

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0765**

Antonio Deandre Johnson, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 8, 2021
Reversed and remanded
Gaïtas, Judge**

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

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

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)

Considered and decided by Slieter, Presiding Judge; Gaïtas, Judge; and Rodenberg, Judge.*

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

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

In this appeal from an order denying postconviction relief, appellant Antonio Deandre Johnson, Jr., argues that the postconviction court erred in failing to find a *Brady* violation. Specifically, he argues that the postconviction court incorrectly determined, after an evidentiary hearing, that the preponderance of the evidence did not establish that the prosecution suppressed a witness-cooperation agreement. Because the postconviction court made clearly erroneous findings of fact, and because the remaining facts establish suppression by a preponderance of the evidence, we reverse Johnson's conviction and remand for a new trial.

FACTS

In January 2017, drug task-force officers executed a search warrant at the residence of J.H., an admitted heroin user, after observing J.S., another heroin user, conducting suspected drug sales from the residence. The officers had information that nonlocal heroin dealers were using J.H.'s apartment as a base for sales, which J.H. permitted in exchange for drugs.

When the officers entered the apartment, Johnson was one of several individuals inside. Johnson attempted to flee by running down a hallway but was apprehended, and the officers found over \$3,000 cash in his possession. They also found a large amount of heroin in the hallway. J.S. was in the apartment at time of the search and, in a later interview, told officers that she was receiving heroin from Johnson and another individual, C.P., and was selling it. J.H. was not home at the time of the search.

The state charged Johnson with aiding and abetting first-degree sale of a controlled substance in violation of Minnesota Statutes sections 152.021, subdivision 1(3), and 609.05, subdivision 1 (2016). Johnson waived his right to a jury trial, and the district court held a bench trial. Before Johnson's trial, J.H. and J.S. each entered cooperation agreements with the state as part of their own plea deals, agreeing to testify against their codefendants (including Johnson) in exchange for reduced charges and sentences. At Johnson's trial, his attorney used J.S.'s cooperation agreement to impeach her credibility during cross-examination, and he highlighted the cooperation agreement in his written closing argument. In contrast, Johnson's attorney made no reference to the state's cooperation agreement with J.H., and the prosecutor did not refer to it either. Indeed, the prosecutor asked J.H. during direct examination whether they had "met prior to today," and J.H. replied that they had not. The prosecutor then clarified in the next question that J.H. "had a case that [he] prosecuted," but that they "never actually had any discussions." He did not add that the referenced case was connected to Johnson's case and that J.H. had agreed to testify against Johnson as part of her plea deal.

The trial court found Johnson guilty and sentenced him to 105 months in prison. Johnson appealed, and this court stayed the appeal for postconviction proceedings at Johnson's request. Then, Johnson filed a petition for postconviction relief in the district court, claiming the prosecutor had failed to disclose J.H.'s cooperation agreement before

trial. Johnson argued the state’s lack of disclosure amounted to a *Brady* violation¹ and prosecutorial misconduct. Johnson requested an evidentiary hearing to establish his claims. The postconviction court denied Johnson’s request for relief without an evidentiary hearing.

After reinstating Johnson’s appeal, we reversed and remanded. *State v. Johnson*, No. A18-0037, 2019 WL 3543175 (Minn. App. Aug. 5, 2019). We concluded that two of the three elements of a *Brady* violation were satisfied—the evidence in question, J.H.’s cooperation agreement, was favorable to the defense and was material. *Id.* at *3 (citing *Zornes v. State*, 903 N.W.2d 411, 417 (Minn. 2017)). But we determined that the third *Brady* element—that the prosecutor suppressed the evidence—involved a factual dispute, which required an evidentiary hearing. *Id.* We accordingly remanded to the postconviction court for an evidentiary hearing on the dispositive question of “whether the prosecutor suppressed J.H.’s cooperation agreement.” *Id.*

Postconviction evidentiary hearing

On remand, the postconviction court held an evidentiary hearing and heard testimony from Johnson’s trial attorney and the trial prosecutor. Johnson’s trial attorney testified that he served the prosecutor with a discovery demand for any “potentially exculpatory” material, which included information about witnesses. He did not recall the

¹ Under the United States Supreme Court’s holding in *Brady v. Maryland*, a prosecutor’s suppression of material evidence violates the defendant’s constitutional due-process rights. 373 U.S. 83, 87, S. Ct. 1194, 1196-97 (1963). Courts have since referred to an alleged or proven violation of this principle as a “*Brady* violation.” *See, e.g., Campbell v. State*, 916 N.W.2d 502, 510 (Minn. 2018).

prosecutor disclosing a cooperation agreement with J.H., either orally or in writing. The trial attorney testified that he maintained a case file, which included records of any material conversations with the prosecutor, and that his file contained no reference to a cooperation agreement involving J.H.

