IN THE COURT OF APPEALS OF IOWA

No. 1-018 / 10-0020
Filed April 13, 2011

DAVID FLORES,
Applicant-Appellee,

vs.

STATE OF IOWA,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

The State appeals from the district court's postconviction-relief order granting a new trial. **AFFIRMED.**

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Joe Weeg, Assistant County Attorney, for appellant.

Mary Kennedy, Waterloo, for appellee.

Heard by Sackett, C.J., and Vogel, Vaitheswaran, Eisenhauer, Potterfield, Doyle, and Danilson, JJ. Tabor, J., takes no part.

SACKETT C.J.

David Flores was convicted of first-degree murder and terrorism following the April 8, 1996 shooting death of Phyllis Davis. On December 22, 2009, the district court granted Flores's petition for postconviction relief and granted a new trial, finding there was undisclosed and newly-discovered evidence that could identify Rafael Robinson, now deceased, as the perpetrator of the crime. The State seeks reversal of the order granting a new trial. We affirm.

SCOPE OF REVIEW. Postconviction proceedings are law actions and are ordinarily reviewed for error at law. *See Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). When the basic claim for relief is an alleged due process violation, such as a failure to disclose exculpatory evidence to a defendant, we conduct a de novo review. *See Benton v. State*, 199 N.W.2d 56, 57 (Iowa 1972). We review a motion for new trial based on newly-discovered evidence for an abuse of discretion. *State v. Overstreet*, 243 N.W.2d 880, 886-87 (Iowa 1976).

BACKGROUND. Phyllis Davis was killed by a single bullet at the corner of University Avenue and Ninth Street in Des Moines while driving between two cars, a Blazer and an Oldsmobile, whose occupants were engaged in a gun battle. The incident appeared to be gang activity and the testimony detailing the events leading to and after Davis's death was conflicting.

Charges were filed against several persons, including three men alleged to have been in the Oldsmobile. Flores was charged with the murder of Davis by trial information filed on May 20, 1996. The State alleges that Flores was driving the Blazer and fired the bullet that accidentally killed Davis. Public Defender

John Wellman was appointed as Flores's counsel. At Flores's arraignment Wellman waived the minutes of testimony "in return for the defendant receiving copies of any and all police reports of facts which have given rise to the above captioned case." On September 13, 1996, the State filed a notice of intent not to prosecute Flores because of an unavailable witness. The district court dismissed the case against Flores without prejudice on September 14, 1996.

On December 20, 1996, a second trial information was filed, charging Flores with the murder of Davis and with terrorism. Flores was again represented by Wellman.

At a pre-trial conference Wellman entered into a stipulation with the State that the State shall produce "to the defendant's counsel by January 21, 1997, all police reports which have been generated since September 1, 1996."

A jury trial was held and Flores was convicted as charged. He appealed to this court and we affirmed, noting there were conflicts in the evidence. *State v. Flores*, No. 97-733 (Iowa Ct. App. Sept. 30, 1998). He also filed a petition for habeas corpus, which was rejected by the federal district court that noted, "The evidence of Flores's guilt was far from overwhelming. It presents a close case." *Flores v. Lund*, S.D. Iowa No. 4:99-cv-300685 (2002). The case was affirmed by the Eighth Circuit Court of Appeals, noting "this is a close case and the evidence against Flores is circumstantial." *Flores v. Lund*, 2002 WL 3184956 at **3 (8th Cir. 2002).

On December 14, 2001, Flores filed a petition for postconviction relief. The petition was amended several times and raised a number of claims for relief,

including claims of ineffective assistance of counsel and allegations of new evidence and recanting witnesses.

On June 12, 2008, during the course of discovery the State requested the open murder investigation file on Rafael Robinson from the Des Moines Police Department. Robinson had been murdered several months after Davis. On June 13, 2008, in a written filing the State advised that in the Robinson file the Des Moines Police Department received information on August 1, 1996, about a May 22, 1996 interview of Calvin Tyrone Gaines by F.B.I. Special agent Terry Bohle. Gaines had suggested to the agent that Robinson killed Davis. The State acknowledged there was no evidence this information was given Wellman "prior to or during the 1997 trial" and noted "there is also no evidence that the prosecution team was aware of any of the attached documents at any pertinent time of the prosecution."

