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Touro Law Review

Volume 12
Number 3 *New York State constitutional
Decisions: 1995 Compilation*

Article 12

1996

Due Process

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Recommended Citation

(1996) "Due Process," *Touro Law Review*. Vol. 12: No. 3, Article 12.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol12/iss3/12>

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N.Y. CONST. art. I, § 6:

No person shall be deprived of life, liberty or property without due process of law.

U.S. CONST. amend. V:

No person shall . . . be deprived of life, liberty, or property, without due process of law

U.S. CONST. amend. XIV, § 1:

No state shall . . . deprive any person of life, liberty, or property, without due process of law

COURT OF APPEALS

People v. Wright¹
(decided October 31, 1995)

Defendant Vicki-Crystal Wright, convicted of second-degree assault, alleged that her constitutional right to due process under both the Federal² and New York State Constitutions³ was violated when the state did not apprise her of the fact that the victim of the assault was a police informant.⁴ The defendant alleged that this type of evidence was *Brady*⁵ material and,

1. 86 N.Y.2d 591, 658 N.E.2d 1009, 635 N.Y.S.2d 136 (1995).

2. U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law” *Id.*

3. N.Y. CONST. art. I, § 6. This provision provides in pertinent part: “No person shall be deprived of life, liberty or property without due process of law.” *Id.*

4. *Wright*, 86 N.Y.2d at 593-94, 658 N.E.2d at 1009, 635 N.Y.S.2d at 136.

5. *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner (Brady) and his companion (Boblit) were found guilty of first degree murder in separate trials. *Id.* at 84. During Brady’s trial, he testified to having participated in the murder, but not to actually killing the victim himself. *Id.* Prior to trial, Brady

therefore, a new trial was required.⁶ The New York Court of Appeals held that the information withheld from the defendant would have been exculpatory under the circumstances of this case, and based on Criminal Procedure Law section 440.10 [hereinafter "CPL"],⁷ the defendant's conviction should be reversed.⁸ The court stated that "Washington's history as a police informant was both favorable and material to the defense, and the People's failure to disclose this information to the defense violated defendant's constitutional right to due process."⁹

had asked the prosecutor to allow him to examine all of Boblit's extrajudicial statements. *Id.* The prosecutor turned over all of the statements, except for one where Boblit admitted to killing the victim himself. *Id.* The Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. In addition, the court stated that "[a] prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant." *Id.* at 86-87.

6. *Wright*, 86 N.Y.2d at 595, 658 N.E.2d at 1010, 635 N.Y.S.2d at 137.

7. N.Y. CRIM. PROC. LAW § 440.10(1)(g), (h) (McKinney 1992).
Section 440.10 states in pertinent part:

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

....

- (g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or
- (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

Id.

8. *Wright*, 86 N.Y.2d at 598, 658 N.E.2d at 1012, 635 N.Y.S.2d at 139.

9. *Id.*

Defendant and the victim, Washington, met at a bar, and after speaking and having a few drinks, they decided to go back to defendant's apartment.¹⁰ However, the events which followed were contested.

Washington testified as follows: While they were at the bar, he and defendant were "hugging, kissing and holding hands."¹¹ Once they arrived at the defendant's apartment, they both went into the bedroom where Washington undressed in the defendant's presence, placing his clothes on the floor by the bed.¹² He sat on the bed while defendant exited the bedroom.¹³ When she returned, she was wielding a knife which she used to stab him in the penis and chest, while shouting at him.¹⁴ After this confrontation, Washington testified that he got dressed, threw a flower pot at the bedroom door and then exited the apartment with a radio.¹⁵ Upon hailing a cab, he requested that the driver take him home; however, the driver proceeded to a local hospital, despite Washington's objections.¹⁶

The defendant, however, presented a completely different version of what had transpired at the apartment. She testified that when she was ready to leave the bar in which she had met Washington, she discovered that her coat was missing.¹⁷ Washington told her that his friend had the coat and that he would call him, but not from the bar.¹⁸ The defendant, allowing Washington to come to her apartment, told him to use the phone in the living room while she went in the bedroom to hide her pocketbook.¹⁹ While she was in the bedroom, Washington came into the room naked, and told defendant "I want to * * * you."²⁰ Afraid that she was about to be raped, she grabbed a knife that

10. *Id.* at 594, 658 N.E.2d at 1009, 635 N.Y.S.2d at 136.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 594, 658 N.E.2d at 1009-10, 635 N.Y.S.2d at 136-37.

