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COLORADO COURT OF APPEALS Court Address: 2 East 14th Avenue Denver, CO 80203 Phone Number: (303)837-3785 Appeal from Arapahoe County District Court Case no. 04CR2316 Hon. Michael J. Spear, Judge	FILED IN THE COURT OF APPEALS STATE OF COLORADO FEB - 8 2008 Clerk, Court of Appeals
Plaintiff - Appellee: **THE PEOPLE OF THE STATE OF COLORADO** **Defendant - Appellant:** **ROBERT RAY**	**▲COURT USE ONLY ▲** Case Number: 06CA2269 Div: Courtroom:
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REPLY BRIEF

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I. A NEW TRIAL IS REQUIRED DUE TO THE PROSECUTION'S FAILURE TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE.

The prosecution's response concerning this issue is predicated upon a faulty premise. Specifically, the prosecution argues that its failure to disclose exculpatory evidence must be reviewed under the standards applicable to a motion for new trial based upon newly discovered evidence. Answer Brief at 6-7. That standard, however, applies only in situations in which the defense discovers evidence following trial that was not known to the prosecution or withheld by it. In situations, however, where the evidence is known to the prosecution and is withheld, such as the present case, this standard is irrelevant. Rather, the sole governing standard of review, as repeatedly affirmed both by the courts of this state and the United States Supreme Court is whether the withheld evidence is "material;" if so, reversal is required. Kyles v. Whitley, 514 U.S. 419, 435 (1995); People v. Lincoln, 161 P.3d 1274, 1280 (Colo. 2007); see discussion in Opening Brief at 16-18.

The erroneous standard upon which the prosecution relies not only contains requirements nowhere present in the materiality standard governing withheld evidence – such as the requirement that the defendant have used due diligence to discover the evidence before or during trial – but also contains requirements that

actively contradict the applicable materiality standard. For example, in order to prevail on a motion for new trial based upon newly discovered evidence, the defendant must show that the new evidence would probably bring about an acquittal in another trial. People v. Lowe, 969 P.2d 746, 750 (Colo. App. 1998). In direct contrast, the United States Supreme Court has held that, where evidence has been withheld, "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.... The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434. Thus, the standard of review proposed by the prosecution not only is inapplicable, but is directly contradictory to the correct standard of review.

The prosecution further proposes, based upon this erroneous standard, that the trial court's determination may only be reversed for an abuse of discretion. This assertion, too, is contradicted by the relevant case law, which holds that review of the materiality question in this context is conducted de novo. United States v. Jernigan, 492 F.3d 1050, 1062-63 (9th Cir. 2007); see also Kyles, 514 U.S.

at 435 ("[O]nce a reviewing court applying [the materiality test of] Bagley[1] has found constitutional error, there is no need for further harmless-error review.").

For these reasons, the prosecution's analysis of this issue under the erroneous new trial standard is simply irrelevant. Answer Brief at 6-8. After devoting the bulk of its argument on this issue to that standard, the prosecution briefly addresses the materiality question, contending that the evidence was not material because "the undisclosed information was already known to the Defendant, cumulative of other evidence admitted at trial, and there is no reasonable probability that timely disclosure would have resulted in an acquittal." Answer Brief at 8. These arguments fail.

As noted above, there is no requirement that the defendant attempt to obtain the withheld evidence through other means. See Levin v. Katzenbach, 363 F.2d 287, 291 (1966)(in contrast to motion for new trial based upon newly discovered evidence, a "claim for relief based upon a breach of the prosecutor's duty of disclosure challenges the fairness, and therefore the validity, of the proceedings" and relief does not depend upon defense efforts to discover the evidence on its own). Equally important, there is no evidence beyond speculation that the defendant actually knew the withheld information. It is beyond contest that the

[1]United States v. Bagley, 473 U.S. 667 (1985).