An amendment to Flores's postconviction petition was filed on October 11, 2006, that raised for the first time the claim there was exculpatory evidence in the interview conducted on May 22, 1996 of Calvin Gaines by Terry J. Bohle, a special agent of the Federal Bureau of Investigation. The interview of Gaines, a federal prisoner, took place in the Polk County jail where Gaines was being held on pending federal charges.

As to the interview the agent had reported:

> Gaines was shown a photograph of Rafael Robinson and Gaines stated he was the individual in the Blazer involved in the shooting in which the woman was accidentally killed. Gaines said that the Iowa 90 Crips have a contract out on Robinson because of an individual named Nicholas who was killed in a fight in the park. The Des Moines 90 Crips go by Chicago, Illinois, rules and are organized

> with certain ranks in the gang. When Nicholas was killed, Robinson did not stand up for the 90's like he should have. According to Jody Stokes, Robinson is still somewhere in Des Moines. Gaines was shown additional photographs of Des Moines gang members. He identified the photograph of Derrick Williams as the individual who goes by Squab. Williams is a nobody in the gang and does what he is told. Gaines also identified the photographs of Thomas Cornell as Nutt and the photograph of Donyea Williams as Low Key.

The State recognizes the FBI report had not been given to Flores's attorney John Wellman before trial. The State contends Flores was aware of the evidence because it claims Wellman had a copy of a report from Officer Trimble of the Des Moines Police Department that provided similar information.[1]

Trimble's' report stated:

> On 6 June 1996 I went to the County Jail to interview subject by the name of Calvin Gaines. Mr. Gaines advised he had heard from a subject by the name of Jinx that the passenger in the Blazer involved in the Phyllis Davis shooting was Rafael Amand Robinson. The further information on Mr. Robinson is DOB 2/20/68. . . . According to Mr. Gaines this Jinx who was in jail with him (Gaines) had received information from some other source about Mr. Robinson being the passenger.
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> Mr. Calvin Gaines could give no further information on Jinx as far as name or information, however, he stated the story was that Mr. Robinson's brother had been beaten at some point in time by these other subjects involved in the shooting and this was an attempt to get even for that. Mr. Gaines had no other information at this point however he indicated he would recontact us should he hear any more information.

In December of 2007, Carla Harris, who from September of 1995 to March of 1996 had been in a relationship with Robinson, saw in the Des Moines Register a picture of Robinson and an article about Flores's conviction. She called the Des Moines Register and ultimately contacted Flores's postconviction

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[1] John Wellman died in August 2006.

attorney to report Robinson had told her on April 8, 1996, the day of Davis's murder, that he and one of his friends were having a shootout with boys whom he had been feuding with before and a woman was accidentally shot and he thought she was dead.

On March 18, 2008, an amended and substituted application for postconviction relief was filed, reiterating earlier claims for relief and included among others a claim of new evidence including Harris's statements.

The matter came on for hearing on March 23 and 24, 2009.[2] The court heard a number of witnesses and dismissed all of Flores's claims except the claims related to the FBI report and Harris's statements. The court acknowledged that Wellman was entitled to all evidence as agreed, but Wellman did not have the FBI report before trial,[3] and contrary to the State's argument, the Trimble report was not included in the discovery provided to Wellman. The court found the Trimble report that was unintentionally omitted from discovery was favorable to Flores's defense, there was a reasonable probability that the report would have assisted Wellman in preparation of a more adequate defense, and the suppression of the report undermined confidence in the outcome of the trial.

The district court found the testimony of Carla Harris credible and, while she testified to hearsay pursuant to Iowa Rule of Evidence 5.801(*c*), found her testimony fell within the exception of Iowa Rule of Evidence 5.804(4), and was

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[2] There had been an earlier hearing on a motion for summary judgment made by the State. The motion was denied.

[3] These two facts have never been denied by the State.

newly-discovered evidence, which when considered with the Trimble report, could lead to a different result.

