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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20150345

State of North Dakota,

Plaintiff and Appellant

-vs-

Mark Beaulieu,

Defendant and Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT
NORTH WEST JUDICIAL DISTRICT
MCKENZIE COUNTY CR. NO. 27-2013-CR-01007
THE HONORABLE ROBIN SCHMIDT PRESIDING

BRIEF

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STATEMENT OF THE ISSUES

[¶1] ISSUES: I. After a district judge in North Dakota is assigned to rule on a motion in a case tried by another district judge must that assigned district judge certify any familiarity with the case before she rules on a Defendants Motion for a New Trial?

II. Did the Court err when it denied Mark Beaulieu's Motion for a New Trial?

NATURE OF THE CASE

[¶2] On August 3, 2013 Mark Beaulieu was charged with three crimes in McKenzie County North Dakota in three separate citations. The first citation charged him with Criminal Trespass, the second citation charged him with Refusing to Halt and the third citation charged him with Disorderly Conduct.

[¶3] Mr. Beaulieu entered pleas of not guilty to each of these three charges on October 15, 2013.

[¶4] On October 30, 2014 Mr. Beaulieu filed a Rule 16 Discovery Request.

[¶5] A Notice of Recusal of district judge Robin A. Schmidt was filed on December 24, 2014.

[¶6] An Order specially appointing Allan L. Schmalenberger to be the district judge to try Mr. Beaulieu's case was filed on December 24, 2014.

[¶7] A pretrial conference in Mr. Beaulieu's case was held before district judge Allan L. Schmalenberger on January 14, 2015.

[¶8] Mr. Beaulieu's case came on for trial on January 28, 2015.

[¶9] Before the trial started the State dismissed Count 1 Criminal Trespass.

[¶10] The trial ended with jury verdicts finding Mr. Beaulieu guilty of Count 2 Refusing to Halt and not guilty of Count 3 Disorderly Conduct.

[¶11] On May 4, 2014 Mr. Beaulieu filed with the court a 3.2 Motion for New Trial because of newly discovered evidence.

[¶12] The State filed a response to Mr. Beaulieu's 3.2 Motion for New Trial on May 21, 2015.

[¶13] The Court entered an Order Denying Mr. Beaulieu's Motion for New Trial

on November 3, 2015.

[¶14] Mr. Beaulieu then filed a Notice of Appeal and an Order for Transcript on December 1, 2015.

[¶15] This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶16] In 2013 there were many more criminal cases charged out then there were district judges to hear them in McKenzie County, North Dakota. In order to get these criminal cases tried a surrogate judge had to be specially appointed. That surrogate judge was Allan L. Schmalenberger.

[¶17] One of these cases charged the Defendant/Appellant Mark Beaulieu with the following crimes: Count 1 Criminal Trespass, Count 2 Refusing to Halt, and Count 3 Disorderly Conduct. To each of these criminal charges Mr. Beaulieu entered a plea of not guilty.

[¶18] On October 30, 2014 Mr. Beaulieu filed a Rule 16 Discovery Request. Part of the State's response to that Discovery Request was to send to Mr. Beaulieu a document entitled Supplemental Report Form 1. (Report) App. P. 67. In that report the State had two choices it could make after the words : "photographs taken? ___ yes ___ no". The State put an X before no. Because the State checked no, nothing was written in the Report after the words: "If yes, the photographs are located with".

[¶19] Mr. Beaulieu received a Notice of Jury Trial on January 15, 2015 informing him that his case would be tried on January 28, 2015. On January 28, 2015 before Mr. Beaulieu's trial began the State dismissed Count 1 Criminal Trespass.

[¶20] At Mr. Beaulieu's trial the State called one witness, Officer Travis Bateman

and the defense called one witness Mr. Beaulieu. Officer Bateman testified that on the night he arrested Mr. Beaulieu, when he took Mr. Beaulieu to the ground, Mr. Beaulieu landed on his back and didn't injure his face. Mr. Beaulieu testified that when Officer Bateman took him to the ground he landed on and injured his face. Therefore the jury had two possible stories to consider about as to how Officer Bateman took Mr. Beaulieu to the ground. In this case because of a note sent by the jury, App. P41 the jury had to have discussed these two stories before they reached their verdict. If the jury had had a mug shot of Mr. Beaulieu on the night of his arrest that mug shot would have been discussed with the two stories and there is a reasonable possibility that the mug shot would have had an effect on the verdict.

