STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC **SUPERIOR COURT**

STATE OF RHODE ISLAND	:	
	:	
VS.	:	**W1-2003-0316A**
	:	
HAROLD T. DREW	:	

DECISION

CLIFTON, J. Before this Court is Defendant Harold T. Drew's Motion for a New Trial Based on Newly Discovered Evidence. Defendant's specific focus is his claim of newly discovered details of a cooperation agreement (hereinafter "agreement") between the State of Rhode Island's (hereinafter "State") main witness Bobbi Jo Dumont (hereinafter "Ms. Dumont"), and Rhode Island and Massachusetts authorities. Defendant claims the agreement he received did not disclose the following:

(1) five breaking and entering violations committed by Ms. Dumont in Swansea Massachusetts;
(2) thirteen additional breaking and entering violations committed by Ms. Dumont and the Defendant, both in the states of Massachusetts and Rhode Island, and
(3) the State's promise not to charge Ms. Dumont with murder and conspiracy to murder.

The Defendant acknowledges that a cooperation agreement was provided by the State before the Defendant's trial, but contends that certain details about the agreement were absent, and amounted to a failure to disclose on the part of the State. The Defendant argues that the non-

disclosure was discovered after trial, that the details of the agreement constitutes discovery material that should have been disclosed to the Defendant before trial, and failure to do so prevented the Defendant from presenting the "best and fullest defense available to him." Brady v. Maryland, 373 U.S. 83 (1963); State v. Scurry, 636 A.2d 719, 725 (R.I. 1994).

I
FACTS & TRAVEL

Harold T. Drew (Defendant) was tried and convicted for the murder of Harold "Jack" Andrews in Rhode Island on May 13, 2003, at a trial that commenced on October 19, 2004. The State's main witness at trial was Bobbie Jo Dumont. On October 8, 2003, during pre-trial discovery, the State provided the Defendant with a copy of the agreement between Ms. Dumont and the State, in which Ms. Dumont agreed to plead to one charge of possession of heroin, and two counts of breaking and entering committed within the State of Rhode Island. The agreement spelled out that in exchange, Ms. Dumont would receive three-years suspended/three-years probation on the possession of heroin charge, and five years suspended/five years probation on the two counts of breaking and entering, respectively. Within the agreement the State also agreed to withdraw a pending bail violation notice filed pursuant to Super. R. Crim. P. Rule 46(g) in an unrelated matter. The agreement was executed on July 31, 2003 in exchange for Ms. Dumont's previous and continued cooperation in connection with the prosecution of criminal cases resulting from the murder of Mr. Andrews.

On October 12, 2004 the State provided Defendant with supplemental discovery that included a seven-page written summary resulting from the joint review of documents conducted by the State and counsel for Defendant at some point during the proceeding summer. The

summary included information indicating that Ms. Dumont, Mr. Drew and Mr. Andrews were all suspected of having committed fourteen breaking and enterings as reported by Rhode Island police departments in 2003.

Ms. Dumont provided testimony at Defendant's murder trial that she, Mr. Drew and Mr. Andrews were involved in a series of break-ins within the two states of Rhode Island and Massachusetts. She also testified that without her knowledge of his intent to do so, Mr. Drew shot and killed Mr. Andrews.

Defendant claims that after his conviction on the murder charge in Rhode Island, he was brought to Massachusetts to face breaking and entering charges. During the course of the Massachusetts proceedings, the Defendant discovered a police report by Detective Gregory Ryan of the Swansea Police Department, of Swansea Massachusetts. Det. Ryan's report, dated May 17, 2004,[1] stated that he and Detective Kershaw of the Rhode Island State Police, drove Ms. Dumont to several Massachusetts residences where Ms. Dumont would then inform the detectives whether the residence was one that she herself, Mr. Drew and/or Mr. Andrews had broken into while also providing details of these break-ins to the detectives. At the end of the report Det. Ryan states that "[a]s requested by Det. Arthur Kershaw, as part of her cooperation, Bobbie Jo Dumont will not be charged due to her assistance as a witness." Det. Ryan's report does not expressly reference the cooperation agreement between Ms. Dumont that the State provided at the murder trial in Rhode Island, nor does it state precisely what charges Ms. Dumont avoided for her cooperation.

