

**IN THE COURT OF APPEALS OF IOWA**

No. 0-878 / 10-0354  
Filed February 23, 2011

**JOSE ANGEL AGUILERA,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Wright County, James M. Drew,  
Judge.

A postconviction relief applicant appeals the dismissal of his second application for postconviction relief, contending the State withheld exculpatory evidence and that other newly discovered evidence entitles him to a new trial.

**AFFIRMED.**

Martyn S. Elberg of Elberg Law Office, P.L.C., Eagle Grove, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, and Eric R. Simonson, County Attorney, for appellee State.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J.,  
takes no part.

**VAITHESWARAN, J.**

In 1997, Jose Aguilera was found guilty of second-degree murder. This appeal arises from the district court's dismissal of his second application for postconviction relief. The issues on appeal are whether Aguilera should have prevailed on his claims that (1) the State withheld exculpatory information and (2) an assistant county attorney's subsequent convictions on unrelated charges amounted to newly discovered evidence.

***I. Background Facts and Proceedings***

Aguilera attended a party hosted by Salvador Guido. Also in attendance was the lover of Aguilera's estranged wife, Jesus "Jesse" Garcia. During the party, Garcia was shot and killed. The State charged Aguilera with the crime.

At Aguilera's trial, Guido and another man, Lorenzo Lopez, essentially testified that they saw Aguilera with a gun and saw Garcia shot. The Department of Criminal Investigation (DCI) had previously questioned both of these witnesses and prepared written statements summarizing their responses. The statements were not turned over to the defense, despite an order granting a defense motion for discovery. A jury found Aguilera guilty. Aguilera was unsuccessful in his challenge to the conviction on direct appeal and in his first application for postconviction relief.

Aguilera filed a second application for postconviction relief. Eventually, the DCI investigative file was turned over to Aguilera, precipitating an amended second application for postconviction relief. Following an evidentiary hearing, the district court concluded the DCI file was not provided to the defense prior to trial and the file contained evidence that was exculpatory. The court determined,

however, that the evidence was not material to the issue of guilt. Based on this determination, the court rejected Aguilera's claim and dismissed the amended second postconviction relief application.

## **II. Exculpatory Evidence**

Aguilera maintains the DCI file was improperly withheld by the prosecution and it contained exculpatory and material evidence warranting a new trial. State suppression of exculpatory evidence is known as a *Brady* violation. See *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). To establish a *Brady* violation, the postconviction applicant must prove by a preponderance of the evidence that: "(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issue of guilt." *Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003). We will address these factors primarily as they relate to the testimony of the two eye-witnesses, Salvador Guido and Lorenzo Lopez. Our review is de novo. *Id.* at 519.

### **A. Salvador Guido**

At trial, Guido testified that he saw Aguilera shoot Garcia. Specifically, he said Aguilera confronted Garcia, called him a name, then "reached from the back, pulled out a gun and shot" Garcia. He stated Garcia had no weapon in his hand. In response to a question on cross-examination, he said Aguilera had the gun because "it was either him or Jesse."

Guido's trial testimony contradicted his earlier statements to the DCI. A day after the shooting, he told an agent he did not see a gun on the evening of the shooting and never saw Aguilera with a gun. He stated he was inside the

house when he heard a gunshot. He said he remembered Aguilera backing his car out into the street.

Three days after the shooting, the DCI again interviewed Guido, and Guido again did not say he saw the shooter. Instead, he reiterated that he heard a shot and saw Aguilera leave the scene.

The State argues these prior statements were not “suppressed” because a DCI agent summarized the statements in a pre-trial deposition. *Id.* at 522 (stating evidence is suppressed “when information is discovered after trial ‘which had been known to the prosecution but unknown to the defense’” (citation omitted)). The agent testified as follows when asked to describe what Guido relayed to him about the incident:

Salvador told me that he had been at the party since early in the morning on Sunday the day of the shooting because he was in charge of cooking the meat. Salvador told me that he had gone to pick up Carlos Romero so that Carlos could attend the party. Salvador told me that he saw both Jose and Jesse at the party in Rowan, and commented that neither of them had been invited.

Salvador stated that he saw Jose arrive at the party between 7 o'clock and 7:30 p.m. Salvador thought that Jesse had arrived at the party at approximately 8 o'clock p.m.

Salvador stated that Jose had been drinking while at the party. Salvador stated that he had been inside the house talking to other party guests and had just stepped back outside when he heard the gunshot. Salvador told me that he looked towards the sound of the shot and saw Jesse [lying] on the ground. And also saw Jose Aguilera walking towards his daughter commenting, “Let's go daughter.”

Salvador stated that Jose then took off fast driving a red Mazda. Salvador told me that he did not see a gun that evening. Salvador told me that when he saw Jesse on the ground, Jose was walking—excuse me—when he saw Jesse on the ground and Jose walking towards his daughter, Jose was approximately 10 feet from the body walking near a pickup truck.

Salvador described to me where Jose's car was parked, which is an area between the garage and house. Salvador told me that at the time that he heard the shot, he did not see anyone else

on the street except Jose and Jesse. Salvador told me he remembers Jose back his car out into the street, but does not remember which way Jose left when he left the area.