defendant was unaware that LaToya Ray had given a statement, and was ignorant of its contents, until the prosecution informed defendant of the statement following trial. Nor is there any evidence that defendant had actual knowledge of the facts contained in the statement. For example, Ms. Ray during the statement described an incident early in the day of July 4, 2004 in which Sir Mario Owens had driven the Lincoln to a barbecue; Owens was accompanied at that time by Cashmere Jones and another woman named Ambrosia. Env. 2, exh. 1, p. 22. Although Ms. Ray indicated that the defendant also attended this barbecue, there is nothing in her statement to demonstrate that he did so simultaneously with Owens or that he knew that Owens and the others had gone in the Lincoln. Similarly, Ms. Ray described an incident later in the day in which she drove the Lincoln, along with Markeeta Ray, Ambrosia, Cashmere Jones and Kendra Williams. Id. at 24. Although Ms. Ray stated that she took the Lincoln with defendant's permission, nothing in the statement shows that the defendant was aware of the other persons in the vehicle.[2] In short, it requires a series of speculative assumptions to reach the conclusion that the defendant actually knew of the facts contained in the statement.

Nor, contrary to the prosecution's argument, is Ms. Ray's information merely cumulative of the testimony of Rose Asante. As shown in the opening

[2]It is, moreover, speculative to assume that the defendant would agree with Ms. Ray's assertion that he gave her permission to take the Lincoln.

brief, Ms. Asante's testimony concerning the use of the vehicle by other persons was impeached by statements she had allegedly made to police indicating that no one else had driven it. Opening Brief at 11-12. Moreover, the prosecution subjected Ms. Asante to extensive cross-examination concerning her alleged motive to fabricate evidence that others had used the car. Opening Brief at 9-11. In closing argument the prosecution emphasized these motives and inconsistent statements, arguing that Ms. Asante had fabricated her testimony in order to help her son; the prosecution termed such evidence "not very credible...." Opening Brief at 13. In light of this assault upon Ms. Asante's credibility, the suggestion that Ms. Ray's information would have been "merely cumulative" is startling. To the contrary, that additional testimony would have significantly rebutted the prosecution's extensive, and ultimately successful, impeachment of Ms. Asante's testimony by providing independent corroboration. In addition, Ms. Asante testified that the car had been used by her other sons, Maurice Ray, and LaToya Ray. To this testimony, LaToya Ray could have added that the vehicle had also been occupied by Sir Mario Owens, Ambrosia, Cashmere Jones, Markeeta Ray and Kendra Williams.

Finally, the prosecution is incorrect in its assertion that there is no reasonable probability of a different result. As shown in the opening brief, this standard does not require a demonstration that acquittal was likely based upon the

withheld evidence; rather, this standard is met when the withheld evidence undermines confidence in the outcome of the trial. Kyles, 514 U.S. at 434-35; Bagley, 473 U.S. at 682. As further demonstrated in the opening brief, no evidence connected the defendant to the weapon hidden in the door panel other than his presence in the vehicle. The production of additional evidence corroborating that others had occupied the vehicle, and had had an opportunity to place a weapon inside the door panel, could easily have created a reasonable doubt concerning defendant's knowledge of the weapon's presence. Indeed, this issue – the possibility that someone else may have placed the weapon in the door panel – was the only contested issue at trial The outcome of the trial, in light of the withheld evidence, is thus not worthy of confidence. See Opening Brief at 18-21 for more extensive discussion of this issue.

For the foregoing reasons, as well as those advanced in the opening brief, defendant respectfully requests that this court grant a new trial based upon the suppression of material evidence.

