Circuit Court for Baltimore City
Case No. 116273010

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1243

September Term, 2017

MARION DAUGHTON

v.

STATE OF MARYLAND

Wright,
Berger,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: August 3, 2018

Marion Daughton, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore City of crimes relating to the shooting of two victims.[1] Appellant raises a single question on appeal: Did the trial court err when it denied appellant's motion to compel the State to produce the confidential informant agreements between the State's two key witnesses and the federal government? For the following reasons, we shall affirm the judgments.

FACTS

Because the only question presented on appeal concerns a motion to compel, we shall provide only a brief overview of the facts presented at trial to provide some context to the question raised.

During the early morning hours of September 5, 2016, Keara Peterson, her husband Daniel Smalls, and her sister Cierra Carrington, were shot near the intersection of East Monument and North Glover Streets in Baltimore City. Smalls sustained a gunshot wound to the chest and died. Both Peterson and Carrington sustained gunshot wounds but survived. The police immediately responded to the area.

Several hours after the shooting, Peterson gave the police a recorded statement about the shooting and identified appellant as the shooter. The police also showed Peterson a

[1] There were three victims in the shooting incident: Keara Peterson, Cierra Carrington, and Daniel Smalls, but appellant was acquitted of all charges related to Smalls. As to Carrington, appellant was convicted of attempted second-degree murder, first-degree assault, and second-degree assault. As to Peterson, appellant was convicted of attempted second-degree murder, first-degree assault, and second-degree assault. Appellant was also convicted of possession of a regulated firearm having been convicted of a disqualifying crime, two counts of use of a handgun in the commission of a felony or a crime of violence, and carrying a handgun.

six-person photographic array in which she identified appellant's picture as the shooter. At trial, Peterson testified that she did not remember the shooting. The trial court found that she was feigning memory loss and admitted, as a prior inconsistent statement, her prior statement to the police. Davon Fields was present during the shooting, and he too gave a recorded statement to the police after the shooting. At trial, Fields, like Peterson, testified that he did not remember the shooting. The trial court found that he was feigning memory loss and admitted his prior statement to the police into evidence as a prior inconsistent statement.

DISCUSSION

Appellant argues that the trial court committed reversible error when it denied her motion to compel the State to produce the confidential informant agreements between Peterson and Fields and the federal government. Appellant argues, as she did below, that the State was required to produce the agreements because "the Baltimore City Police Department engaged in a joint investigation with the federal government and, therefore, had constructive possession of the federal government's agreements with Peterson and Fields." The State argues that we should affirm the ruling below because the trial court correctly found that there was no joint investigation or shared resources between the State and federal governments regarding the shooting. We agree with the State.

Md. Rule 4-263 governs discovery in circuit court. Subsection (d)(6) provides that the State's Attorney "[w]ithout the necessity of a request . . . shall provide to the defense . . . [a]ll material or information in any form, whether or not admissible, that tends to impeach a State's witness[.]" Subsection (c) describes disclosable material as material "in

the possession or control of the attorney, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case."

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "the suppression by the prosecution 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." The Court has since included impeachment evidence as a category of evidence that must be disclosed. *Giglio v. United States*, 405 U.S. 150, 154 (1972). Over the years, three components have been distilled to establish a *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). *See also State v. Williams*, 392 Md. 194, 199 (2006). The burdens of production and persuasion fall on the defendant. *Diallo v. State*, 413 Md. 678, 704 (2010).

The question before us is whether the State suppressed the agreements between the federal government and Peterson and Fields, or, in other words, whether the State had an obligation to provide the defense with those agreements.

The knowledge or possession of exculpatory or impeachment information is not limited to knowledge held directly by the State prosecutor. The Court of Appeals has held that "[w]here two jurisdictions engage in joint investigations, courts generally hold that the prosecutor has constructive possession of any evidence possessed by the other party to the

investigation." *Diallo*, 413 Md. at 708. The *Diallo* Court stated that "the proper inquiry is to examine, on a case-by-case basis, the extent of interaction and cooperation between the two governments." *Id*. at 713 (quotation marks and citation omitted). The Court also discussed and then used the following three factors enunciated by the Third Circuit to determine cross-jurisdictional constructive knowledge:

> (1) whether the party with knowledge of the information is acting on the government's "behalf" or is under its "control"; (2) the extent to which state and federal governments are part of a "team," are participating in a "joint investigation" or are sharing . . . resources; and (3) whether the entity charged with constructive possession has "ready access" to the evidence.

Id. at 709 (citing *United States v. Risha*, 445 F.3d 298, 304 (3rd Cir. 2006)).

Prior to trial, appellant filed a written motion to compel the State to produce the agreements Peterson and Fields had with the federal government. A hearing was held on the motion during which Baltimore City Police Department Detective Jonathan Jones, the primary detective in the case, was the sole witness.

Detective Jones testified that after the shooting he interviewed Peterson twice at the hospital. About two weeks later, he introduced Peterson to Agent Weaver with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). The detective explained that the ATF had a "satellite" office on the same floor as the homicide division of the Baltimore City Police Department, and that he introduced Peterson and Agent Weaver because he was concerned for her protection and the federal government had "better resources for protecting witnesses[.]" Detective Jones testified that he sat in for about a half an hour of their first meeting to ease Peterson's concerns about meeting with an ATF agent, as he was a person she trusted. During that time, they spoke of nothing that was relevant to the

detective's case. Detective Jones testified that the federal government "didn't assist me in investigating this homicide at all" and, even though he was aware that in October 2016, Peterson became an informant for the federal government, he did not know what their agreement was and had never asked about it. He testified that the Baltimore City Police Department paid Peterson as a confidential informant in other cases three times between October and December 2016. Detective Jones testified that he was also aware that Fields became a federal informant in October 2016, but he did not know how Fields became a federal informant or what agent he worked with.