17. *Id.* at 594, 658 N.E.2d at 1010, 635 N.Y.S.2d at 137.

18. *Id.*

19. *Id.*

20. *Id.*

was lying on the dresser and stabbed Washington.²¹ She then forced him out of the apartment and dialed 911.²²

In his police report, Officer Douglas Walczak stated that he found a hat, shoe and a pair of boxer shorts outside of defendant's bedroom.²³ Contrary to this report, he testified that he found the shoe and shorts in the bedroom and the hat at the doorway of the room.²⁴ There was also a discrepancy between Detective Sean Keane's report and his testimony at trial. In his report, he stated that Washington had told him that he was attacked while on his way to the bedroom, while not wearing any clothes.²⁵ However, at trial, Detective Keane testified that he was not completely sure if Washington had made that statement to him or not.²⁶ During their deliberation, the jury requested a read back of Officer Walczak's testimony regarding the place where Washington's clothes were found. Thereafter, the jury convicted defendant of second-degree assault.²⁷

Defendant subsequently filed a motion under CPL section 440.10 vacate the judgment of conviction.²⁸ After the conviction, the defendant discovered that Washington was an informant with the Albany Police Department.²⁹ She argued that a new trial was necessary to rectify the fact that new evidence was discovered and that *Brady* material was not fully turned over to the defense.³⁰ The state did not dispute the fact that Washington was an informant, however, the state maintained that he was not

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 594, 658 N.E.2d at 1010, 635 N.Y.S.2d at 137.

26. *Id.* at 594-95, 658 N.E.2d at 1010, 635 N.Y.S.2d at 137.

27. *Id.* at 595, 658 N.E.2d at 1010, 635 N.Y.S.2d at 137.

28. *Id.*

29. *Id.*

30. *Id.* See *United States v. Bagley*, 473 U.S. 667, 677 (1985) (stating that "when the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the general rule of *Brady*"); *Giglio v. United States*, 405 U.S. 150, 153 (1972) (stating that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice").

acting in that capacity in this case.³¹ In addition, the state tried to justify its action by stating that the trial prosecutor was not aware that Washington was a police informant.³²

The lower court denied defendant's motion on the ground that the discovery with regard to Washington's status as an informant was not considered new evidence.³³ The appellate division affirmed the judgment of the conviction, as well as the denial of the section 440.10 motion.³⁴ Neither the lower court nor the appellate division discussed the issue of whether Washington's informant status constituted *Brady* material.³⁵ However, the New York Court of Appeals determined that Washington's informant status was *Brady* material and, therefore, reversed the defendant's conviction.³⁶

31. *Wright*, 86 N.Y.2d at 595, 658 N.E.2d at 1010, 635 N.Y.S.2d at 137. See *People v. Ciaccio*, 47 N.Y.2d 431, 438, 391 N.E.2d 1347, 1350, 418 N.Y.S.2d 371, 374 (1979) (holding that by not alleging the untruthfulness of facts in issue, the people impliedly conceded them); *People v. Gruden*, 42 N.Y.2d 214, 216, 366 N.E.2d 794, 796, 397 N.Y.S.2d 704, 706 (1977) (stating that "what is not disputed is deemed to be conceded").

32. *Wright*, 86 N.Y.2d at 595, 658 N.E.2d at 1010, 635 N.Y.S.2d at 137.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 596, 658 N.E.2d at 1010, 635 N.Y.S.2d at 137. See *Gruden*, 42 N.Y.2d at 215, 366 N.E.2d at 795, 397 N.Y.S.2d at 705. In *Gruden*, the People claimed that error was committed when an indictment was dismissed without a hearing, even though that the facts were not expressly conceded. *Id.* The *Gruden* court held that a motion to dismiss can be granted unless it is shown that there is a question of fact to be resolved. *Id.* at 217, 366 N.E.2d at 797, 397 N.Y.S.2d at 706. See also N.Y. CRIM. PROC. LAW § 440.30(3) (McKinney 1992). Section 440.30(3) states in pertinent part:

Upon considering the merits of the motion, the court must grant it without conducting a hearing and vacate the judgment or set aside the sentence, as the case may be if:

- a) The moving papers allege a ground constituting legal basis for the motion; and
- b) Such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations thereof; and
- (c) the sworn allegation of fact essential to support the motion are . . . conceded by the people to be true

Id.

