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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0916

Bradley Ronald Stevens, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 4, 2013
Affirmed
Halbrooks, Judge

Martin County District Court
File No. 46-K9-92-000583

David W. Merchant, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Terry W. Viesselman, Martin County Attorney, Michael D. Trushenski, Assistant County Attorney, Fairmont, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Collins, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing that his due-process rights were violated when the police, in bad faith, lost, destroyed, or

failed to preserve potentially exculpatory evidence. Appellant asserts additional challenges in a pro se supplemental brief. Because the postconviction court properly denied relief, we affirm.

FACTS

In November 1991, J.L. informed Fairmont Police Officer Gregory Brolsma that she had been sexually assaulted by appellant Bradley Ronald Stevens in July or August of that year. According to J.L., Stevens arrived at her residence early in the morning, inhaled fumes from a white powdery substance, and proceeded to kiss, grab, and touch her. He then carried her into her bedroom, threw her onto her bed, kissed and touched her breasts over her shirt, and reached inside of her pants. When J.L. screamed for him to stop and resisted his advances, Stevens punched her in the face, causing her nose to bleed, and then held down her wrists and forced her to have sex with him. Stevens then left. J.L. told Officer Brolsma that a Fairmont police officer arrived at J.L.'s residence sometime after the assault occurred.

Stevens was charged with two counts of first-degree criminal sexual conduct. He submitted a rule 15 plea petition, acknowledging that he would enter an *Alford* plea to the first count of criminal sexual conduct in exchange for the dismissal of the second count. The district court accepted Stevens's plea and sentenced him to 134-months' imprisonment to be served concurrently with a separate conviction of criminal sexual conduct.

In 1996, Stevens filed what he termed a postconviction petition along with a waiver of counsel, arguing that the use of his inmate wages to reimburse the state for the

cost of incarceration violated his right against double jeopardy. The postconviction court dismissed his petition. We affirmed, concluding that Stevens's petition "did not fall under the statutorily defined claims permitted under [Minn. Stat.] § 590.01" because Stevens was not challenging the legality or constitutionality of his conviction or sentence. *Stevens v. State*, No. CX-96-1803, 1997 WL 161825, at *1 (Minn. App. Apr. 8, 1997), *review denied* (Minn. June 11, 1997).

Stevens's civil-commitment trial was held in March 2005, almost 14 years after the sexual assault occurred. J.L. testified that Stevens punched her in the face, but that she did not think that she bled. She asserted that "[the police] would know" because she gave the responding officer her clothes. J.L. further testified that she was shown her clothing when she testified at Stevens's criminal trial.

Officer Brolsma also testified at the civil-commitment trial. He stated that he was surprised when J.L. reported to him that she had been sexually assaulted because it was unusual that a case report would not have been initiated or that an officer was not assigned to investigate. Officer Brolsma looked into J.L.'s claim that an officer came to her home after the 1991 sexual assault, but he found no evidence of a report associated with her residence in July or August of 1991. Officer Brolsma testified that he remembered something about J.L.'s clothes consisting of a long-sleeved button-down shirt and cutoff shorts, but clarified that he did not recall taking her clothes and had found no evidence that J.L.'s clothes were ever in police possession.

Stevens was civilly committed as a sexually dangerous person based on his sexual assault of J.L. and his other convictions of criminal sexual conduct. Stevens, pro se,

petitioned for postconviction relief in July 2005. The postconviction court denied his petition, and we affirmed. *Stevens v. State*, No. A06-622, 2007 WL 152637 (Minn. App. Jan. 23, 2007), *review denied* (Minn. Apr. 17, 2007).

In 2009, Stevens again petitioned for postconviction relief and requested appointment of counsel. In response, the Office of the Minnesota Appellate Public Defender advised Stevens that he was not eligible for representation. But the Minnesota Supreme Court issued an order concluding that Stevens was entitled to representation for the current petition because he was not represented by counsel in 2005. Stevens subsequently petitioned for postconviction relief, contending that his due-process rights were violated when the police, in bad faith, lost, destroyed, or potentially failed to preserve J.L.'s clothing, which was potential exculpatory evidence.

The postconviction court held an evidentiary hearing in October 2011. Stevens testified that J.L. invited him to her residence, and they engaged in consensual sexual intercourse. During their encounter, he observed two used condoms in the wastebasket next to J.L.'s bed. Stevens stated that, after he left J.L.'s residence, he stopped at a gas station. But on his way home, he saw a police officer at J.L.'s door. Stevens denied hitting J.L. or forcing her to have sex with him. Stevens asserted that, had he known that an officer collected J.L.'s clothes and the used condoms, he would not have pleaded guilty to criminal sexual conduct. He alleged that J.L.'s clothes would not have had blood stains because he never hit J.L., and the used condoms would have shown that J.L. had multiple sexual partners.

Officer Brolsma testified at the postconviction hearing and reiterated that he searched for, but was unable to find, evidence of an officer's visit to J.L.'s residence in July or August 1991. Officer Brolsma testified that J.L.'s testimony at the 2005 civil-commitment trial was the first time that he heard J.L. claim that a responding officer took her clothes, but stated that there was no evidence that the police ever collected them.