[¶21] The trial ended with the jury finding Mr. Beaulieu guilty of Count 2, Refusing to Halt and not guilty of Count 3, Disorderly Conduct.

[¶22] After the trial Mr. Beaulieu's attorney, Benjamin C. Pulkrabek thought that law enforcement must have taken a mug shot of Mr. Beaulieu after they had arrested him on August 3, 2013. Attorney Pulkrabek knew that if a mug shot had been taken it would show the condition of Mr. Beaulieu's face when he was arrested. Attorney Pulkrabek started his search for the mug shot of Mr. Beaulieu by trying to contact law officer Lt. Mike Schmidt in Watford City, North Dakota. When he couldn't contact Lt. Schmidt, on April 22, 2015 he sent a e-mail to Jake Rodenbiker the McKenzie County State's Attorney asking him for help in locating Mr. Beaulieu's mug shot. App. P. 68 McKenzie County State's Attorney, Jake Rodenbiker responded with a e-mail on April 22, 2015 and attorney Pulkrabek got Mr. Beaulieu's mug shot. App. P.69 and P. 63.

[¶23] On May 4, 2015 Mr. Beaulieu filed a 3.2 Motion for New Trial because Mr.

Beaulieu's mug shot was newly discovered evidence. The State responded to Mr. Beaulieu's 3.2 Motion on May 21, 2015.

[¶24] Trial Judge Allan L. Schmalenberger did not respond to Mr. Beaulieu's Motion for New Trial before his special judicial appointment ended. Mr. Beaulieu's Motion for a new trial was then assigned to Northwest Judicial District Judge Robin A. Schmidt. Judge Schmidt then listened to the trial tapes and on November 3, 2015 denied Mr. Beaulieu's Motion for a New Trial.

[¶25] Mr. Beaulieu then appealed Judge Schmidt's denial to the North Dakota Supreme Court.

ARGUMENT

[¶26] **ISSUE I. After a district judge in North Dakota is assigned to rule on a motion in a case tired by another district judge must that assigned district judge certify any familiarity with the case before she rules on a Defendant's Motion for a New Trial?**

[¶27] In this case Allen L. Schmalenberger was the surrogate judge who was assigned to try and did try the above case. His appointment expired before he could rule on Defendant/Appellant, Mark Beaulieu's Motion for New Trial because of newly discovered evidence. Therefore another district judge in the Northwest Judicial District had to be assigned to the case. The district judge that was assigned was Robin A. Schmidt.

[¶28] The procedure to be followed by a district judge in North Dakota that is assigned to take over a case when the original trial judge is unable to continue is set out in Rule 25 of the NDR of Crim Pro:

Rule 25. Judge – Disability.

(a) **During jury trial.** A successor in office or any judge regularly sitting in or assigned to the court may complete a jury trial if:

(1) the judge before whom the trial began cannot proceed because of termination of office, death, sickness, or other disability; and

(2) the judge completing the trial certifies familiarity with the trial record.

(b) **After verdict or finding of guilt.**

(1) *In general.* After a verdict or finding of guilty, a successor in office or any judge regularly sitting in or assigned to the court may complete the court's duties if the judge who presided at trial cannot perform those duties because of termination of office, absence, death, sickness, or other disability.

(2) The successor judge may grant a new trial if satisfied That:

(A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or

(B) a new trial is necessary for some other reason.

