FIRST DIVISION
August 7, 2017

No. 1-15-3528

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 09691
	)	
MUHAMMED JUDEH,	)	Honorable
	)	Angela Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for possession of a controlled substance with intent to deliver is affirmed as the State did not violate *Brady v. Maryland* or Illinois Supreme Court Rule 412(c).

¶ 2 Following a jury trial, defendant Muhammed Judeh was found guilty of possession of a controlled substance with the intent to deliver (720 ILCS 570/401(a)(2)(D) (West 2010)) and sentenced to 19 years in prison. On appeal, Mr. Judeh argues that the State violated its duty under both *Brady v. Maryland*, 373 U.S. 83 (1963), and Illinois Supreme Court Rule 412 (eff. Mar. 1, 2001) by not disclosing a Drug Enforcement Administration (DEA) "deconfliction"

report prior to Mr. Judeh's testimony at trial. Mr. Judeh asserts that these violations entitle him to a new trial. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Mr. Judeh was charged by indictment with possession of a controlled substance with intent to deliver, based on a May 1, 2009, drug exchange—orchestrated by the DEA to target Mr. Judeh—in which he traded 2000 Benzylpiperazine (BZP) pills and $14,000 for one kilogram of cocaine.

¶ 5 Although Mr. Judeh asserted the affirmative defense of entrapment in his answer to discovery prior to trial, the defense that he presented during his opening statement instead revolved around him "working for the Department of Justice as an undercover federal confidential informant" on the day of the May 1 drug exchange.

¶ 6 At trial, the State called, among other witnesses, three law enforcement officers—Detective Tom Piszczor, DEA Agent Kestutis Jodwalis, and DEA Agent Craig Schwartz—and a DEA confidential informant, John Bafia. Their testimony was that Detective Piszczor and Mr. Bafia posed as drug sellers to complete the planned exchange with Mr. Judeh. At around 4 p.m. on May 1, 2009, Mr. Bafia met with Mr. Judeh at a pre-arranged meeting place in Chicago Ridge, Illinois. At around 4:30 p.m., Mr. Bafia called Agent Piszczor, who arrived by car and handed Mr. Judeh a black duffle bag containing roughly one kilogram of cocaine. When Mr. Judeh took possession of the cocaine from Agent Piszczor, the officers moved in to arrest him, and Mr. Judeh attempted to flee on foot.

¶ 7 After Mr. Judeh's arrest, the DEA agents recovered both the cocaine and a "GPS box" that Mr. Judeh brought to the scene. The GPS box contained the $14,000 in cash and what the agents then believed to be ecstasy pills. The pills were later identified as BZP, a substance which was not illegal in Illinois at the time of Mr. Judeh's arrest.

¶ 8 After his arrest, Mr. Judeh told Agent Jodwalis that he received the pills from an "Albanian" man named Erol Abdui and intended to deliver the cocaine to a buyer named "Carmine." Mr. Judeh agreed to cooperate with the DEA, against Mr. Abdui, and led Agent Jodwalis to Mr. Abdui's residence later that evening. When they arrived, Mr. Judeh knocked on the door and attempted to call Mr. Abdui, but was unable to contact him. Agent Jodwalis testified that he planned to sign Mr. Judeh up as a "cooperating source," but lost contact with him shortly after the May 1 incident.

¶ 9 Detective Piszczor, Agent Schwartz, and Agent Jodwalis all testified that Mr. Judeh was not acting as a confidential informant at the time of this exchange on May 1, 2009. Detective Piszczor specifically testified that he was the chief officer on the case and therefore would have known if an individual connected with the case was already working with the DEA. He also stated that they would not have conducted the operation if Mr. Judeh was an informant for the DEA. Agent Schwartz stated that Mr. Judeh was "absolutely not" a confidential source at the time of the operation.

¶ 10 Agent Jodwalis explained during his testimony that when an agency identifies a person as the potential target for an upcoming drug-related operation, the agency runs a "deconfliction" to ensure that the target is not a confidential source for another agency. The deconfliction report—run through an interagency "setup group"—uses information compiled from all narcotics task forces including the FBI, Customs, ATF, and state and local task forces. The process also verifies that no other law enforcement agencies are conducting operations in the same area, and that no other officers have the same target.