TRIMBLE REPORT. The State concedes the FBI report should have been disclosed to Wellman but argues the evidence supported a finding that Wellman had the Trimble report and consequently knew or should have known the facts contained in the FBI report. Flores disagrees, arguing there was information in the FBI report that could not be gleaned from the Trimble report.

The State argues the evidence shows Wellman had a file on the Flores case where the Trimble report was found a decade later by an assistant Polk county attorney. The report found by the assistant county attorney was designated I-619. The State also supports its position with evidence that counsel for three codefendants had the report in their files. The State argues the testimony of Randi Seib, who was employed by the Polk County Attorney's office when the discovery was produced, supported a finding that Wellman had received the same discovery as had the other three attorneys. From Seib's testimony we learn that she paginated discovery before turning it over to defense counsel. Apparently early in this proceeding she used a letter and a number. But part way through she used only numbers.

The State discounts the testimony of Delores Mason, Wellman's assistant, who denied their office received the report, arguing her testimony was flatly contradicted by the remaining evidence and suggesting her memory must be questionable because she insisted neither she nor Wellman received a document from the county attorney's office identified by a letter.

The district court recognized, as do we, that Seib testified that, consistent with standard operating procedures, she was confident Wellman received the report simultaneously with discovery provided to the defendants. Seib testified that attorneys getting discovery packets were required to sign receipts verifying the pages of material received, and Seib testified she recalled shredding receipts signed by defense counsel representing the defendants charged with the Davis murder after the respective trials were over.[4]

The district court then found the Trimble report was not in the discovery provided Wellman prior to the Flores trial because Seib testified the Trimble report was paginated as I-619 and the same witness testified the receipts for discovery were shredded, yet one of the defense counsels had two receipts in his file for discovery material and neither included the Trimble report, noting the first receipt was for documents I-1 through I-595 disclosed on May 20, 1996, and the second receipt was for documents I-596 through I-614 disclosed on May 29, 1996. The court also noted that Wellman was blind, and Mason, who testified they had not received the report, read all the discovery to Wellman and testified Wellman's theory of defense was that Flores had not fired the shot that killed Davis. The court specifically found, "It is not conceivable to think that John Wellman, an accomplished and talented trial lawyer, would not have used the Trimble report as a part of the Flores's defense."[5]

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[4] It could be questioned why these receipts would be destroyed when Flores was sentenced to a life sentence and postconviction proceedings were likely.

[5] The district court further commented it was not conceivable an experienced defense attorney would not have deposed Gaines or subpoenaed him to testify.

The court noted it was aware the State found the report in a file. Flores argues this means little because defense counsel made a statement she had combed the files and had not found the report and it was only after the assistant county attorney requested to review Wellman's files that the document was found. Flores also argues Mason denied the report was Wellman's file or that it was organized in a manner that she organized his files. Flores also points to the testimony citing the district court finding that the original Wellman file was passed among other attorneys and his family, and his family members testified other information was put in the file.

Suppression by the prosecution of evidence favorable to the accused violates the Due Process Clause of the Fourteenth Amendment where the undisclosed evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution. *Brady v. Maryland*, 383 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963). For us to affirm, we must find in addition to suppression that Flores has proved by a preponderance of the evidence the evidence was favorable to him and the evidence was material to the issue of guilt. *See Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003). Clearly evidence that Robinson not Flores killed Davis is favorable to Flores defense. *See id.* at 523. Its nondisclosure could have affected Wellman's trial preparation and the result of the trial. *See id*. at 524.

There is substantial evidence supporting the district court's factual findings. While the file where the assistant county attorney found the Trimble report may have been Wellman's file, there was substantial, unrefuted evidence

the file in question had been taken by the Flores family shortly after trial and passed to various attorneys and family members. Angel Flores, Flores's father, among others, testified to receiving other documents with the help of friends and putting the documents in the file they had taken from Wellman's office, and Mason said it was not organized in the way the Wellman file was organized.[6] Additionally, one of the attorneys for a co-defendant testified that his receipts of documents sent by the county attorney did not include document I-619 (the Trimble report). He also testified he was not sure he spoke to Wellman about the Trimble report. Another attorney for a second co-defendant stated he never worked with Flores or his lawyer, lending credence to Flores's assertion that Wellman did not learn of the Trimble report from other counsel.

