

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2004-01-006
 :
 - vs - : O P I N I O N
 : 2/7/2005
 :
 JAMES MATTHEW CARR, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2002CR0070

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffman, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

Helene Koligian, 325 West Ohio Pike, Amelia, Ohio 45102, for defendant-appellant

WALSH, J.

{¶1} Defendant-appellant, James Carr, appeals the decision of the Clermont County Court of Common Pleas, overruling his motion for a new trial. We affirm the decision of the trial court.

{¶2} In December 2001, Loveland police, while on routine patrol, stopped Jeffrey Popp for a traffic violation and discovered a large amount of methamphetamine in his auto. Popp was arrested

and questioned at the Loveland Police Station. He told police that appellant and another man, Frank Kruse, were operating a methamphetamine lab in a shed at Popp's residence. Police searched the property and the methamphetamine lab was discovered. Appellant was charged with manufacturing methamphetamine and in June 2003, following a jury trial, appellant was convicted of manufacturing methamphetamine in violation of R.C. 2925.04(A).

{¶3} In October 2003 he filed a motion for a new trial pursuant to Crim.R. 33(A)(6), arguing that the prosecution failed to provide him with exculpatory evidence. Appellant claimed that an audio tape recording of the police interview with Popp, provided to him by the prosecution, did not include the entire contents of the interview. He argued that the omission was not discovered until, after trial, his counsel obtained a police report summarizing Popp's statements, and that the summary contained exculpatory evidence. The trial court overruled the motion noting that Popp testified to the alleged exculpatory evidence at trial. Appellant appeals, raising a single assignment of error:

{¶4} "The trial court erred in denying defendants [sic] motion for a new trial when exculpatory evidence was discovered after trial."

{¶5} In his assignment of error, appellant argues that he is entitled to a new trial because the prosecution suppressed exculpatory material in violation of his constitutional rights and Brady v. Maryland (1963), 373 U.S. 83, 83 S.Ct. 1194. Appellant claims that the written police summary of the interview contains exculpa-

tory statements not included in the audio recording. In support of this contention he points to Popp's statement, contained in the summary, that he told appellant not to use anhydrous ammonia (necessary to one of the steps in manufacturing methamphetamine), in his shed, but rather in appellant's van, so as to protect Popp's children from the hazards inherent in working with the material. Appellant argues that this statement demonstrates that he was not manufacturing methamphetamine in the shed, as Popp testified at trial. Appellant argues that because the prosecution failed to provide him with this evidence prior to trial, he was unable to use the inconsistent statement to impeach Popp's testimony.

{¶6} To prevail on a Crim.R. 33(A)(6) motion for a new trial on the ground of newly-discovered evidence, the movant must demonstrate that the evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. State v. Hawkins (1993), 66 Ohio St.3d 339, 350, quoting State v. Petro (1947), 148 Ohio St. 505, syllabus.

{¶7} Since the failure to disclose material, exculpatory evidence violates a defendant's Fourteenth Amendment right to due process, an appellate court reviewing a trial court's resolution of a motion for a new trial claiming a Brady violation utilizes a due process analysis rather than an abuse of discretion analysis.

State v. Johnston (1988), 39 Ohio St.3d 48, 59. We must therefore determine whether the prosecution suppressed evidence that is material to appellant's guilt, irrespective of the good faith or bad faith of the prosecution. See *id.*, citing Brady at 87.

{¶8} In order to establish a Brady violation, three elements must be demonstrated: first, that the prosecution failed to disclose evidence upon request; second, that the evidence was favorable to the defense; and third, that the evidence was material. See Moore v. Illinois (1972), 408 U.S. 786, 92 S.Ct. 2562. In U.S. v. Bagley (1985), 473 U.S. 667, 105 S.Ct. 3375, the United States Supreme Court held that both exculpatory and impeachment evidence may be the subject of a Brady violation, so long as the evidence is material.

{¶9} Bagley also provides the materiality test to be applied where evidence has been suppressed. In determining whether the prosecution improperly suppressed evidence favorable to an accused, evidence is material 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. *Id.* A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.*; see, also, Pennsylvania v. Ritchie (1987), 480 U.S. 39, 57, 107 S.Ct. 989, 1001.

{¶10} Review of the record reveals that Popp testified, both on direct examination and cross-examination, that he asked appellant not to use anhydrous ammonia in the shed on his property. Popp testified that he asked appellant to use the anhydrous ammonia in

appellant's van, and also testified that he asked appellant not to use anhydrous ammonia "around [his] property." We agree with the trial court's conclusion that Popp's trial testimony exposed the alleged inconsistency which appellant argues is revealed only in the police summary of the interview. Consequently, the police summary is not material evidence that merits a new trial. The evidence does not raise a reasonable probability that, had it been disclosed to or discovered by the defense, the result of the trial would have been different. Appellant was not denied due process. The assignment of error is overruled.

{¶11} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.

[Cite as *State v. Carr*, 2005-Ohio-417.]