But Johnson's trial attorney did recall the prosecutor disclosing the state's cooperation agreement with J.S., though he could not remember whether the disclosure was made orally or in writing. He testified that it would not surprise him if it was not made in writing. Johnson's trial attorney stated that he believed that J.S.'s cooperation agreement was helpful to Johnson's defense, and he used it at trial to impeach J.S.'s credibility. He testified that if he had been aware of the state's cooperation agreement with J.H., he "definitely" would have used it during cross-examination the same way that he used J.S.'s agreement. According to the attorney, the fact that he did not reference J.H.'s cooperation agreement led him to conclude "[t]hat at the time of trial . . . [he] wasn't aware or didn't recall any information about a cooperation agreement with [J.H.]"

The prosecutor acknowledged that he never provided a written disclosure to Johnson's trial attorney regarding J.H.'s cooperation agreement. He recalled, however, a conversation that he had with Johnson's attorney about the plea agreements in J.S.'s and J.H.'s cases. Specifically, Johnson's attorney had asked for a disposition similar to those offered to J.S. and J.H. The prosecutor declined to make a similar offer, as he believed that Johnson was "a dealer who had only come to town to profit off the heroin epidemic in [the] community," unlike J.S. and J.H., who were seemingly involved in drug sales "to support their addiction." Yet the prosecutor did not recall whether, in the course of this

conversation, he disclosed that J.H.'s plea agreement required her to testify against Johnson. The prosecutor believed this conversation occurred in the spring of 2017, but he could not recall the date more precisely. He did concede, though, that he believed the conversation occurred before J.H. pleaded guilty in her case at the end of May.

The prosecutor also testified that he had not planned to call J.H. at Johnson's trial, even though he had subpoenaed her as a witness. J.H. had an active warrant for her arrest, and nobody from his office had spoken with her about testifying. On the morning of Johnson's trial, though, law enforcement located J.H., served her with the subpoena, and brought her to the courthouse. The prosecutor did not believe that the requirement for J.H. to testify against Johnson was a "large factor" in J.H.'s plea deal. But he conceded that J.H. would have technically violated the agreement if she had not cooperated in Johnson's case.

Following the evidentiary hearing, the postconviction court again denied Johnson's request to reverse his conviction and order a new trial, concluding that Johnson had not shown by a preponderance of the evidence that the prosecutor suppressed J.H.'s cooperation agreement.

This appeal follows.

DECISION

The Fourteenth Amendment to the United States Constitution guarantees every person the right to due process of law before a deprivation of liberty. U.S. Const. amend. XIV, § 1. In the context of a criminal case, the due-process guarantee requires that a criminal defendant receive a fair trial. *See Smith v. Phillips*, 455 U.S. 209, 221, 102 S. Ct.

940, 948 (1982). In *Brady v. Maryland*, the United States Supreme Court held that a prosecutor's suppression of material evidence renders a trial unfair and thereby violates the defendant's due-process rights. 373 U.S. at 87-88, S. Ct. at 1196-97.

Johnson claims that he was denied a fair trial when the state committed a *Brady* violation by failing to disclose J.H.'s cooperation agreement. *See id.* To establish a *Brady* violation, Johnson must prove three elements: (1) the evidence in question is favorable to his case because it is "exculpatory or impeaching;" (2) the state withheld the evidence, "intentionally or otherwise;" and (3) the evidence is material because its absence would "have caused prejudice to the defendant." *Zornes*, 903 N.W.2d at 417. Only the second element is at issue here; we already concluded that Johnson's claim satisfies elements one and three. *Johnson*, 2019 WL 3543175, at *3.

At a postconviction evidentiary hearing, the petitioner bears the burden of establishing the petitioner's claims by a preponderance of the evidence. *Hummel v. State*, 617 N.W.2d 561, 564 (Minn. 2000). To satisfy the preponderance of the evidence standard, the evidence must demonstrate that it is "more probable that the fact exists than that the contrary exists." *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.*

An appellate court evaluating a postconviction court's decision examines whether the postconviction court "has 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." *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (quotation omitted). The

appellate court reviews legal issues de novo, but its review of factual issues “is limited to whether there is sufficient evidence in the record to sustain the postconviction court’s findings.” *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015) (quotation omitted). In other words, a reviewing court will “not reverse the postconviction court’s findings unless they are clearly erroneous.” *Pearson*, 891 N.W.2d at 596 (quotation omitted). When an issue presents a mixed question of law and fact, an appellate court reviews the postconviction court’s factual findings for clear error and its legal conclusions de novo. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013).

