

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	CASE NO. ST-2015-CR-186
Plaintiff,	)	
vs.	)	14 V.I.C. 297(a)(2)
	)	14 V.I.C. 2251(a)(2)(B)
KARL R. CAESAR,	)	14 V.I.C. 298(5)
(D.O.B.: 05-17-73)	)	14 V.I.C. 622(1)
Defendant.	)	

MEMORANDUM OPINION

Before the Court is Defendant's Motion to Dismiss for *Brady* and *Giglio* Violations (the "Motion") filed on March 7, 2016.¹ On March 8, 2016, the People's Opposition to Defendant's Motion to Dismiss for *Brady* and *Giglio* Violations was filed. On the same date, Defendant's Supplemental Filing on Motion to Dismiss was filed. Defendant's Motion seeks a dismissal of this matter due to a purported *Brady* violation² based on the Prosecutor's two-week delay in disclosing verbal statements made to the Prosecutor by eyewitness Raymond Forbes ("Forbes").³ Caesar argues that the Prosecutor's delay in disclosure amounts to prosecutorial misconduct.⁴ The Prosecutor's position is that the delay was not intentional. Because the verbal statements made to the Prosecutor were not suppressed within the meaning of *Brady*, and the delay did not amount to prosecutorial misconduct, the Court will deny Defendant's Motion.

BACKGROUND

The charges in this case are based upon events that occurred on or about May 9, 2015. A jury was selected in this matter on February 22, 2016, with trial to commence on March 7, 2016.

On August 13, 2015, Officer Lorne Clarke ("Clarke") spoke with Forbes. Forbes told Clarke that he did not want to make a statement or be involved with the case. Thereafter, the Prosecutor subpoenaed Forbes. On February 19, 2016, the Prosecutor contacted Forbes over the telephone. At that time, Forbes reiterated that he did not want to be involved with the trial and did

¹ Counsel of record for the People of the Virgin Islands, Assistant Attorney General Denise George Counts, is no longer employed at the Department of Justice. Another assistant attorney general has not entered an notice of appearance in this matter. The Defendant, Karl Caesar, is represented by Attorney Susan Bruch Moorehead.

² The Defendant appears to argue that a *Giglio* violation occurred based on the title of the Motion. However, such a violation has not occurred. *See People of the Virgin Islands v. Ward*, 55 V.I. 829, 833 (V.I. 2011) (A *Giglio* violation occurs when "the undisclosed evidence reveals that the prosecution knowingly made false statements or introduced or allowed trial testimony that it knew or should have known was false. To prevail on a *Giglio* claim, a [defendant] must establish that (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material.").

³ Defendant's Motion to Dismiss for *Brady* and *Giglio* Violations ("Defendant's Motion to Dismiss"), 3-5, March 7, 2016.

⁴ *Id.* at 2.

not want to put anyone in jail. On February 22, 2016, the People obtained and provided a written statement from Forbes which Defendant contends is “largely exculpatory.” Then, on March 7, 2016, at 7:02 a.m., the Prosecutor sent the following email message to the Defendant’s attorney:

I am sharing with you verbal statements made by witness Raymond Forbes made shortly prior and leading up to the written statement taken later that day. On the morning of jury selection, I called Mr. Forbes in the AG office at the court house to provide me with DOB and POB information in order to obtain his NCIC. He took the opportunity to tell me that he did not want to have anything to do with the trial and claims he was expecting sex from the victim witness Aqueesha Renault in exchange for his verbal account of the incident that he previously provided to the police and DOJ at or near the time of the incident and up to the previous Friday. He then expressed dismay that Renault had not had sex with him, ‘up to this day,’ as he said. It was then that he claimed he did not see anything he previously said that he observed at the scene of the assault. I stopped Forbes at that point because I generally do not question witnesses about the facts without an agent or officer present. I then informed the officers⁵ of what he told me and requested that the officers take a written statement from Forbes before he left the court that day. Officer Clarke later that day took the written statement of Mr. Forbes, which I provided to you upon my receipt and which reflects a change in Forbes’ statements previously reported by the police and favorable to the Defendant. I did not hear anything more from Mr. Forbes regarding this. I am available to meet with you this morning before trial if you would like to discuss this matter.⁶