¶ 11 Agent Jodwalis testified that a deconfliction report was run for Mr. Judeh prior to the May 1, 2009, operation, which showed that Mr. Judeh was not cooperating with any other law enforcement agencies at that time. Agent Jodwalis did not run the deconfliction report himself,

but testified that someone on his team generated the report instead.

¶ 12 The following day, Mr. Judeh testified on his own behalf to a narrative of events that differed significantly from that presented by the State. Mr. Judeh testified that he helped coordinate the illegal narcotics sale on May 1, 2009, while working in conjunction with the authorities as a "Department of Justice confidential informant."

¶ 13 Mr. Judeh testified that in late December 2008, a group of officers from the Department of Justice pulled over his car and uncovered two pounds of marijuana in his trunk. One of the officers then spoke to Mr. Judeh in Arabic and requested that he "work with" them. The officers told him that they did not care about the marijuana and that he was a good candidate for the "job." Mr. Judeh then spoke with an officer who he described as part of an area task force working with Homeland Security "going after an Albanian terrorist group." The officer wanted him to sign a confidential source agreement requiring that Mr. Judeh "provide [the officers] with information that [wa]s accurate[,] *** engage in sales that [we]re controlled by the DEA or Department of Justice[,] *** [and] introduce undercover agents to violators." Mr. Judeh testified that he agreed to the terms, initialed each provision, and signed his name to the agreement. He was then released, but did not receive a copy of the agreement.

¶ 14 Mr. Judeh testified that in "January of 2010," he received a phone call from the agent who signed him up as a confidential source and who he identified only as "Dan." Mr. Judeh stated that, during the call, he told Dan that Mr. Abdui provided him with the marijuana they found in the trunk of his car. He and Dan also discussed whether John Bafia could be a potential target and how to gain Mr. Abdui's trust.

¶ 15 Mr. Judeh testified that, following that phone call, he spoke with another agent, identified only as "Tom." Tom told Mr. Judeh that Mr. Bafia had agreed to cooperate with them. Mr. Judeh and Tom then arranged the drug deal that took place on May 1, 2009. Mr. Judeh testified that his

only role in the transaction was as a "Department of Justice confidential informant," and that he never intended to possess any of the cocaine involved in the transaction for himself.

¶ 16 When asked about his behavior during the arrest, including attempting to flee on foot, Mr. Judeh testified that he was trying to "make it look like [he] was being arrested," and that he was "play[ing] along" for the benefit of Mr. Abdui, who he claimed was watching from a parking lot a few hundred yards away. He testified that he cooperated throughout the operation and pointed out that he was never booked, fingerprinted, and did not even go inside of a police station that day.

¶ 17 Mr. Judeh further testified that he received Dan's phone number during their initial encounter, but lost it sometime in September or October 2009. He described one interaction with Tom after May 1, 2009, in which Tom informed Mr. Judeh that they had apprehended Mr. Abdui, but no interactions after that. All of Mr. Judeh's reported interactions with Tom took place over the phone, so he was unable to identify Tom among the 20 or so officers at the scene on May 1, 2009. During cross-examination, Mr. Judeh could not produce any contact information for either Tom or Dan, nor could he verify their existence in any other way.

¶ 18 The court broke for lunch after Mr. Judeh's testimony. When the parties returned, Mr. Judeh's counsel told the court, outside the presence of the jury, that he had received a deconfliction report from the State during the lunch break. The State acknowledged that the report was relevant to the trial, but denied any discovery violation because it had only become aware that a deconfliction report existed during trial. The State explained that, although it received a copy of the deconfliction report the previous night, the DEA only gave it permission to release the report during the break after Mr. Judeh's testimony. The State also argued that it was not aware that Mr. Judeh was going to testify that he was a confidential source and thus had no way to predict the deconfliction report's evidentiary value.

¶ 19 While looking at the deconfliction report, the court stated: "I am looking at something that's two pages plus a fax. From Chicago HIDTA Deconfliction Submission for a target named Muhammed Judeh at 10908 South Keating in Oak Lawn and it's dated 4-30-09, 11:38 hours." If the report contained any further information, the court did not read it into the record. Mr. Judeh's brief attributes a few subsequent recitations by the court to the deconfliction report, but the record shows that those recitations instead refer to an "operation plan" tendered after the deconfliction report and after a recess during which the court requested that the State "check if any other reports [in addition to the deconfliction report] exist with [Detective Piszczor or Agent Jodwalis]." The operation plan made no allusions to Mr. Judeh's status as a confidential source nor did it provide any other relevant information.

¶ 20 Defense counsel then objected to the deconfliction report's admission into evidence because the State had been aware of its existence but failed to disclose it before Mr. Judeh testified. Counsel argued that he would have prepared a different defense if he had known of the deconfliction report ahead of time. He also explained that Mr. Judeh "might not have exercised his right to take the stand" if he had prior notice of the deconfliction report.

¶ 21 After hearing argument from both parties, the court said that it would allow the State to use the deconfliction report on rebuttal because the report "[was] not new and because it's not new information." However, the court also said: "I question why this information wasn't submitted to [the defense] with the other subpoenaed material from the police department. I can't answer that. I believe it should have been." The court then said:

> "The report that the State seeks to introduce into evidence is in the nature of rebuttal which does not have to be disclosed ahead of time. It disturbs me and I want to say that the State had this report and didn't tell counsel about it, but it was in the nature of rebuttal and had the defense not changed at the 11th hour

> [alluding to Mr. Judeh's original affirmative defense of entrapment – not argued at trial], the State would have had permission to get this ahead of time."

¶ 22 After the discussion regarding the deconfliction report, the State chose not to use it in rebuttal and both parties rested without formally entering the report into the record. In closing arguments, the court allowed Mr. Judeh's counsel to imply that the deconfliction report did not exist and allowed him to say to the jury: "I will sit down right now and say find him guilty if you have a copy of the deconfliction [report]. It's not here." The jury found Mr. Judeh guilty of possession of a controlled substance with intent to deliver.

¶ 23 Mr. Judeh filed a motion for a new trial arguing that the State committed a *Brady* violation by not turning over the deconfliction report sooner. At the motion hearing, Mr. Judeh's counsel referred to the deconfliction report as "a scribbled, pathetic piece of paper that listed the Defendant as not being an informant on the date and time that he claimed he was" and stated that the deconfliction report was "in direct opposition to what [Mr. Judeh] was going to testify to." The court said that it found "[Mr. Judeh's] story about being a secret undercover operative incredible" and held that the State did not commit a *Brady* violation because "the deconfliction did not contain *Brady* material. It contained inculpatory rather than exculpatory information. It contains testimony already given of the DEA agent that they had submitted a deconfliction form and received information that no conflict existed with any other agencies." The court also found that the State did not commit a discovery violation because the report "was in the nature of rebuttal which the State could not have anticipated" and that, even if the State should have tendered the report earlier, the error did not prejudice Mr. Judeh because it contained no new evidence and because Mr. Judeh had been permitted to argue that the report did not exist.

¶ 24 At sentencing, the court said that it did not "believe that a sentence near the higher end of the range would be appropriate" or, "in light of the [Mr. Judeh's] story, which I believe is what

he gave to the jury, that the minimum [wa]s appropriate either." The court sentenced Mr. Judeh to 19 years in prison out of a sentencing range of 15 to 60 years.

¶ 25 JURISDICTION

¶ 26 Mr. Judeh was sentenced on June 29, 2012. No appeal was filed by Mr. Judeh at that time. On November 14, 2014, Mr. Judeh, through new counsel, filed a petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)), arguing that his trial counsel was ineffective for failing to file a notice of appeal from Mr. Judeh's conviction. On December 10, 2015, the trial court granted Mr. Judeh's petition and gave Mr. Judeh leave to file a late notice of appeal, which Mr. Judeh filed that same day. Leave to file a late notice of appeal is the appropriate remedy when a postconviction petitioner demonstrates that defense counsel was ineffective for failing to file a notice of appeal. *People v. Ross*, 229 Ill. 2d 255, 271 (2008). Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)).

¶ 27 ANALYSIS

¶ 28 I. *Brady* Violation

¶ 29 On appeal, Mr. Judeh contends that the trial court committed reversible error by not granting a mistrial after the State allegedly violated *Brady v. Maryland*, 373 U.S. 83 (1963), in failing to tender the deconfliction report to defense counsel prior to Mr. Judeh's testimony. We review *de novo* whether the State committed a *Brady* violation. *People v. Cielak*, 2016 IL App (2d) 150944, ¶ 22.

¶ 30 To establish a *Brady* violation, a defendant must show that "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was

suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008).