As an initial matter, the parties disagree about the applicable standard of review. Johnson asserts two challenges on appeal, arguing first that the postconviction court made two erroneous factual findings; and second, that a preponderance of the evidence shows that the state suppressed J.H.’s cooperation agreement. As to the specific factual findings that Johnson challenges, both parties concur that the clearly-erroneous standard of review applies, and we agree. *Pearson*, 891 N.W.2d at 596. The parties disagree, though, as to how this court should review the postconviction court’s determination that Johnson did not meet his burden of showing that suppression occurred. Johnson characterizes this determination as a legal conclusion warranting de novo review, while the state characterizes it as a factual finding subject to clear-error review.

After examining the postconviction court’s findings of fact, conclusions of law, and order, we agree with Johnson that his second challenge is not to a factual finding. The postconviction court evaluated the evidence and made findings of fact, and then applied the law to those facts to determine whether Johnson had shown, by a preponderance of the

evidence, that suppression occurred within the meaning of *Brady*. In other words, the postconviction court did not make a finding that the prosecutor disclosed J.H.’s cooperation agreement. Instead, faced with the attorneys’ competing testimony and the lack of documentation, the postconviction court weighed the evidence and ultimately decided that Johnson had not met his burden of showing suppression.

We conclude that, in this specific case, Johnson’s challenge to the postconviction court’s determination that he failed to meet his burden of proof involves a mixed question of law and fact, and we accordingly apply de novo review in considering that issue. *Cf. Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005) (determining that the materiality prong of the *Brady*-violation test, which asks whether the absence of the evidence caused prejudice to the defendant, involves a mixed issue of law and fact that requires de novo review).

With the applicable standards of review in mind, we turn to Johnson’s specific allegations of error.

I. The postconviction court made clearly erroneous factual findings.

We initially consider Johnson’s challenge to the substance of the postconviction court’s factual findings, which we review for clear error. A district court’s factual findings are clearly erroneous when the appellate court is “left with the definite and firm conviction that a mistake has been made.” *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008) (quotation omitted). If “reasonable evidence” supports the district court’s factual findings, the appellate court will not disturb them. *Id.*

Johnson first challenges one of the postconviction court’s factual findings regarding the substance of the prosecutor’s testimony at the evidentiary hearing. According to the postconviction court’s order, the prosecutor testified that, during Johnson’s plea negotiations, Johnson’s attorney “was aware of the cooperation agreements reached with [J.S.] and [J.H.] and was requesting a similar agreement for [Johnson].” Johnson points out that, contrary to this finding, the prosecutor never testified that Johnson’s attorney was specifically aware of J.H.’s *cooperation agreement* (that is, the part of the plea bargain compelling her to testify against Johnson). Instead, the prosecutor simply testified that Johnson’s attorney knew about the favorable plea deals that J.S. and J.H. were offered. When asked whether he specifically recalled disclosing that J.H.’s plea agreement, which required J.H. to testify against Johnson, the prosecutor stated that he did not.

We agree with Johnson that the record does not support, and indeed contradicts, the postconviction court’s factual finding. Although the prosecutor’s testimony certainly suggests that Johnson’s attorney generally knew about J.H.’s and J.S.’s favorable plea deals, the prosecutor also testified that he did not recall any specific discussion about the *cooperation component* of J.H.’s plea agreement requiring her to testify against Johnson. Accordingly, the postconviction court’s finding—which purports to convey the prosecutor’s actual testimony—is clearly erroneous.

The second finding that Johnson challenges is the postconviction court’s statement that Johnson’s attorney “has no recollection of any disclosure of the cooperation agreements made with [J.S.] and [J.H.].” Johnson argues that this finding is clearly

erroneous because his trial attorney testified that he *did* recall the prosecutor disclosing J.S.’s cooperation agreement.

As Johnson observes, the postconviction court’s factual finding is inconsistent with the record. Johnson’s attorney testified that he recalled the prosecutor disclosing J.S.’s cooperation agreement, and this testimony was unrebutted. The trial attorney’s use of the cooperation agreement to impeach J.S.’s trial testimony supported his recollection. While Johnson’s attorney could not remember any specific details about the disclosure, the record does not support the postconviction court’s finding that the attorney had “*no recollection of any disclosure* of the cooperation agreement[] made with [J.S.]” (Emphasis added.) Accordingly, this finding is clearly erroneous.