Furthermore, we agree with the district court that it is unlikely Wellman would not have acted on that evidence if he had it. But the stronger evidence to support the failure to provide the Trimble report to Wellman is the testimony of Mason, who because Wellman was blind, read all written documents to him and was not aware of the document. We affirm the finding the information in the FBI report that Robinson may have fired the fatal shot was not made available to Wellman prior to trial despite the State's agreement to provide all evidence. We affirm also the finding the Trimble report, which would have advised Wellman

[6] Flores's attorney suggests the prosecution may have planted the Trimble report in Wellman's file a decade after trial. We find no evidentiary support for this suggestion.

there was information Robinson may have fired the fatal shot, was not made available to Wellman before trial.[7]

Furthermore, the claim Robinson had been the perpetrator was supported by Gaines's testimony. He was deposed and testified at the postconviction trial and gave testimony basically consistent with the reports.[8] The claim was also supported by evidence that Robinson, as a rival gang member, whose brother had previously been beaten by men in a brown vehicle, had an incentive to pursue the brown vehicle, by evidence that the shooter was a black man, and by additional evidence described below.

HARRIS'S TESTIMONY. The State contends Harris's evidence is not newly discovered or, if it is, it does not warrant a new trial.

Iowa Code section 822.2(1)(d) provides for postconviction relief if "there exists evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence in the interest of justice."

To be granted a new trial based upon newly-discovered evidence Flores must show (1) the evidence was discovered after judgment; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted. *See Harrington*, 659 N.W.2d at 516; *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991).

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[7] Because we affirm this holding we need not address Flores's argument that there was helpful information in the FBI report that did not appear in the Trimble report.

[8] He acknowledges talking to the FBI when in Des Moines. His testimony as to whether he talked to Trimble is fuzzy.

Harris testified to hearsay. See Iowa R. Evid. 5.801(*c*). While generally inadmissible Iowa Rule of Evidence 5.804(3) allows an exception

> (1) where the declarant is unavailable and (2) the hearsay is a statement which was at the time of its making . . . so far tended to subject the declarant to criminal liability, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Iowa Rule of Evidence 5.804(3) says, "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." In *State v. Martinez*, 621 N.W.2d 689, 694 (Iowa Ct. App. 2000), this court said the inference of trustworthiness from the proffered corroborating circumstances must be strong, not merely allowable.

The district court found Carla Harris's testimony credible, that she was a confidant of Robinson, and he told her he "was always feuding with other boys from out of town." The district court found this consistent with the gang violence in Des Moines in the early and mid-1990s. Robinson presented Harris with a version of the Davis incident and told her that he and another of his friends were having a shoot out with other people.

The district court noted that Harris said she always took Robinson's words for what they were worth because of other things he told her in the past that she did not believe "until the FBI started showing up at my door saying they were looking for him" and stuff she had mentioned to him before. The district court further noted Harris's testimony about Robinson's statements did not change during vigorous cross-examination, and the court found Robinson's statement consistent with an individual telling the truth.

The district court also made specific findings that: (1) Harris's testimony of Robinson's statement was made under oath, (2) Robinson's statements of how the event occurred were consistent with the official version of the shootout, (3) the event and the alleged statement both happened on April 8, 1996. The district court also found Robinson's statement was corroborated, describing it as providing an eerily-similar description of the events on the day of Davis's death made by the Trimble report. We agree.

Harris testified that Robinson unexpectedly called her on the day of Davis's death and admitted to having shot a woman. Robinson indicated the murder was accidental and was the result of a feud between rival gangs. The timing of Robinson's statements and his knowledge of what had occurred support a finding that his statements are trustworthy. Robinson's statements are corroborated by the Trimble report and by witnesses who stated the man who killed Davis was black. Robinson's statements are further corroborated by the testimony of Derek Thompson that he saw Robinson in a Blazer followed by a brown Oldsmobile. Thompson testified that after he was grazed with a bullet, the Blazer pulled alongside his car, and Robinson asked if he was alright. Thompson's testimony at the postconviction hearing was inconsistent with his testimony at trial that he did not see anyone in the Blazer because he ducked. He explained that he was scared at trial because of Robinson's gang involvement, so he lied and said he had not seen anyone in the Blazer. Brad Adams testified the Blazer he saw was a two-door and Flores's Blazer was a four-door vehicle; Shawn Smith said the person in the vehicle appeared to be a

