the State, including but not limited to nonprosecution agreements, reductions in charges, or any similar agreements or understandings reached with any of the persons identified to date and as to any identified in response to this motion."

¶ 5 On August 15, 2009, approximately two weeks prior to the scheduled trial date, the victim, Christopher Nessel, and Erin Fletcher, an occurrence witness, were arrested by the Hoffman Estates Police Department. Nessel was charged with possession of heroin with intent to deliver, while Fletcher was charged with possession of heroin. This information was included in the criminal histories of these two witnesses, which were sent by the prosecutor to defense counsel by facsimile transmission on August 26, 2009. On that same day, the prosecutor also sent the criminal history of Bogdan Felip, another occurrence witness, to defense counsel by facsimile transmission. Felip's

criminal history did not reflect any arrests on either August 14 or August 15, 2009.

¶ 6 On August 28, 2009, the defendant filed a motion to continue the trial date, then set for September 1, 2009, and for leave to conduct additional discovery. In his motion, the defendant acknowledged receipt of the criminal histories of Nessel, Fletcher, and Felip. The motion also claimed that Felip's criminal history "do[es] not show his arrest the same date for purchasing controlled substances from Nessel though defendant has received credible information that Felip was arrested at that time." The defendant's motion asserted that "no arrest reports have been tendered nor has any other witness(es) to the events of August 15, 2009 been revealed by the prosecution" and that "information concerning the relationship between these three people and their motives to testify against defendant is critical to this defendant's defense." The defendant's motion also asserted, as a separate basis for the requested continuance, that defense counsel had suffered an eye injury, which limited his ability to complete his trial preparations by the scheduled trial date.

¶ 7 At the hearing on the defendant's motion for a continuance, the attorneys representing the defendant and co-defendant Eichhorst both indicated that they had obtained information regarding the search warrant used in the August 15, 2009, arrests of Nessel and Fletcher, which indicated that Nessel and Fletcher were living together. In addition, counsel for co-defendant Eichhorst stated that "[u]pon our investigation, we also determined that the third witness in this matter *** [a]nother State witness, also was arrested; however, no charges are pending against him."

¶ 8 The simultaneous bench trials commenced on September 1, 2009. After the parties made their opening statements, the defendant requested a continuance of one week, because his attorney was experiencing vision problems as a result of his previous eye injury. The defendant filed his

answer to discovery during the one-week continuance. In his discovery response, the defendant stated that he "may call as witnesses any persons whose names are referred to in *** Hoffman Estates *** Police Reports, Case Reports ***". Thereafter, the cause was continued to October 1, 2009, at which time the trial was resumed and concluded.

¶ 9 The evidence presented at trial established the following facts. On the night of February 20, 2009, Nessel, Felip, and Fletcher had attended a party at the Schaumburg apartment of Felip's sister. They left the party at approximately 1:20 a.m. and walked through the parking lot of the apartment complex. Nessel was walking with Felip, and Fletcher was 15 to 20 feet ahead of them. As they approached Fletcher's car, the defendant and co-defendant Eichhorst got out of a Jeep, and co-defendant Eichhorst began beating Nessel with a baseball bat. Nessel suffered multiple abrasions and contusions to his abdomen, upper chest, frontal scalp, left elbow, and both knees and shins. He also suffered a fractured rib, hematoma of his right kidney, and a contusion on his lung. In addition, he had a laceration on the front of his scalp, which was 3.5 centimeters long and was closed with surgical staples.

¶ 10 Nessel testified that he was 22 years old and previously had been friends with the defendant and co-defendant Eichhorst until September 2008, when they accused him of robbing Eichhorst's house. Nessel further stated that, when he left the party in February 2009, he was struck in the back of the head with "something hard" but did not see who had hit him. Following the blow to his head, he tried to protect himself by putting his arm over his head, and he was hit in the elbow. He then tackled his assailant, and both men fell to the ground. After being sprayed in the face with pepper spray, he was then hit again on the top of his head with the hard object. Nessel testified that he was

curled up on the ground and was trying to cover his head while being struck repeatedly on his head, arms, and legs. Though he could not see his attackers, he believed he heard the defendant and co-defendant Eichhorst talking during the assault. According to Nessel, the beating continued for about 45 to 60 seconds, and he eventually was taken to the hospital in an ambulance.

¶ 11 During cross-examination by the defendant's attorney, Nessel admitted that he was arrested on April 15, 2009, and charged with possession of heroin with intent to deliver, but he denied that he had been promised anything in exchange for his testimony at the defendant's trial. Nessel also acknowledged that Fletcher was living with him in August 2009 and was arrested on the same date. He denied, however, that Felip had been arrested with them. Nessel further acknowledged that, after being released from the hospital, he called Felip and threatened him because he believed that Felip had "set [him] up."