The postconviction court denied relief, concluding that (1) Stevens failed to show by a preponderance of the evidence that the police lost, destroyed, or failed to preserve evidence and (2) assuming that the police possessed the evidence and failed to preserve it, Stevens did not establish that the evidence had both apparent exculpatory value and was destroyed in bad faith. This appeal follows.

D E C I S I O N

A petitioner for postconviction relief has the burden of establishing by "a fair preponderance of the evidence" that the facts alleged in the petition warrant relief. Minn. Stat. § 590.04, subd. 3 (2010). To establish the existence of a fact under the preponderance-of-the-evidence standard, it must be more probable that the fact exists than the contrary fact. *City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1, 4 (Minn. 2004). "If evidence of a fact or issue is equally balanced, then that fact or issue has not been established by a preponderance of the evidence." *Id.* We review the denial of postconviction relief for abuse of discretion and will not reverse "unless the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010). We review questions of law de novo.

Schleicher v. State, 718 N.W.2d 440, 445 (Minn. 2006). But we do not disturb a postconviction court's credibility determinations on appeal. *Carter v. State*, 787 N.W.2d 675, 679 (Minn. App. 2010).

I.

Stevens argues that the postconviction court erred by concluding that his right to due process was not violated when the police lost, destroyed, or failed to preserve J.L.'s clothes. "A defendant's right to due process of law is implicated when the state loses, destroys, or otherwise fails to preserve material evidence." *State v. Jenkins*, 782 N.W.2d 211, 235 (Minn. 2010); *see also Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S. Ct. 333, 337 (1988). The failure to preserve potentially useful evidence that is collected during a criminal investigation does not constitute a denial of due process unless the police acted in "bad faith." *State v. Bailey*, 677 N.W.2d 380, 393 (Minn. 2004); *see also Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337.

A. Possession of J.L.'s clothing.

"The state's duty to preserve evidence exists only with respect to evidence it collects during the investigation of a crime . . . as it would be illogical to impose an obligation on the state to preserve evidence that it does not possess." *State v. Krosch*, 642 N.W.2d 713, 718 (Minn. 2002) (citations omitted). Here, the postconviction court concluded that Stevens failed to show by a preponderance of the evidence that the Fairmont Police Department collected J.L.'s clothes, noting that "[i]t is not clear that the Fairmont police possessed the evidence." The postconviction court's conclusion is not clearly erroneous. There was conflicting evidence on this issue. While J.L. testified

14 years later that it was her recollection that the police took her clothing in the course of the investigation, Officer Brolsma testified that there was no record of the police collecting J.L.'s clothing. Based on this record, the postconviction court did not abuse its discretion.

B. Evidentiary value of J.L.'s clothing.

Stevens asserts that the postconviction court erred by concluding that the evidentiary value of J.L.'s clothes was not apparent and material. When analyzing a destruction-of-evidence claim, we consider whether the exculpatory value of the lost or destroyed evidence was apparent and material. *State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992); *see also California v. Trombetta*, 467 U.S. 479, 489, 104 S. Ct. 2528, 2534 (1984). Apparent is defined as visible, manifest, or obvious. *Black's Law Dictionary* 93 (7th ed. 1999). Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. *See Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010) (examining suppression-of-evidence violation). Exculpatory evidence is evidence that tends to negate or reduce guilt. Minn. R. Crim. P. 9.01, subd. 1(6).

Preliminarily, we note that there is nothing in this record to support Stevens's assertion that any clothing was destroyed. Nevertheless, we will address Stevens's argument. The postconviction court determined that Stevens failed to show by a preponderance of the evidence that "the evidence had apparent exculpatory value," stating that the exculpatory value of the clothes was "not apparent because it is not manifest or obvious that [J.L.'s] clothing would tend to establish Stevens' innocence."

We agree. The exculpatory value of J.L.'s clothing was neither apparent nor material because Stevens admitted to having sex with J.L. and whatever evidence may have been discovered would not have contributed to a determination of whether or not the sex was consensual.

Stevens argues that the clothing had potential exculpatory value because the case turned on the credibility of J.L. and himself, and if he had been able to analyze the clothing, he may have been provided a means of impeaching J.L.'s credibility. But the due-process standard in a claim of destruction of evidence or failure to preserve evidence requires that the evidence have exculpatory value. *Friend*, 493 N.W.2d at 545; *see also Trombetta*, 467 U.S. at 489, 104 S. Ct. at 2534 (limiting the constitutional duty of states to preserve evidence that possesses "an exculpatory value that was apparent before [it] was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means").

In *State v. Campion*, we held that the state's destruction of evidence that had impeachment value, rather than exculpatory value, did not require the sanction of acquittal. 353 N.W.2d 573, 581 (Minn. App. 1984). Although *Campion* did not address whether the destruction of evidence constituted a due-process violation, *Campion* is instructive because it utilized the same analysis set forth by the landmark destruction-of-potentially-exculpatory-evidence cases of *Youngblood* and *Trombetta*. *See id.* In *Campion*, we stated that "[i]n determining whether the destruction of the [evidence] irreparably prejudiced the defense . . . we must examine the intent of the person destroying the evidence and the materiality of the evidence." *Id.* We held that because

the evidence was "innocently" thrown away and because it was not exculpatory but merely impeaching, appellant was not entitled to relief. *Id.* Similarly, here, the postconviction court did not err by denying Stevens relief because J.L.'s clothes may have had impeachment but not exculpatory value.