II. THE TRIAL COURT ERRED IN FINDING THAT THE SEARCH OF DEFENDANT'S VEHICLE WAS A VALID PROTECTIVE SEARCH.

A. Protective search

In response to defendant's argument on this issue, the prosecution speculates that the defendant "might" have broken free of his handcuffs, escaped from the

back of a patrol car, and gained access to a weapon, or that the police "might have changed their minds" and decided to reverse the arrest of defendant that had already taken place. Answer Brief at 16. In this regard, it is worth noting that the relevant authorities concerning a protective search of a vehicle require that any such search be supported by "specific and articulable facts" which reasonably cause an officer to believe that the suspect may gain immediate control of a weapon. Michigan v. Long, 463 U.S. 1032, 1049 (1983); People v. Litchfield, 918 P.2d 1099, 1104 (Colo. 1996). Where there are no such facts, a protective search is impermissible. See, e.g., United States v. Holmes, 376 F.3d 270, 279-80 (4th Cir. 2004)(where suspect handcuffed in back of patrol vehicle, it is only the fact that the suspect that was not under arrest, and therefore may later re-enter the vehicle, that may permit a protective search); Litchfield, 918 P.2d at 1105 (protective search of trunk not justified where defendant could not have gained access to this area). Here, the defendant was handcuffed, locked in the back of a patrol car, and under arrest; there are thus no specific and articulable facts, beyond the speculation offered by the prosecution, to suggest that the defendant could have gained immediate control of a weapon.[3]

[3]Under these facts, People v. Weston, 869 P.2d 1293 (Colo. 1994), cited by the prosecution, is inapposite. There, the suspects were removed from the vehicle, but were not handcuffed, placed in a patrol car, or arrested.

B. Search incident to arrest

Although the prosecution suggests that the search in this case may be justified as a search incident to arrest, it is far from clear that this rationale may be considered by this court in the absence of any reference to this doctrine in the trial court's ruling. It is true that in People v. Aarness, 150 P.3d 1271, 1277 (Colo. 2006), the court stated that it "has discretion to affirm the trial court's denial of [a] motion to suppress on different grounds than those relied upon by the trial court." However, in People v. Inman, 765 P.2d 577, 578 (Colo. 1988), the court held to the contrary: "Appellate review of a suppression ruling is *limited to the legal bases set forth in the district court's ruling*, and not necessarily the grounds alleged in the motion." (Emphasis added). Accord, People v. Gee, 33 P.3d 1252, 1257 (Colo. App. 2001). Neither Aarness, nor, to defendant's knowledge, any other case, has addressed this clear holding of Inman, and it remains good law. Defendant therefore suggests that this court does not have the authority to affirm the suppression ruling on the alternate grounds suggested by the prosecution, which were not referenced by the trial court. Alternatively, defendant requests that this court exercise its discretion not to do so, inasmuch as there is nothing in the trial court's ruling that would set forth the court's position on this issue so as to permit appellate review.

In the event that this court chooses to consider the doctrine of search incident to arrest, a review of applicable Supreme Court precedent provides no basis for permitting such a search in a case, such as this, where the defendant has been secured and cannot access the vehicle. The rationale for a search incident to arrest was first set forth in Chimel v. California, 395 U.S. 752 (1969). The Court in Chimel explained that a search incident to arrest was permitted for the purpose of preventing an arrestee from attaining access to evidence or weapons; based upon this purpose, the Court limited the permissible scope of such a search to the "arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Id. at 763.

In New York v. Belton, 453 U.S. 454 (1981), the Court examined the permissible scope of a search incident to arrest during the stop of a vehicle, setting forth a "bright line rule" permitting a search of the passenger compartment incident to arrest. In so doing, the Court explained that its holding "in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests." 453 U.S. at 460 n.3. Rather, the court simply found that the search of a passenger compartment is permissible because it is "generally, even if not inevitably" within the control of the arrestee. Id. at 460. In Belton, the Court did not address a situation in which an arrrestee

has been handcuffed and secured, as, in that case, the occupants of the vehicle had been removed but were neither handcuffed nor secured. Indeed, the Court in Belton took pains to distinguish the situation before it from the circumstances of United States v. Chadwick, 433 U.S. 1 (1977), in which the "federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest...." Belton, 453 U.S. at 462, quoting Chadwick, 433 U.S. at 15. Thus, far from approving a search incident to arrest where the arrestee has been secured, the Court in Belton specifically stated that there is no "arguably valid search incident to a lawful custodial arrest" in such a situation. 453 U.S. at 462.