[1] Although Det. Ryan's two-page Swansea Police Department report was dated "5/17/2004" the narrative, with the exception of one statement reading "Aug 8, 2004," speaks of break-ins which occurred during the spring months of 2003; which were then recounted for Det. Ryan and Det. Kershaw in August of 2003 by Ms. Dumont.

In light of this summary report, the Defendant filed a motion for a new trial based on new evidence. Defendant claims that this summary report demonstrates an agreement between Ms. Dumont, the State of Rhode Island and Massachusetts authorities, and that the details of which had not been provided by the State prior to or during trial, thus violating Defendant's due process rights. An evidentiary hearing was held June 1, 2011, and the parties requested the opportunity to file their respective memoranda.

II

STANDARD OF REVIEW

This motion is brought by the Defendant pursuant to Rule 33 of the Superior Court Rules of Criminal Procedure. The Rhode Island Supreme Court has held:

> Under [State v.] Brown, [528 A.2d 1098 (R.I. 1987)] "newly discovered evidence serves as the basis for a new trial if it satisfies a two-part test. The threshold test consists of four factors: (1) the evidence must actually be newly discovered since trial, (2) the defendant must have been diligent in attempting to discover the evidence for use at the original trial, (3) the evidence must not be merely cumulative or impeaching but must be material to the issue, and (4) the evidence must be of the kind that would probably change the verdict at a new trial."

State v. Evans, 725 A.2d 283, 289 (R.I. 1999) (brackets in original) (hereafter Evans II), quoting Brown at 1104. If this threshold test is met, the second prong requires the trial justice to decide whether the evidence is credible enough to warrant a new trial, using his or her independent judgment regarding witness credibility and the weight of witness testimony. Evans II, 725 A.2d at 289 (citation omitted), quoting Brown at 1104.

III

DISCUSSION

The Defendant argues that the newly discovered evidence is the State's failure to disclose all the details of the cooperation agreement between the State and Ms. Dumont. Specifically, the Defendant claims that the State failed to disclose promises allegedly made to Ms. Dumont regarding twelve or thirteen[2] breaking and entering charges in Rhode Island, five breaking and entering charges in Massachusetts, and charges of murder and conspiracy to commit the murder of Harold "Jack" Andrews. Both Defendant and State agree that prior to trial, the State did provide a copy of the cooperation agreement that existed between the State and Ms. Dumont, whereby she pleaded to possession of heroin and to two counts of breaking and entering and by doing so, she received suspended sentences on all charges in return for her cooperation.

Under Rule 16 of the Superior Court Rules of Criminal Procedure, for any state's witness, the state must produce any of their prior recorded testimony, a summary of their expected trial testimony, and any records of their prior convictions. See e.g., State v. Chalk, 816 A.2d 413,418 (R.I. 2002). The Supreme Court of Rhode Island has stated that even "[w]hen evidence does not fit one of these three categories, but may nonetheless be helpful to defendant's effective cross-examination of a witness, a defendant's right to that evidence arises from the right of confrontation, and thus becomes an issue only when a defendant is improperly denied the ability to confront and to effectively cross-examine an adverse witness at trial." Chalk at 418 (internal quotation marks omitted).

[2] In Defendant's Memorandum in Support of the Motion for New Trial, the Defendant states that there were thirteen break-ins that took place in Rhode Island, a number of which are the basis for the motion. However, according to a witness statement by Ms. Dumont provided by the State to the Defendant prior to trial, the number of break-ins in Rhode Island totaled only twelve. It is unclear from what other source the Defendant relies on in asserting that there were thirteen break-ins.

Further, the United States Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963), interpreting the Due Process Clause of the Constitution of the United States, pronounced that a government official's failure to disclose evidence favorable to the defense amounts to a violation of due process, further extending the State's obligations on pre-trial disclosures. Subsequent Rhode Island Supreme Court decisions have held that when deciding whether non-disclosed evidence violates a defendant's rights under Brady, a court must first address whether the non-disclosure was deliberate or not. DeCiantis v. State, 24 A.3d 557, 570 (R.I. 2011), citing Chalk at 418-19. If the non-disclosure is deliberate, defined as a "'considered decision to suppress . . . for the purpose of obstructing" or failing "'to disclose evidence whose high value to the defense could not have escaped . . . [the state's] attention,'" then the non-disclosure "'constitutes grounds for a new trial regardless of the degree of harm to the defendant.'" DeCiantis at 570 (quotations omitted) (brackets and omissions in original).

