IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM
Plaintiff-Appellee

vs.

BENITO JOSE MESA REYES
Defendant-Appellant

OPINION

Supreme Court Case No. CRA98-005
Superior Court Case No. CF0133-94

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Appeal from the Superior Court of Guam
Submitted for oral argument on 01 February 1999
Hagåtña, Guam

Appearing for the Plaintiff-Appellee:
Gerad Egan
Assistant Attorney General
Office of the Attorney General
Prosecution Division
Suite 2-200E, Judicial Center Building
120 West O'Brien Drive
Hagatña, Guam 96910

Appearing for the Defendant-Appellant:
Richard S. Dirkx
Assistant Public Defender
Public Defender Service Corporation
200 Judicial Center Annex
110 West O'Brien Drive
Hagatña, Guam 96910

BEFORE: PETER C. SIGUENZA, Chief Justice[1]; JANET HEALY WEEKS, and RICHARD BENSON, Associate Justices.

WEEKS, J:

[1] Appellant Benito Jose Reyes appeals his conviction of Importation of a Schedule I Controlled Substance (As a 1st Degree Felony). Appellant argues that the trial court erred in denying his request for a new trial based upon newly discovered evidence. Upon review of the record, we find that the trial court abused its discretion. Accordingly, the decision of the trial court is reversed and the matter is remanded for a new trial.

I.

[2] On the evening of 1 September 1993, Benito Jose Mesa Reyes (hereinafter "Reyes") arrived on Guam from Koror, Palau. During the time he was being interviewed for clearance through Customs, Reyes' name was flagged on the computer records of Customs as a "Code 1". (the result of a prior misdemeanor conviction for possession of marijuana in 1986). This "Code 1" classification meant that Reyes would be subjected to a secondary search every time he came through Customs.[2] Reyes had a carry-on bag and at least two coolers of fish and other food. During the secondary inspection, Officer Federico Lumagui discovered a plastic bag containing a green substance taped to the bottom of a board inside the carry-on bag that supported the bottom of the bag. This substance was field tested positive as marijuana.

[1]The signatures in this opinion reflect the titles of the justices at the time this matter was considered and determined.

[2]The "Code 1" classification was devised as a part of the internal procedures used by Customs to alert officers of passengers with prior drug convictions. *See* Transcript, vol. IV, p. 40-41 (Trial 2 October 1997).

[3] Reyes was arrested by Customs and the bag of marijuana was sealed in another bag. The evidence was sent to the crime lab for prints and analysis. Reyes was confined for a period of time, the duration of which is not clear, and then released. Neither party has provided the court with a record of the period of time he was actually confined.

[4] On 2 May 1994, the Grand Jury indicted Reyes on one count of importing a Schedule I Controlled Substance (as a 1st Degree Felony), pursuant to 9 GCA § 67.89. He was eventually arrested on 4 December 1996 and arraigned shortly thereafter.

[5] Reyes' counsel filed a pretrial motion to compel discovery on 16 January 1997 requesting a number of different items, including but not limited to exculpatory material. Most of the requested items were required for disclosure under 8 GCA § 70.10 (1993). A hearing was held on 14 February 1997, in which the custodian of records from Guam Customs and Quarantine and witnesses from the Guam Police Department were subpoenaed. At that hearing, defendant's counsel was able to review what was represented to be the entire Customs's file and all police records regarding the defendant's case.

[6] A pretrial motion to dismiss was also filed on 17 January 1997 alleging three reasons for dismissal: 1) Unlawful detention without a magistrate's hearing; 2) Violation of the citation and notice to appear process prescribed by 8 GCA § 25.30, (As interpreted by *People v. Palomo*, 1998 Guam 12); and 3) pre-indictment delay. The motion to dismiss was denied, but no findings were made.

[7] Jury selection and trial began on 1 October 1997. After the completion of jury selection, Reyes' counsel reiterated his request for any material covered under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) and the government stated that all materials had been turned over to

defense counsel.[3] The trial continued through 3 October 1997. Deliberations began 3 October 1997 and resumed on 6 October 1997, with the jury requesting certain testimony be re-read and a request to see "any arrival/custom records that may show that Mr. Reyes was searched or not searched upon arrival from Palau everytime from 1986 to 1993."[4] In response to the jury's request for arrival/customs records, the trial court properly advised the jury that they would have to make their decision based upon what has been presented as evidence.[5] That same day, the jury returned a verdict of guilty.