C. Bad faith on the part of the police.

Stevens contends that the postconviction court erred by concluding that he failed to show by a preponderance of the evidence that the police acted in bad faith. Unless a petitioner can show bad faith on the part of the police, failure to preserve potentially exculpatory evidence does not constitute a denial of due process of law. *Engle*, 731 N.W.2d at 857; *see also Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337. Bad faith is indicated when the police intentionally destroy, lose, or fail to preserve the evidence in order "to avoid discovery of evidence beneficial to the defense." *Bailey*, 677 N.W.2d at 393 (quoting *State v. Koehler*, 312 N.W.2d 108, 109 (Minn. 1981)); *see also Heath*, 685 N.W.2d at 56 ("[The defendant] offered no proof that the police destroyed the evidence knowing it had exculpatory value."). The postconviction court stated that "[t]here is no fact in the record suggesting bad faith on the part of [the] police." Based on our careful review of this record, we agree.

Stevens raises additional arguments that, in effect, ask this court to amend the bad-faith standard. It is not the role of this court to make a change in the interpretation of the Minnesota Constitution when the Minnesota Supreme Court has not done so. *State v. Rodriguez*, 738 N.W.2d 422, 431 (Minn. App. 2007), *aff'd*, 754 N.W.2d 672 (Minn. 2008). Instead, our role is limited to identifying and correcting errors. *Sefkow v. Sefkow*,

427 N.W.2d 203, 210 (Minn. 1988). The Minnesota Supreme Court has consistently required a showing of bad faith in its review of due-process claims when it is alleged that the police destroyed, lost, or failed to preserve potentially exculpatory evidence. *See, e.g.*, *State v. Nissalke*, 801 N.W.2d 82, 110 (Minn. 2011); *Jenkins*, 782 N.W.2d at 235; *Bailey*, 677 N.W.2d at 393. We therefore conclude that the postconviction court did not err in concluding that Stevens failed to show bad faith.

II.

In a pro se supplemental brief, Stevens argues that his due-process rights were violated because the police suppressed evidence of J.L.'s clothing and the used condoms that he observed at her residence. The suppression of evidence that is favorable to a criminal defendant violates due process when the evidence is material to guilt or punishment, irrespective of the good or bad faith of the state. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963); *see also* Minn. R. Crim. P. 9.01 (requiring disclosure of material evidence). A *Brady* violation exists if (1) the evidence is favorable, being either exculpatory or impeaching, (2) the state suppressed the evidence, and (3) the defendant was prejudiced by suppression. *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005).

Stevens's *Brady* claim fails. The presence of used condoms at the scene, even if true, would not be admissible or relevant evidence to the determination of whether Stevens committed an act of criminal sexual conduct. *See* Minn. Stat. § 609.347, subd. 3(a) (2010) (allowing accused to present evidence of a victim's previous sexual conduct when the victim has made previous unsubstantiated allegations of sexual assault and the

victim has had a previous relationship with the accused); Minn. R. Evid. 401 (defining relevant evidence as that which tends to make the existence of a fact of consequence to the determination of an action more or less probable than it would be without the evidence). Further, there is no support in this record that the state suppressed any evidence. For these reasons, we conclude that Stevens's *Brady* claim has no merit.

Stevens also claims that Officer Brolsma was deficient in his investigation, specifically noting his failure to learn from J.L. that the reporting officer had obtained physical evidence and failure to learn of any favorable evidence. Stevens cites no legal authority that imposes a duty on police to learn of favorable evidence, and his reliance on *Gorman v. State*, 619 N.W.2d 802 (Minn. App. 2000), is misplaced. That case examined a *Brady* nondisclosure violation, not whether an officer has a duty to investigate crimes.

Finally, Stevens contends that he would not have pleaded guilty if he had been informed of the existence of an alleged extra-marital affair between J.L. and a sheriff's deputy and that this allegation constitutes newly discovered evidence warranting a new evidentiary hearing. A postconviction court must hold an evidentiary hearing "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2010). The petitioner bears the burden of establishing by a fair preponderance of the evidence facts that warrant reopening the case. *Id.*, subd. 3 (2010). But no evidentiary hearing is required if the petitioner alleges facts that, even if true, are legally insufficient to entitle him to the requested relief. *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). And allegations in a postconviction petition must be more than argumentative assertions without factual

support. *McKenzie v. State*, 754 N.W.2d 366, 369 (Minn. 2008). There is no support in this record for Stevens's assertion. And, even if true, J.L.'s affair with a sheriff's deputy is neither admissible nor relevant evidence to the determination of whether Stevens committed an act of criminal sexual conduct. *See* Minn. Stat. § 609.347, subd. 3(a); Minn. R. Evid. 401.

Affirmed.