[¶29] Rule 25 (a)(2) of the NDR of Crim Pro requires a district judge who is assigned to take over a case when another district judge is unable to continue the trial to file a certificate of familiarity. According to Rule 25 (b)(1)(2) of NDR of Crim Pro no certificate of familiarity is required after a verdict or finding of guilt. District Judge Robin A. Schmidt filed no certificate with her order denying Mr. Beaulieu's Motion. Since Mr. Beaulieu's Motion was after the verdict and finding of guilt, should district judge Schmidt have had to file a certificate of familiarity? It only seems reasonable that a district judge who takes over a case for another judge at any stage of the proceeding should have to file a certificate of familiarity.

[¶30] **ISSUE II. Did the district court err when it denied Defendant/Appellant, Mark Beaulieu's Motion for a New Trial?**

[¶31] This case is unique because of a comment the trial judge Allen Schmalenberger made while the jury was deliberating regarding his opinion on the State's failure to produce a picture of Mr. Beaulieu's face during the trial.

[¶32] The following is Judge Schmalenberger's comment on what his thoughts

were if a picture of Mr. Beaulieu's face on the night of the arrest was ever found. Tr. P.62L.8-16.

THE COURT: Well, let's put it this way. If you find out there's been - - that pictures were actually taken, you know, showing his condition, then obviously that would be new evidence and depending upon what the jury does - - I mean, obviously, if they find him not guilty, it's done. There's no more. If they find him guilty, and you discover new evidence, you know, you have a right at that point to bring that back to the Court.

[¶33]After the above statement by trial judge Schmalenberger, Mr. Beaulieu was found guilty of Count 2 Refusing to Halt.

[¶34] A mug shot picture of Mr. Beaulieu's face was found after the jury's guilty verdict on Count 2 of Refusing to Halt and it appears in the App. P. 63.
According to the arresting officer Travis Bateman on the night of the arrest on 08-03-2013 he noticed that Mr. Beaulieu had a bloody face and shirt. Tr.P.25L.23. The problem with Officer Bateman's testimony about a bloodied shirt is no blood can be seen on the shirt Mr. Beaulieu is wearing in the mug shot. Therefore had the mug shot picture been available for trial it would have impeached Officer Bateman's testimony about a bloody shirt.

[¶35] Then there is the effect Mr. Beaulieu's bloody face mug shot would have on the questions and answers on Recross Examination about Mr. Beaulieu's bloody face on 8-03-2013. Tr.P.34L.8-20

Q. Officer, you drive in in your vehicle. You see someone walking away from you. You can't see his face, can you?

A. I did see his face.

Q. When you drove in?

A. No, not initially; yes.

Q. It doesn't say that in your report. It says that - - your report finally after you get to the ground, is when you see that he has blood on his face. (emphasis added)

A. Yes, sir.

Q. You didn't see it at all before that?

A. I may have, but I can't recollect for certain, sir.

[¶36] The above question referring to the police report resulted in the jury asking during deliberations in a note, to the court if they could see the police report! Tr.P.75L.15-16. Trial Judge Schmalenberger response to that jury's question was: Tr.P.76.L19 to P.77L.1

THE COURT: The record should indicate that we're still out of the presence of the jury. Here's what I propose to do is that we send a formal, written response back that would say, "You have asked the following question: Can we see the arrest report," and then below that put: "Answer: No." Then go on and say, "you must decide this case based solely on the evidence presented in the courtroom which consists of the testimony of the witnesses."

[¶37] While the jury was still deliberating Judge Schmalenberger made another comment: Tr.P.80L.9-11

THE COURT: For a second there, I was thinking we were going to get a question that they have a deadlocked jury, and that's probably going to come next.

[¶38] New trial motions are set out in NDR of Crim Pro 33 and says such motions should be granted "if the interest of justice requires" The part of NDR of Crim

Pro 33 that permits a new trial because of newly discovered evidence is (a) subdivision (b)(1).

[¶39] The standard of review for a new trial motion is set out in State vs. Kraft 413 NW2d 303 N.D. 1987.

