UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0828

September Term, 2014

GEORGE TYLER

v.

STATE of MARYLAND

Zarnoch,
Leahy,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: June 11, 2015

George Tyler appeals from the judgment of conviction for possession of cocaine with intent to distribute, rendered after a jury trial in the Circuit Court for Baltimore City. Tyler's sole question for our consideration is whether the trial court erred by refusing to order disclosure of police internal investigative files.[1] We find no abuse of discretion and shall affirm.

BACKGROUND

On the evening of January 12, 2011, Baltimore City Detectives Daniel Martin and Edmund White were on patrol in the Westport, Mount Winans area. The detectives were using an unmarked car to look for narcotics activity, which was considered to be a common activity of the area of their patrol. Detective Martin drove on Hollins Ferry Road onto Hartman Avenue when they spotted an individual, later identified as Tyler. Tyler was holding a black plastic bag and was also quickly walking across Hartman Avenue toward Morgan Street, an alley. The alley was known for narcotics activity, specifically transactions in drugs and their concealment in stashes.

The detectives drove into the alley and saw Tyler peering into the plastic bag. He was "completely focused" in this endeavor and appeared not to notice when the detectives approached from behind and to within five feet and to his left. As the detectives edged near,

[1] Tyler's brief presents the following specific question:

> Was it error to deny the motion for an order that the Court obtain and review records of the police internal investigation unit for evidence of any misconduct indicating the police witness's lack of veracity?

Tyler was seen to reach into the bag and withdraw a "large chunk of ... rocklike substance." Detective Martin suspected that the substance was "crack cocaine."

When the detectives pulled up alongside Tyler, he looked up and abruptly returned the object to the bag, which he then moved around to his other side away from the detectives as if to "shield it" from them. Detective White opened the passenger door to the car and shouted "Stop, police." Tyler then took off and fled, returning back up the alley with detective Martin in pursuit.

This chase ended after a few blocks, when the detective apprehended Tyler. The detectives conducted a search and recovered several chunks of suspected cocaine base along with $2,047 in currency. Their suspicions about the nature of the substance were confirmed when a forensic analysis concluded that the bag had contained a total of 171 grams of "cocaine base" with a value of about $6,000 in the form as recovered, and $30,000 if the cocaine were sold in smaller units for street sales.

Tyler went to trial, after which the jury, as noted, found him guilty of possession with intent to distribute cocaine base. The trial court sentenced Tyler to twenty years' imprisonment, with the first ten years to be served without parole. Tyler filed a petition for post-conviction relief, and was granted leave to file this appeal. We shall recite additional facts as necessary to address the question before us.

DISCUSSION

Tyler filed a pretrial motion seeking the discovery of records from the Baltimore City Police Department "Internal Investigation Unit" relating to any allegations of "wrongful activity" lodged against Detective Martin, the arresting officer. Md. Rule 4-264. He averred that "[u]pon information and belief," the Public Defender's Office "has received complaints" of "misconduct" by that officer. This motion was driven by what Tyler has characterized as a "bizarre" and "questionable stop, search and seizure," and Tyler sought to use this information to challenge Detective Martin's credibility.

On May 9, 2011, the circuit court conducted a hearing on Tyler's motion as well as a corresponding motion filed by the City seeking a protective order. At the outset, the court was skeptical about defense counsel's proffer:

> THE COURT: It's just that it says a mere assertion to the credibility of a witness is an issue and that some latitude is necessary for looking at the impeachment material is not enough to cross the initial threshold. And that's where I think we are. I mean, what you're saying, I don't disagree with you that this officer, his credibility is clearly going to be an issue. And gee, it would be nice to know what's in that file.
>
> [DEFENSE COUNSEL]: Right. I understand.
>
> THE COURT: Well, because maybe that's somehow helpful, but it doesn't seem to me that's the – from what I see from the appellate decision, like, you know, the decisions that you cite, I think it was Madigan or whatever, and there was a finding that there was a false statement by someone or an issue where there's an actual statement by an officer relating to the actual incident. You know, clearly that's something that should be produced.

Defense counsel responded:

> [DEFENSE COUNSEL]: Your Honor, I can only proffer that, according to my client, you know, when he was in lockup, there were other individuals that seem to have been in – claimed to have been in a similar circumstance as my client was with this particular officer. So, that's the only additional information that I could even offer Your Honor. Your Honor's right, I mean, it is a balancing test. And you're right, credibility is always at issue. And for that, you know, for that purpose, any defense lawyer could come in and ask in every instance ... credibility is at issue. And particularly in these drug cases when we're only looking at police officers, and that's the whole case. So I understand that. You know, my only problem with Police Department's motion – or memorandum was citing a lot to do with privilege as opposed to confidentiality –

Following this, the court denied Tyler's motion. The court explained that the defense must "give me something more than [what counsel had proffered]" to justify disclosure.

