

**SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS**

**People of the Sault Ste Marie Tribe of Chippewa Indians
Plaintiff, Appellee,**

v.

**Case No. APP-20-01
Lower Court No. 19-47**

**Shaun Davis
Defendant, Appellant.**

Before: Feleppa, Causley, Dietz, Jump, and Finch, Appellate Judges.

Decided: February 8, 2021

OPINION AND ORDER

Feleppa, on behalf of the Court, who is joined by other Appellate Judges Causley, Dietz, Jump, and Finch.

This Court heard oral arguments for this matter on September 11, 2020 via zoom in light of the COVID-19 pandemic and renovation issues in the Courtroom.

As explained more fully in the discussion below, this Court affirms the Trial Court's decision, conviction, and sentence rendered June 3, 2020.

FACTS and PROCEDURAL BACKGROUND

Defendant / Appellee was charged on September 23, 2019 with Aggravated Assault and Battery STC 71.704 and Domestic Abuse STC 71.1404 following the events of September 21, 2019. Various pre-trials were held in the fall of 2019 with the final Pre-Trial Summary Order dated November 14, 2019 setting a bench trial on Tuesday January 21, 2020 requiring the exchange of all discovery prior to November 28, 2019 with witness and exhibit lists exchanged seven days later. After some proofs on January 21, 2020 a continuance was granted until Friday January 24, 2020 to permit the exchange of a police report relating to conduct of the victim from a complainant that occurred hours prior to the charged assaults but was reported several days later. That report was exchanged. When the trial reconvened on January 24, 2020 defendant / appellant moved for dismissal alleging a *Brady* violation on account of the police report provided

after the first day of trial. The Court continued the trial directing the parties to file written pleadings concerning this alleged *Brady* violation. On February 10, 2020, following the submission of briefs and without hearing, the Court issued an Order on Defendant's Motion to Dismiss. In this Order, the trial court made findings that any failure to disclose that police report was a discovery violation under TCR 6.201(B) however this was remedied by the report's production to defense and the matter was allowed to proceed. Insufficient information from the police reports was available to either the Trial Court or to this Court to determine the level of exculpatory or relevant evidence or if the failure to disclose was anyhow malicious on the part of the Prosecution. The Court directed the trial resume on February 19, 2020. This permitted nearly a month between the first day of trial and its resumption and conclusion. The record is absent any information regarding a request for a mistrial, assistance sought recalling witnesses who testified on the first day who could now be crossed regarding the content of the disclosed second police report. On February 19, 2020, the defendant was found guilty as charged.

On June 3, 2020 defendant / appellee was sentenced. That day a Notice of Appeal was filed, requesting that the matter either be remanded or dismissed.

JURISDICTION AND STANDARD OF REVIEW

This Court has exclusive jurisdiction in this matter, as it is reviewing the decision of the Tribal Court. Tribal Code Section 82.109.

The issues before this court are strictly issues of law, and as such would be reviewed *de novo*. Tribal Code Section 82.124(5).

DISCUSSION

There were two police reports concerning the complaining witness / victim. One, 19-4018 documented the conduct resulting ultimately in the present convictions involving the appellant. The second, 19-4041, per the Appellant's [counter]statement of facts was described,

A secondary incident where she [complaining witness / victim] was accused of unlawful entry into the home of a Sara Bowerman and an assault of Jessica Silva. This incident was recorded by the Sault Tribe Law Enforcement in STILE Incident Number 19-4041. Incident Report 19-4041, regarding Pope's unlawful

entry into Bowerman's home, contains a lengthy statement from Rachel Pope taken by officers approximately 3 days after the incident occurred. In this statement Pope disclosed that "she got into an argument with her boyfriend," "Shaun had left so she went looking for him," and that "she was involved in a domestic assault."

By all accounts report 19-4018 was given sufficiently in advance of trial. The second, 19-4041, from Defendant's *Motion to Dismiss for Failure to Disclose Evidence* was provided two days after the trial started, on January 23, 2020. This report was provided almost three weeks in advance of the conclusion of the trial February 19, 2020.

There is no indication report 19-4041 was contained in with the file relating to arrest and conviction for assault. That while report 19-4041 was related in its participants and proximity of events, it is not related intricately to the charged offense. In a time where electronic retention of records is becoming more prevalent, what is the duty of the government to search out for potentially exculpatory evidence? Allegations denied two years prior, or two jurisdictions over impacting the level of credibility of witnesses? In a time where propensity evidence in state Courts (ie, MCL 768.27b in cases of domestic violence or sexual assault evidence of commission of other acts for any relevant purpose is admissible) can become admissible against a defendant, what safeguards are in place or need to put in place to protect the rights of the accused? Troubling to this Court is the proximity in time and overlap of participants to the charges against appellee. The Sault Tribe Prosecutor's Office does not have dozens of attorneys with a case volume that would overload the ability to make the connection between other alleged assaultive conduct with the victim being the accused hours prior.

Those, however, are questions for a different day. Appellant was given the report and several weeks to prepare for the conclusion of his trial. This Court does not see the timing of the release of police report 19-4041 as resulting in a due process violation rising to the level requiring the reversal of any conviction.

The report in question was disclosed pre-conviction, the nature of the non-disclosure does not rise to the level of offensiveness evident through study of *Brady* and its progeny. In *United States v Bagley*, 473 US 667 (1985) the non-disclosure of paid confidential informants required remand for a determination of whether this omitted information would have changed the trial's

outcome with this impeachment material. In *Brady*, a non-disclosed confession of an accomplice to the killing was not provided in a felony murder trial where that accomplice's confession in the Court's mind would likely to have changed Mr. Brady's being placed on death row. Justice Douglas aptly stated, "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v Maryland*, 373 U.S. 83, 87 (1963). A retrial was granted Mr. Brady on his punishment. Here, the report was ultimately disclosed, and the material was available for the appellant during trial. "Thus, *Brady* generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose." *US v Bencs*, 28 F.3d 555, 560 (6th Cir, 1994). In *Bencs*, two reports of witness interviews were produced either two days prior to trial and the second during trial but prior to that witness taking the stand.

Further analyzing the applicability of sanctions for pre-trial disclosure of Brady / Giglio type material and the aim of a defendant having the ability to prepare and use information at trial.

Preserving the defendant's ability to defend himself effectively at trial is the underlying purpose of the criminal discovery rules. Therefore, so long as the defendant is given impeachment material, even exculpatory impeachment material, in time for use at trial, we fail to see how the Constitution is violated. [9] Any prejudice the defendant may suffer as a result of disclosure of the impeachment evidence during trial can be eliminated by the trial court ordering a recess in the proceedings in order to allow the defendant time to examine the material and decide how to use it. *US v Presser*, 844 F 2d 1275, 1283-84 (6th Cir., 1988)

In the present case the appellee had weeks to assimilate the materials provided into the defense of the allegations. A thorough analysis on materiality of any information contained in the report is un-necessary due to the fact the report was disclosed and time granted to assimilate the information in the defense's case in chief. Any claimed difficulties in re-calling a witness do not elevate the timing of this discovery exchange to that of a due process violation requiring either dismissal or a new trial.

CONCLUSION

For the reasons outlined above, the relief requested by the Appellant is denied and this appeal is denied. The June 30, 2020 judgment and sentence of the Trial Court stands.

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Alicia J. Boy
Court Clerk/Administrator