

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 1, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP2824-CR**

**Cir. Ct. No. 2001CF283**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSEPH F. MICHALKIEWICZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Joseph F. Michalkiewicz appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. Michalkiewicz was convicted of first-degree intentional homicide. He argues that his conviction violates due process of law because the

State did not preserve the identity of certain confidential informants whose information tended to prove the crime had been committed by others, because the court erred when it refused to admit these exculpatory statements as substantive evidence at trial, because the State waited twenty-two years to prosecute him, and because a new trial should be granted in the interests of justice. Because we conclude that Michalkiewicz's conviction did not violate due process, we affirm the judgment and order.

¶2 Michalkiewicz was convicted of the murder of George Moore. Moore was killed on February 9, 1979, in a Clark gas station where he worked. He was found by two police officers who noticed that a trash barrel had been thrown through the window of the station. While investigating the crime scene, one of the officers noticed bloody shoeprints on the pavement—one near the door and one near the gas pumps. These prints had an arrow design on them. About \$1100 in cash, mostly in one dollar bills, had been stolen from the station.

¶3 Police investigators made inquiries and were told that Michalkiewicz and another man had been in the area the night of the murder. When the police interviewed Michalkiewicz, he initially told him that he had been out drinking but had not been near the gas station that night. When the police left his house, however, they noticed shoeprints similar to those found at the gas station. Michalkiewicz allowed the police to take his shoes for comparison. Shortly afterwards, Michalkiewicz called the police and asked for another interview. He then told the police that he had gone to the gas station that night to use the restroom. He said that while he was in the restroom, he heard noises and Moore's screaming voice. He said when he went inside the station to investigate, he saw Moore's body on the floor and a black man standing over it. The man then chased him away.

¶4 In a subsequent statement, he also said that he had seen a two-toned car in the gas station parking lot. He said that when he went into the room where Moore's body was lying, the man standing over Moore threw a bottle down at Moore. The man then chased Michalkiewicz out of the station, and he hid as the man drove away. He told the police that he had initially lied because the man standing over Moore's body had seen him and he was afraid of retaliation. Michalkiewicz was not able to identify the man from any of the photos of possible suspects. Many witnesses gave information to the police about people who may have committed the murder, as well as sightings of a two-toned car in the area around the time of the murder. Some of these were confidential informants and, by the time of Michalkiewicz's trial, the police no longer knew their identities.

¶5 At the time of the homicide, the police searched Michalkiewicz's home, but did not find any of the money. An examination of the clothes Michalkiewicz was wearing that night revealed human blood stains. At that time, the police were not able to identify the blood as Moore's. The State conducted DNA testing on the clothing in 1999 and 2001 and established that Moore's DNA was in the blood found on Michalkiewicz's pants.

¶6 The State charged Michalkiewicz, he went to trial, and the jury convicted him. The court sentenced him to life in prison. Michalkiewicz brought a motion for postconviction relief seeking to vacate his conviction based on the State's inability to identify the confidential informants. The court denied the motion and Michalkiewicz appeals.

¶7 Michalkiewicz argues that his due process rights were violated because the police did not preserve the identities of the witness who gave the statements that tended to prove the crime was committed by someone else, and

because the court erred when it refused to allow these statements to be considered by the jury for the truth of the matter asserted. The confidential statements that Michalkiewicz argues should have been admitted, fall into two general categories: (1) statements concerning the two-toned car that was seen in the area at the time of the crime; and (2) statements about two suspects, James Oliver and Dwayne Cooper.

¶8 First, as to the State's failure to preserve the names of the confidential informants, the State argues that the information the informants provided about the two-toned car was only potentially useful to the defense, and not exculpatory. Potentially useful evidentiary material is that of which no more can be said than "it could have been subjected to tests, the results of which might have exonerated the defendant." *State v. Greenwold*, 181 Wis. 2d 881, 885, 512 N.W.2d 237 (Ct. App. 1994) (citation omitted). The police's failure to preserve potentially useful information does not violate due process unless the defendant can show bad faith by the police. *Id.* The good or bad faith of the State is irrelevant when it fails to disclose apparently exculpatory evidence. *Id.* In order to establish a due process violation, the defendant must prove that the apparently exculpatory evidence was also material. *State v. Harris*, 2004 WI 64, ¶13, 272 Wis. 2d 80, 680 N.W.2d 737. The evidence is material only if there is a reasonable probability that the result would have been different. *Id.*, ¶14. As in the test for ineffective assistance of counsel, a reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the trial. *Id.* (citation omitted). The reviewing court is to assess this possibility in light of the totality of the circumstances. *Id.*