Standard of Review

"Pre-trial production of 'documents' or 'other tangible things' under Md. Rule 4-264 is discretionary, requiring a motion and a court order." *Goldsmith v. State*, 337 Md. 112, 122 (1995). Because "[d]iscovery questions generally involve a very broad discretion that is to be exercised by the trial courts[, t]heir determinations will be disturbed on appellate review only if there is an abuse of discretion." *Cole v. State*, 378 Md. 42, 55 (2003) (citation and internal quotation marks omitted). We review *de novo* whether the circuit court's adherence to procedures for resolving a discovery request was legally correct. *See Fields & Colkley v. State*, 432 Md. 650, 672 (2013) (motion court committed legal error by failing to adhere to discovery protocol).

Introduction

It is long-established that a "defendant has a due process right to discover and put before the fact finder evidence that might influence the determination of guilt." *Reynolds v. State*, 98 Md. App. 348, 364 (1993) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987)). Further, a "defendant cannot be prohibited from discovering evidence the nondisclosure of which would undermine the confidence in the outcome of the trial." *Reynolds*, 98 Md. App. at 364 (citing *Pennsylvania v. Ritchie*). Records of internal investigations may be pertinent to a defense. Indeed,

> [a] *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. ... This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence ... and *Brady* suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor," ... "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" ... although a "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," ... The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Youngblood v. West Virginia, 547 U.S. 867, 870 (2006) (citations omitted). The Court of Appeals has emphasized that, in the appropriate case, confidential personnel records are subject to disclosure:

> A person facing criminal charges may be entitled nonetheless to discovery of confidential personnel records. We have emphasized that, "[w]hile confidentiality does go to discoverability, it does not guarantee insulation of the confidential matter from disclosure. The confidentiality interest must be balanced, in this context, against the confrontation and due process rights of the defendant."

Fields & Colkley v. State, 432 Md. 650, 666 (2013) (quoting *Robinson v. State*, 354 Md. 287, 309 (1999)). *See Blades v. Woods*, 107 Md. App. 178, 185 (1995) (records of police internal investigation confidential – disclosure required in appropriate case).

When a party seeks discovery of records that may ordinarily be protected from disclosure by privilege or confidentiality, the trial court must engage in a procedure that addresses the competing interests of confidentiality and a defendant's right to a fair trial. Initially, the defendant shoulders the burden of demonstrating a "need to inspect" that must be informed by a "reasonable possibility that review of the records would result in discovery of usable evidence." *Fields & Colkley*, 432 Md. at 667 (citing *Zaal v. State*, 326 Md. at 81). *See Blades v. Woods*, 107 Md. App. at 186. The "sufficiency of the need to inspect depends upon factors such as the nature of the charges brought against the defendant, the issue before the court, and the relationship between the charges, the information sought, and the likelihood that relevant information will be obtained as a result of reviewing the records." *Fields & Colkley v. State*, 432 Md. at 667 (citation and internal quotation marks omitted; punctuation altered).

The circuit court generally should follow the protocol or the balancing "test well-established in Maryland[,]" as set forth by the Court in *Zaal v. State*, 326 Md. 54 (1992). In *Zaal*, the defendant was charged with the sexual child abuse of his twelve-year-old granddaughter. He filed a pretrial subpoena for the victim's school records. The school board filed for a protective order. The circuit court held a hearing on the school board's motion, after which he conducted an *in camera* review of the school records. The circuit court granted the school board's motion and quashed the subpoena. The Court of Appeals reversed.

The Court weighed the privacy interests in nondisclosure against a defendant's concerns for a fair trial and to receive information relevant to his defense, and held that the defendant had made a preliminary showing that the records were relevant and thus subject to inspection. The Court went on to hold that the trial court should review the records to discover material not only substantively admissible, but also relevant for purposes of impeachment. Before the circuit court conducts an *in camera* review, with or without the presence of counsel, the court makes a "determin[ation whether] the 'need to inspect' threshold has been crossed[.]" *Zaal*, 326 Md. at 87. It is the circuit court's determination with respect to the initial showing that informs the issue before us.

Tyler relies on *Fields & Colkley v. State* to advance his claim that the circuit court "erred" by refusing to order disclosure of pertinent records relating to any investigation of Detective Martin. We consider *Fields & Colkley* to be inapposite and explain.

Darnell Fields and Clayton Colkley were tried and convicted in connection with events that were characterized as a "revenge-type shooting spree" that culminated in May, 2003. Following trial and retrial, a journey that brought them twice before this Court, Fields and Colkley were eventually convicted of various offenses that are characteristic of drug-distribution rivalries.[2] They sought further review by the Court of Appeals, which awarded them a new trial after deciding the following salient question:

> Where an internal affairs investigator for the police found "facts sustained" against officers, did the trial court err in refusing to permit the defense to inspect internal investigation division files concerning misconduct by the officers and, at trial, in refusing to allow the defense to cross-examine the officers about the misconduct?

