

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-061085
	:	TRIAL NO. B-0010225
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
LAMONT SMITH,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Following a jury trial in 2001, defendant-appellant Lamont Smith was convicted of burglary and attempted burglary. Prior to sentencing, he moved for acquittal or a new trial based on the trial court's failure to allow Smith's trial counsel to review the state's lead investigator's police file, which presumably contained two police incident reports. The trial court denied the motion. Smith was then sentenced to a term of incarceration.

Smith appealed his conviction and sentence, but did not raise as error the trial court's failure to allow defense counsel to review the police records.<sup>2</sup> Four years later, Smith filed a second motion for a new trial based on newly discovered evidence: two police incident reports, one of which included a description of Smith

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

<sup>2</sup> See *State v. Smith*, 1<sup>st</sup> Dist. No. C-010517, 2002-Ohio-2886.

as six inches shorter than his actual height. This description was given by the eyewitness to the attempted burglary. The trial court overruled the motion.

In his appeal, Smith raises a single assignment of error, maintaining that the trial court abused its discretion by denying Smith's motion for a new trial based on what he asserts was the state's failure to disclose in discovery exculpatory material, as required by *Brady v. Maryland*.<sup>3</sup> Smith claims that the police incident reports bore upon the reliability of the state's eyewitness's identification testimony.

If witness statements are exculpatory, in other words *Brady* material, they are discoverable under Crim.R. 16(B)(1)(f). Disclosure of such information is a constitutional imperative. *Brady* material includes all evidence that is favorable to the accused and is material to the issue of guilt or punishment.<sup>4</sup> The test for materiality is whether there exists a "reasonable probability" that had the state disclosed such evidence, the outcome of the trial would have been different; in other words, it is a probability sufficient to undermine confidence in the convictions.<sup>5</sup> *Brady* material includes impeachment evidence under the same test of materiality.<sup>6</sup>

The determination of whether a new trial is warranted is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion.<sup>7</sup>

The first police incident report that Smith obtained after his conviction was related to the burglary conviction. That report indicated that the witnesses had described the "suspect" as a male black between the ages of 20 and 30. Smith argued

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<sup>3</sup> (1963), 373 U.S. 83, 83 S.Ct. 1194.

<sup>4</sup> *Id.*; see, also, *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898.

<sup>5</sup> *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375; *Johnston*, supra, paragraph five of the syllabus.

<sup>6</sup> *Bagley*, supra at 676, 105 S.Ct. 3375; *State v. Aldridge* (1997), 120 Ohio App.3d 122, 137, 697 N.E.2d 228.

<sup>7</sup> *State v. Matthews*, 81 Ohio St.3d 375, 1998-Ohio-433, 691 N.E.2d 1041.

that this report contained exculpatory evidence demonstrating that the witnesses' identification of Smith had been unreliable because they had not given police a detailed description of him shortly after they had allegedly seen him burglarizing a home. But the trial testimony of one witness did not differ from the police incident report; she simply identified him at trial and indicated that she could not remember if he had had anything on his face when she saw him in her apartment. And the second witness testified that the burglar had been tall and had had a big nose. While this information was not contained in the police report, we do not believe that admitting that report into evidence would have tarnished the second witness's identification of Smith. Thus, there is no reasonable probability that this police incident report would have changed the outcome of the trial.

The second police incident report related to the attempted burglary conviction, indicated that the sole eyewitness, Betty Nowell, had described the burglar as six inches shorter than Smith. While this description is inconsistent with Nowell's testimony at trial, where she indicated that the burglar had been tall, we do not believe that this report had a reasonable probability of changing the outcome of the trial in light of the computer-aided dispatch ("CAD") report that had been admitted into evidence. The CAD report indicated that Nowell had told the dispatch police officer that the burglar had been six inches shorter than Smith. The jury had this information when it determined that Smith was guilty of attempted burglary, and it still found that Nowell had properly identified Smith as the burglar.

Because we have determined that that these police incident reports did not present exculpatory evidence, and thus did not violate *Brady*, we hold that the trial

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court did not abuse its discretion in denying Smith's motion for a new trial. Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J., HENDON AND WINKLER, JJ.**

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

*To the Clerk:*

Enter upon the Journal of the Court on December 28, 2007  
per order of the Court \_\_\_\_\_.  
Presiding Judge