STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
July 22, 1997

No. 189189
Recorder's Court
LC No. 91-005944

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY ALLEN LEWIS,

Defendant-Appellant.

No. 190091
Recorder's Court
LC No. 91-005944

Before: Taylor, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendants appeal as of right from orders denying their motions for new trial following this Court's remand of their cases to the trial court for a hearing pursuant to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). *People v Lewis*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 1995 (Docket Nos. 151563 [Lewis], 151564 [Williams]). We affirm.

Both defendants were charged with two counts of armed robbery, MCL 750.529; MSA 28.797, one count of assault with intent to commit robbery while armed, MCL 750.89; MSA 28.284, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Williams was convicted as charged following a bench trial and subsequently pleaded guilty

of being a third-offense habitual offender, MCL 769.11; MSA 28.1083. He was sentenced to fifteen to twenty-five years' imprisonment as an habitual offender, to be served consecutively to his two-year sentence for the felony-firearm conviction. Lewis was acquitted of the felony-firearm charge, but was convicted of the armed robbery counts and the assault count. He, too, pleaded guilty of being a third-offense habitual offender and was sentenced to fifteen to twenty-five years' imprisonment. Both defendants appealed their convictions and sentences. This Court affirmed in part, but remanded for a hearing on whether the prosecution failed to disclose potentially exculpatory information. The trial court conducted the hearing and concluded no exculpatory evidence was withheld.

I

Williams first challenges the trial court's finding that no *Brady* violation occurred. We review the trial court's decision on whether to grant a new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). We review the trial court's findings of fact for clear error. *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995). A decision is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made. *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993).

A defendant has a due process right to be given evidence in the prosecution's possession if the evidence is favorable to the defendant and material to guilt or punishment. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), discussing *Brady*, *supra* at 87. Regardless of whether a defendant requests the information, favorable evidence must be turned over "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v Whitley*, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490, 505 (1995). "The concept of 'suppression' implies that the Government has information in its possession of which the defendant lacks knowledge and which the defendant would benefit from knowing." *United States v Natale*, 526 F2d 1160, 1170 (CA 2, 1975). The defendant has the burden of showing that the withheld evidence was exculpatory. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

To the extent Williams challenges the government's failure to inform him of the statement of one victim that there was an additional witness to the incident, that statement was made during the preliminary examination. Both Williams and his attorney were present during this testimony, so the possible existence of another witness was not information that Williams did not know. There was no suppression of this evidence.

Considering Williams' argument as one challenging the failure of the government to disclose the results of its investigation into the existence of this possible witness, we are satisfied that the evidence was neither material nor exculpatory. The testimony at the *Brady* hearing established that the police and the prosecution reviewed the reports of the incident and did not discover the names of any witnesses other than the victims. There was no record of any statement being taken from this person, and the follow-up investigation by the officer in charge did not reveal the existence of this person. That no other witnesses had been found, and no other statements had been taken, is not evidence that is likely to have

changed the result of the proceeding. The trial court did not abuse its discretion in holding that no *Brady* violation occurred.

Williams also challenges as clearly erroneous the trial court's factual finding that the government did not hide a witness or suppress information about how to locate that witness. We disagree. The trial prosecutor testified about his efforts to determine if the witness existed, and the officer in charge described his investigation, including the lack of any evidence that this person existed. The trial court had the opportunity to observe the witnesses and evaluate whether their testimony was credible. That court believed the testimony of the government witnesses, and this Court is not to resolve credibility determinations anew. MCR 2.613(C); *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). The testimony presented at the hearing provided sufficient support for the trial court's factual findings such that we are not left with a definite and firm conviction that a mistake was made. *Id*.

Williams' argument focuses on the lack of due diligence exercised by the police in attempting to locate the alleged witness. To the extent that this argument is an attempt to reargue the diligence of the government in locating a *res gestae* witness, this Court previously rejected that claim because Williams never asked for assistance in locating the witness. Furthermore, *Brady* does not involve the obligation of the government to locate potentially exculpatory information, but only the duty of the government to disclose information that it possesses. *People v Canter*, 197 Mich App 550, 568; 496 NW2d 336 (1992). Considering defendant's argument as challenging the government's failure "to preserve evidentiary material that might be useful to a criminal defendant," *Arizona v Youngblood*, 488 US 51, 52; 109 S Ct 333, 102 L Ed 2d 281, (1988), we note that such an argument requires proof of bad faith on the part of the government in destroying the evidence. *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989). Defendant bears the burden of showing that the police acted in bad faith. *Johnson, supra* at 365. Williams has not demonstrated that the government acted in bad faith, and the evidence in the record suggests the opposite. Thus, to the extent that Williams' argument can be construed as arguing a violation of *Youngblood* and is not outside the scope of the remand order, it too fails.

Finally, Williams claims to have located the missing witness. Because this alleged witness did not testify at the *Brady* hearing, nor was he even mentioned, any mention of this person is an improper attempt to expand the record on appeal. MCR 7.210(A)(1). We also note that the trial court did not believe this alleged missing witness' testimony in a subsequent hearing on a motion for relief from judgment, and this Court rejected Williams' application for leave to appeal that ruling for lack of merit in the grounds presented.

