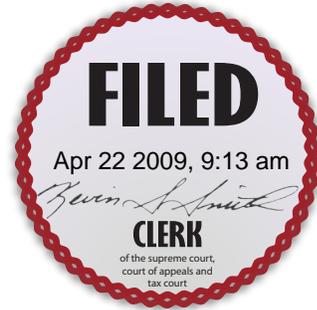


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LARRY COSBY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0809-CR-786

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Paula Lopossa, Senior Judge
Cause No. 49F08-0805-CM-129797

April 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Larry Cosby appeals his convictions after a bench trial of two counts of unlawful possession of a firearm by a domestic batterer, class A misdemeanors.¹

We affirm.

ISSUE

Whether the State violated Cosby's due process rights by withholding evidence.

FACTS

On May 29, 2008, Indianapolis Metropolitan Police Officers Matthew Hamner and Mark Ayler went to an Indianapolis residence to serve an arrest warrant for Charles Dawson. Tobias Cosby answered the door, told Officer Hamner that it was his residence, and allowed the officers inside the residence. As the officers were searching the residence for Dawson, Officer Ayler discovered a shotgun "leaning up against the wall" in the bedroom. (Tr. 54). He "ran a wanted check on it," which indicated that it had been stolen. (Tr. 55)

Shortly thereafter, Cosby entered the residence, "yelling and screaming" (Tr. 23). The officers placed Cosby in handcuffs and advised him of his *Miranda* rights. Once he calmed down, Cosby explained that "he received mail for a female and that [Dawson] could have connections to that female" (Tr. 26). The officers then asked Cosby about the gun that had been found in the residence. Cosby explained that a friend had given it to him. He described the gun as a .32 caliber with a missing firing pin. He further indicated where the gun could be found. The gun's description and location,

¹ Ind. Code § 35-47-4-6.

however, did not match that of the shotgun previously discovered by Officer Ayler. The officers subsequently found the handgun described by Cosby under a television stand. Cosby informed the officers that he owned both of the guns found in the residence.

On June 2, 2008, the State charged Cosby with two counts of unlawful possession of a firearm by a domestic batterer, class A misdemeanors. The trial court conducted a bench trial on July 29, 2008. At the start of the trial, Cosby moved to suppress any search or arrest warrant as “improperly discovered under the local rules.” (Tr. 4). The trial court denied the motion. The trial court found Cosby guilty as charged and imposed concurrent sentences of 365 days with 348 days suspended.

DECISION

Cosby contends that his due process rights were violated by the State’s failure to disclose the arrest warrant as required in *Brady v. Maryland*, 373 U.S. 83 (1963). He further contends that “the nature of the State’s duty to discover the search or arrest warrant should not be obviated by” his failure to file a motion to compel discovery. Cosby’s Br. at 4.

In *Brady*, the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87.

To prevail on a *Brady* claim, a defendant must establish: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial. 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.” However, the State will not be found to have suppressed material information if that information was available to a defendant through the exercise of reasonable diligence.

Hyppolite v. State, 774 N.E.2d 584, 599 (Ind. Ct. App. 2002), *trans. denied*.

Cosby has made no showing that the arrest warrant was unavailable through the exercise of reasonable diligence.² Thus, we cannot say that the State suppressed information. *See id.* Cosby also has failed to show there was any exculpatory evidence to be gained from the arrest warrant or that that the outcome of his trial would have been different had the State provided him with a copy of the arrest warrant. In fact, Cosby concedes that “it is unknown as to whether the search or arrest warrant would tend to exculpate him.” Cosby’s Br. at 4. We therefore find no *Brady* violation.

Affirmed.

RILEY, J., and VAIDIK, J., concur.

² We note that the probable cause affidavit refers to the warrant at least three times and that Cosby was aware of the arrest warrant prior to trial.