Forbes’ February 22, 2016 statement made no reference to the sexual favors allegedly offered by Renault to Forbes in exchange for his testimony. On March 7, 2016, while responding to Defendant’s Motion, the Prosecutor stated that she did not speak to the police officers after they took Forbes’ statement and that it was not until Sunday, March 6, 2016, the day before trial, that she realized that Forbes’ statement to the police made no reference to Forbes’ contention that Renault had agreed to offer sex in exchange for his testimony.

Relying on *Strickler v. Greene*,⁷ Caesar argues: (1) the verbal statement contained favorable impeachment evidence; (2) the verbal statement was suppressed by the Government; and (3) the suppression of the verbal statement is highly prejudicial to Caesar.⁸ Therefore, Caesar seeks dismissal of this matter.

⁵ At the motion hearing, the Prosecutor indicated that she spoke with Officer LaToya Schneider and Officer Alphonso Boyce.

⁶ Defendant’s Motion to Dismiss, Ex. 2, March 7, 2016.

⁷ 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

⁸ Defendant’s Motion to Dismiss, 3-5, March 7, 2016.

ANALYSIS

At issue are: 1) whether the verbal statements made by Forbes to the Prosecutor were timely disclosed within the meaning of *Brady*; 2) whether the Prosecutor's delay in disclosure amounts to prosecutorial misconduct; and 3) whether the Prosecutor will likely be called as a necessary witness.

A. The Verbal Statements Made By Forbes To The Prosecutor Were Timely Disclosed Within The Meaning of *Brady*

There is no question that on the morning of trial the Prosecutor disclosed the verbal statements to Caesar's defense counsel. The question presented is whether the disclosure was untimely within the meaning of *Brady* and, therefore, constitutes suppression of the evidence.

As a threshold matter, Caesar bears the burden of showing that a *Brady* violation has occurred. A defendant's due process right to a fair trial is violated under *Brady* when the prosecution fails to disclose "evidence favorable to a criminal defendant where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."⁹ "Evidence is material if there is a reasonable probability that the outcome would have been different had the evidence been disclosed to the defense."¹⁰ Therefore, to meet his burden, Caesar must show that the verbal statements made to the Prosecutor were "(1) suppressed (*i.e.*, the People failed to disclose it), (2) favorable, and (3) material to his defense."¹¹ Impeachment evidence constitutes a *Brady* violation when the reliability of a witness "may be determinative of a criminal defendant's guilt or innocence."¹² "The purpose of *Brady* is not to require the prosecution to disclose all possibly favorable evidence to the defense but to make certain that the defendant will not be denied access to evidence which would ensure him a fair trial."¹³

Considering the first prong of *Brady*, Caesar must show that the verbal statements made by Forbes were suppressed by the People. Caesar argues that the statements were suppressed because the People waited until two weeks before informing the defense about the statements on the morning of the jury trial.¹⁴ The People rely on *Williams v. People of the Virgin Islands* to argue that "a *Brady* violation only occurs if exculpatory information is not disclosed until after trial. In other words, evidence turned over during trial is not considered suppressed for *Brady* purposes."

⁹ *Ward*, 55 V.I. at 842; *Brady v. Maryland*, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 1197 (1963).

¹⁰ *Bowry v. People*, 52 V.I. 264, 274 (V.I. 2009); *see also United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985); *Stevens v. People*, 55 V.I. 550, 556 (V.I. 2011).

¹¹ *Bowry*, 52 V.I. at 274 (citing *Riley v. Taylor*, 277 F.3d 261, 301 (3d Cir. 2001)).

