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MRJC COURTHOUSE
KING COUNTY DISTRICT COUF

KING COUNTY DISTRICT COURT
SOUTH DIVISION,
MALENG REGIONAL JUSTICE CENTER

STATE OF WASHINGTON,

Plaintiff,

v.

TERRANCE XAVIER BROWN,

Defendant.

No. 7Z0655546

ORDER ON RALJ REMAND

The above matter came on for hearing on September 18, 2020 before the undersigned judge of the King County District Court. The State was represented by Nathan Frei, Esq. Defendant Terrance Brown was represented by Kimberly La Fronz, Esq. of SCRAP.

This was a non-testimonial hearing pursuant to a Mandate of Superior Court on RALJ appeal. On remand, this court was directed to make factual findings to determine: (1) whether the documents discovered by Mr. Brown fell within the State's Brady¹ obligations; (2) whether failure to disclose these documents constituted a violation warranting suppression of Trooper Ballard's testimony; and

¹ 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

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2 (3) whether the State engaged in government misconduct with resulting prejudice
3 to the Defense under CrRLJ 8.3 (b).

4 **FINDINGS OF FACT**

5 For purposes of the RALJ mandate, the court adopts the Defendant's
6 proposed findings of fact, and also incorporates by reference Defendant's Exhibits
7 O through AN² in its determination whether the discovered documents fell within the
8 State's Brady obligations. The facts may be summarized as follows.

9 On September 1, 2017, the State charged Mr. Brown DUI with a refusal
10 enhancement. The violation date was May 5, 2017. Mr. Brown's case was first set
11 for trial on October 1, 2018. On November 9, 2018, then defense counsel Sophia
12 Posnock filed motions pursuant to CrRLJ 3.5 and 3.6, raising the issues of whether
13 Mr. Brown's right to an attorney has been violated, whether he was sufficiently
14 informed of the Implied Consent Warnings, whether the alleged refusal was invalid,
15 and whether the video should be suppressed where the warnings were not present
16 on the video. On November 16, 2018, 3.5 and 3.6 hearings were held; Trooper
17 Ballard testified and served as the State's only witness. Based on Trooper Ballard's
18 testimony, the Court found that the Trooper informed Mr. Brown he was being audio
19 and video recorded, that Mr. Brown's pre-arrest statements were made knowingly
20 and voluntarily, that Mr. Brown was given the option to talk to an attorney, and that
21 the issue of a refusal would be determined by the jury.

22 After continuances for good cause and to litigate whether an FTA was
23 properly noted, and whether speedy trial had already expired, the case was set for
24 trial on March 5, 2019. The parties convened on that date to address motions in

25 ² Submitted for Defense Motion in Response to RALJ Decision.

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limine. While reviewing motions in limine on that same date, defense counsel brought a **possible Brady** issue to the court's attention. Defense counsel indicated she was not specifically aware of the nature of the Brady material, but that other attorneys in her office indicated that there was **likely Brady** material on Trooper Ballard. Defense counsel also indicated she learned that there was a substantiated finding against Trooper Ballard. While the Deputy Prosecuting Attorney represented to the court that there was no Brady material on Trooper Ballard, defense counsel nonetheless indicated she would continue looking into the matter. The parties proceeded to impanel and swear in a jury that same day.

The parties reconvened the next day, March 6, 2020. After addressing preliminary matters the Court addressed the defense's motion to dismiss pursuant to Brady and CrRLJ 8.3(b). In the motion defense counsel indicated that her investigator had obtained copies of the Brady material for Trooper Ballard and that the material received was comprised of pdf files ranging in length from one page to 8,513 pages, plus an excel spreadsheet. Defense counsel indicated she had not had sufficient time to review the documents in their entirety, but noted the nature of the allegations against Trooper Ballard, the fact that he had entered into a settlement where he admitted a number of the allegations, that he was suspended from work and forfeited paid leave, that he received emails indicating he was not making a sufficient number of DUI arrests, that emails existed indicating Trooper Ballard was "not where he needs to be" on DUI Enforcement, and that documents existed showing that the prosecuting authorities were notified of these allegations.

The Court heard arguments on the motion from the parties. At this time defense counsel presented that there was a second set of substantiated allegations

1 from 2009, apart from the allegations referenced in her motion which were from the
2 spring and summer of 2016. Defense counsel indicated that in addition to requiring
3 more time to review, the documents would also prompt further investigation.
4 Defense counsel also presented to the Court the contents of a conversation in which
5 the Deputy Prosecuting Attorney indicated that she was aware of a prior instance in
6 which the State was aware of allegations against Trooper Ballard.