II. The preponderance of the evidence shows that the state suppressed the cooperation agreement.

Johnson next argues that the postconviction court erred in its ultimate determination that there was no suppression of J.H.’s cooperation agreement, which as noted, is a decision we review de novo. “[I]n criminal cases, the state has an affirmative duty to disclose evidence that is favorable and material to the defense.” *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999). When the state fails to disclose such evidence, whether intentionally or not, the defendant’s constitutional right to due process is violated. *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010). Although the term “suppression” suggests some ill intent on the part of the prosecutor, the prosecutor’s intent is immaterial. *See id.* Whether “a failure to disclose is in good faith or bad faith, the prosecution’s responsibility for failing to disclose known, favorable evidence rising to a material level of importance is

inescapable.” *Kyles v. Whitely*, 514 U.S. 419, 437-38, 115 S. Ct. 1555, 1567-68 (1995) (citation omitted).

Here, the postconviction court concluded that Johnson did not establish by a preponderance of the evidence that the prosecutor failed to disclose J.H.’s cooperation agreement. The postconviction court reasoned that Johnson did not satisfy his burden because he merely offered his trial attorney’s testimony that (1) the trial attorney could not specifically recall the disclosure and (2) had disclosure occurred, the trial attorney would have used the cooperation agreement at trial as he used J.S.’s agreement. This testimony, the postconviction court reasoned, “does not establish that the [s]tate suppressed [J.H.’s] cooperation agreement any more than it leaves open the possibility the defense did not utilize the agreement for some other reason.”

Our independent or de novo review of the record persuades us that, contrary to the postconviction court’s conclusion, Johnson offered sufficient, unrebutted evidence to show suppression. The following evidence supports Johnson’s claim.

First, it is undisputed that the prosecutor did not turn over J.H.’s written cooperation agreement to Johnson or make any other written disclosure about the cooperation agreement. J.H.’s plea agreement with the state was indeed reduced to writing and includes the cooperation term. As Johnson points out, rule 9.01 of the Minnesota Rules of Criminal Procedure requires prosecutors to disclose documents “that relate to the case.” Minn. R. Crim. P. 9.01, subd. 1. It appears the prosecutor violated that rule.

Next, Johnson’s trial attorney testified that he had no recollection of the prosecutor disclosing the cooperation agreement orally. He testified that his file for the case, where

he recorded material conversations, did not contain a note about the disclosure. He also testified unequivocally that, had the cooperation agreement been disclosed to him, he would have used it to impeach J.H.'s credibility at trial. This testimony was corroborated by the fact that he did use J.S.'s cooperation agreement with the state to impeach her credibility on cross-examination and highlighted her potential bias in closing arguments.

To counter Johnson's claim of nondisclosure, the prosecutor testified that, although he did not recall specifically disclosing J.H.'s cooperation agreement, defense counsel must have been aware of it based on a conversation the two had during plea bargaining. During this conversation, Johnson's attorney requested a sentence similar to the sentences that J.S. and J.H. were offered. Importantly, however, the prosecutor could not recall whether he mentioned during the plea-bargain discussion that J.H.'s plea agreement was contingent on her testifying against Johnson. But even more importantly, the prosecutor believed that this conversation occurred *before* J.H. entered her guilty plea. In other words, the prosecutor did not provide any testimony suggesting that he disclosed J.H.'s cooperation agreement with the state after the agreement was actually entered.

Although Johnson carried the burden of proof at the postconviction proceeding, the state carries the affirmative obligation of disclosing *Brady* material. *Williams*, 593 N.W.2d at 234. And Johnson only needed to show that it was more likely than not that the state never disclosed J.H.'s cooperation agreement. *See City of Lake Elmo*, 685 N.W.2d at 4. The undisputed evidence shows that the state provided no written disclosure of J.H.'s cooperation agreement, which it should have done under the rules of criminal procedure. *See Minn. R. Crim. P. 9.01, subd. 1.*

Johnson also offered compelling evidence that the agreement was not disclosed orally, and the state could not point to a specific instance where it did orally disclose the cooperation agreement. The state instead relied on a conversation—which the prosecutor believed occurred *before* the J.H. cooperation agreement was actually entered—to raise an inference of disclosure. At most, this conversation shows that Johnson’s attorney had some knowledge of the state’s general favorable plea agreements with J.S. and J.H.; it does not show that the prosecutor satisfied his affirmative obligation under *Brady* to disclose the cooperation agreement. Stated otherwise, what the defense attorney did or did not know about J.H.’s and J.S.’s cases is not the dispositive question. While his knowledge is relevant evidence of whether a disclosure occurred, the question is still whether the prosecutor in fact made the required disclosure.

The totality of the evidence compels us to conclude that Johnson met his burden of showing that the prosecutor never disclosed the cooperation agreement involving J.H. as required under *Brady*. Because this court has already held that Johnson satisfied the other two prongs of the *Brady*-violation analysis, *see Johnson*, 2019 WL 3543175, at *3, we accordingly reverse Johnson’s conviction and remand for a new trial.

Reversed and remanded.