If the non-disclosure is not deliberate, the applicant must establish its prejudicial effect by a showing of materiality–that is that "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" DeCiantis at 570 (quotations omitted).

Notably, the Rhode Island Supreme Court has held that a non-deliberate failure to disclose evidence that may be used to impeach witnesses against the defendant, especially if there is only one witness, is a violation of due process, and warrants a new trial. State v. Evans, 668 A.2d 1256 (R.I. 1996) (hereafter Evans I). However, in a related decision, the court stated that to disturb a conviction based on new evidence intended to impeach a witness, when the witness is not the only witness in a case, and much of that witness's criminal past has already been presented, "is 'tantamount to [] accepting a belief that if one were to paint one additional

black stripe on a zebra, it would serve to disguise the zebra and conceal its identity as a zebra.'" Evans II at 290.

Evans II, is a different decision from the one cited in the defendant's memorandum in support of the motion for new trial which is cited above as Evans I, yet both raise similar claims as the Defendant in this case. In Evans I and II the facts are largely the same: after a robbery trial, that defendant—Evans—learned of agreements and promises made by prosecutors to the former accomplice, who in return for dismissal of charges and protections, would testify against the defendant. Evans I at 1258; Evans II at 286. In Evans I, that court determined that because the accomplice was the only witness against that defendant, and the disclosures made by the state regarding the witness's criminal history and promises in return for testimony were not made until mid-trial, the "negligent disclosure denied the defendant the opportunity to present his fullest and best defense." Evans I at 1260.

In light of the success of Evans I, the same defendant attempted to have a different conviction vacated and remanded for new trial in Evans II, because the same witness testified in that trial as well. However, in Evans II, the court distinguished the circumstances of the two trials, and found that a new trial was not warranted in the second case because even though the same witness testified, he was not the sole witness, as he had been in Evans I. Had the non-disclosed evidence been presented at trial in Evans II, the same result would likely have occurred. Evans II at 290. The Rhode Island Supreme Court rejected such argument because, in applying the Brown standard, the evidence of non-disclosure was merely cumulative or impeaching. Id. at 289.

Another case that addresses the issue raised by Defendant in this case is the DeCiantis decision. There, the defendant—DeCiantis—presented evidence that a witness who had testified

against him, later received the benefit of police custody and protections for his family. DeCiantis at 562-68. DeCiantis argued that the witness had been promised these benefits by the state, and that the state had deliberately failed to disclose the promise. Id. at 559, 571. He further argued that an uncharged criminal act was not disclosed to him before trial, which amounted to a non-disclosure that was material, and thus violated his due process rights under Brady. Id. at 572. The court reviewed the testimony of the trial prosecutor at the post-conviction relief hearing, and found that there had been no deliberate non-disclosure of exculpatory evidence. Id. at 571-72. Regarding the claim that the witness's uncharged claims should have been disclosed, the court agreed that uncharged crimes should have been disclosed "because counsel might have used them to further impeach [the witness]'s testimony." Id. at 572. However, the court held that the non-deliberate, non-disclosure lacked materiality, and thus was not grounds for finding a violation under Brady. Id. at 573. The court reasoned that based on other evidence presented at trial, it could not have escaped the jury that the witness had an extensive criminal background and had decided to testify against the defendant in the hope of receiving protection and avoiding incarceration, therefore, the undisclosed evidence would not have changed the ultimate result of the proceeding. Id.

Thus, if the Defendant here has shown that there were details of the cooperation agreement between the State and Ms. Dumont, beyond those disclosed by the State, prior to or during trial, then that non-disclosure (deliberate or not) could satisfy the first part of the first prong of the Brown test, provided that the evidence was newly discovered since trial, the Defendant worked diligently to discover the evidence, the evidence was more than impeaching and cumulative, and that the new evidence would probably change the outcome. Evans II at 289. If that requirement is met, the evidence must then satisfy the remainder of the Brown test, and

be addressed accordingly. Further, this Court must analyze whether or not any non-disclosure amounts to a violation of the Defendant's rights under Brady. However, only after the evidence is determined to be new evidence can this Court make a determination regarding the nature and effect of the non-disclosure, under either the Brown or Brady analyses.