¶ 12 Fletcher testified as to the events occurring on the night of February 20, 2009, and her testimony substantially corroborated that of Nessel. Fletcher further stated that she was able to see both the defendant and co-defendant Eichhorst during the beating of Nessel. According to Fletcher, the defendant tried to pull Nessel down while co-defendant Eichhorst swung a black, metal baseball bat at his head. After the two men fell to the ground, the defendant sprayed something in their direction. Fletcher then observed co-defendant Eichhorst hit Nessel with the baseball bat 15 to 20 more times while the defendant punched him all over his body. Fletcher testified that she was screaming during the attack and said that she was going to call the police. Thereafter, the defendant and co-defendant Eichhorst got back into the Jeep and drove away. After she called 911, the police and an ambulance arrived at the scene.

¶ 13 When the prosecutor inquired whether she had been arrested for possession of a controlled substance on "April 15th of 2009," Fletcher answered in the affirmative. She also denied having received any promises with regard to that offense in exchange for her testimony at the defendant's trial. On cross-examination, Fletcher admitted that she had been arrested on "August 15th of 2009" and was charged with having drugs in her possession.

¶ 14 Bogdan Felip also testified regarding the events occurring on the night of February 20, 2009, and his description of the beating was substantially consistent with the accounts given by Nessel and Fletcher. When questioned by counsel for co-defendant Eichhorst, Felip acknowledged that he had been involved in a traffic stop on August 14, 2009, and that the police officer found heroin in the trunk of his car, but he was not charged with any offenses as a result of that stop. On cross-examination by the defendant's attorney, Felip stated that he was not arrested in August 2009 and that he had not received any promises of leniency from the prosecution or the police in exchange for his testimony at the defendant's trial. Felip's description of the August 2009 traffic stop was impeached, in part, by the stipulated testimony of Hoffman Estates police sergeant Vincent Sciannone, who stated that he arrested Felip on August 14, 2009, but did not charge him.

¶ 15 During closing argument, counsel for the defendant specifically referred to the fact that the State's primary witnesses all had "serious pending charges against them that affect *** their motivations for testifying in this case." The trial court found the defendant guilty of one count of aggravated unlawful restraint and two counts of aggravated battery.

¶ 16 The defendant filed a post-trial motion for judgment notwithstanding finding, or, in the alternative, for a new trial, in which he challenged Fletcher's and Felip's testimony that they were not

the beneficiaries of any agreements or promises of leniency from the State. In his motion, the defendant asserted that Fletcher's testimony revealed that she had been released on bond for a drug offense and that the defense had discovered that Felip had been arrested and then released even though he had controlled substances in his vehicle. The defendant's motion further asserted that "[t]he record is still blank as to what promises were made and what the *quid pro quo*, if any, was [for Fletcher's and Felip's testimony]. If deals were made, the failure to reveal same requires at a minimum a new trial."

¶ 17 At the hearing on the defendant's motion, the defendant's attorney argued that Fletcher had been granted "deferred prosecution" on the heroin-possession charge and that "it just begs [*sic*] credulity" that Fletcher and Felip would not be prosecuted. In denying the defendant's post-trial motion, the trial court observed that defense counsel had ample opportunity to question the State's witnesses regarding the existence of any agreements or promises of benefits that had been offered in exchange for their testimony, and the witnesses had denied having received any such agreements or promises. The court further noted that there was no evidence in the record that any of the State's witnesses had received any agreement or promise of leniency. The court sentenced the defendant to serve two years' probation and 100 hours of community service, and this appeal followed.

¶ 18 The defendant contends that the trial court committed reversible error in denying his motion for a new trial where the State failed to provide timely disclosure of the prior criminal histories and arrest reports of Nessel, Fletcher, and Felip. We review a trial court's denial of a motion for a new trial for abuse of discretion. *People v. Brink*, 294 Ill. App. 3d 295, 302, 690 N.E.2d 136 (1998). An abuse of discretion will be found only where the trial court's decision is "fanciful, arbitrary, or

unreasonable to the degree that no reasonable person would agree with it." *People v. Ortega*, 209 Ill. 2d 354, 359, 808 N.E.2d 496 (2004).

¶ 19 The prosecution has a duty to disclose evidence favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963). This obligation encompasses impeachment evidence, as well as evidence that is exculpatory. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985); *People v. Williams*, 329 Ill. App. 3d 846, 857, 769 N.E.2d 518 (2002).

