IN THE SUPREME COURT OF THE STATE OF NEVADA

NELSON RONALD BRADY A/K/A NELSON RON BRADY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52432

FILED

MAR 01 2010

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of solicitation to commit murder. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant Nelson Ronald Brady, Jr., in custody on an unrelated offense, solicited a fellow inmate to murder three witnesses in the high-profile murder case involving world champion bodybuilders Craig Titus and Kelly Ryan.

Brady raises four arguments on appeal. First, he asserts that the police violated Nevada wiretap statutes by listening to his phone conversations with a police informant without a warrant. Second, he contends that the State failed to collect and preserve exculpatory evidence. Third, he argues that the State violated Brady v. Maryland, 373 U.S. 83, 87 (1963), by failing to provide impeachment evidence to defense counsel. Finally, Brady claims that juror misconduct warrants a new trial.

Wiretap statutes

Whether the police violated Nevada's wiretap statutes is a matter of law which we review de novo. See e.g., Clark County Sch. Dist. v. Virtual Educ., 125 Nev. ___, ___, 213 P.3d 496, 502 (2009). NRS 179.425(1)(b) excepts investigative or law enforcement officers' use of

telephones in the ordinary course of their duties from Nevada statutes governing interception of wire or oral communications. We examined the scope of this exception in State v. Reyes, 107 Nev. 191, 808 P.2d 544 (1991) and determined that police eavesdropping on a telephone conversation between a police informant and drug dealer falls under the exception.

During their investigation in this case, police listened to 168 phone conversations between Brady and their informant via a phone in the coroner's office. Brady claims that these police actions do not fall under the exception as developed in Reyes. He argues that the police were not acting in the ordinary course of their duties because they did not use police telephones and that they did not act reasonably because they monitored over 150 calls without obtaining a warrant.

In Reyes, we relied on State v. Page, 386 N.W.2d 330 (Minn. Ct. App. 1986), a case in which police officers listened to a conversation on a private, residential phone line without a warrant. Id. at 333. The court in Page held that the officers' actions fell within the Minnesota exception, which is almost identical to the Nevada statute. Reyes, 107 Nev. at 193, 808 P.2d at 545; Page, 386 N.W.2d at 337. Under Reyes, the NRS 179.425(1)(b) warrant exception therefore applies even if the police listen to phone calls on non-police phones.

Reyes, Page, and a third case relied upon in the Reyes opinion, Adams v. State, 406 A.2d 637 (Md. App. 1979), also do not discuss any limit on the number of calls officers could monitor before their conduct becomes unreasonable. We therefore conclude that the phone's location and the number of phone calls listened to have no bearing on whether the NRS 179.425(1)(b) exception applies. Rather, the relevant inquiry is

whether the police monitor the calls in the ordinary course of their duties. NRS 179.425(1)(b).

Brady further asserts that NRS 179.460 and 179.470, statutes governing court order authorization for the interception of wire or oral communications by police officers, would be extraneous under this reading of Reyes. We disagree. The exception as explained in Reyes applies to a very specific circumstance in which the police listen to a conversation between a police agent/informant and a suspect. In that situation, the agent/informant grants permission for the police to listen to the conversation. In removing this circumstance from the statutory scheme, NRS 179.425(1)(b) effectively creates a limited exception to the two-party consent requirement. See NRS 200.620(1), Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 109 (2008). The court order requirement still applies, however, to all other communication interceptions not involving a telephone extension and an agent/informant acting at the direction of the police. Thus, contrary to Brady's assertion, our interpretation of Reyes does not render the court order requirements for communication interceptions inapplicable.