II

Lewis argues that he was deprived the right to counsel at the *Brady* hearing after his counsel withdrew and the trial court appointed Williams' attorney, Alfred Millstein, to represent both defendants for purposes of the hearing only. Lewis argues that a continuance should have been granted rather than proceeding with an attorney appointed less than an hour before the start of the hearing. Lewis argues that because his right to counsel was denied, he need not demonstrate prejudice.

Lewis did not object to the denial of a continuance, nor did he object to the substitution of counsel. Because the right to counsel is of constitutional dimension, however, Lewis' claim that

he was denied his right to counsel may be reviewed by this Court. *People v Heim*, 206 Mich App 439, 441; 522 NW2d 675 (1994). To the extent this Court reviews Lewis' argument as one challenging the effectiveness of counsel, his failure to object limits the Court to review of errors apparent from the record below. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989), remanded for resentencing 439 Mich 896 (1991).

Whether a defendant was deprived of the right to counsel is a question of law and is reviewed de novo. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). If a defendant establishes a denial of the right to counsel, such error can never be considered harmless. *People v Minor*, 213 Mich App 682, 687; 541 NW2d 576 (1995). To demonstrate ineffective assistance of counsel, a defendant must show (1) that his attorney's performance was deficient, (2) that the deficient performance prejudiced the defense, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

The Supreme Court's recent decision in *People v Mitchell*, 454 Mich 145; ___ NW2d ___ (1997), discusses the distinction between a claim of a denial of counsel and a claim of ineffective assistance of counsel. The Court recognized, pursuant to *United States v Cronic*, 466 US 648, 658-659; 104 S Ct 2039; 80 L Ed 2d 657 (1984), that cases challenging a defendant's right to counsel under the Sixth Amendment "present a continuum." *Mitchell, supra* at 153. Prejudice is presumed where the state fails to provide any counsel, where defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," and where the court or the state have directly interfered with the attorney-client relationship such that defense counsel was prevented from providing assistance. *Id*. at 154-155. A defendant also need not demonstrate prejudice in the rare case where the surrounding circumstances make it so unlikely that any lawyer could provide effective assistance that it is inappropriate to look at the attorney's actual conduct. *Id*. at 155. If the circumstances are not of such magnitude, counsel's actual performance is to be reviewed and prejudice must be shown. *Id*. at 155.

Like the defendant in *Mitchell*, Lewis has not demonstrated facts sufficiently "egregious" to justify the presumption that no attorney could possibly provide him adequate representation. *Mitchell, supra* at 157, n 12. Millstein had represented Williams on his first appeal, and therefore was presumably familiar with the facts of the case. Lewis concedes that Millstein's performance was competent, and it is not unreasonable to expect an attorney in Millstein's position to be able to so perform. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). The nature of the motion did not present unique challenges for each defendant; both men would benefit equally from a finding that exculpatory evidence had been withheld. Additionally, the hearing was continued from June 23, 1995, until September 12, 1995, and Lewis does not claim he was prevented from consulting with Millstein during this 2 ½month period. During this time, Lewis was able to mention any concerns he might have had about the proper questioning of any witness.

Lewis' claim that he was unable to discuss his concerns with Millstein is also contrary to the record of the *Brady* hearing. On the first day of the hearing, Millstein stated on the record that both of his clients were making requests of him regarding which witnesses needed to be presented. When the

trial court asked Millstein if one witness' testimony could be waived, Millstein responded, "Both defendants said no. They specifically made a request for [this witness], Your Honor." Lewis' claim that he could not consult with his attorney is therefore not supported by the record.

Likewise, Lewis' claim that the trial court's refusal to grant a continuance establishes a denial of the right to counsel such that prejudice need not be shown is not supported by the facts or the case law. In *Mitchell, supra* at 158-159, the Court discussed *Morris v Slappy*, 461 US 1; 103 S Ct 1610; 75 L Ed 2d 610 (1993), in which the defendant claimed that the trial court should have granted a continuance to allow his originally assigned counsel to recover from surgery and represent the defendant. The United States Supreme Court held that

> [n]ot every restriction on counsel's . . . opportunity to investigate . . . or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. . . . [O]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel. [461 US 11-12, quoted in *Mitchell, supra*, slip op at 14.]

As in *Morris*, the trial court's refusal to grant a continuance was not "an unreasoning and arbitrary 'insistence upon expeditiousness.' " The trial court asked Millstein to consult both defendants about joint representation, and the trial court asked each defendant on the record if he consented to Millstein representing both defendants, with both defendants approving of the representation. The trial court also stated on the record that it did not see any potential conflict of interest in Millstein representing both defendants. The trial court's effort to not continue the hearing was based on a rational desire to hold the hearing when witnesses were available and in light of Millstein's familiarity with the case and the identical interests of both defendants. The circumstances of Millstein's representation of Lewis do not justify a conclusion that he was denied his right to counsel.

Lewis appears to concede that Millstein's actual representation was competent, and, after reviewing the record of the hearing, we agree. Millstein appropriately questioned witnesses and introduced the documentation that established the prosecution's knowledge of the missing potential witness. Millstein's performance was not below an objective standard of reasonableness, nor can Lewis demonstrate any prejudice from having had Millstein represent him at the hearing. Accordingly, we find that Lewis was not deprived of the right to counsel or of the effective assistance of counsel.

Affirmed as to both defendants.

/s/ Clifford W. Taylor
/s/ Richard Allen Griffin
/s/ Henry William Saad