Prior to their trial in 2010, Colkley, joined by Fields, moved the court to issue a subpoena duces tecum for certain Internal Investigation Division records relating to a specific complaint that had been lodged in an unrelated matter against two of the investigating officers. The records request was specific, and that particularity was acknowledged by the State:

> At the outset of the first day of the hearing, Petitioners proffered in support of the subpoena that Detective Sergeant Massey and Detective Snead had been the subjects of an IID complaint in which both officers were accused (evidently among other officers) of "committ[ing] and conspiring to commit theft by deception by submitting fraudulent, daily and court overtime slips between January 1, 2006 and January 31, 2007."

[2] *See, e.g., Marks v. Criminal Injuries Compensation Board*, 196 Md. App. 37, 70-71 (2010) (citing cases and noting "intimate relationship between violence and drugs").

> Petitioners further proffered that the facts underlying the complaint had been found "sustained" by the IID. Petitioners indicated that investigatory reports contained in the file would reveal that the officers had been under Departmental surveillance, corroborating the complaint. Petitioners argued that the information concerning the alleged misconduct, if in fact it had occurred, would be relevant to the credibility of the detectives, which in turn would be relevant to the integrity of the photo arrays and witness interviews conducted in connection with the investigation of the Port Street shootings. According to Petitioners, the information they believed is contained in the IID files would serve to impeach the detectives, partly in connection with, in the words of counsel for Petitioner Colkley, "allegations that an officer forced somebody to make statements."
>
> Counsel for the Department acknowledged that Petitioners had "adequately identified" an IID matter. Counsel for the Department noted, though, that a finding that the allegations of the complaint were "sustained" is not dispositive of an officer's guilt.

Fields & Colkley v. State, 432 Md. at 661-62.

The Court of Appeals disagreed with the trial court's refusal to order the disclosure of the records. The Court's opinion suggests that the preliminary showing that must accompany a request for discovery or disclosure need not be stringent:

> We repeat, and apply to this case, our prior admonition in *Zaal* that a court in reviewing material for discovery purposes may deny a defendant any form of access to the material only if nothing in it, "in anyone's imagination, [could] properly be used in defense or lead to the discovery of usable evidence." Given Petitioners' proffer, the motion court, at the minimum, had the obligation to review the IID files, not simply the summaries, to decide whether the files contained anything "even arguably relevant and usable" by the defense to impeach the detectives

> and, *only* if the answer to that question were " no," then "deny the defendant total access to the records."

Id., 432 Md. at 670 (citation omitted).

Although the preliminary justification of a need to inspect may not be burdensome, the defendant must nevertheless make some preliminary showing, without which the circuit court does not abuse its discretion by not proceeding further. In *Goldsmith v. State*, 337 Md. 112 (1995), the defense sought access to the psychotherapy records of the victim of sexual child abuse and related offenses. To accomplish this, Goldsmith requested the issuance of a subpoena pursuant to Md. Rule 4-264. Goldsmith's counsel made proffer to justify discovery, the "substance" of which, according to the Court of Appeals, was that the "incidents at issue occurred over 10 years prior to trial, that the victim was in counseling, and the defense counsel complained 'I simply don't know what her emotional state is.'" *Goldsmith*, 337 Md. at 118.

The *Goldsmith* Court emphasized that "it is the defendant who bears the burden of establishing the need for pre-trial disclosure." *Goldsmith v. State*, 331 Md. at 128 (citing cases). In upholding the motions court's refusal to issue a pre-trial subpoena for the records at issue, the Court ruled that "Goldsmith did not meet his burden to establish the likelihood that relevant information will be obtained as a result of reviewing the records." *Id.*, 337 Md. at 129 (citation and internal quotation marks omitted). The Court of Appeals earlier emphasized the obligation to make a preliminary, adequate, proffer:

> [A] party to ongoing litigation may subpoena, without advance notification having to be given to the other party, a third party's records for use at trial. When, however, the records sought are "confidential," before disclosure will be ordered, the moving party must show, usually at a hearing, some connection between the records sought, and the issue before the court, and the *likelihood* that information relevant to the trial would be discovered.

Harris v. State, 331 Md. 137, 161 (1993) (citation omitted) (emphasis added).

Returning to *Fields & Colkley*, the proffer in that case of a need to inspect was specific and detailed:

> Petitioners were required to – and did – carry the burden under *Zaal* of showing a need to inspect. They did so by offering a *detailed proffer* of the alleged misconduct underlying the IID complaint, which was deemed "sustained," and by explaining how that misconduct related to the veracity of the detectives and the potential value of that impeachment evidence to the defense's theory of the case.

Id., 432 Md. at 671 (emphasis added). In the case before us, Tyler's proffer was sparse, lacked detail, and driven by rumor and speculation. The circuit court was told only that when Tyler "was in lockup there were other individuals that seem to have been in – claimed to have been in a similar circumstance as my client was with this particular officer."

On this record, we conclude that the motions court did not abuse its discretion by denying Tyler's motion for discovery of the internal investigation records. The "prima facie"

showing to justify disclosure of the confidential records falls short. In view of our disposition, we need not reach the State's alternate suggestion for a limited remand.

JUDGMENTS AFFIRMED.

APPELLANT TO PAY COSTS.