¶ 31 Here, Mr. Judeh's *Brady* violation claim fails because the record fully supports the trial court's finding that the deconfliction report was neither exculpatory nor impeaching evidence. Mr. Judeh cannot use the absence of the deconfliction report in the record to suggest that the report itself would support his *Brady* claim. To the contrary, the burden was on Mr. Judeh, as the appellant to present a complete record. Thus, Mr. Judeh cannot show the first element of a *Brady* violation, that the undisclosed evidence was either exculpatory or impeaching.

¶ 32 The evidence in the record in this case all points to the fact that the deconfliction report was neither exculpatory nor impeaching. The description of the report given by the trial court in this case was simply: "I am looking at something that's two pages plus a fax. From Chicago HIDTA Deconfliction Submission for a target named Muhammed Judeh at 10908 South Keating in Oak Lawn and it's dated 4-30-09, 11:38 hours." The trial court stated during its ruling on the report's admissibility that the report was "not new information" and that it corroborated the testimony already given by the law enforcement officers, who all testified that Mr. Judeh was not a cooperating individual and one of whom testified that this was what was reflected on the deconfliction report. At the hearing on the motion for a new trial, the court also stated that the deconfliction report "contained inculpatory rather than exculpatory information." Mr. Judeh's counsel himself argued at the hearing that the report "listed [Mr. Judeh] as not being an informant on the date and time he claimed he was," and acknowledged that it "was in direct opposition" to Mr. Judeh's testimony.

¶ 33 Each of these statements contradicts any inference that the report contained exculpatory material. Similarly, these statements contradict any inference that the report would be

impeachment material; rather, the record suggests that the report would have supported, not impeached, any testimony given by law enforcement officers regarding Mr. Judeh's status as a cooperating individual.

¶ 34 Moreover, although we review Mr. Judeh's claim *de novo,* in our reading of the record, absent "strong affirmative evidence to the contrary," we presume that the trial court understood and applied the law correctly. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). This is true even in the context of a *Brady* challenge. We followed this principle in *People v. Alduino,* 260 Ill. App. 3d 665, 669 (1994), where a defendant alleged a *Brady* violation against the State for failing to "disclose that two of the witnesses in [the] case had been shown a photograph array and a lineup and had not identified anyone," arguing that because he was not able to review the arrays shown to the witnesses, he could not determine whether the evidence was favorable to him. The law enforcement officers who created the arrays testified that the defendant was not among the suspects portrayed. *Id.* at 670. On appeal, the defendant argued that the officers' testimony was unreliable, in part arguing that the trial court never specifically found that the defendant's picture was not displayed to the witnesses. *Id.* at 670-71. Although this court agreed with the defendant that the arrays could have been exculpatory if they included his picture and the witnesses then failed to identify him, the court held that no *Brady* violation had occurred because "[o]bviously, the trial judge found the police officers to be credible in their assertions" that the defendant was not among the individuals shown on the arrays. *Id.* at 671. As in *Alduino*, the fact that the trial court in this case never expressly found that the deconfliction report said that Mr. Judeh was not a cooperating individual is not controlling. Every description of the report by the trial court and even by defense counsel made it clear that the report would not have been *Brady* material. The trial court's findings reflected a clear understanding that, if the report had said that Mr. Judeh was a cooperating individual, the State's failure to disclose this information before Mr. Judeh

testified would have violated *Brady.*

¶ 35 To the extent that our review of the actual deconfliction report could have somehow helped Mr. Judeh's *Brady* claim, it was Mr. Judeh's burden to make that report part of the record. We have repeatedly held that " '[t]he appellant carries the burden of presenting a complete record on appeal and any doubts arising from an incomplete record will be construed against the defendant.' " *People v. Viramontes*, 2017 IL App (1st) 142085, ¶ 80 (quoting *People v. Smith*, 406 Ill. App. 3d 879, 886 (2010)). Although the deconfliction report was not shown to the jury, Mr. Judeh could have made the report part of the record by, for instance, attaching it to his motion for a new trial. We cannot credit any argument by Mr. Judeh that is premised on the inadequacy of the record. See *People v. Toft*, 355 Ill. App. 3d 1102, 1105 (2005) (no *Brady* violation where "the inadequacy of the record *** prevents this court from considering virtually all of defendant's concerns" and the record was incomplete because "the defendant did not prepare a bystander's report (see 166 Ill. 2d R. 323(c)) nor [did] the record contain an agreed statement of facts (see 166 Ill. 2d R. 323(d))").

