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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0037**

State of Minnesota,
Respondent,

vs.

Antonio Deandre Johnson, Jr.,
Appellant.

**Filed August 5, 2019
Reversed and remanded
Worke, Judge**

St. Louis County District Court
File No. 69DU-CR-17-335

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Christopher J. Pinkert, Assistant County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Worke, Judge; and Peterson,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

WORKE, Judge

Appellant appeals his conviction for first-degree drug sale, and, following a stay and remand for postconviction proceedings, challenges the summary denial of his petition for postconviction relief, arguing that he did not receive a fair trial and that the postconviction court abused its discretion by denying his petition without a hearing. Because appellant is entitled to an evidentiary hearing, we reverse and remand.

FACTS

On January 25, 2017, police officers obtained a search warrant for the residence of a known drug user, J.H., after observing another known drug user, J.S., conducting suspected drug deals from the residence. The officers had information that the residence had been used by non-local heroin dealers as a base for operations. Three prior search warrants had been executed on the residence while J.H. was living there, and through those searches officers had learned that she would allow heroin dealers to use her residence in exchange for drugs.

When officers entered the residence, one officer observed appellant Antonio Deandre Johnson Jr. run from a back bedroom, down a hallway toward a bathroom. Johnson was apprehended, and a large amount of heroin was found in the hallway along the path Johnson took from the bedroom. He was also found in possession of over \$3,000. In the bedroom from which Johnson fled, the officers found a scale, heroin, money, C.P., another known drug user, and N.R. Approximately seven other heroin users were present in the residence during the search. J.H. was not present when the warrant was executed,

although she had been at the residence that day during police surveillance. At least two of the heroin users, including J.S., informed officers that they had received heroin directly from either Johnson or C.P. Johnson, C.P., and J.S. all had prior controlled-substance convictions.

Johnson was charged with first-degree aiding and abetting the sale of a controlled substance. Prior to Johnson's court trial, J.H. and J.S. signed cooperation agreements with the state in exchange for their testimony against Johnson. J.H.'s agreement allowed her to avoid jail time. At trial, the following exchange occurred between J.H. and the prosecutor:

Q: [J.H.], we've never actually met prior to today; is that right?

A: No.

Q: You had a case that I prosecuted, but we've never actually had any discussions; correct?

A: No; correct.

Johnson's counsel did not cross-examine J.H. However, counsel did question J.S., and used her cooperation agreement to impeach her testimony. In August 2017, the district court found Johnson guilty of the charged offense and sentenced him to 105 months in prison. Johnson filed a direct appeal.

While the case was on appeal, in a June 2018 email exchange between Johnson's appellate counsel and trial counsel, trial counsel indicated that he did not recall the prosecutor disclosing J.H.'s cooperation agreement. Johnson then moved to stay the direct appeal to pursue postconviction proceedings and, after this court granted the motion, filed a postconviction petition. In the petition Johnson alleged that the prosecutor committed a

*Brady*¹ violation by failing to disclose J.H.’s cooperation agreement and that the prosecutor committed misconduct by eliciting allegedly false testimony from J.H. that the two had never had prior discussions. The prosecutor responded in an affidavit that he had orally disclosed both cooperation agreements during plea negotiations and outlined all contact he had with J.H. prior to questioning her during Johnson’s trial.

The postconviction court denied Johnson’s petition without an evidentiary hearing, and the appeal was reinstated.

D E C I S I O N

A postconviction court must hold an evidentiary hearing unless the petition and the files and records of the proceeding conclusively show that the petitioner is not entitled to relief. Minn. Stat. § 590.04, subd. 1 (2018). “In determining whether an evidentiary hearing is required, a postconviction court considers the facts alleged in the petition as true and construes them in the light most favorable to the petitioner.” *Brown v. State*, 895 N.W.2d 612, 618 (Minn. 2017). A postconviction court “may not find a postconviction affiant unreliable without first holding an evidentiary hearing to assess the affiant’s credibility.” *Andersen v. State*, 913 N.W.2d 417, 423 (Minn. 2018). In reviewing a postconviction court’s denial of relief without an evidentiary hearing, “we resolve any doubts about whether an evidentiary hearing is required in favor of the petitioner.” *Patterson v. State*, 670 N.W.2d 439, 441 (Minn. 2003). “[W]e review a denial of a petition

¹ See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963) (holding that prosecutor’s suppression of evidence material to the defense violates due process).

for postconviction relief, including a denial of relief without an evidentiary hearing, for an abuse of discretion.” *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013).