7
8 The Court heard arguments from the parties on whether the documents were
9 Brady material, and whether the State's failure to turn over the documents
10 constituted mismanagement under CrRLJ 8.3(b). The Court concluded that the
11 material was impeachment material and that, pursuant to Kyles v. Whitley, 514 U.
12 S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d (1995), the State should have disclosed
13 the information. Rather than grant the defense's request for dismissal, the court took
14 an intermediate remedial step by suppressing Trooper Ballard's testimony. When
15 the State was unable to proceed to trial without Trooper Ballard's testimony, the
16 Court dismissed the case.

17 The State appealed the trial court's decision. The RALJ Court issued its ruling
18 on January 15, 2020. It held, in relevant part, that the case was reversed and
19 remanded "for a more complete review ... of the alleged Brady material and findings
20 of fact in support of its decision." The RALJ Court indicated it was reluctant to
21 reverse the trial court's decision and that it "sympathize[d] with the dilemma the trial
22 court had in addressing approximately 8,600 pages of alleged Brady material
23 brought before it after a jury had been impaneled." The RALJ Court indicated that
24 the trial court now needed to consider whether the documents discovered fell within
25 the State's Brady obligation, whether failure to disclose these documents

1 constituted a violation warranting suppression of Trooper Ballard's testimony, and
2 whether the State engaged in government misconduct with resulting prejudice to the
3 Defense under CrRLJ 8.3(b).

4 **Brady.**

5 In Brady v. Maryland, the United States Supreme Court articulated the
6 government's disclosure obligations in a criminal prosecution: "the suppression by
7 the prosecution of evidence favorable to an accused upon request violates due
8 process where the evidence is material either to guilt or to punishment, irrespective
9 of the good faith or bad faith of the prosecution." Brady, 373 U. S. at 87. In
10 subsequent years, the Supreme Court expanded the Brady rule's reach: favorable
11 evidence under Brady now includes not only exculpatory evidence but also
12 impeachment evidence. Giglio v. United States, 405 U.S. 150, 154-55, 92 S. Ct.
13 763, 31 L. Ed. 2d 104 (1972). Brady obligations extend not only to evidence
14 requested by the defense but also to favorable evidence not specifically requested
15 by the defense. United State v. Agurs, 427 U.S. 97, 110, 96 S. Ct. 2392, 49 L. Ed.
16 2d 342 (1976). The government must disclose not only the evidence possessed by
17 prosecutors but evidence possessed by law enforcement as well. Kyles v. Whitley.

18 Under the Supreme Court's current jurisprudence, in order to establish a
19 Brady violation a defendant must establish three necessary elements: (1) the
20 evidence at issue must be favorable to the accused, either because it is exculpatory,
21 or because it is impeaching; (2) that evidence must have been suppressed by the
22 State, either willfully or inadvertently; and (3) the evidence must be material. State
23 v. Davila, 184 Wn.2d 55, 69, 357 P.3d 636 (2015)(citing Strickler v. Greene, 527
24 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 286 (1999)). As a court conducts its

1 analysis under Brady, the court considers not only its discrete elements but its
2 animating purpose as well. State v. Mullen, 171 Wn.2d 881, 895, 259 P.3d 158
3 (2011). “The animating purpose of Brady is to preserve the fairness of criminal
4 trials.” Id. (citations omitted). “The Brady rule is not meant to ‘displace the
5 adversary system’; ‘the prosecutor is not required to deliver his entire file to defense
6 counsel, but only to disclose evidence favorable to the accused that, if suppressed,
7 would deprive the defendant of a fair trial.” Id. (quoting United States v. Bagley, 473
8 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)).

9 **There Was No Suppression.**

10 The second element of an alleged Brady violation requires proof that the
11 State “suppressed” evidence favorable to the defense. Brady obligations include
12 not only evidence in the prosecutor’s file but also include evidence in the possession
13 of the police and others working on the State’s behalf. State v. Lord, 161 Wn.2d
14 276, 292, 165 P.3d 1251 (2007) (citing Kyles, 514 U.S. at 438)(distinguished on
15 other grounds State v. Lui, 88 Wn.2d 525, 548, 370 P.3d 90 (2017)). However,
16 “[t]he prosecution is under no obligation to turn over materials not under its control.”
17 United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991). “While the prosecution
18 must disclose any information within the possession or control of law enforcement
19 personnel, it has no duty to volunteer information that it does not possess or of which
20 it is unaware.” United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 824 (9th Cir.
21 1985).

22 Here, the State asserts that Brady does not apply because “police disciplinary
23 files are available to the public and are not ‘suppressed by the government.’ ”
24 State’s Response, p. 8 line 5. This argument has merit.

