BY THE COURT:

DATE SIGNED: September 6, 2018

Electronically signed by Angela W Sutkiewicz
Circuit Court Judge

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

STATE OF WISCONSIN,

v. Case No. 2005 CF 381

STEVEN AVERY,

Defendant

MEMORANDUM DECISION AND ORDER

This matter is back before this court for a limited review pursuant to an Order from the Court of Appeals. The case was remanded to this court to allow the defendant to submit a motion to pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The defendant alleges that the prosecution withheld a CD created from seized computer drives and that the failure to turn over this item of discovery directly impacted the defense in both the trial and appellate courts.

It is important to note that the Court of Appeals was very specific in its order. The Court of Appeals retained full jurisdiction over this matter. The court remanded the case to this court for a limited review. The defendant was ordered to file his brief within

30 days of the Court of Appeals order. He complied with this portion of the order. This court was ordered to conduct any necessary proceedings within 60 days of the filing of the brief. The Court of Appeals then set forth very detailed procedures to be filed after this court enters its ruling.

No where in the very specific orders of the Court of Appeals did the court allow for a reply brief by the state or a response by the defendant. Because the Court of Appeals was so detailed in its instructions, the court did not consider the subsequent briefs submitted by the parties after the defendant's court ordered filing. This court followed the order of the Court of Appeals and only considered the initial brief of the defendant.

FACTUAL BACKGROUND

The court will not recount all the dates and details of this case. Rather, it will confine itself to the facts immediately surrounding the evidence in question in this motion. Any exhibits referred to in this decision are from the motion filed in this matter, rather than any previous documents filed.

During the course of the investigation in this matter, Special Agent Thomas Fassbender of the Wisconsin Department of Justice, Division of Criminal Investigation and Investigator Mark Wiegert of the Calumet County Sheriff's Department seized a computer and 12 CDs from the home of Barbara Janda. (ex. 2) According to Wisconsin Division of Criminal Investigation Case report, number 05-1776/304, the evidence was turned over to Detective Mike Velie of the Grand Chute Police Department on April 22, 2006. (Ibid.) On May 11, 2006, the materials were returned to S/A Fassbender. A CD was created by Detective Velie entitled, "Dassey's Computer, Final Report, Investigative

Copy". That CD included Detective Velie's report and copies of instant messages, along with a summary of the images found. Seven additional CDs were also turned over to the detectives. Those CDs included a copy of the hard drive seized from Barbara Janda. (Ibid.)

On December 14, 2006, the prosecutor turned over numerous items to the defense in advance of trial. An itemized list of the evidence delivered was also supplied to the defense. (Ex. 3) On the last page of the inventory are listed 7 CDs, described as coming from Brendan Dassey's computer. (Ibid.) While the defendant disputes who actually owned the computer in his motion, the defendant does not dispute that these are copies of the hard drive in question or that these CDs were given to the defense prior to trial. In his letter of December 15, 2006, the prosecutor asked the defense to look at the items in the inventory carefully and advise them of any missing items. (Ibid.) Included in the discovery sent was the report of Special Agent Fassbender, in which he identifies the report written by Detective Velie and the existence of the CD that he created. (Ibid.) On December 19, paralegal Shavon Ryan sent a letter confirming that the copies of the hard drive CDs were given to the defense. (Ex. 4)

On January 25, 2007, the prosecutor sent an email to Attorney Strang, proposing entering into various stipulations prior to trial (Ex. 5). In that email, the prosecutor, in paragraph R, discusses Detective Velie's examination of the computer in question, as well as inspections of two other computer drives not subject to this motion. The prosecutor indicates that, in his opinion, no relevant evidence was found on any of the drives in question. On February 4, 2007, Attorney Strang responded that the results of

the computer analysis done on the drive were not relevant, unless Brandon was called as a witness or his statements were offered at trial. (Ibid.)

On July 31, 2017, the defendant requested that his computer expert, Mr. Gary Hunt, review the 7 CDs that were made of the computer hard drive in question. (Ex. 8) According to the affidavit of Mr. Hunt, he discovered violent pornography that existed on the hard drive.