Johnson asserts that the postconviction court abused its discretion by denying relief without an evidentiary hearing because it failed to treat the allegations in his postconviction petition as true and view them in the light most favorable to him. The postconviction court determined that Johnson was not entitled to an evidentiary hearing because the postconviction court concluded that, even if taken as true that the prosecutor committed a *Brady* violation by failing to disclose J.H.’s cooperation agreement and committed misconduct by eliciting false testimony to conceal that violation, it would not have changed the outcome of the trial. But the postconviction court’s statements do not view Johnson’s allegations in the light most favorable to him and instead evaluate the materiality of the alleged *Brady* violation and misconduct without allowing an opportunity for Johnson to present argument to the contrary. We disagree with this treatment of Johnson’s postconviction petition.

The standard for evidentiary hearings set out in Minn. Stat. § 590.04, subd. 1, supports the conclusion that the postconviction court should have held an evidentiary hearing because the record does not conclusively show that Johnson is not entitled to relief under the *Brady* test or the standard for prosecutorial misconduct.

***Brady* violation**

The state must disclose evidence that is material to the defense. *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97; *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999). To constitute a *Brady* violation, three requirements must be established:

- (1) the evidence must be favorable to the defendant because it would have been either exculpatory or impeaching;
- (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and
- (3) the evidence must be material—in other words, the absence of the evidence must have caused prejudice to the defendant.

Zornes v. State, 903 N.W.2d 411, 417 (Minn. 2017) (quotation omitted). “Because a *Brady* materiality analysis involves a mixed question of law and fact, [appellate courts] review a district court’s materiality determination de novo.” *Id.* (quotation omitted).

Here, the first requirement for a *Brady* violation is met, because evidence of J.H.’s cooperation agreement would have been impeaching to her testimony. Johnson’s trial counsel used a similar cooperation agreement to impeach J.S.’s testimony.

The second *Brady* requirement is at issue because there are conflicting accounts as to whether the cooperation agreement was disclosed. The only evidence in the record that the state failed to disclose J.H.’s cooperation agreement is an email between Johnson’s appellate counsel and trial counsel, but the only evidence that the agreement was in fact disclosed is the prosecutor’s affidavit, filed in relation to Johnson’s postconviction petition. This factual dispute is critical in determining whether Johnson is entitled to any relief.

The postconviction court does not have the discretion to find Johnson’s allegations unreliable and the prosecutor’s version of events reliable without first holding an evidentiary hearing. *See Andersen*, 913 N.W.2d at 423. Indeed, “[a]n evidentiary hearing on a petition is mandated whenever material facts are in dispute which have not been resolved in the proceedings resulting in conviction and which must be resolved in order to determine the issues raised on the merits.” *Riley v. State*, 819 N.W.2d 162, 167 (Minn.

2012) (quotation omitted). On this record, the postconviction court abused its discretion by resolving the factual dispute without an evidentiary hearing. Absent the ability to use J.H.'s cooperation agreement to impeach her testimony, she may have appeared to be a more credible witness than otherwise. Her testimony was significant as it corroborated that of J.S. And the district court found that J.H.'s testimony "was not impeached" and was "credible in linking [Johnson] to the sale of heroin" at the residence. Consequently, the record indicates that J.H.'s cooperation agreement was material to Johnson's conviction. We therefore reverse and remand for the postconviction court to conduct an evidentiary hearing on whether the prosecutor suppressed J.H.'s cooperation agreement.

Misconduct

A prosecutor is an officer of the court, charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). "Generally, a prosecutor's acts may constitute misconduct if they have the effect of materially undermining the fairness of a trial." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). When, as here, the defendant fails to object to alleged prosecutorial misconduct at trial, we review the conduct under a modified plain-error standard. *Ramey*, 721 N.W.2d at 302. If the defendant shows error that is plain, then under the "prejudice" prong, the state bears the burden of proving that there is no reasonable likelihood that the absence of the alleged misconduct would have had a significant effect on the verdict or outcome. *Id.*

Johnson alleged in his postconviction petition that the "prosecutor elicited false testimony from [J.H.] that she had no prior relationship with the prosecution." The

postconviction court denied this allegation stating, “[t]he transcript from the trial does not support this assertion.” The postconviction court therefore did not accept Johnson’s allegations as true or view them in the light most favorable to Johnson. This issue requires an evidentiary hearing, because the record does not conclusively show anything regarding the relationship between J.H. and the prosecutor. When Johnson’s claim is viewed in the light most favorable to him, the prosecutor’s relationship with J.H. and subsequent trial conduct demand further examination. Johnson alleges that the prosecutor intentionally concealed the nature of his relationship with J.H., and, treating that allegation as true, an evidentiary hearing is appropriate. If such a hearing elicits evidence of misconduct, then the state bears the burden of proving such misconduct did not materially undermine the fairness of Johnson’s trial.

Reversed and remanded.