A
New Evidence

(1)
Agreements Regarding the Rhode Island and Massachusetts Break-ins

(a)
The Police Report

The Defendant has asserted that the police report discovered through proceedings in Massachusetts contains new evidence that is grounds for granting a new trial. Defendant argues that the Swansea Police Report contains evidence of an agreement between Ms. Dumont and the State that Ms. Dumont not be charged with the Massachusetts break-ins in return for her testimony at the murder trial. This agreement with the Massachusetts authorities went beyond the scope of the cooperation agreement or other narratives regarding the cooperation agreement provided in discovery by the State prior to the October trial. It is important to note that the State asserts, and no evidence has been presented otherwise, that the State was only made aware of this report after the trial had concluded. Thus the report itself could not have been disclosed in pre-trial discovery, and was not, therefore, required to be provided prior to the murder trial. Therefore, it is only the possibility that the report contains evidence of an undisclosed agreement that may amount to evidence of a non-disclosure in violation of due process.

The Swansea police report contains a narrative, in which Det. Ryan states that he led Det. Kershaw and Ms. Dumont to five addresses in Massachusetts, of which break-ins had been reported in the spring of 2003. Det. Ryan, according to his testimony, did not receive direct confirmation from Ms. Dumont as to whether she and Mr. Drew and/or Mr. Andrews were involved in the break-ins. Rather, Det. Ryan would lead Det. Kershaw and Ms. Dumont to the addresses. There, Ms. Dumont would verify to Det. Kershaw that she and the two men (Drew and Andrews) had broken into such addresses, and proceeded to describe to Det. Kershaw what she could recall from each break-in. Det. Kershaw would then confirm for Det. Ryan that Ms. Dumont had indeed broken into said addresses with Mr. Drew and/or Mr. Andrews. Ms. Dumont confirmed her involvement with Drew and Andrews in the breaking and entering of four Swansea addresses and one Somerset address.

The report states that Det. Kershaw made a request to Det. Ryan asking that Massachusetts authorities not charge Ms. Dumont in light of her cooperation with the State in the murder trial against Defendant. At the motion for new trial hearing, Det. Kershaw claimed that he asked Det. Ryan, to "hold off" on any charges. Det. Ryan testified that Ms. Dumont was not present for the conversation between he and Det. Kershaw regarding the charges she might face in Massachusetts. Ms. Dumont testified at both the trial and the motion hearing that she believed all of her breaking and entering charges, in Rhode Island and Massachusetts, had been dropped based on her continued cooperation with the State in the prosecution of Drew.

As explained further below, prior to the October trial, the Defendant had been provided with information regarding these break-ins. This included a witness statement dated "8-7-03" in which Ms. Dumont identified for Det. Kershaw seventeen addresses in which she had been involved in the break-ins. Five of which were the same Massachusetts addresses described in the

Swansea police report. The fact remains that the report discovered after trial references an agreement regarding the benefits or promises Ms. Dumont would receive for testifying at the murder trial. In light of this fact, the issue at hand is whether the State failed to disclose an agreement evidenced by the Swansea police report, an agreement which should have been provided to the Defendant pre-trial pertaining to the seventeen or eighteen break-ins that occured in both Rhode Island and Massachusetts.

(b)
The Break-Ins

The Defendant asserts that there was an agreement between the State and Ms. Dumont regarding the seventeen or eighteen break-ins, including five Massachusetts break-ins, which is mentioned in the newly discovered Swansea police report and was not disclosed before trial was material, and thus was a violation of due process under Brady. In order to find a violation under the Brady analysis, there must be evidence of a non-disclosure, deliberate or not. DeCiantis at 570. If the Defendant is correct regarding the materiality of the Swansea police report, and it is found that there has been a non-disclosure of an agreement that is deemed a violation under Brady, it must be shown that the Defendant was diligent in trying to discover this agreement.