¶ 36 In *People v. Carballido*, 2015 IL App (2d) 140760, ¶ 71, this court held that "[w]hen it is not clear whether the undisclosed evidence would be favorable, we should presume that it would be favorable." *Id.* However, this is not a situation like *Carballido* where the defendant himself was not responsible for any gap in the record and it was clear that the material withheld was impeaching and was therefore *Brady* material. The *Brady* violation in *Carballido* involved a set of field notes, created by the investigator of a shooting and not tendered to the defense, that directly contradicted the investigator's testimony at trial. *Id.* ¶ 68. While it was "not clear" the extent to which the contradiction aided the defendant's case; that the contradiction constituted an impeachment opportunity was evident. *Id.* ¶¶ 68-72 The cases cited in *Carballido* to support that holding follow a similar pattern. *Id.* ¶¶ 71-72. See, *e.g.*, *People v. Nichols*, 63 Ill. 2d 443, 448

(1976) (holding that where the prosecution failed to turn over a shoe left at the scene of the crime, presumably belonging to one of the perpetrators, "[t]he shoe must be considered as evidence favorable to the defendants").

¶ 37 II. Rule 412(c)

¶ 38 Mr. Judeh argues that the State also violated Illinois Supreme Court Rule 412(c). That rule requires that "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." Ill. S. Ct. R. 412(c) (eff. Mar. 1, 2001).

¶ 39 Rule 412(c) is "a codification of the due process requirements espoused in the United States Supreme Court case of *Brady v. Maryland*." *People v. Tyler* 2015 IL App (1st) 123470, ¶ 206. Mr. Judeh contends, without reference to any case law or other authority, that Rule 412(c) "casts a wider net than *Brady*." Mr. Judeh emphasizes that Rule 412(c) includes not only evidence to negate guilt, which would be *Brady* material, but also evidence that "would tend to reduce [the defendant's] punishment." Mr. Judeh argues that, here, if the State had tendered the deconfliction report sooner, he might not have taken the stand, and the court would not have weighed his testimony against him at sentencing. In support of this argument, Mr. Judeh points to the following statement of the trial court: "I don't believe that a sentence near the higher end of the range would be appropriate here. I don't believe *in light of the defendant's story*, which I believe is what he gave to the jury, that the minimum is appropriate either." (Emphasis added).

¶ 40 This court has never held that Rule 412(c) extends the rights of the accused beyond the due process requirements of *Brady*. In fact, we have recognized that *Brady* and Rule 412(c) address the same due process requirements. See, *e.g.*, *People v. Simon*, 2011 IL App (1st) 091197, ¶ 99 ("Rule 412 is a codification of the due process requirements espoused in the United States Supreme Court case of *Brady*").

¶ 41 Even if we were to agree that 412(c) is broader than *Brady*, Mr. Judeh's argument that if the deconfliction report had been tendered earlier, he may not have testified—preventing the trial court from "us[ing his] testimony against him at sentencing" and thereby reducing his sentence—is simply too speculative to persuade us to find a Rule 412(c) violation. Assuming, without deciding, that Mr. Judeh is correct that 412(c) requires disclosure of information that is relevant and exculpatory as to sentencing, Mr. Judeh fails to draw a causal connection between his sentence, which although it is very high was actually near the bottom of the sentencing range, and the deconfliction report.

¶ 42 Mr. Judeh's *Brady* and 412(c) claims fail because he cannot demonstrate that the deconfliction report was either exculpatory or impeaching, but we agree with the trial court's statement when it said: "[i]t disturbs me and I want to say that the State had this report and didn't tell counsel about it." Although the State argues that it tendered the report as soon as it was able, the record shows that the State obtained the deconfliction report the night before Mr. Judeh's testimony, but did not tender it to Mr. Judeh's defense counsel until *after* Mr. Judeh exercised his right to testify. The State claims that it waited to tender the report because it had not yet received permission to do so from the DEA. While we understand the State's need to work cooperatively with federal agencies like the DEA, we echo the trial court's concerns. As defense counsel pointed out, even if the State could not yet share the report, there was no reason that he could not have been advised, before his client testified, that the State had received the report and was seeking permission to provide it to the defense.

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, we affirm the judgement of the circuit court.

¶ 45 Affirmed.