> A motion for a new trial is committed to the sound discretion of the trial court and its judgment is conclusive unless we can say that, in denying the motion, there was an abuse of discretion. State v. Kringstad, 353 N.W.2d 302, 307 (N.D. 1984) (citing State v. Schimetz, 328 N.W.2d 87, 97 (N.D. 1983)). An abuse of discretion has been defined as an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Johnson, supra, at 294 (citing State v. Knoefler, 325 N.W.2d 192, 195 (N.D. 1982)); State v. Schimetz, 328 N.W.2d 808, 811 (N.D. 1982). Also, this Court has frequently held that a stronger showing of abuse is required to reverse an order granting a new trial than to reverse an order denying a motion for new trial. State v. Oasheim, 353 N.W.2d 291, 293 (N.D. 1984).

[¶40] In denying Mr. Beaulieu's Motion for a New Trial Judge Schmidt relied on the following language in State vs Garcia 462 NW2d 123 ND 1990:

> Under Rule 33, N.D.R.Crim.P., a new trial may be granted "if required in the interests of justice." A Motion for new trial on the ground of newly discovered evidence will be granted only if all of the following conditions are met: (1) the evidence must have been discovered since the trial, (2) the failure to learn of the evidence at the time of trial was not the result of the defendant's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the evidence is of such a nature that it would probably produce an acquittal at a retrial. State v. McLain, 312 N.W.2d 343 (N.D. 1981).

[¶41] Brady vs Maryland 373 US 83 makes the suppression by the prosecution of evidence, favorable to the accused a violation of due process where the evidence is material to the guilt or to the punishment irrespective of the good or bad faith of the prosecutor.

[¶42] The above four elements in Garcia have been changed in Kyles v. Whitley, 514 U.S. 419 (1995) which cites United States vs Bagley, 473 US 667 and the following four aspects of materiality for Brady purposes:

First, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Thus, 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. 473 U.S., at 682, 685. *United States v. Agurs*, 427 U.S. 97, 112-113, distinguished.

Second, *Bagley* materiality is not a sufficiency of evidence test. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by 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.

Third, contrary to the Fifth Circuit's assumption, once a reviewing court applying *Bagley* has found constitutional error, there is no need for further harmless-error review, since the constitutional standard for materiality under *Bagley* imposes a higher burden than the harmless-error standard of *Brecht v. Abrahamson*, 507 U.S. 619, 623.

Fourth, the State's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item. 473 U.S., at 675, and n. 7. Thus, the prosecutor, who alone can know what is undisclosed, must be assigned the responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. Moreover, that responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. To hold otherwise would amount to a serious change of course from the *Brady* line of cases. As the more likely reading of the Fifth Circuit's opinion

shows a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*, it is questionable whether that court evaluated the significance of the undisclosed evidence in this case under the correct standard. Pp. 432-441.

[¶43]The above quote from Whitley makes it clear that:

1. The showing of materiality does not require a demonstration by a preponderance that the disclosure of the suppressed evidence would have resulted in the defendants acquittal;

2. A Brady violation is established by 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;

3. When a reviewing court applying Bagley finds constitutional error there is no need for further harmless error review;

4. The prosecutor must disclose all evidence at a trial that has a reasonable possibility of being favorable to the defense;

[¶44] Usually the same district judge who tries a criminal case decides any post trial motion in that case. In this case the usual didn't happen. The reason it didn't happen is the trial judge who tried this case was Allen L. Schmalenberger and he was specially appointed to hear this case. His special appointment expired before he could rule on Mr. Beaulieu's Motion for a New Trial. Therefore a new judge was assigned to Mr. Beaulieu's Motion for a New Trial. That judge was Robin A. Schmidt. Before District Judge Schmidt ruled on Mr. Beaulieu's Motion for a New Trial she listened to the tape that was recorded during Mr. Beaulieu's trial. Times on that trial tape are cited in her denial of Mr.

Beaulieu's Motion. No where in the record or in her denial of Mr. Beaulieu's Motion for a New Trial is there any statement as to how much of the trial tape she listed to before she issued her Order Denying Mr. Beaulieu's Motion for a New Trial.

[¶45] The following are facts about the trial that Mr. Beaulieu believes have to be considered before any ruling can be made on his Motion for a New Trial.