[8] After trial, reports regarding searches of the defendant from February, May, and July 1993 were discovered by investigators from the offices of defense counsel. On 10 October 1997, Reyes filed a Motion for New Trial based upon the discovery of new evidence, namely the newly discovered Customs records. After a hearing on the matter, the trial court denied the motion finding that the new evidence was not relevant. Subsequently, Reyes filed a motion to reconsider, which was also denied by the trial court. Reyes was sentenced and judgment was entered on 30 March 1998. Reyes remains on release pending resolution of this appeal.

II.

[9] Reyes raises three issues on appeal. First, whether the trial court erred in denying his motion for new trial based upon the discovery of new evidence. Second, whether the People's failure to disclose certain evidence to Reyes before trial deprived him of due process. Finally,

[3] *See* Transcript, vol. III, p. 78-82 (Jury Selection 1 October 1997).

[4] *See* Appellant's Excerpts of Record at 3.

[5] *See* Transcript, vol. VI, p. 59 (Jury Deliberations 6 October 1997).

whether the People complied with the requirements of 8 GCA § 25.30 and this court's decision in *People v. Palomo*, 1998 Guam 12.[6]

III.

[10] This court has jurisdiction pursuant to 7 GCA §§ 3108 and 3108 (1994).

IV.

[11] Reyes' argues that the trial court erred in denying his motion for new trial based upon newly discovered evidence and requests this court to reverse his conviction and remand this matter for a new trial. This court reviews a denial of a motion for new trial under an abuse of discretion standard. *People v. Quinata*, 1999 Guam 6, ¶16.

[12] Under this standard, this court cannot reverse a decision unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors. *People v. Tuncap*, 1998 Guam 13, ¶12; *People v. Quinata*, 1999 Guam 6, ¶17. A trial court may abuse its discretion if under certain circumstances it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact. *People v. Tuncap*, 1998 Guam 13, ¶13. A trial court may also abuse its discretion when the record contains no evidence to support its decision. *Id.*

[13] In ruling from the bench, the trial court held that the newly discovered evidence was not relevant to the case, noting that the newly discovered evidence would tend to prove or

[6]In light of the Court's disposition of this matter, *infra*, the court need not reach the merits of the second and third arguments presented by Reyes.

disprove motive, which was not an element of the crime charged. Based upon this conclusion of relevance, the trial court also found that the newly discovered evidence was not exculpatory[7]. The trial court expressed concern that the definition of exculpatory evidence was unclear and was not sure how to properly address the issue when it arises.[8] The trial court declared that the Customs records were not exculpatory and partially denied the motion for new trial on this basis; however the record does not indicate the factual or legal basis for its decision nor the legal rule that was applied in that determination.

[14] Normally, in order to prevail on a motion for new trial based upon newly discovered evidence, a movant must show: 1) the evidence is newly discovered; 2) the failure to discover the evidence sooner was not the result of lack of diligence; 3) the evidence is material to the issues at trial; 4) the evidence is neither cumulative nor impeaching; and 5) the evidence, at a new trial, would probably result in acquittal. *United States v. Sitton*, 968 F.2d 947, 959-960 (9th Cir. 1992), *citing United States v. Kulczyk*, 931 F.2d 542 (9th Cir. 1991).

[15] However, in examining the merits of Reyes' motion for new trial, the analysis changes when the situation involves the suppression of evidence, albeit unintentional. The question before the court is whether this evidence was suppressed and whether this evidence is exculpatory, amounting to a due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). The suppression by the government of material evidence violates due process and requires that the tainted conviction be vacated. *United States v. Sarno*, 73 F.3d 1470, 1504 (9th Cir. 1995)

[7] *See* Transcript, vol. VII, p. 26-27 (Post-trial Motions 4 December 1997).

[8] *Id.* at 28.

[16] In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197 (1963), the U.S. Supreme Court held that the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. In a later case, *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976), the U.S. Supreme Court distinguished between three different situations for determining the materiality of evidence.[9]

[17] However, the test was for materiality under *Brady* was reformulated in *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985). In *Bagley*, the court rejected the different tests established in *Agurs* and adopted a standard that evidence is material only if there a reasonable probability that if the evidence had been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 682, 105 S.Ct. 3383. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 681.