Assuming that this second factor in the Brown test is satisfied, as there has been no evidence showing to the contrary, and the Defendant filed a timely motion for promises and agreements, then it must be established what evidence of these break-ins, if any, was provided to the Defendant before and during trial, and whether the evidence pertaining to the break-ins that was provided pre-trial, also disclosed all agreements between the State and Ms. Dumont. The extent of the information regarding the cooperation agreement or agreements made to Ms.

Dumont before the murder trial for her testimony determines whether this information makes the evidence of a cooperation agreement contained in the Swansea police report "merely cumulative or impeaching" under Brown, or whether it is material, and thus required disclosure beyond what was disclosed in discovery by the State.

The State through pre-trial discovery provided Defendant with a narrative made by Det. Kershaw, in which Det. Kershaw states that as part of the cooperation agreement, Ms. Dumont agreed to identify "numerous residences" in which she was involved in break-ins with the Defendant and Mr. Andrews. In that narrative, Det. Kershaw states that on August 8, 2003 Ms. Dumont showed them residences "throughout Rhode Island and Massachusetts." The State also provided a witness statement made by Ms. Dumont to Det. Kershaw on June 6, 2003. In the witness statement, she identifies and describes seventeen addresses, each of which, were houses she had been involved in the breaking and entering of with the Defendant and Mr. Andrews. These addresses included both Rhode Island and Massachusetts residences. Thus the State provided to the Defendant before trial; a copy of the cooperation agreement, the witness's statement regarding the seventeen break-ins, and a narrative explaining that Det. Kershaw understood that Ms. Dumont's cooperation in identifying the seventeen broken into residences was part of the cooperation agreement.

Further, during cross-examination of Ms. Dumont at trial, the Defendant demonstrated knowledge of the seventeen or eighteen breaking and entering charges. When questioned about these breaking and enterings in relation to her cooperation agreement, Ms. Dumont stated that she believed that she was not being charged with the breaking and enterings as part of her agreement with the State. The Defendant then proceeded to question Ms. Dumont regarding this "sweet deal" with the State, which had allowed her to avoid prosecution on these charges.

Moreover, in the Defendant's cross-examination of Det. Kershaw at the murder trial, the Defendant questioned the detective about the cooperation agreement between Ms. Dumont and the State as referenced in his narrative, including the fact that he [Kershaw] understood that the deal covered break-ins both in Massachusetts and in Rhode Island.

It is clear that the Defendant was provided through discovery prior to trial, information regarding the break-ins, both in Massachusetts and Rhode Island, in the form of the cooperation agreement, the witness statement and Det. Kershaw's narrative. The Defendant was not only aware of these break-ins prior to trial, but was also apprised of the fact that Ms. Dumont was not being charged, nor was she facing any legal recourse by either the State of Rhode Island nor the Commonwealth of Massachusetts for these crimes in return for her cooperation in the Defendant's murder trial. As such, the Defendant has not shown that there was any failure to disclose, deliberate or not, on the part of the State regarding these multiple break-ins, or any cooperation agreement pertaining to them. Because the State provided the Defendant, prior to trial, all the relevant details regarding the cooperation agreement with Ms. Dumont, as it pertained to any breaking and entering charges, the Court finds that no new evidence of non-disclosure in violation of the Defendant's rights under due process has been presented by the report.

(c)
Evans II and the Police Report

According to Brown, this Court must be convinced that any non-disclosure of information contained in the Swansea police report was material, not cumulative and impeaching. The Rhode Island Supreme Court affirmed in Evans II the trial court's decision to deny the defendant's motion for new trial based on new evidence. Evans II at 290. There, new

evidence existed that amounted to a failure to disclose on the part of the state. Id. Importantly, as it pertains to the Defendant's claims here, that court found that the evidence amounted to no more than cumulative and impeachment evidence, failing the Brown test, and further, did not disturb confidence in the conviction. Id. at 289-90 (citation omitted). Here, as in Evans II, the "new evidence" about an agreement between Ms. Dumont and the State as contained in the Swansea police report, was disclosed to the Defendant by the State, in the form of a witness statement, the narrative, and the cooperation agreement.

In this case, given the amount of impeachment evidence presented to the jury at trial regarding Ms. Dumont's criminal past, it would have been difficult to show that more information regarding her past would shake any confidence in the verdict. As the court in Evans II noted, disturbing a conviction based on new evidence intended to impeach a witness, when much of that witness's criminal past has already been presented "is 'tantamount to [] accepting a belief that if one were to paint one additional black stripe on a zebra, it would serve to disguise the zebra and conceal its identity as a zebra.'" Id. at 290.