The United States Supreme Court, in *Brady v. Maryland*,³⁷ set forth the rule that the prosecution has a duty to give to the defense all material evidence that is favorable to the accused and goes toward proving guilt and/or punishment.³⁸ Citing *Brady*, the court, in *Wright*, noted that for years, New York has held that it is the prosecutor's duty to disclose exculpatory information and, if this is not done, there is a violation of defendant's constitutional right to due process.³⁹

The first issue that had to be addressed by the court was whether the evidence came within the scope of the *Brady* rule.⁴⁰ Addressing this issue, the New York Court of Appeals reasoned that the fact that Washington was an informant for the police would have been favorable evidence for the defense, because it would have explained why and how the testimony at trial was so different than what had been written in the police reports on the date of the incident.⁴¹ The police officers refuted their own reports written at the scene; Walczak stated at trial that the articles of clothing were found in the bedroom, and not in the living room as he first reported, and Keane stated he could not remember if Washington actually made the statements that Keane reported he made on the night of the incident.⁴² In addition, the information that Washington was an informant would have provided an explanation for the motive of the police in disbelieving and arresting the defendant, rather than Washington,

37. 373 U.S. 83 (1963).

38. *Id.* at 87.

39. *Wright*, 86 N.Y.2d at 696, 658 N.E.2d at 1010, 635 N.Y.S.2d at 137 (citing *Brady*, 373 U.S. at 87). See *People v. Savvides*, 1 N.Y.2d 554, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956). In *Savvides*, the state's witness lied about the lenient treatment he would be given if he testified against the defendant. *Id.* at 556, 136 N.E.2d at 854, 154 N.Y.S.2d at 886. The *Savvides* court held that it is of no consequence whether the prosecutor's behavior was intentionally devious or prejudicial; what matters is that the impact was the same - in that it prevented a fair trial. *Id.* at 557, 136 N.E.2d at 855, 154 N.Y.S.2d at 887.

40. *Wright*, 86 N.Y.2d. at 595, 658 N.E.2d at 1011, 635 N.Y.S.2d at 138.

41. *Id.* at 596, 658 N.E.2d at 1011, 635 N.Y.S.2d at 138.

42. *Id.*

even though the defendant was the one who made the 911 call immediately after the incident.⁴³ Therefore, the court held that Washington's status as a police informant was *Brady* material.⁴⁴

The next issue addressed by the court involved the requirements for reversal. The evidence must not only be proved to be favorable to the defendant, but it must also be material.⁴⁵ The court in *Wright* discussed a test for materiality known as the "reasonable possibility" test described by the New York Court of Appeals in *People v. Villardi*.⁴⁶ The defendant in *Wright* claimed that she made a specific request when she asked the prosecution prior to the trial about "any deals, promises or agreements entered into between the People or any agent thereof and any prosecution witness."⁴⁷ The reasonable possibility test states that if a specific discovery request is made by the defense for information the defense deems important, the evidence is material if there is a "reasonable possibility" that the prosecution's failure to comply with the request for an exculpatory report contributed to the verdict.⁴⁸ The defendant contended that her specific request triggered the "reasonable possibility" test.⁴⁹ However, the *Wright* court reasoned that even if the request did not invoke the reasonable possibility test, the evidence was material nonetheless because, had it been given, the result of the proceedings would have been different.⁵⁰

43. *Id.*

44. *Id.*

45. *Id.*

46. 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990).

47. *Wright*, 86 N.Y.2d at 596, 658 N.E.2d at 1011, 635 N.Y.S.2d at 138.

48. *Villardi*, 76 N.Y.2d at 77, 555 N.E.2d at 920, 556 N.Y.S.2d at 523.

49. *Wright*, 86 N.Y.2d at 596, 658 N.E.2d at 1011, 635 N.Y.S.2d at 138.