¶9 We agree with the State that the evidence about the two-toned car was only potentially useful. Michalkiewicz was able to obtain comparable

evidence by other means. More than one witness testified to having seen the two-toned car in the area around the time the crime was committed. As the State asserts, the only fact that the unknown informants' statements would have added was that the car had been seen at two other locations during the same general time frame. We agree that these additional facts were not exculpatory. Since the appellant does not argue that the police acted in bad faith when they failed to preserve the identity of the informants, we conclude that Michalkiewicz's due process rights were not violated as to these statements.

¶10 The State concedes, however, that one of the statements concerning Oliver and Cooper was apparently exculpatory. There were four confidential informant statements that discussed Oliver and Cooper. The State argues that three of these statements were only potentially exculpatory. In one statement, however, the witness told the police that Oliver and Cooper had told him that they had done the Clark Station robbery and murder. We agree with the State that this information is apparently exculpatory.

¶11 This conclusion, however, does not undermine our confidence in the outcome of the trial. The evidence presented against Michalkiewicz at trial was strong. He did not dispute that he was in the gas station the night of the murder. Further, the recently performed DNA tests established that Moore's blood was on Michalkiewicz's clothes. Michalkiewicz offered an innocent explanation for the blood, but this story was not supported by the evidence. Further, Michalkiewicz initially lied to the police about whether he had been at the station that night. Michalkiewicz also described Moore as a good friend, yet according to his story left him lying there battered and bleeding, without calling for assistance. Michalkiewicz said that he entered the station through a large plate glass window that had been broken with a barrel. When the police arrived at the scene, however,

they found the barrel still stuck in the window and the front door to the station unlocked. In addition, Michalkiewicz did not have a good explanation for the blood on his clothing. Given this evidence, our confidence in the jury's verdict is not undermined.

¶12 Michalkiewicz also argues that the circuit court violated his right to present a defense when it limited the jury's use of these statements. The trial court allowed the jury to hear the statements but not to consider them for the truth of the matter asserted. Instead, the court allowed the jury to consider these statements as evidence that might corroborate Michalkiewicz's statements to the police. We again agree with the State that Michalkiewicz's right to due process was not violated when the court refused to admit these statements as substantive evidence.

¶13 The circuit court declined to admit these statements for the truth of the matter asserted because it concluded that the statements lacked sufficient indicia of trustworthiness. The court found that the statements were troublesome because the identities of the speakers were not known. Michalkiewicz does not challenge the court's decision that these statements were inadmissible hearsay, but rather argues that the court's decision violated his right to present a defense.

¶14 “[T]he test for whether the exclusion of evidence violates the right to present a defense has been stated as an inquiry into whether the proffered evidence was ‘essential to’ the defense, and whether without the proffered evidence, the defendant had ‘no reasonable means of defending his case.’” *State v. Williams*, 2002 WI 58, ¶70, 253 Wis. 2d 99, 644 N.W.2d 919 (citation omitted). In this case, the court's decision to exclude the evidence for the truth of the matter asserted, did not leave Michalkiewicz without any reasonable means to present his defense. The jury actually heard the statements because they were allowed in to corroborate

Michalkiewicz's statements to the police. In addition, these statements corroborated Michalkiewicz's own statements: the limitation on their use did not impair his ability to present his defense. Moreover, even it was error for the court to limit the use of these statements, given the evidence against Michalkiewicz and the inconsistencies in his story, we conclude that such an error was harmless for the same reasons we concluded that the evidence was not material.

¶15 Michalkiewicz also argues that the twenty-two year delay in prosecuting him violates his right to due process. To establish a due process violation, Michalkiewicz must prove that the state delayed the prosecution for an improper purpose or motive such as gaining an unfair tactical advantage. *See State v. Wilson*, 149 Wis.2d 878, 904-05, 440 N.W.2d 534 (1989). Michalkiewicz admits that he cannot prove this.

¶16 Finally, Michalkiewicz asks that we grant a new trial in the interests of justice because the real controversy was not fully tried. We have concluded, however, that Michalkiewicz received a fair trial and decline to grant him a new trial in the interests of justice. For the reasons stated, we affirm the judgment and order of the circuit court.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