Collection and preservation of evidence

Brady next claims that the State violated his due process rights by failing to collect and preserve evidence. Although police officers generally have no duty to collect all potential evidence, this court has adopted a two-part test to determine when the State's failure to gather evidence warrants a dismissal of charges. Gordon v. State, 121 Nev. 504, 509, 117 P.3d 214, 218 (2005). "The defense must first show that the evidence was material, *i.e.*, that there is a reasonable probability that the result of the proceedings would have been different if the evidence had

been available. Second, if the evidence was material, the court must determine whether the failure to gather it resulted from negligence, gross negligence, or bad faith." Id. at 509-10, 117 P.3d at 218 (citing Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001)). If the failure to collect evidence was in bad faith, the charges may be dismissed. Id. at 510.

Brady claims that the police, in bad faith, failed to record all calls and destroyed notes pertaining to unrecorded calls. He also argues that the police acted in bad faith because they did not document threatening language from the recorded calls in their police reports. According to Brady, this omission means the police likely made similar omissions in their reports for the unrecorded calls.

Brady's argument fails because, despite participating in the unrecorded calls, he neglected to reveal what material and exculpatory evidence the calls and associated notes would have provided. Instead, he merely argues what he hoped the evidence would show. See Daniel v. State, 119 Nev. 498, 520, 78 P.3d 890, 905 (2003) ("'[i]t is not sufficient that the showing disclose merely a hoped-for conclusion from examination of the destroyed evidence' or 'that examination of the evidence would be helpful in preparing [a] defense'") (quoting Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)). In addition, the State's evidence belies his coercion claim. The police informant gave Brady several opportunities to abandon his plot, but Brady insisted on moving forward and provided undercover agents with money and information in furtherance of the plan. Because Brady failed to meet the first prong of the Gordon test, we do not consider his claim that the State acted in bad faith.

Impeachment evidence under Brady

Brady also claims that the prosecution withheld evidence it could have used to impeach a witness. Under Brady v. Maryland, 373 U.S. 83, 87 (1963), a prosecutor must disclose evidence favorable to the defense if the evidence is material to either guilt or punishment. Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000) (citing Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996)). In addition to exculpatory evidence, due process requires disclosure of evidence that provides grounds for the defense to impeach the credibility of the State's witnesses. Id. (citing Kyles v. Whitley, 514 U.S. 419, 434 (1995)). However, "Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

We conclude that this argument lacks merit under Steese because the evidence Brady claims the State withheld was made available by the State and was available to the defense through Brady's sister.

Juror misconduct

Finally, Brady claims juror misconduct warrants a new trial because a hearing impaired juror, who used court issued headphones during trial, later admitted that the headphones also allowed him to hear small portions of communications between defense counsel and Brady.

"To justify a new trial, '[t]he defendant must, through admissible evidence, demonstrate the nature of the juror misconduct and that there is a reasonable probability that it affected the verdict.'" Zana v. State, 125 Nev. ___, ___, 216 P.3d 244, 248 (2009) (quoting Meyer v. State, 119 Nev. 554, 565, 80 P.3d 447, 456 (2003)). "A denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of

discretion by the district court. Absent clear error, the district court's findings of fact will not be disturbed." Id. (quoting Meyer, 119 Nev. at 561, 80 P.3d at 453) (internal citations omitted).

Although the juror's conduct here was unintentional, it technically falls under the category of juror misconduct. See People v. Danks, 32 Cal.4th 269, 307 (2004) (juror's inadvertent receipt of information not presented in court falls within the general category of juror misconduct). In Zana, we concluded that a juror's outside research was not so prejudicial as to necessitate a new trial because, although the juror discussed his research efforts with other jurors, his outside research did not yield any significant results. 125 Nev. at ___, 216 P.3d at 249.

The circumstances of this case suggest even less risk than in Zana that juror misconduct affected the verdict. The juror here did not tell the court or other jurors that he could hear these discussions because he did not think they were important. He also did not discuss what he heard with other jurors. In a subsequent evidentiary hearing on Brady's motion for mistrial, the juror explained to the court that he only heard sporadic and seemingly unimportant portions of conversations. The juror further confirmed that he listened to all the evidence and based his decision only on evidence presented in court. We therefore conclude that there is not a reasonable probability that juror misconduct affected the verdict. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Michael H. Schwarz
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk