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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON WOODY RACKLIFFE,

Defendant and Appellant.

F062028

(Super. Ct. No. F09100297)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Rosendo Peña, Jr., Judge.

C. Wallace Coppock, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and John W. Powell, Deputy Attorneys General, for Plaintiff and Respondent.

* Before Hill, P. J., Kane, J. and Poochigian, J.

Appellant Brandon Woody Rackliffe appeals a judgment following his no contest plea to battery on a nonprisoner by a prisoner (Pen. Code,¹ § 4501.5) after the trial court denied his motion to dismiss the case pursuant to *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). Appellant contends: (1) the trial court erred by denying the motion; and (2) he received ineffective assistance of counsel. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

On January 1, 2008, Jose Cervantes and Richard Zuniga, correctional officers at Pleasant Valley State Prison, were collecting meal trays from prison cells, when Officer Cervantes noticed the door to cell 119 was not completely shut. He then saw that one of the inmates had put his fingers in the door to prevent it from closing.³

When Officer Cervantes returned to look at cell 119, the door suddenly opened and an inmate punched him in the face. After Officer Cervantes was punched in the face, Officer Zuniga saw appellant step out of the cell, “approaching Cervantes in an aggressive manner with his fist closed.”

As appellant started coming towards him, Officer Cervantes “grabbed [appellant] around his neck, swung him around, and hit him face first into a cell door.” Officer Zuniga activated his personal alarm and started ordering appellant to get down.

Appellant turned around and swung at Officer Cervantes two or three more times. Officer Cervantes “deflected [appellant’s] swings” and “grabbed him from underneath his arms and held him in a bear hug.”

¹ Further statutory references are to the Penal Code unless otherwise specified.

² The facts are taken from a preliminary hearing held on April 27, 2009.

³ Officer Cervantes testified that the two inmates who occupied cell 119 were appellant and “inmate Clarke.”

While Officer Cervantes was holding onto appellant, Officer Zuniga jumped on appellant's back. Appellant struck Officer Zuniga in the ribs with his elbows. Appellant and Officer Zuniga both fell over on top of Officer Cervantes. Officer Cervantes' head hit the ground and he momentarily lost consciousness.

As a result of the incident, Officer Cervantes suffered a bloody and swollen nose, cuts to the inside of his mouth, and a partial black eye. Officer Zuniga sustained some bruised ribs.

During cross-examination, Officer Zuniga acknowledged there were inmates in the vicinity who were close enough to observe there was an incident occurring, but he could not recall any of their names. In his incident report, he listed only himself, appellant, and Officer Cervantes as potential witnesses.

An information was filed on May 1, 2009, charging appellant with two counts of battery on a nonprisoner by a prisoner (§ 4501.5.) The information also alleged that appellant had six prior convictions that qualified as strikes under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

On October 25, 2010, appellant filed a motion to dismiss the case pursuant to *Brady, supra*, 373 U.S. 83. The motion was brought on the ground that, in making their written reports, the officers failed to ascertain the identities of inmates who potentially witnessed the incident on January 1, 2008, and thus violated California Code of Regulations, title 15, section 3268.1.⁴

In support of the *Brady* motion, defense counsel filed a declaration stating, "I am informed or believe that during this incident, there were numerous inmates in nearby cells

⁴ At the time of the incident, the regulation provided: "An employee who uses or observes non-deadly force greater than verbal persuasion to overcome resistance or gain compliance with an order shall document that fact. *The document shall identify any witnesses to the incident and describe the circumstances giving rise to the use of force, and the nature and extent of the force used. The employee shall provide the document to his or her immediate supervisor.*" (Former Cal. Code Regs., tit. 15, § 3268.1, subd. (a)(1), italics added.)

and in the day[room]” and “[t]he names of the inmates in the day[room] were not noted, cannot now be ascertained and now can never be known.” Defense counsel further declared: “The names of the thirteen inmates in nearby cells were not provided until December 4, 2009, nearly two years after the January 1, 2008 incident” and “Nine of those thirteen inmates have been interviewed by my investigator, but two have no memory of the incident.”

The *Brady* motion was first heard on November 18, 2010. During the hearing, defense counsel introduced an incident report prepared by Officer Bejinez,⁵ who reported seeing appellant “step out of his cell onto the day room floor ... and throw a left handed closed fist punch at Officer Cervantes and missing.” Officer Bejinez further reported that “all the inmates in the day room complied with staff’s orders to get down except for [appellant].”

At the end of the hearing on November 18, 2010, the judge disqualified himself, and the case was assigned to a different department.

Following a hearing on January 6, 2011, the trial court denied the motion without prejudice. The court’s rationale is reflected in the following colloquy:

“THE COURT: All right. Court will note that three components of a true *Brady* violation. [T]he evidence at issue must be favorable to the accused either because it is exculpatory or because it is impeaching, that evidence must have been suppressed by the State either willfully or inadvertently and prejudice must have ensued.

“The problem I think the [defense] is having in this case is that prejudice must have ensued. I don’t think that the Court at this time, with this information, what the Court has before it today can find that there has been prejudice shown. We don’t know whether the evidence, itself, is exculpatory. We know there may have been witness, but we don’t know whether as argued by [the prosecutor] that the evidence they might present might be cumulative to other witnesses.

⁵ During the preliminary hearing, Officer Zuniga identified Officer Bejinez as the control booth operator. Officer Cervantes referred to him as the tower officer, and testified that the tower officer was located around 20 yards away from where the incident was occurring.

“These are matters that are unknown, but these are matters that are on the burden of the defendant to show in order for the Court to find a true *Brady* violation which then could result in a dismissal of the charges in this case.

“The—it seems to me that there is no real dispute that in fact that the CDCR [(California Department of Corrections and Rehabilitation)] was under an obligation to conduct an investigation as argued by the Defense. It appears from the evidence that has been cited by the Defense that there may have been witnesses that were in fact not investigated, or were not—whose statements were not taken.

“So, I do find that there is at least a violation of that statute at this point and really the question is the remedy. I think that the proper focus because dismissal, I don’t believe is an appropriate remedy at this time.

“With regard to other possible remedies such as jury instruction which you have suggested, again, that would be something that I believe the trial Court would need to fashion. And, so, it may be that this will have to be brought again when this matter is at trial, may be after witnesses have been called and evidence presented, which may then give you an opportunity to show some prejudice to defendant’s case. [¶] ... [¶]

“And, so, although this is not a *Brady* violation certainly there appears to be an argument that could be made that there is some sort of prosecutorial misconduct or failure to conduct a full investigation, but I will end at this point by stating that the dismissal is not appropriate. And, so the motion to dismiss is denied. [¶] ... [¶]

“[DEFENSE COUNSEL]: Is the Court—did the Court, I believe, found a violation of the regulation. Did the Court find prosecutorial misconduct by not having—by CDCR not having conducted a full investigation as required?

“THE COURT: I haven’t found that, I think that there is that possibility. You may argue that in the future. I mean it’s a violation, so, and in this case CDCR is an arm of the prosecution because this is the investigating agency.

“[DEFENSE COUNSEL]: If I could ask one more question. Is the Court deferring to the trial Court to fashion a possible remedy?

“THE COURT: That is correct. The motion that is before me is, what’s been titled, a *Brady* Violation and Motion to Dismiss that is what is before the Court.

“[DEFENSE COUNSEL]: And the Court has not found a *Brady* violation at this point and the Court has not said dismissal is not appropriate at this time. I just wanted to clarify that the Court is permitting the defense to renew a request for a remedy from the trial Court. I understand the Court is not saying the trial Court has to grant one, but is the Court permitting us to seek a remedy from the trial court?”

“THE COURT: Correct, the Court at this point is denying your motion without prejudice. Again, generally speaking, this is a type of a motion that would normally be made after a trial has been had, when you have evidence and which might give the Defense the opportunity to show how it was prejudiced. You’re going to have to show that more reasonable, it’s reason and probable would be more favorable result could have been achieved, but for the alleged violation.

“So, I don’t think that I should or can preclude you from subsequently renewing this type of a motion after the circumstances have changed, in a sense, there has been evidence that has been present.”

During the afternoon session of January 6, 2011, appellant entered a plea agreement under which he agreed to plead no contest to count 1 and admit the six strike priors. The court then granted the prosecution’s motion to dismiss count 2. Appellant waived his right to a probation report and requested immediate sentencing. The court struck five of appellant’s strike priors and sentenced him to a six-year prison term.

DISCUSSION

I. Denial of Brady Motion

Appellant contends the trial court erred in denying his motion to dismiss the case against him based on the failure of prison officials to record the names of inmates who were on the day room floor when the subject incident occurred. We disagree.

As stated above, appellant brought his motion to dismiss pursuant to *Brady, supra*, 373 U.S. 83. *Brady* held “that the 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.” (*Brady, supra*, 373 U.S. at p. 87.) “The scope of a prosecutor’s disclosure duty includes not just exculpatory evidence in *his* possession but that possessed by investigative

agencies to which he has reasonable access.” (*People v. Robinson* (1995) 31 Cal.App.4th 494, 499; see also *In re Littlefield* (1993) 5 Cal.4th 122, 135.)

Evidence, for the purpose of duty to disclose, is material “only if there is a reasonable probability that, had [it] been disclosed to the defense, the result of the proceeding would have been different.” (*United States v. Bagley* (1985) 473 U.S. 667, 682; see also *In re Sassounian* (1995) 9 Cal.4th 535, 544.) “A “reasonable probability” is a probability sufficient to undermine confidence in the outcome.” (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 57, citing *United States v. Bagley, supra*, 473 U.S. at p. 682; accord *In re Sassounian, supra*, 9 Cal.4th at p. 544.) Thus, to prevail on this claim, defendant “must show both the favorableness and the materiality of any evidence not disclosed by the prosecution.” (*In re Sassounian, supra*, 9 Cal.4th at p. 545; see *United States v. Bagley, supra*, 473 U.S. at pp. 674-678.)

This standard was not met here. As respondent points out, appellant merely elicited testimony that other inmates were present in the vicinity of the incident. There was no showing these witnesses saw what happened or possessed evidence favorable to him. Appellant suggests that one of the day room inmates may have been able to corroborate the statement in Officer Bejinez’s report that he saw appellant swing at Officer Cervantes and miss.⁶ However, this suggestion is pure speculation and is thus insufficient to establish a *Brady* violation.

⁶ We note that, despite appellant’s emphasis on this statement in Officer Bejinez’s report, it does not necessarily impeach the version of events presented by Officer Cervantes and Officer Zuniga, who both indicated that, after landing the first punch on Officer Cervantes, appellant took a number of swings at Officer Cervantes and missed. Moreover, Officer Bejinez’s report indicated he did not always have a clear view of what was occurring as his vision was obscured by a stairwell. And apparently none of the inmates in nearby cells interviewed by the defense investigator saw anything helpful to the defense; otherwise we would expect such information to have been presented in support of the *Brady* motion. According to defense counsel’s declaration, of the nine inmates interviewed, two had no memory of the incident, implying that the other seven did have some recollection of the incident but were presumably unable to provide any evidence favorable to the defense.

Nonetheless, appellant claims prison officials' alleged noncompliance with California Code of Regulations, title 15, section 3268.1 by failing to document the names of day room inmates effectively rendered them unavailable as witnesses, and thus entitled him to dismissal of the charges under the authorities of *Bellizzi v. Superior Court* (1974) 12 Cal.3d 33 (*Bellizzi*) and *People v. Hernandez* (1978) 84 Cal.App.3d 408 (*Hernandez*), cases mentioned in the parties' briefing to the trial court. We conclude that *Bellizzi* and *Hernandez* do not entitle appellant to a dismissal.

From these authorities, we can discern the following principles: Due process "requires only that the police or prosecution refrain from conduct which makes the noninformant material witness unavailable." (*Hernandez, supra*, 84 Cal.App.3d at p. 411.)⁷ The prosecution may not "wrongfully deprive[] an accused of the opportunity to secure the presence of a material witness." (*Bellizzi, supra*, 12 Cal.3d at p. 36.)⁸

Here, appellant made no showing that the prosecution engaged in conduct which made a material witness unavailable or deprived him of the opportunity to secure the presence of a material witness. There was no showing that the day room inmates were material witnesses. Other than being present in the vicinity of the incident, there was no indication they actually witnessed the incident between appellant and the correctional officers. We decline to find that unidentified potential witnesses are analogous to known

⁷ In *Hernandez, supra*, 84 Cal.App.3d at pages 410-412, police officers saw the defendants beat the victim and take money from him. The victim was also taken into custody due to his intoxication and inability to care for himself. When the victim was released from custody, the police made no effort to ascertain means of contacting him and the victim thereafter could not be located to testify at the preliminary hearing. The court of appeal reversed the trial court's order of dismissal because the record did not support the inference that the police did something to make the victim witness unavailable.

⁸ In *Bellizzi, supra*, 12 Cal.3d at pages 35-37, the prosecution's failure to comply with a pretrial discovery order led to the dismissal of drug charges against the defendant. The prosecution refiled the charges two days later. In the interim, the defendant told a defense witness about the dismissal, whereupon the witness left the state and subsequently could not be located. Our Supreme Court held that, under these circumstances, the defendant's inability to call the witness did not constitute a denial of his right to due process of law because the unavailability of the defense witness was not due to any impropriety on the prosecution's part.

material witnesses such as the defense witness in *Bellizzi*, the victim witness in *Hernandez*, or the police informant in *People v. Kiihoa* (1960) 53 Cal.2d 748, a case appellant cites in his reply brief.

II. Ineffective Assistance of Counsel Claim

Appellant contends that defense counsel rendered ineffective assistance of counsel by failing to move to compel discovery of the names of the day room inmates. He posits that, if counsel had brought a motion to compel, the prosecution would have been unable to comply due to the correctional officers' failure to document the names of the day room inmates, which in turn would have given counsel grounds to move for sanctions to preclude the correctional officers from testifying at trial, which motion appellant claims the trial court would have been likely to grant under the circumstances.

“To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel’s performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. [Citation.]” (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.)

We do not agree that defense counsel failed to adequately represent appellant because he did not file a motion to compel discovery with a view to later obtaining sanctions precluding the correctional officers from testifying against appellant. A reasonably competent attorney might well have determined that the chances of prevailing on such a motion to be slim and that the better course would be to advise his client to enter a plea agreement like the one appellant entered in this case.

As a sanction for failing to comply with a discovery order, a court “may prohibit the testimony of a witness” but “*only* if all other sanctions have been exhausted.”

(§ 1054.5, subd. (c); italics added.)⁹ Moreover, the exclusion of testimony is not appropriate as punishment absent a showing of significant prejudice and willful conduct motivated by a desire to obtain a tactical advantage. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758.) There is no indication in the record that the correctional officers' failure to document the names of potential inmate witnesses was willful conduct motivated to help the prosecution obtain a tactical advantage and therefore a motion to prohibit them from testifying would likely be futile. It is axiomatic that counsel is not ineffective for failing to make futile motions. (*People v. Thompson* (2010) 49 Cal.4th 79, 122.)

DISPOSITION

The judgment is affirmed.

⁹ Consistent with this authority, the above colloquy reflects that defense counsel and the trial court specifically discussed the possibility of imposing the lesser sanction of giving a jury instruction regarding the officers' failure to document inmates' names. (See § 1054.5, subd. (b) ["the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure"].)