The Court revisited the search incident to arrest doctrine in Thornton v. United States, 541 U.S. 615 (2004). Although the factual situation in that case involved circumstances in which the arrestee had been handcuffed and secured, the defendant did not raise this issue and the Court did not address it. Rather, the sole issue on certiorari in that case was whether the Belton rule applied to situations in which the arrestee was a recent occupant of a vehicle, but was not inside the vehicle at the time of the contact. 541 U.S. at 624 n.4. The court therefore specifically declined to address the issue of whether the arrestee had to be within "reaching distance" of the vehicle in order for the rule to apply. Id. at 622 n.2.

Because the rationale for a search incident to arrest has always been, and remains, preventing an arrestee from obtaining weapons or evidence, numerous courts have concluded that the doctrine does not apply where the arrestee is handcuffed and secured, or has been removed from the scene. United States v. Edwards, 242 F.3d 928, 938 (10th Cir. 2001)(where defendant was handcuffed and in the back of a patrol car, search could not be justified as incident to arrest as "there was no reason to fear Edwards could retrieve a weapon or destroy evidence in the car, as nothing within the car was within Edwards' 'grab space' or immediate control."); United States v. Lugo, 978 F.2d 631, 635 (10th Cir. 1992)(where defendant had been removed from the scene "the rationale for a search incident to arrest had evaporated."); State v. Gant, 216 Ariz. 1, 162 P.3d 640, 646 (2007)(based upon review of applicable Supreme Court precedent, court concludes that there is no justification for search incident to arrest after occupants have been handcuffed and placed in patrol cars); People v. Wither, 321 Ill. App.3d 382, 748 N.E.2d 336, 338 (2001)(where defendant secured in patrol car, search cannot be justified as incident to arrest); State v. Hernandez, 410 So.2d 1381, 1385 (La. 1982)("[T]he Belton rule can have no application after an arrestee has been handcuffed and removed from the scene, foreclosing even the slightest possibility that he could reach for an article within the vehicle."); Ferrell v. State, 641 So.2d 831, 833 (Miss. 1995)(search of vehicle not valid as incident to arrest where

arrestee was handcuffed and in the back of a patrol car); State v. Greenwald, 109 Nev. 808, 858 P.2d 36, 37 (1993)(search cannot be justified as incident to arrest where arrestee secured in patrol car). As recognized in these cases, the extension of the Belton rule to any situation in which the arrestee has been handcuffed and secured away from the vehicle not only finds no justification in Supreme Court precedent, but is contrary to the logic and rationale of such cases. See Thornton, 541 U.S. at 625 (application of Belton rule to a situation in which arrestee is handcuffed and secured in patrol car "stretches it beyond its breaking point....")(Scalia, J., concurring).

Although some Colorado cases have approved of a search incident to arrest in circumstances superficially similar to the present case, such cases made no attempt to examine the relevant Supreme Court precedent or the rationale for the search incident to arrest doctrine. More importantly, such cases are distinguishable from the present facts. In People v. Savedra, 907 P.2d 596 (Colo. 1995), for example, the driver of a vehicle was arrested and placed in a patrol car; however, a passenger of the vehicle remained at liberty during the entire encounter and subsequent search. In holding that the search incident to arrest was valid, the court relied upon the fact that the passenger remained free: "The officer was outnumbered by two men as well. [Footnote omitted]. Given that Savedra's passenger remained at liberty and Savedra's wife also had access to the truck, the

police officer had reason to be concerned that the passenger might retrieve a weapon from the vehicle or that either could destroy or remove potential evidence in the truck." Id. at 600. Similarly, in People v. Daverin, 967 P.2d 629 (Colo. 1998), the police arrested the passenger of a vehicle, handcuffed him, and placed him in a patrol car; the driver, however, remained at liberty throughout the encounter. With little discussion or analysis, the court held that a search incident to arrest was justified under these circumstances. Id. at 632.