The defendant does not state when his counsel discovered the existence of the Velie CD and report, but indicates that on November 14, 2017, December 4, 2017, and March 20, 2018, counsel requested a copy of the CD from Attorney Fallon. (Ex. 25) After receiving the CD, Mr. Hunt produced another report, detailing his findings of what was on the disc produced by Detective Velie. In his third supplemental affidavit, submitted as part of Exhibit 8 of this motion, Mr. Hunt states that, with few unidentified exceptions, the content of the CD created by Detective Velie was created from the 7 CDs provided to the defense prior to trial by the prosecution. While Mr. Hunt concludes that the information on the CD was available to the defense on the CDs provided, he asserts that the defense was deprived of certain critical information regarding the creation of the CD; he does not, however, specifically indicate what information was withheld other than stating that the defense was not informed of the criteria used by Detective Velie in developing his report. (ex. 8)

ANALYSIS

In *State v. Harris,* 2004 WI 64, 272 Wis. 2d, 80, 680 N.W.2d 737, the Wisconsin Supreme Court confirmed the standards that form the establishment of a Brady violation in this state:

> The United States Supreme Court has summarized the three prerequisites for a *Brady* violation as follows: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler,* 527 U.S. at 281-82, 119 S.Ct. 1936. "Prejudice," as *Strickler* provided, encompasses the materiality requirement of *Brady* so that the defendant is not prejudiced unless " 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Strickler,* 527 U.S. at 290, 119 S.Ct. 1936 (quoting *Kyles v. Whitley,* 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

Ibid., 2004 WI at ¶ 15.

In this matter, one key part of the test settles this matter in its entirety. In order for the defendant to establish that there was a *Brady* violation in a criminal prosecution, the defendant must prove that evidence was suppressed by the state. In this case, the defendant fails on this first burden.

The state turned over 7 CDs, containing the contents of the hard drive seized in the Janda house, on December 14, 2006; this is not disputed by either party in this matter. Mr. Hunt, the computer expert hired by the defendant, submitted a third supplemental affidavit (Ex. 8) in support of this motion, asserting that the missing CD, created by Detective Velie, contained, with limited exceptions, the same information from the Janda computer as held on the CDs turned over to the defense in December, 2006.

The defendant argues that the information contained on the Velie CD was critical to the defense and, by failing to turn the disc over, the defendant's trial strategy was seriously harmed. However, as the defendant's own computer expert asserts, the same information presented in the Velie CD was in the possession of the defense on the 7 CDs

turned over by the prosecution in December of 2006, almost two months prior to the beginning of trial on February 12, 2007. While the defense did not have those specific impressions of Detective Velie prior to trial, the information that he used to create the CD in question was in the possession of the defendant prior to trial. Furthermore, as indicated in the emails exchanged between the defense and the prosecution in January and February of 2007, the defense was aware of Detective Velie's computer work and his potential to be a witness at trial. What the prosecution failed to turn over to the defense was not the key information that the defense argues was critical to his case, but the summary impressions and compilation of information created by an investigator in this matter. The state provided and the defendant was in possession of the information that he considered critical to his defense months before trial.

The defendant asserts that the 7 CDs turned over by the prosecutor were delivered too late for the defense to meaningfully examine the evidence in question, thus violating the *Brady* disclosure requirements. The defense asserts that special software, specifically the EnCase program, was required to view the evidence on the 7 CDs. Because the defendant did not have access to that software, he argues that he was meaningfully deprived of the use of the material contained therein.

What is missing from the defendant's exhibits and affidavits is any assertion that the defendant reviewed the images on the CDs and, being unable to view the information, contacted the prosecution for access to the necessary software and was denied such access. If the defendant did not open the evidence disclosed to him and was unaware that the specialized software was necessary to study it until his post conviction proceedings, he was not deprived of access to the information; trial counsel simply chose not to review

it. This strategic choice would have been made by the defense, rather than the result of the prosecution withholding any information.

The defendant also asserts that the CDs were turned over to the defense too close to the commencement of trial for counsel to make any meaningful review of the information contained on the discs. The evidence was turned over to the defendant almost two months prior to trial. If, in the weeks prior to trial, the defendant was concerned that he could not meaningfully examine the evidence prior to the beginning of the presentation of evidence to the jury, the defense could have submitted a motion to the court requesting additional time to review newly disclosed evidence. There is no indication in the record that any such request was made.

Mr. Hunt, in his third affidavit in this matter, makes an assertion that although the defendant was in possession of the same information that Detective Velie used in the creation of his CD, the defense was deprived of access to critical information used to create the CD, such as the methodology used by the detective in the creation of the documents. The affidavit is vague as to what "critical information" was withheld or how that critical information affected the defense at trial. Mr. Hunt's vague assertions on this point are conclusory and speculative, rather than evidentiary.

The defendant also asserts that the defense was not aware of the existence of the Velie CD prior to the beginning of trial. However, the record indicates that the defense was in possession of the report of Special Agent Fassbender, numbered 05-1776/304, prior to trial. In that report, Special Agent Fassbender discloses the seizure of the Janda computer, the delivery of the computer drives to Detective Velie, the creation of the CD in question and the disclosure of a report created by Detective Velie. In his

correspondence of December 16, 2006, the prosecutor sent correspondence to the defense, requesting that they carefully review all items turned over pursuant to *Brady* and to contact the prosecutor if anything listed was missing. There is no indication of record that the defense made any such request for the missing CD, although notice of the existence of the Velie CD was given to the defense via Special Agent Fassbender's report prior to trial.