¶ 20 The due process requirements articulated in *Brady* are codified by Illinois Supreme Court Rules 412 and 415. See *People v. Sharrod*, 271 Ill. App. 3d 684, 688, 648 N.E.2d 1141 (1995). Rule 412(c) (eff. March 1, 2001) provides that, upon the filing of a written motion, "the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor." Rule 415(b) (eff. Oct. 1, 1971) imposes a continuing duty to comply with the rules of discovery and provides that any additional material or information which is subject to disclosure shall be promptly disclosed.

¶ 21 The failure to comply with discovery requirements does not in all instances necessitate a new trial. *People v. Harris*, 123 Ill. 2d 113, 151, 526 N.E.2d 335 (1988). A new trial should only be granted if the defendant is prejudiced by the discovery violation and the trial court failed to eliminate the prejudice. *Harris*, 123 Ill. 2d at 151-52. Among the factors to be considered in determining whether a new trial is warranted are: (1) the strength of the undisclosed evidence; (2) the likelihood that prior notice could have aided the defense in discrediting the prosecution's case; and (3) the

willfulness of the State in failing to disclose. *Harris*, 123 Ill. 2d at 152.

¶ 22 Here, the defendant argues that he is entitled to a new trial because the State violated its discovery obligation by failing to provide police reports and other details pertaining to the August 2009 arrests of Nessel and Fletcher and to the traffic stop of Felip. We do not agree.

¶ 23 The record affirmatively demonstrates that, on August 26, 2009, six days before the scheduled trial date, the prosecution provided to the defense the criminal history sheets for all of the State's primary witnesses. Thereafter, defense counsel subpoenaed the relevant information. On September 1, 2009, the first day of trial, the court heard the opening statements of counsel and then continued the cause for one week due to the vision problems of the defendant's attorney. The trial was again continued and eventually was resumed and concluded on October 1, 2009. Thus, the defendant was aware of the ostensibly impeaching information long before any evidence was presented, and he had more than a month in which to prepare his cross-examination of the State's primary witnesses to determine whether they had a motive to testify falsely against him. When the defendant's attorney questioned those witnesses on cross-examination, they unequivocally denied that they had entered into any nonprosecution agreements with or received any promises of leniency from the prosecution.

¶ 24 As the trial court observed, there is no evidence that the witnesses who testified for the State received any agreement not to prosecute, promise of leniency, or other benefit in exchange for their testimony at the defendant's trial. In the absence of such a benefit, we cannot say that there was a substantial likelihood that prior notice would have assisted the defendant in challenging the State's case. In addition, the record does not indicate that the State acted willfully in failing to disclose the

police reports and other details related to the witnesses' contact with the police in August 2009. Thus, the factors recognized in *Harris* do not compel the conclusion that the defendant is entitled to a new trial.

¶ 25 We also note that there is absolutely no indication in the record that Fletcher had been arrested in April 2009. The defendant did not object to or voice any concern regarding Fletcher's affirmative answer to the prosecutor's question as to whether she had been arrested on "April 15th of 2009." We agree with the State that this question and answer, when read in context, reflects that the prosecutor intended to inquire about Fletcher's August arrest, and the prosecutor merely mis-spoke when she inadvertently referred to "April" in her question. In light of these circumstances, we conclude that the defendant has not demonstrated that he suffered any prejudice as a result of the State's alleged failure to disclose impeaching information.

¶ 26 In reaching this conclusion, we find that the defendant's reliance on *People v. Blackman*, 359 Ill. App. 3d 1013, 836 N.E.2d 101 (2005), is misplaced. In *Blackman*, the court held that, under the circumstances of that case, the prejudice caused by the State's failure to disclose potentially exculpatory evidence, as required by the discovery rules, was not eliminated by the trial court's offer to continue the trial because, if the subject evidence had been disclosed in a timely fashion, the defendant might have opted to be tried by a jury rather than the court. *Blackman*, 359 Ill. App. 3d at 1019-20. The holding in *Blackman* was premised, in part, on the fact that defense counsel "stated on the record that had he known all the facts concerning [the witness's] relationship with the State's Attorney's office– that the State was paying [the witness's] relocation expenses–he would have proceeded differently." *Blackman*, 359 Ill. App. 3d at 1020.

¶ 27 Here, the record reflects that the defendant knew of the arrests of the State's witnesses approximately one week before he executed his jury waiver on September 1, 2009. The record does not indicate what, if any, investigation of those arrests was performed by the defense during that week, nor does it indicate that either the defendant or his attorney expressed any reticence or uncertainty regarding his waiver of the right to be tried by a jury. Considering these factual distinctions, we find that the decision in *Blackman* does not mandate that the defendant be afforded a new trial.

¶ 28 For the foregoing reasons, we affirm the defendant's convictions and sentence.

¶ 29 Affirmed.