Thus, the details of all forms of cooperation agreements by which Ms. Dumont would avoid breaking and entering charges through cooperation with the State, in either Massachusetts or Rhode Island, do not appear to have been withheld from the Defendant at any point before trial. Furthermore, Det. Ryan's report does little more than acknowledge the fact that a cooperation agreement did exist between Ms. Dumont and Rhode Island authorities, specifically Det. Kershaw, by which avoid certain charges, and plead to others, in exchange for her help in the murder trial.

Notably, at all pertinent times prior to and during the trial, the Defendant knew about the breaking and entering charges that were part of the agreement; Defendant knew about the

seventeen or eighteen break-ins that Ms. Dumont described for the State; and Defendant knew or should have known the details of the cooperation agreement; through not only the copy of the agreement, but through Det. Kershaw's narrative, Ms. Dumont's statement, as well as Ms. Dumont's testimony at trial verifying the details of her agreement with the State.

Therefore, any information contained in the Swansea police report pertaining to any type of agreement between Ms. Dumont and the State regarding the seventeen or eighteen break-ins in Massachusetts and Rhode Island were merely cumulative, and thus failed to satisfy the third factor of the first prong of the Brown test.

2.

Agreements Regarding Dismissal of Murder and Conspiracy Charges

The Defendant has claimed that the State failed to disclose agreements between the State and Ms. Dumont pertaining to dismissals of murder and conspiracy to commit murder charges. According to DeCiantis, evidence of uncharged crimes can amount to a violation of due process under Brady. However, no evidence has been provided to this Court before, during, or after the trial that charges of Murder and Conspiracy to Commit Murder charges were ever filed or considered. The State asserts in their Memorandum in Response to the Motion for New Trial, that although she had been a suspect in the murder, evidenced by her rights form, Ms. Dumont was not and could not be charged, because there was no evidence of her culpability in the murder, claiming at all times that Mr. Drew murdered Mr. Andrews without her knowledge.

The Defendant bases the argument that these murder and conspiracy charges were part of an agreement between the State and Ms. Dumont, and points to their lack of inclusion in the cooperation agreement. No evidence was presented at the motion hearing demonstrating the

existence of any such agreement, nor was Ms. Dumont ever charged and therefore dismissed. It is worth noting that in DeCiantis the court stated that failing to disclose uncharged crimes could amount to a violation of due process under Brady. However, in DeCiantis there was direct testimony from a prosecutor stating that uncharged crimes were part of the agreement between the state and witness. DeCiantis at 571-72. Here, there has been no such testimony. Therefore, the Court finds that no new evidence exists to support the assertion that the State failed to disclose the details of an agreement between the State and Ms. Dumont regarding the dismissal of murder and conspiracy to commit murder charges.

3.

Ms. Dumont's Testimony Regarding Promises Made by Det. Kershaw

In the Defendant's filing of the Motion for New Trial Based on New Evidence, the Defendant asserts that Ms. Dumont perjured herself by stating that Det. Kershaw never made any promises to her. This argument was not addressed in the Defendant's memorandum. It appears that the Swansea police report discovered by the Defendant subsequent to the murder trial does mention a promise made by Det. Kershaw to Ms. Dumont. However, Ms. Dumont's testimony denying any promise made by Det. Kershaw was in the context of a violation charge against her, which occurred subsequent to her cooperation with Rhode Island and Massachusetts authorities regarding the break-ins. Further, Det. Kershaw's statement regarding his understanding of Ms. Dumont's cooperation agreement stated essentially the same promise as detailed in the Swansea police report. Thus, because the report was not new evidence, and there is no other such report, it could not have been used to perjure the witness in that instance.

CONCLUSION

After consideration of the Defendant's arguments, this Court finds that the Defendant has failed to meet his burden to show that new evidence has been discovered since the trial that warrants the granting of a new trial. The Defendant has not satisfied the Court's requirement that any evidence discovered after trial demonstrates a failure on the part of the State to disclose information that should have been presented to the Defendant before trial. Therefore, the Defendant's motion for a new trial based on new evidence is denied.