Here, in contrast to the foregoing cases, the defendant was the sole occupant of the vehicle. Once he was arrested, handcuffed, and secured in the patrol car, there was no conceivable danger that anyone other than the police would have access to the vehicle. For this reason, Savedra and Daverin are distinguishable. Indeed, approval of a search incident to arrest under the specific circumstances of this case would run afoul of the rationale for such a search repeatedly reaffirmed in the precedents of the United States Supreme Court.

For these reasons, even if this court chooses to address the issue of search incident to arrest, such doctrine cannot justify the search in this case.

C. Removal of the door panel

Pursuant to the authorities cited in the opening brief, a "passenger compartment" search under either Belton or Long may not extend to dismantling vehicle parts, including removal of door panels. Opening Brief at 27-28. The

prosecution attempts to distinguish the present case from these authorities on the ground that the officer did not use tools or fully remove the door panel. Answer Brief at 19. There is no such requirement. In United States v. Ornelas-Ledesma, 16 F.3d 714, 719 (7th Cir. 1994), judgment vacated on other grounds sub nom. Ornelas v. United States, 517 U.S. 116 (1996), for example, the officer "pried...open" the door panel; there is no indication in the opinion that he used tools or fully removed the panel. 16 F.3d at 716. The court nonetheless held that this search was not justified by Long. 16 F.3d at 719.

Moreover, the purportedly contradictory cases cited by the prosecution are inapposite. For example, the prosecution cites United States v. Willis, 37 F.3d 313 (7th Cir. 1994). There, an officer, acting on information indicating that drug dealers were hiding narcotics inside removable dashboard radios, removed such a radio from the dashboard as part of a search incident to arrest. Whether this search fit within the permissible scope of a Belton search was neither raised by the defendant nor addressed by the court: "Willis does not take issue with the district court's determination that the radio casing was properly considered a 'container' searchable incident to arrest. Instead, Willis contends only that, at the time of his arrest, he was not an 'occupant' of the vehicle and that [the officer's] search of the radio was not 'contemporaneous' with the arrest." 37 F.3d at 317. Thus, Willis

may not be cited, as the prosecution does, for the proposition that the radio search was within the proper scope of a Belton search.

The prosecution also cites United States v. Veras, 51 F.3d 1365 (7th Cir. 1995). There, the officers observed the defendant and a companion placing objects in the back seat of a vehicle. The officers later stopped the vehicle, discovering a revolver on the floor of the car. The officers then opened a built-in compartment located on the deck between the back seat and rear window, discovering cocaine. The court held that this search was permissible incident to arrest. In so doing, the court cited to Willis, without noting that Willis never actually addressed this issue (and without acknowledging the relevant Seventh Circuit precedent of Ornelas-Ledesma). Veras, however, is clearly distinguishable from the present case on at least two grounds: first, the officers there specifically observed the defendant loading items into the area that was later searched, and, second, the rear seat compartment, unlike the door panel in the present case, was designed to be opened by the occupants of the vehicle.

Finally, the prosecution cites to United States v. Barnes, 374 F.3d 601 (8th Cir. 2004), in which the court approved a search in which the officer separated a rubber window seal with his fingers and shone a flashlight into the door panel. That search, however, unlike the present case, did not involve the dismantling of any part of the vehicle.

For the foregoing reasons, and those stated in the opening brief, the search herein exceeded the permissible scope of either a Long or Belton search.

CONCLUSION

For the foregoing reasons, as well as those stated in the opening brief, defendant respectfully requests that this court reverse the judgments of conviction and remand for a new trial.

DATED: February 8, 2008

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the above and foregoing **REPLY BRIEF** by placing a true and correct copy of same in the United States mail, postage prepaid, this 8th day of February, 2008, addressed to the following:

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