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2 Where “a defendant has enough information to be able to ascertain the
3 supposed Brady material on his own, there is no suppression by the government.”
4 Aichele, 941 F.2d at 764. “ [W]here the defendant is aware of the essential facts
5 enabling him to take advantage of any exculpatory [or impeachment] evidence, the
6 Government does not commit a Brady violation by not bringing the evidence to the
7 attention of the defense.’ ” State v. Mullen, 171 Wn.2d at 896 (citations omitted).
8 “Since suppression by the Government is a necessary element of a Brady claim, if
9 the means of obtaining the exculpatory evidence has been provided [or is available]
10 to the defense, the Brady claim fails.” Id. (citation omitted).

11 Somewhat recent precedents expositing the Brady doctrine affirm this
12 proposition: “[e]vidence that could have been discovered but for lack of due
13 diligence is not a Brady violation.”³ See, e.g., State v. Lord, 161 Wn.2d at 276; see
14 also State v. Gregory, 158 Wn.2d 759, 798, 147 P.3d 1201 (2006)(overruled on
15 other grounds State v. W.R. Jr., 181 Wn.2d 757, 336 P.3d (2014)); State v. Thomas,
16 150 Wn.2d 821, 851, 83 P.3d 970 (2004).

17 In Giglio, the existence of an immunity grant was something that could not be
18 discovered (through any amount of diligence) if not disclosed by the State. In Brady,
19 the State suppressed the confession of petitioner’s confederate, a piece of evidence
20 that was material to punishment, and could not be discovered (through any amount
21 of diligence) if not disclosed by the State.

22 The files in this case were public documents. Defense counsel admits that
23 her investigator “had obtained copies of the [Brady] material for Trooper Ballard and
24 that the material received comprised of pdf files ranging in length from one page to

25 ³ It is not the court’s intention to disparage defense counsel in any way.

1 8,513 pages, and an excel spreadsheet.” Defense Proposed Findings of Fact and
2 Conclusions of Law, p.3 lines 3-7.

3 **The Disciplinary Reports were not “Material” under Brady.**

4 With respect to the third element of a claim under Brady, “[t]he terms
5 “material” and “prejudicial” are used interchangeably...” United States v. Price, 566
6 F.3d 900, 911 n. 12 (9th Cir. 2009). Evidence is “prejudicial” or “material” “if there
7 is a reasonable probability that, had the evidence been disclosed to the defense,
8 the result of the proceeding would have been different.” Kyles, 514 U.S. at 433-44
9 (quoting Bagley, 473 U.S. at 682). A “reasonable probability” is shown if the
10 suppression of the nondisclosed evidence “ ‘undermines confidence in the outcome
11 of the trial.’ ” Id. at 434. (quoting Bagley at 678). For purposes of the Brady
12 materiality test, courts are to consider evidence “collectively, not item by item.” Id.

13 Here, the materials identified in Defendant’s exhibits consist largely of
14 Trooper Ballard’s personnel file (mainly disciplinary records). Certain of the
15 disciplinary documents deal with perceived deficiencies in the number of DUI
16 arrests. See, e.g., Exhibits Q, W and X.

17 Could some of this material have been helpful to the defendant? Possibly.
18 But as stated by the Washington Supreme Court, “[t]he mere possibility that an item
19 of undisclosed evidence might have helped the defense or might have affected the
20 outcome of a trial . . . does not establish materiality in the constitutional sense.”
21 State v. Kwan Fai Mak, 105 Wn.2d 692, 704-705, 718 P.2d 407 (1986)(rejected on
22 other grounds by State v. Hill, 123 Wn.2d 641, 645-47, 870 P.2d 313 (1994)).

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2 **CrRLJ 8.(3)**

3 In its proposed Findings of Fact and Conclusions of law, the defense asserts
4 that "The State's Suppression of Trooper Ballard's Disciplinary Violations
5 Constitutes Mismange Under CrRLJ 8.3(b)." Since the court does not find
6 suppression of material evidence in violation of Brady, this claim also fails.

7 The court concludes that the State did not engage in governmental
8 misconduct that prejudiced the defendant.

9
10 **CONCLUSION**


11 Based on further briefing and oral argument of counsel, and based on the
12 facts specific to this case, the court answers the Superior Court mandate as follows:

- 13 1. The materials did not fall within the State's Brady obligations because
14 they were not material to a DUI refusal case;
- 15 2. Failure to disclose the documents did not violate Brady.
- 16 3. The State did not engage in prejudicial misconduct warranting
17 suppression of Trooper Ballard's testimony.
- 18 4. Although the parties addressed the issue of Double Jeopardy at the
19 hearing, this was not part of the RALJ mandate and will not be ruled
20 on at this time.

21 **IT IS SO ORDERED.**

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DONE THIS 24 day of September, 2020.


Nathaniel B. Green, Jr.
King County District Court Judge