[18] In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995), the Supreme Court upheld the materiality standards in *Bagley* and refined the respective duties of a prosecutor to disclose evidence under *Brady* in determining whether evidence was indeed suppressed. The court held that a prosecutor has a duty to learn of any favorable evidence known to others acting on the

[9]The first situation established by the court is the knowing use of perjured testimony by a prosecutor or a prosecutor's failure to disclose that the testimony used to convict the defendant was false. In this situation, perjured testimony is material, unless the failure to disclose the evidence was harmless beyond a reasonable doubt. *Agurs*, 427 U.S. at 103, 96 S.Ct. 2397.

The second situation established by the court was where a defendant does not make a specific *Brady* request and the prosecutor fails to disclose favorable evidence to the accused. The court failed to specifically set a standard for materiality, but refused to apply a harmless error standard as in the first situation and also rejected requiring a defendant to show that if the evidence were disclosed, it would have resulted in an acquittal. *Id.* at 111, 96 S.Ct. at 2401.

The third situation is where a defendant makes a specific request and the prosecutor fails to disclose the evidence. Again, the court did not establish a standard of materiality. *Id.* at 106, 96 S.Ct. at 2398.

government's behalf in the case, which includes police. *Id.* at 437, 115 S.Ct. at 1567. But where a prosecutor fails to disclose known favorable evidence that rises to a level of material importance, the prosecutor has failed to meet their obligation under *Brady*. *Id.* at 438, 115 S.Ct. at 1568.

[19] Under Guam's discovery statute, as codified under 8 GCA §§ 70.10 et seq. (1993), the prosecuting attorney's obligation requires disclosure of *Brady* material that the prosecuting attorney knows to exist or "by the exercise of due diligence may become known" to him.[10]

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[10]Title 8 G.C.A. § 70.10 (1993) provides:

§70.10. Matters Generally Discoverable; Prosecutor's Obligations.

(a) Except as otherwise provided by §§70.20 and 70.30, at any time after the first appearance upon noticed motion by the defendant, the court shall order the prosecuting attorney to disclose to the defendant's attorney or permit the defendant's attorney to inspect and copy the following material and information within his possession or control, the existence of which is known, or by the exercise of due diligence may become known to the prosecuting attorney:

(1) the name and address of any person whom the prosecuting attorney intends to call as a witness at the trial, together with his relevant written or recorded statement;

(2) any written or recorded statement and the substance of any oral statement made by the defendant or made by a co-defendant if the trial is to be a joint one;

(3) any report or statement of an expert, made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments or comparisons;

(4) any book, paper, document, photograph or tangible object, which the prosecuting attorney intends to use in the trial or which was obtained from or belonged to the defendant;

(5) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at the trial;

(6) whether there has been an electronic surveillance of conversations to which the defendant was party or of his premises;

(7) any material or information which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.

(b) The prosecuting attorney's obligations under this Section extend to any material information in the possession or control of members of his staff and any other persons who have participated in the

[20] The trial court deemed the newly-discovered Customs forms as irrelevant because it felt that the evidence would aid only in the determination of motive. As a small part of our examination, we must look to the standard of relevance relied upon by the trial court. Under 6 GCA § 401 (1995), "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[21] Reyes argued during trial that he would not have committed the crime "knowingly"[11] because he was always being searched by Customs. He claims that this evidence is relevant to support his claim that he did not possess the required state of mind for the crime. We agree.

[22] Reyes assertion in his testimony that he would not have knowingly carried marijuana back from Palau because he knew he would be searched by Guam Customs,[12] is validated by this evidence. The Customs forms provide a record of past searches conducted upon Reyes and were relevant to the jury in evaluating the veracity of Reyes claims of his lack of the required state of mind.

[23] Although we have found this evidence to be relevant, we now examine whether the prosecutor had a duty to disclose this evidence.

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investigation or evaluation of the case and who either regularly report or with reference to this case have reported to his office.