¹² *Id.* ("Evidence that may be used to impeach may qualify as *Brady* material.") (citing *Kyles v. Whitley*, 514 U.S. 419, 445, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

¹³ *Stevens*, 55 V.I. at 556 (internal quotation marks omitted).

¹⁴ Defendant's Motion to Dismiss, 4, March 7, 2016.

¹⁵ Therefore, the People assert that if the disclosure has been made, it is not suppressed within the meaning of *Brady*.¹⁶

In *People v. Ward*, the Supreme Court of the Virgin Islands held “to constitute a *Brady* violation, the prosecution must have failed to *timely* disclose the pertinent materials.”¹⁷ The Court also noted that the trial court sets pre-trial deadlines for the disclosure of *Brady* material, which the prosecution must comply with unless there has been an abuse of discretion by the trial court.¹⁸ “However, in the absence of a scheduling order, disclosure is timely ‘if *Brady* material is disclosed ... in time for its effective use at trial.’”¹⁹

In *Williams*, the Virgin Islands Supreme Court held that “a *Brady* violation only occurs if exculpatory information is not disclosed until after trial.”²⁰ The Court held that “since each piece of purportedly ‘suppressed’ evidence was — at the absolute latest — disclosed during trial,” the defendant failed to meet his burden with respect to the first prong.²¹

Further, the rationale for this position can be best understood from the United States Supreme Court, which recognizes that there must be a failure to disclose or an omission on the part of the prosecution. The Court provides “unless the *omission* deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose.”²²

At the outset, the Court agrees with defense counsel’s argument that it should have been “readily apparent” to a seasoned prosecutor that the verbal statements made by Forbes should have been immediately disclosed prior to jury selection.²³ The Prosecutor could have filed an affidavit with the Court or made an oral statement on the record prior to jury selection. The Prosecutor failed to pursue either avenue. Instead, she selected the jury after having spoken with Forbes. She then waited for two weeks to disclose the evidence. However, without suppression, “there can be no *Brady* violation, notwithstanding the putative materiality” of the evidence.²⁴ The People did disclose the verbal statements made by Forbes prior to trial in an email entitled “POVI v. C[ae]sar-[P]re-trial D[i]sclosure.”²⁵ Such a disclosure falls within this jurisdiction’s definition of timeliness and can be utilized by defense counsel to impeach Forbes. Therefore, the Court finds that Caesar

¹⁵ 59 V.I. 1024, 1026 (V.I. 2013).

¹⁶ People’s Opposition to Defendant’s Motion to Dismiss for *Brady* and *Giglio* Violations (“People’s Opposition”), 2, March 8, 2016.

¹⁷ *Ward*, 55 V.I. at 848.

¹⁸ *Id.*

¹⁹ *Id.* (quoting *United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983) (holding the right to a fair trial will be fully protected if impeachment material used to challenge the credibility of government witnesses is disclosed on the day the witness testifies).

²⁰ *Williams*, 59 V.I. at 1040; See e.g., *George v. People of the Virgin Islands*, 59 V.I. 368 (V.I. 2013).

²¹ *Id.*; see also *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (holding that *Brady* applies in three different situations and each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense).

²² *Agurs*, 427 U.S. at 108 (emphasis added).

²³ Defendant’s Supplemental Filing on Motion to Dismiss, 4, March 7, 2016.

²⁴ *United States v. Pelullo*, 399 F.3d 197, 204 (3d Cir. 2005).

²⁵ Defendant’s Motion to Dismiss, Ex. 2, March 7, 2016.

has failed to satisfy the first prong of *Brady*. Because Caesar has not met his burden with respect to the first prong of *Brady*, the Court will not address the second or third prongs of the test.