After hearing the detective's testimony and the parties' arguments, the lower court denied the motion to compel, finding that the defense's argument amounted to "taking a big leap" without any evidence. Reviewing the three *Diallo/Risha* factors, the court stated:

> It's [] found that the Defendant has not put forth any facts to demonstrate that the Bureau of Alcohol, Tobacco, Firearms and Explosives, a federal agent, was acting on behalf of the State's Attorney's Office for Baltimore City or is under its control and it is further found the Defendant has not put forth any facts to demonstrate that the federal and state governments are part of a team participating in a joint investigation or sharing resources.
>
> Defendant contends that Confidential Informant Ke[a]ra Peterson met with Federal Agent [] Jovan Weaver on September 5, 2016 and that Detective Jonathan Jones from the Baltimore City Police Department homicide division was present. Even if Detective Jones was present during the interview, the Defendant . . . has not shown that the two governments shared their investigation resources.
>
> And it is further found here that the Defendant . . . has not set forth any facts to support its contention as to the third [*Diallo*] factor. The mere fact that the documents may be obtainable is insufficient to establish constructive possession. To establish constructive possession the Defendant must show that the requested evidence is in the possession of people engaged in the investigation or prosecution, that the federal and state governments are

> engaged in the investigation or prosecution of this matter. Thus, the Court finds that the State does not have constructive possession of any evidence possessed by the federal government in the prosecution of this case[.]

Interestingly, appellant does not challenge the lower court's findings as clearly erroneous. Rather, she argues that the facts of her case are comparable to those in *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979), which was discussed in *Diallo*, 413 Md. at 708-14.. In *Antone*, a defendant was convicted of conspiracy and racketeering charges under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *See* 18 U.S.C.A. § 1961 *et seq*. At trial, the federal government's main witness had testified that he paid for his own legal representation. That was false. The Assistant United States Attorney who prosecuted the case was informed after Antone's trial by attorneys for the State of Florida, that the State had paid the main witness's legal fees. Antone moved for a new trial. At a hearing, it was learned that the Federal Bureau of Investigation ("FBI") agents and the State had participated in a joint task force to investigate a murder for which the main witness was allegedly involved. A State agent agreed to "take care" of the matter and had a lawyer appointed to the witness using State funds. The fee arrangement was not disclosed to federal agents or prosecutors. When the lower court denied the motion for a new trial, Antone appealed, arguing that the federal government had suppressed evidence concerning the payment of attorney's fees, thereby committing a *Brady* violation. *Antone*, 603 F.2d. at 569. The Fifth Circuit affirmed.

The *Antone* Court agreed that information known to the State should be imputed to the federal government because "the two governments, state and federal, pooled their investigative energies to a considerable extent." *Id*. at 569. "Even the meeting at which

[the agent] volunteered to 'take care of' the danger of a 'planted' attorney was a joint meeting. The entire effort was marked by this spirit of cooperation and state officers were important witnesses in the federal prosecution." *Id*. The Court stated:

> [E]xtensive cooperation between the investigative agencies convinces us that the knowledge of the state team that Haskew's lawyer was paid from state funds must be imputed to the federal team. We have little difficulty in concluding that the state investigators functioned as agents of the federal government[.] . . . The state agents were in a real sense members of the prosecutorial team.

Id. at 570. Although the *Antone* Court found that the federal prosecution should have known of the falsehood, the Court affirmed because it found the information about how the witness's attorney was paid "would not reasonably have affected the judgment of the jury." *Id*.

Appellant argues that, like in *Antone*, because of the "spirit of cooperation" between the federal and state investigative agencies, the Baltimore City State's Attorney Office "had constructive knowledge" of the agreements between its witnesses, Peterson and Fields, and the federal government, and therefore that information should have been supplied to the defense. Appellant points to the following as evidence of "cooperation": (1) the federal agents have office space within the Baltimore City Police Department, (2) the federal agents gave Peterson protection and funds in exchange for information about the shooting; and (3) the Baltimore City police and the federal agents "share[d] some resources." (quotation marks omitted). The State disagrees, as do we.

The fact that federal agents have office space within the Baltimore City Police Department is insufficient to indicate that the federal agents were part of a State

investigative team. Pointedly, Detective Jones testified that although he "occasionally" sought federal assistance on his cases, he specifically testified that he did not seek or receive any federal assistance in this case. Appellant's argument that the "federal agents gave Peterson protection and funds in exchange for information about the shooting in this case" was not shown by the evidence. Detective Jones testified that he did not know what was in the agreement between Peterson and the federal government, he never asked Agent Weaver about it, and he knew only that at some point Peterson became a federal informant and received some money for "her protection." Additionally, we note that Peterson had already identified appellant as the shooter in an interview with Detective Jones before being introduced to Agent Weaver. Appellant's last argument, that the Baltimore City Police Department and the federal government "shared some resources" is, like her other arguments, too general and without any supporting facts to sustain a conclusion that the State and the federal government were part of a joint investigative or prosecutorial team regarding the shooting in this case. In sum, appellant's arguments are insufficient to overcome the lower court's conclusion based on the testimony elicited at the hearing. For the reasons stated above, we shall affirm the lower court's ruling denying appellant's motion to compel.

JUDGMENTS FOR THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.