[11]A person acts knowingly, or with knowledge, with respect to his conduct or to attendant circumstances or the result of his conduct or attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist. A person acts knowingly or with knowledge, with respect to a result of his conduct is practically certain to cause the result. 9 GCA § 4.30(b).

[12]*See* Transcript, vol. V, p. 15-16 (Trial 3 October 1997).

[24] Based upon the record, it is clear to us that the government, which includes Customs, was in possession of this evidence and failed to turn over these records to the defense before trial. The government argues that this evidence was not disclosed prior to trial because the prosecutor did not know about this evidence and that Reyes did not ask for the evidence. However, the record below shows that defense counsel had filed a motion for discovery requesting for all documents that were known to be in the custody of Customs. This motion was granted. At a pre-trial conference, defense counsel again requested any other material covered under *Brady v. Maryland*. After the jury requested to see additional evidence regarding past searches of Reyes, defense counsel expressed concern that evidence was not disclosed, citing the testimony of one of the People's witnesses suggesting the existence of records documenting previous searches being conducted on Reyes. The court was impressed by the government's concession during oral arguments that it was only at trial that it appeared that a record was supposed to made of all searches made upon Reyes. Whether the failure to disclose this evidence rises to the level of a *Brady* violation, also requires an examination of whether this evidence was material.

[25] In applying the test articulated in *Bagley*, it is our belief that verdict of the jury has been compromised by the nondisclosure of this particular evidence. We note that during deliberations, the jury requested to see evidence documenting past searches conducted upon Reyes. After being properly advised by the trial court to consider only the evidence presented to them at trial, Reyes was found guilty. The jury's request to see the type of evidence that is at issue here, is telling of not only its relevance, but also of its materiality. Although it is speculative to ascertain the actual significance of these Customs forms in the prior trial, the inability of the defense to present this evidence is troubling to the court. The jury's request to see the exact type of evidence discovered

after trial, only compels us even more to find that a new trial is warranted, noting that the evidence could have made a difference in the minds of the jury.

[26] The government argues that part of the blame for the failure to disclose the evidence should be placed upon Reyes' defense counsel for not being diligent to ask for this evidence. It is clear under *Bagley* that a defendant's failure to request for *Brady* material is inconsequential to determining a *Brady* violation. *See also* 8 GCA § 70.10. The prosecution is obligated to disclose material exculpatory evidence on its own motion and without request. *United States v. Service Deli*, 151 F.3d 938, 943 (9th Cir. 1998).

[27] We find no fault on the part of defense counsel in his efforts to obtain the evidence prior to the trial. Despite the government's assertions that defense counsel would have been able to obtain this evidence, if he had simply asked for it, defense counsel acted accordingly in light of the information available to him at the time of his requests for discovery. Reyes was diligent in his efforts to obtain the evidence.

[28] The trial court's reliance upon the standard of relevance was not only misplaced, but it was also misinterpreted. In our review of the record, we conclude that the evidence was relevant in determining whether Reyes had the requisite state of mind to commit the crime. Although we recognize the trial court's difficulty of establishing a definition of what exculpatory evidence was in its decision, the standards stated in this opinion make it clear that we only need to inquire whether the confidence in Reyes' conviction has been undermined by the government's failure to disclose this evidence. The trial court's reliance on the standard of relevance and its

accompanying analysis, or lack thereof, was an abuse of discretion. The proper standard that should have been applied is the test found in *Bagley* to determine whether the evidence was exculpatory. In this case, we find that the newly discovered Customs forms documenting searches upon Reyes were exculpatory. The decision of the trial court denying Reyes' motion for new trial is reversed and the matter is remanded for a new trial.

V.

[29] Reyes makes additional arguments for reversal based upon general assertions of denial of due process (failure to disclose evidence) and possible non-compliance with the guidelines of this court's decision in *People v. Palomo,* 1998 Guam 12. In light of the court's decision to reverse and remand this matter for new trial, we do not deem it necessary to consider the merits of these arguments. These arguments raised by Reyes are normally within the traditional realm of purview and resolution by a trial court and may be raised upon remand.

VI.

[30] The decision of the trial court denying Reyes' motion for new trial is REVERSED and the matter is remanded for new trial.

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PETER C. SIGUENZA, Chief Justice

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JANET HEALY WEEKS, Associate Justice RICHARD BENSON, Associate Justice