B. The Prosecutor's Delay in Disclosure Does Not Constitute Prosecutorial Misconduct.

The question presented is whether the Prosecutor's delay in disclosure of the verbal statements amounts to prosecutorial misconduct.²⁶

A prosecutor must act appropriately in criminal proceedings with the ultimate goal not simply to ensure a conviction, but to seek justice.²⁷ Prosecutorial misconduct has been found by courts in cases where the prosecutor elicits information outside the presence of defendant's counsel,²⁸ when a prosecutor expresses personal opinions about the defendant's guilt or credibility,²⁹ and certainly in cases where the prosecutor has engaged in a *Brady* violation.³⁰ In the instant case, given that the Court has determined that the Prosecutor has not violated *Brady*, the Court finds that the Prosecutor's delay in disclosure does not constitute prosecutorial misconduct.

C. The Prosecutor Is Likely To Be A Necessary Witness.

The question presented is whether the Prosecutor is likely to be a necessary witness in light of the verbal statements made by Forbes to the Prosecutor.

Virgin Islands Supreme Court Rule 211.3.7(a) provides,

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; (3) or disqualification of the lawyer would work substantial hardship on the client.³¹

²⁶ *Id.* at 2.

²⁷ *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

²⁸ See e.g., *Massiah v. U.S.*, 377 U.S. 201, 204 (1964).

²⁹ See e.g., *U.S. v. Smith*, 982 F.2d 681, 684 (1st Cir. 1993); *Boyd v. French*, 147 F.3d 319 (4th Cir. 1998); *U.S. v. Warshak*, 631 F.3d 206, 303 (6th Cir. 2010); *U.S. v. Nunez*, 532 F.3d 645, 653 (7th Cir. 2008).

³⁰ But see *Ward*, 55 V.I. at 845-47 (holding that the Superior Court erred in finding prosecutorial misconduct because there was no *Brady* violation).

³¹ See V.I. ST. C. R 211.3.7(a).

A necessary witness has been defined in this jurisdiction as an individual whose possible testimony is found to be “relevant, material, and unobtainable elsewhere.”³²

Caesar argues that “the only means by which the newly discovered evidence can be utilized in a meaningful way” would be to call the prosecutor as a witness in the case.³³ Caesar also argues that it is apparent that the Prosecutor who selected the jury is now a potential witness and a new prosecutor must handle the case.³⁴ Also, the jury that has been selected cannot sit as jurors in light of the prejudicial irregularity of the same prosecutor now being a witness.³⁵

The People counter that there is no compelling need nor is the calling of the Prosecutor unavoidable.³⁶ The People contend that Caesar can examine Forbes and inquire as to whether Forbes made the statement to the Prosecutor.³⁷ If Forbes denies the statement, the use of the disclosure email would be “sufficient and admissible with a stipulation from both parties that the disclosure was made by the Prosecutor.”³⁸ Therefore, the People contend that since there are other means by which the statements can be introduced “there is no need to place the prosecutor on the stand to say the same thing in the note.”³⁹

Further, the People rely on, *United States v. Tamura*, to assert there is no compelling need for prosecutor to testify.⁴⁰ In *Tamura*, the Defendant Leigh Raymond Tamura (“Tamura”) was convicted among other things for bribery with respect to a kickback scheme involving his employer. Several individuals were also indicted including a man named Forrest J. Ellis (“Ellis”). On appeal, Tamura argued that the trial court should have allowed him to call the prosecutor in order to impeach the testimony of Ellis. Specifically, Tamura argued that Ellis had “materially changed” his statement before trial. Oral argument was held on Tamura’s motion for a mistrial and the prosecutor stated: the first time the Government interviewed him, Ellis had seemed unsure whether the first person he negotiated with was Tamura or a man referred to as Akimoto. A month before trial, Ellis identified Tamura which caused the prosecutor to be “skeptical about this sudden change from Akimoto to Tamura.” The prosecutor then told Ellis “to go back and think real hard about who you talked to and when.” The following week, Ellis confirmed it was Tamura.

