COURT OF APPEALS
DECISION
DATED AND RELEASED

June 06, 1995

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

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3421-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORBIN JONES,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed*.

SULLIVAN, J. Corbin Jones appeals from a judgment of conviction, after a jury trial, for one count of disorderly conduct, while armed, and one count of resisting an officer. He asks this court to grant a new trial because his due process rights were allegedly violated when the trial court allowed into evidence testimony about a police report that the State failed to turn over after a defense discovery request. We conclude that while the State should have disclosed the police report to Jones, a new trial is not warranted

because failure to disclose the report did not affect the result of the trial. Accordingly, we affirm.[1]

The following facts were adduced at trial. City of Milwaukee police officers responded to a domestic argument between Jones and his live-in girlfriend. Jones's girlfriend had earlier phoned the police and told them that Jones had threatened her with a kitchen knife. When the police arrived, Jones's girlfriend informed them that Jones had tampered with her automobile's engine, had threatened her with a claw hammer, and was located in the upstairs apartment of the two-story duplex.

The police requested back-up officers and then proceeded to the upstairs apartment; knocking on the outside door, identifying themselves as Milwaukee police officers, and requesting Jones to come to the door. After they received no response, the officers entered the apartment using a key given to them by Jones's girlfriend. They announced their presence several times and then began searching for Jones. Officer Kenneth Henning located Jones, lying on a bed in a bedroom. He announced "Milwaukee Police" and told Jones to show the officer his hands.

Jones sat up, and Henning saw a kitchen knife in his hands. The police officers ordered Jones to drop the knife. He failed to do so and the officers next saw Jones reach for a claw hammer located on the bed. The officer sprayed Jones in the face with pepper spray, but Jones did not drop the knife. Officer Kevin Porter struck Jones's arm several times with his baton and Jones released the knife. Jones then struggled with the officers as they attempted to handcuff him. He was eventually subdued and arrested. He was charged in a two-count criminal complaint and received a jury trial.

At trial, during Jones's counsel's cross-examination of Officer Henning, the issue of Henning's belief that Jones was under the influence of a controlled substance arose. Jones's counsel asked why Henning had not written in his police report that Jones was intoxicated. Henning stated that the report

[1] This appeal is decided by one judge, as provided by § 752.31(2), STATS.

form asked about intoxication, and that he (Henning) believed that "intoxication" only referred to alcoholic beverages—not controlled substances.

On redirect-examination by the assistant district attorney, the following exchange took place:

> [PROSECUTOR]: Do you recall if in your green clearance report you indicated any concerns about the defendant being high or under the influence of an--of some sort of narcotic?
>
> [COUNSEL]: Objection. It's not before us. Under ***Brady v. Maryland***, I have a right to it. It's extrinsic. It hasn't been offered. If he's got something, he should have brought it in and I should have it.
>
> [PROSECUTOR]: You do have it, counsel.
>
> [COUNSEL]: Where?
>
> THE COURT: All right. The objection is overruled. Answer the question.
>
> THE WITNESS: Yes.
>
> ....
>
> [PROSECUTOR:] And what did you indicate in your report? Do you recall?
>
> [THE WITNESS:] I don't recall exact words, but I believe I stated the victim informed me that the suspect probably was high on cocaine.
>
> [COUNSEL]: Objection. That's already been ruled on. The victim reported--it's been ruled on. I move to strike.
>
> [PROSECUTOR]: I disagree.

THE COURT: Then, officer, if you would just indicate whether that was in your report or not.

[COUNSEL]: And I still object, because I have a right to the report. It can't be offered in the record without the discovery given to me, Judge.

THE COURT: Your objection is overruled.

[PROSECUTOR]: No other questions.

The jury later convicted Jones of all counts. He now appeals.

Jones argues that the trial court erred by allowing Officer Henning to testify about the police report. Jones contends that because the State did not provide him with a copy of Henning's report pursuant to his demand for discovery and inspection of all police reports his due process rights were violated. Accordingly he asks this court to grant him a new trial. We decline to do so.

In ***Brady v. Maryland,*** 373 U.S. 83 (1963), the United States Supreme Court held that the State's failure to turn over evidence favorable to an accused violated due process where the evidence is *material*, either to guilt or punishment. ***Id***. at 87. While the "*Brady* rule applies as well where the nondisclosure of the evidence goes to the credibility of a witness," such "evidence is material under *Brady* `only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" ***State v. Pettit,*** 171 Wis.2d 627, 644, 492 N.W.2d 633, 641 (Ct. App. 1992).

The evidence at question in the case at bar was a police report in which Officer Henning allegedly noted his belief that Jones was under the influence of a controlled substance. Jones alleges in his appeal that the issue of Jones's alleged intoxication was the "cornerstone of the defense" because the police reports that were provided to Jones allegedly did not mention any suspicion of intoxication. Jones argues that the lack of such evidence supported his version of the events in which he alleged that he was not under the influence

of any substances and that the officers used "excessive force" in their investigation. Further, he argues that lack of any statements in the police reports allowed Jones to impeach the credibility of the officers. When, however, the trial court allowed Officer Henning to discuss the undisclosed police report, it "greatly bolstered [Henning's] credibility" and allowed the State to rehabilitate the inconsistencies created during Jones's cross-examination of Officer Henning.

We conclude that while the State should have turned over the police report during discovery, the failure to do so and the subsequent procurement of testimony about the report does not entitle Jones to a new trial. We reach this conclusion because we do not believe that if the police report "had been disclosed to the defense, the result of the proceeding would have been different." ***Id***.

While evidence of Jones's alleged intoxication may have been minimally relevant to the credibility of both Officer Henning's and Jones's version of the arrest, whether or not Jones was high on cocaine was completely irrelevant as to Jones's guilt in the offenses charged. Additionally, there was ample evidence presented to the jury by which it could find Jones guilty of these offenses—irrespective of whether Jones's alleged intoxicated state was shown or disproved. Accordingly, even if the defense had received the report, the result of the proceeding would not have changed. ***Id***.

For the foregoing reason, Jones is not entitled to a new trial and we must affirm his judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.