It should also be noted that the prosecution and defense exchanged emails regarding stipulations as to evidence to be submitted at trial. On January 25, 2007, the prosecution asked that the defense stipulate to the conclusions of Detective Velie regarding the computer drive in question as well as several other computer drives seized during the course of the investigation. As previous stated, Attorney Strang responded to that email on February 4, 2007. In that email, Attorney Strang specifically acknowledged Detective Velie's work in the investigation. The attorney then stated that the results of the analysis of Brandon's computer were not relevant, unless he was a witness at trial or his statements were offered into evidence. Attorney Strang was in possession of Special Agent Fassbender's report revealing the work of Detective Velie, he acknowledged the detective's review of the drives when discussing the stipulation proposals, and concluded that the information on the drive in question was irrelevant, a result of a strategic decision on the part of the defense rather than misconduct on the part of the prosecution.

In an affidavit submitted in support of this motion (exhibit 7), Attorney Strang states that he made his decision regarding the stipulation on Detective Velie's testimony while relying on the assertions of the prosecutor rather than his own examination of the

evidence. As such, he argues that the defense suffered prejudice to its case based on a failure to disclose by the state.

It must be noted however that the defense was in full possession of the same information as the prosecution via the 7 CDs turned over pursuant to discovery. This was confirmed by the defendant's expert in his third supplemental affidavit previously referenced in this decision. The defense was put on notice as to the existence of the Velie CD via the police reports given to it by the prosecution and it acknowledged that work of Detective Velie in the discussions regarding stipulation of evidence at trial. If the defendant made the strategic decision to rely on the opinion of the prosecutor rather than review the evidence given to it pursuant to discovery, he cannot claim that the prosecution deliberately mislead him regarding the importance of any evidence contained therein.

In light of all the evidence submitted, it is clear that the defense was in possession of the same evidence as the prosecution prior to trial. The prosecution gave the defendant CD copies of the hard drive in question and alerted him to the existence of the Velie CD via Special Agent Fassbender's report. The defendant's own expert concluded that the Velie CD contained substantially the same evidence as was available to the defense in the 7 CDs turned over in December, 2006. Correspondence issued in December 2006 from the prosecution urged the defense to review all itemizations and evidence disclosed pursuant to discovery. The prosecutor urged the defendant to contact the state if any information listed in the discovery was missing; no such request was made by the defense. The defense acknowledged its awareness of the work of Detective Velie when discussing stipulations to be made at trial. Based on this foundation, the court cannot

find that, either willfully or through error, the prosecution withheld exculpatory evidence from the defense in this matter.

In an alternative argument, the defendant submitted a one paragraph statement asserting that should the court find that evidence was not withheld from the defense in violation of the *Brady* decision, it should find that he received ineffective assistance of counsel from his trial attorneys. (Pg. 30) The defendant mentions *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052(1984) in his argument, but does not set forth the requirements to meet the burden for a finding of ineffective assistance of counsel pursuant to that ruling. The defendant simply states that he incorporates multiple paragraphs of other documents in the record without identifying the information contained in those paragraphs, how they are supported by the evidence submitted with this motion, or how such information satisfies the standards necessary to establish that he was provided with ineffective assistance of counsel.

It is again important to review the order of the Court of Appeals in this matter. This court was ordered to review whether or not a *Brady* violation occurred in discovery. The Court of Appeals did not open the remand to any and all additional arguments that were not included in previous motions. As such, the court should not consider this issue.

Even if the court were allowed to consider such a motion, the one paragraph argument submitted by the defendant is completely inadequate. The argument is so sparse and unsupported by the record that it would be impossible for the court to find in favor of the defense on this issue. The defense cannot simply reference a case and make a statement incorporating large sections of the record to sustain a successful argument. Specific facts must be applied to specific sections of a ruling for the court to consider an

argument. The defendant cannot throw a single paragraph into a thirty-three page motion and expect the court to do his work for him. It is a well established principal in Wisconsin law that a court will not act as an advocate for any party, searching the record for evidence that might support its argument. *See State v. Pettit*, 171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1992). If the defendant intended to make a serious argument on this point, he should have done the work necessary to support such a position.

FOR THE REASONS SET FORTH ABOVE, ALL MOTIONS SUBMITTED BY THE DEFENDANT ON OR AFTER JULY 6, 2018 ARE HEREBY **DENIED**.