50. *Id.* at 597, 658 N.E.2d at 1011, 635 N.Y.S.2d at 138. *See People v. Chin*, 67 N.Y.2d 22, 490 N.E.2d 505, 499 N.Y.S.2d 638 (1986). In *Chin*, the defendant claimed that testimony given by a witness would have been exculpatory and that it should have been revealed prior to trial. *Id.* at 33, 490 N.E.2d at 514, 499 N.Y.S.2d at 647. The *Chin* court held that if the information was disclosed prior to trial, it would not have been material because it would not have caused the proceeding to be different. *Id.* *See also* *People v. Smith*, 63 N.Y.2d 41, 67, 468 N.E.2d 879, 891, 479 N.Y.S.2d 706, 718 (holding that when the defense makes either a general request or no

Applying the material evidence test to the case at bar, the court discussed the importance of Keane's and Walczak's changed testimony. A critical issue in this case was whether Washington's clothes were found in the bedroom, lending credence to his claim that he was attacked, or whether his clothes were found outside the bedroom, which would attest to the veracity of the defendant's testimony that she was protecting herself against a possible rape.⁵¹ If the defendant knew Washington was an informant, she could have offered the jury a possible explanation as to why the policemen changed their testimony.⁵² Another argument that could have supported the defense's contentions involved Washington's reluctance to go to the hospital, which could have been evidence of "his consciousness of guilt [that might] have undermined his credibility."⁵³ Instead, the jury heard the explanation that "because of his criminal record, Washington did not expect justice from the system."⁵⁴ In addition, the court stated that "[h]ad the jury been aware that Washington had a relationship with the local police, his efforts to circumvent police discovery might have appeared even more suspicious."⁵⁵

In addition, the court reasoned that the scope of *Brady* goes beyond the knowledge of only one prosecutor.⁵⁶ Although the state argued that the district attorney involved in the trial had no personal knowledge about Washington being an informant, the court stated that this fact was unavailing.⁵⁷ Reasoning further, the court stated "the 'individual prosecutor has a duty to learn any favorable evidence known to the others acting on the

request at all, failure to turn over exculpatory evidence would violate due process if the "omitted evidence creates a reasonable doubt which did not otherwise exist"), *cert. denied*, 469 U.S. 1227 (1984).

51. *Wright*, 86 N.Y.2d at 597, 658 N.E.2d at 1011, 635 N.Y.S.2d at 138.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 598, 658 N.E.2d at 1012, 635 N.Y.S.2d at 139.

56. *Id.*

57. *Id.*

government's behalf in the case, including the police."⁵⁸ As a result, the government could not be absolved of their duty to turn over *Brady* information that could be exculpatory merely because the trial attorney was not aware of its existence.⁵⁹

In conclusion, the defendant's federal and New York State constitutional rights to due process were violated when she was not informed that the victim was a police informant.⁶⁰ Once the elements set forth by the Supreme Court in the *Brady* case are fulfilled, the Due Process Clauses under both the Federal and State Constitutions are activated.⁶¹ For many years prior to the *Brady* decision, New York has required the prosecutor to disclose exculpatory evidence.⁶² Consequently, non-compliance will trigger the state's due process clause.⁶³ In conclusion, both federal and state law employ the rule in *Brady* as a catalyst to invoke the Due Process Clause.

58. *Id.* (citing *Kyles v. Whitley*, 115 S. Ct. 1555, 1567 (1995)).

59. *Wright*, 86 N.Y.2d at 598, 658 N.E.2d at 1012, 635 N.Y.S.2d at 139. See *People v. Simmons*, 36 N.Y.2d 126, 325 N.E.2d 139, 365 N.Y.S.2d 812 (1975). In a case involving robbery, the principal witness gave conflicting testimony as to the identification of the intruders who entered his apartment on two separate occasions. *Id.* at 129, 325 N.E.2d at 141, 365 N.Y.S.2d at 814. The witness' first statement was made at the grand jury hearing, but the minutes of this proceeding were not turned over to the defense. *Id.* The *Simmons* court held that "negligent, as well as deliberate, nondisclosure may deny due process. Good faith, therefore, may not excuse even a negligent failure to disclose unrequested exculpatory evidence where that evidence is highly material to the defense." *Id.* at 132, 325 N.E.2d at 143, 365 N.Y.S.2d at 816.

60. *Wright*, 86 N.Y.2d at 598, 658 N.E.2d at 1012, 635 N.Y.S.2d at 139.

61. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

62. *Wright*, 86 N.Y.2d at 595, 658 N.E.2d at 1010, 635 N.Y.S.2d at 137.

63. *Id.*