Salvador, again, told me that he did not see a gun that evening, nor has he ever seen Jose with a gun. Also told me that he only heard one shot. Salvador mentioned that Jose and Jesse were the only ones on the street when the shot was fired, and stated that he does not know why the shooting occurred. And listed some of the people that were at the party that he knew.

By virtue of this detailed pre-trial disclosure which closely tracked the written statements, Aguilera had notice of a large share of the exculpatory statements Guido made to the DCI agents. Accordingly, we conclude the statements described in this disclosure were not “suppressed.”

This does not end our analysis, because some of Guido’s statements to the DCI were not disclosed during the agent’s deposition. Specifically, Guido told the agent more than once that Lorenzo Lopez was in the house at the time of the shooting. As the agent did not disclose these statements about the other prosecution eye-witness, we agree with Aguilera that these statements were “suppressed.” *Id.* Turning to the second factor articulated in *Harrington*, there is no question these statements were exculpatory. *Id.* at 523 (evidence must be favorable to the defense). This brings us to the third factor, materiality.

Evidence is material when “there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Id.* (citation omitted). The suppressed statements of Guido, together with the suppressed statement of Lopez, to be discussed below, could have been used by the defense to discredit Lopez. But Lopez’s testimony was cumulative of Guido’s testimony. Even if the suppressed statements about Lopez’s location at the time of the shooting had been produced and used to impeach Lopez, they

would have done nothing to undermine Guido's testimony about the shooting. Guido was clear that Aguilera pulled out a gun and shot Garcia. In light of his testimony, Lopez's testimony was not essential to a finding of guilt. Accordingly, there is no reasonable probability that the result of the proceeding would have been different had the suppressed statements been produced.

***B. Lorenzo Lopez***

At trial, Lopez testified he was talking to Garcia just before the shooting. He described the confrontation between Aguilera and Garcia and said he saw Aguilera pull out a gun. Lopez left the scene but not before hearing a shot and seeing Aguilera take off. His testimony was more equivocal than Guido's about whether Aguilera purposefully shot Garcia. He said, "I don't know if [Aguilera] shot [Garcia] or whether it was a result of the struggling." He also said, "I couldn't really tell you exactly what happened. I was there and looked, but I really couldn't see everything that happened."

Like Guido's trial testimony, Lopez's trial testimony contradicted his first statement to the DCI. In his initial statement, he said that when the shooting occurred, he was in the back of the house watching television and did not see or hear anything regarding the shooting.

Lopez later backed away from his first statement. In a second statement to the DCI, he acknowledged seeing the confrontation and described it as he did at trial. In a pretrial deposition, he reiterated this second version of events.

The DCI agent who was deposed and who provided the detailed description of Guido's statements was not asked about Lopez's statements to the DCI and did not volunteer any information about Lopez's first statement. See *id.*

at 522 (noting a prosecutor's duty to disclose "is applicable even if there has been no request by the accused' for the information" (citation omitted)).

We conclude Lopez's statements to the DCI were suppressed. We further conclude his first statement to the DCI was exculpatory.

This brings us to the materiality prong. Had Lopez been the only eye-witness to the shooting, the suppressed statement may have been material. But because Guido also testified to the shooting and clearly stated Aguilera was the person who fired the shot, Lopez's testimony was cumulative and the suppressed statement of Lopez was not material. See *State v. Anderson*, 410 N.W.2d 231, 235 (Iowa 1987) (noting suppressed evidence was not material where six individuals testified to substantially the same facts that the witness had testified to); see also *Cornell v. State*, 430 N.W.2d 384, 386 (Iowa 1988) (finding exclusion of impeachment evidence did not create a reasonable probability of a changed result).

### ***C. Remaining Statements***

Other DCI statements also were not produced to the defense. We find it unnecessary to summarize those statements. Although they were suppressed and could have had impeachment value, we conclude none of them were material to the issue of guilt.

### ***III. Prosecutor's Subsequent Convictions***

Finally, Aguilera argues that the assistant county attorney who prosecuted him was subsequently convicted of several crimes and these convictions amount to newly discovered evidence warranting a new trial. He asserts, "Although we may never know, [the assistant county attorney] could have made Lopez and

Guido an offer they couldn't refuse." This argument is speculative at best and does not warrant reversal. See *Lopez v. State*, 318 N.W.2d 807, 811 (Iowa Ct. App. 1982) (stating that postconviction relief applicant has the burden of establishing a newly-discovered evidence claim).

We affirm Aguilera's judgment and sentence for second-degree murder.

**AFFIRMED.**

Vogel, J., concurs; Sackett, C.J., dissents.



**SACKETT, C.J.** (dissenting)

I respectfully dissent. I would order a new trial.

I agree with the majority and the district court that the State suppressed exculpatory evidence. I do not agree with the majority conclusion that the suppressed evidence—pretrial statements of the State’s two primary witnesses—was not material to a determination of Aguilera’s innocence or guilt.

The suppression of the evidence hampered the defendant’s investigation and trial preparation as well as severely undermined the credibility of alleged witnesses to the shooting, Lopez and Guido. The majority correctly recognizes these two witnesses gave conflicting renditions of events but finds that because Lopez’s testimony was cumulative of Guido’s, Lopez’s credibility was not material. Clearly both witnesses gave conflicting stories. The fact they may have arrived at the same version of the events at trial does not convince me that their conflicting prior reports were not material or would not have been a challenge to their credibility.