1. Trial Judge Allan A. Schmalenberger's statement "THE COURT: Well, let's put it this way. If you find out there's been - - that pictures were actually taken, you know, showing his condition, then obviously that would be new evidence and depending upon what the jury does - - I mean, obviously, if they find him not guilty, it's done. There's no more. If they find him guilty, and you discover new evidence, you know, you have a right at that point to bring that back to the Court." This statement shows trial judge Schmalenberger's thoughts about the finding after trial of a picture of Mr. Beaulieu's face on the night Mr. Beaulieu was charged with the criminal offenses.

2. Officer Bateman's testimony about Mr. Beaulieu's bloody shirt and the fact that no blood appears on his shirt in the mug shot that was discovered of Mr. Beaulieu that was taken by the police on the night Mr. Beaulieu was charged with the crimes.

3. That the newly discovered mug shot of Mr. Beaulieu on the night the crimes were charged would have bolstered Mr. Beaulieu's story and discredited Officer Bateman.

[¶46] None of the three charges in this case against Mr. Beaulieu were supported by overwhelming evidence showing Mr. Beaulieu's guilt. Count I Criminal Trespass was dismissed before the trial started. Count II Refusing to Halt was the only charge the State won. Count III the jury found Mr. Beaulieu not guilty. Therefore of the three counts charged the jury only believed Officer Batemans story on Count II.

[¶47] In the State's brief there will be an argument that Mr. Beaulieu's mug shot isn't material to this case. Mr. Beaulieu's response to this argument is Mr. Beaulieu's mug shot shows injuries to his face and no blood on his shirt. The injury to Mr. Beaulieu's face and no blood on his shirt would have helped the jury in deciding whether to believe Mr. Beaulieu's story or Officer Batemans story. Also at trial if it is discovered the State has lost evidence it is presumed that the lost evidence would be favorable to the defense. In this case the mug shot was lost evidence at trail time .

[¶48] That State and the police work together in preparing and presenting a case. Therefore the State should know what evidence the police have. In this case the State, for reasons only known to the State, didn't know anything about the mug shot taken of Mr. Beaulieu until after the trial .

[¶49] In this case one of the jury instructions given in the opening jury instructions was Impeachment. App. Pp.23 and 52.

IMPEACHMENT

A witness (including a party) may be impeached (meaning that the witness's testimony is discredited) by contradictory evidence you find to be true or by evidence that on a former occasion the witness made a statement or acted in a manner inconsistent with the present testimony.

If you conclude that a witness has been impeached, you may give the testimony of that witness such weight and credibility, if any, as you think it deserves.

If you conclude that a witness has willfully, knowingly, or intentionally testified falsely concerning a material fact in this case, you may wholly disregard the witness's testimony unless it is corroborated by other credible evidence.

[¶50] Because of the above impeachment instruction, if the jury decided Officer Bateman had been impeached the jury could have given his testimony such weight and credibility if any as they thought it deserves or if they determined Officer Bateman had willfully, knowingly, or intentionally testified falsely concerning a material fact in the case that could wholly disregard Officer Batemans testimony unless it was corroborated by other credible evidence.

CONCLUSION

[¶51] There is no way of knowing how much of the trial transcript Judge Schmidt listened to before she denied Mr. Beaulieu's Motion for a New Trial. Therefore there is no way of knowing if she listened to or even considered what Judge Schmalenberger said about what would happen if a picture of Mr. Beaulieu's face was discovered after the trial.

[¶52] Mr. Beaulieu has met the four of the requirements in Whitley for a new trial. Therefore this case should be remanded to the district court with an order requiring that the district court grant Mr. Beaulieu a new trial motion.

Dated this 19th day of February, 2016.

/s/ Benjamin C. Pulkrabek
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CERTIFICATE OF SERVICE

[¶53] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on February 19th, 2016, she served, by e-mail and/or mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF

to: Charles Burke Neff
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The undersigned further certifies that on February 19th, 2016, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS APPENDIX and BRIEF.

/s/Sharon Renfrow
Sharon Renfrow, Admin. Legal Assistant
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