The Court held that there was no compelling need for the prosecutor to testify. The Court provided,

[T]he prosecutor could not properly testify that Ellis had seemed unsure of his story and that the prosecutor had been skeptical; *these were merely the prosecutor’s opinions about Ellis’s credibility. The prosecutor’s account of*

³² *Daily News Publ. Co. v. 29th Legislature of the Virgin Islands*, 59 V.I. 138, 145 (V.I. Super. Ct. 2012).

³³ Defendant’s Motion to Dismiss, 2, March 7, 2016.

³⁴ Defendant’s Supplemental Filing on Motion to Dismiss, 5, March 8, 2016.

³⁵ *Id.*

³⁶ People’s Opposition, 3, March 8, 2016.

³⁷ *Id.*

³⁸ *Id.* at 4.

³⁹ People’s Opposition, 4, March 7, 2016.

⁴⁰ 694 F.2d 591, 601 (9th Cir. 1982).

what he and Ellis had actually said during the interviews in question was consistent with Ellis's testimony in every respect except one. On cross-examination Ellis had denied that the prosecutor had told him to "go back and think real hard" about his testimony. To impeach Ellis on this point, the trial court admitted into evidence a stipulation that if the prosecutor were to testify, he would state that he had told Ellis to go back and think really hard. Because this was the only point on which the admissible portions of the prosecutor's statements at oral argument diverged from Ellis's testimony, Tamura had no compelling need to call the prosecutor.⁴¹

Unlike *Tamura*, the statements made to the Prosecutor in this case by Forbes were not merely the Prosecutor's opinions about Forbes' credibility. Nor were the statements consistent with Forbes' statement to the police on February 22, 2016. On the contrary, the email from the Prosecutor brought to light evidence unavailable anywhere else in the record. More importantly, the test in this jurisdiction is not whether there is a compelling need for the Prosecutor to testify, but whether it is *likely* that the Prosecutor will be a necessary witness. Accordingly, the Court finds that the Prosecutor must not serve as the advocate in this case.

CONCLUSION

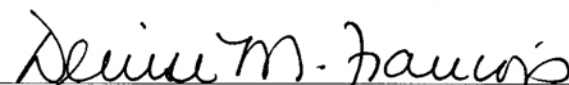
Because Caesar has failed to meet his burden with respect to the first prong of *Brady*, the Court will deny the Motion. In the absence of a *Brady* violation, the Court finds that the Prosecutor did not engage in prosecutorial misconduct. Finally, the Court finds that the Prosecutor must not serve as the advocate in this case as it is likely that she will be called as a necessary witness.

Accordingly, it is hereby

ORDERED that Defendant's Motion to Dismiss for *Brady* and *Giglio* Violations, filed on March 7, 2016, is **DENIED**; and it is further

ORDERED that a copy of this Memorandum Opinion shall be directed to Court-appointed counsel, Susan Bruch Moorehead, Esquire, and to Assistant Attorney General Quincy McRae, Chief of the Criminal Division of the V. I. Department of Justice.

DATED: August 25, 2016



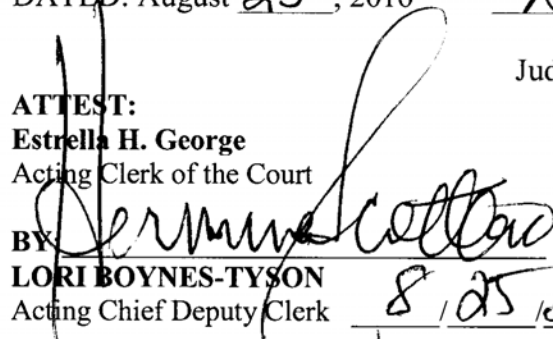
DENISE M. FRANCOIS

Judge of the Superior Court of the Virgin Islands

ATTEST:

Estrella H. George

Acting Clerk of the Court

BY 

LORI BOYNES-TYSON

Acting Chief Deputy Clerk

8/25/2016

⁴¹ *Id.* (emphasis added).