black male and he did not see Flores in the vehicle and he could not say a picture of the Blazer was the Blazer he saw; Tina McGarey said the driver of the vehicle was a black male, and Calvin Gaines named Robinson as the shooter. Robinson had an incentive to go after the people in the Oldsmobile, as he was a rival gang member whose brother was earlier beaten by men in a brown vehicle.

The district court also found Harris credible and her testimony consistent with events about which she could not likely fabricate, the April 8, 1996 shootout, the death of her children's father two days earlier, which resulted in her ignoring local news events, and the Des Moines Register article that suggested Robinson may have had involvement in the shootout. We agree. Importantly, Harris's story did not change on cross-examination, even as she acknowledged people thought she was "stupid or something" for not having heard the story. She testified she did not know Flores, and therefore would have no motive to lie in his favor. It is unclear from the record whether Robinson knew Flores.

The court further found the evidence was not discovered until after judgment, the evidence could not have been discovered earlier through the exercise of due diligence, the evidence was material to the issue and if a new trial were granted, Harris's testimony coupled with the Trimble report could change the case outcome. We agree with these findings, find no error in the court's legal conclusions, and affirm.

AFFIRMED.

Vogel, J., concurs specially.

VOGEL, J. (concurring specially)

We originally found substantial evidence supported the jury verdict stating, "Although there are conflicts in the evidence in this case, it is the jury's function to resolve the conflicts and credibility issues. [*State v. Forsyth*, 547 N.W.2d 833, 836 (Iowa Ct. App. 1996)]." *State v. Flores*, No. 97-733 (Iowa Ct. App. Sept. 30, 1998). In the postconviction proceeding, the district court found Flores should be granted a new trial on two separate grounds—the suppression of the Trimble report was a violation of Flores's due process rights and Carla Harris's testimony was newly discovered evidence necessitating a new trial.

In regard to the newly discovered evidence, I do not believe the district court applied the correct standard in granting a new trial. In order to prevail on a newly-discovered-evidence claim,

> The applicant must show: (1) the evidence was discovered after judgment. He may not rely on evidence discovered after trial but before judgment unless he establishes an excuse for not having raised the issue in a motion for new trial; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it *would probably* change the result if a new trial is granted.

Jones v. Scurr, 316 N.W.2d 905, 907 (Iowa 1982) (emphasis added); *see also Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003) ("To prevail on his newly discovered evidence claim, [the defendant] was required to show: . . . (4) that the evidence probably would have changed the result of the trial."). However, in setting forth the standard it utilized, the district court found the Harris testimony met the four factors set out in *Jones v. Scurr* and stated, "[T]he Harris testimony coupled with the Trimble report *could* change the result in this case." At no point

in the newly-discovered-evidence discussion did the district court state the correct standard, and again repeated the incorrect standard in its conclusion. If reviewed for an abuse of discretion, it is an abuse of discretion to apply an incorrect legal standard. *See Adcock v. State*, 528 N.W.2d 645, 647 (Iowa Ct. App. 1994) (stating that a reviewing court will not interfere with the grant of a new trial unless there is a clear abuse of discretion), *see also Whitsel v. State*, 525 N.W.2d 860, 863 (Iowa 1994) ("We have also recognized that motions for new trial on the basis of newly discovered evidence should be looked upon with disfavor and granted sparingly."). The majority opinion states the district court found the evidence *could* change the case outcome, and yet finds no error.

Nevertheless, because the majority found a due process violation, it is dispositive on appeal. *Harrington*, 659 N.W.2d at 516 *("*Because we conclude the due process claim is dispositive of the present appeal, we do not reach the question of whether the trial court erred in rejecting [the applicant's] request for a new trial on the basis of newly discovered evidence."). Therefore, I specially concur.