[Cite as *State v. Burton*, 2021-Ohio-851.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 109658
v.	:	
JERMAEL BURTON,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: March 18, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-620576-A

Appearances:

Susan J. Moran, *for appellant*.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for appellee*.

ANITA LASTER MAYS, J.:

{¶ 1} Defendant-appellant Jermael Burton appeals the trial court's denial without a hearing of his motion to vacate his conviction due to the alleged postconviction discovery of exculpatory evidence that the state failed to produce. Burton argues that his due process rights were denied in contravention of *Brady v.*

Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We reverse and remand to the trial court for a hearing.

I. Background and Facts

{¶ 2} On February 12, 2018, Burton was tried by jury for multiple charges including attempted murder, felonious assault, and various drug-related charges and firearm specifications. He was acquitted of attempted murder and felonious assault but convicted of the drug and firearm charges. Burton received an aggregate prison sentence of 11 years.

{¶ 3} We affirmed the trial court's judgment in Burton's direct appeal, *State v. Burton*, 8th Dist. Cuyahoga No. 107054, 2019-Ohio-2431 ("*Burton I*"). Pertinent portions of that opinion are employed herein. "At the jury trial, Burton claimed he was framed by the East Cleveland police officers, who he claimed fabricated the shooting incident and conducted an illegal search of the house's attic." *Id.* at ¶ 1. "The police had been led to a house owned by Burton's girlfriend after a gunshot victim reported to the police that he was shot in the house." *Id.*

{¶ 4} As further described in *Burton I*:

> The subject house is a three-story residential home located on Noble Road in East Cleveland. The house was owned by Deanna Thomas, Burton's girlfriend, with whom he had a child. There was an apartment on the first floor and one on the second floor. On the second floor, there was also a door that led to a staircase going up to an attic area, where the police found the drugs and firearms. The state alleged Burton lived or stayed in the attic, while Burton denied he lived or stayed there.
>
> The state had the gunshot victim and four East Cleveland police officers testify; the defense provided testimony of two tenants from the house and Burton himself. These witnesses gave varying accounts of the events surrounding the alleged shooting and the police investigation of

> the shooting. The witnesses' testimony is often confusing and sometimes incoherent.

Id. at ¶ 3-4.[1]

{¶ 5} On May 9, 2019, Burton filed a pro se petition to vacate or set aside his convictions based on a violation of *Brady* and amended the motion on August 8, 2019. On March 10, 2020, the trial court determined that the motion was timely filed. Burton argued that the state failed to provide him with exculpatory evidence that, contrary to the state's trial evidence and testimony, established that his vehicle was in the possession of the East Cleveland Police Department ("ECPD") on the night of the incident. Burton asserted that the exculpatory evidence supported Burton's claim that the ECPD illegally searched the vehicle and placed mail and other items that were in his vehicle in the third-floor unit of the property to impute ownership of the contraband in that unit to Burton. Burton also argued that the new evidence establishes that assistant prosecutors misrepresented numerous facts regarding the evidence.

{¶ 6} ECPD detectives testified that the tow and search did not take place until several days after the incident as reflected by the tow slip evidence introduced at trial. The state produced a "vehicle impound cash receipt" from St. Clair Auto

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[1] Burton's discretionary appeal to the Ohio Supreme Court was not allowed. *State v. Burton*, 157 Ohio St.3d 1408, 2019-Ohio-3731, 131 N.E.3d 83. This court denied reconsideration. *State v. Burton*, 8th Dist. Cuyahoga No. 107054, 2020-Ohio-375. Burton's complaint for a writ of mandamus to compel the trial court to issue requested findings of fact and conclusions of law was denied because the "duty ha[d] already been performed." *State ex rel. Burton v. McCormick*, 8th Dist. Cuyahoga No. 109511, 2020-Ohio-3288.

Body as exhibit No. 87 at trial ("Trial Tow Evidence"). That document indicates that Burton's car was towed on August 25, 2017, and it was stored by the towing company for eight days.

{¶ 7} In the petition to vacate, Burton declares that the state failed to provide him with an exculpatory tow slip that "established the date and time his car was towed, that it was towed to the ECPD station for processing, and then towed to St. Clair Auto until its release." (Appellant's brief, p. 1.) The purported newly discovered evidence ("New Tow Evidence") indicates that Burton's vehicle was, in fact, towed on August 12, 2017, the date of the incident, under authority of three listed members of the ECPD including ECPD Detective Harvey ("Detective Harvey"). The petition also offers that the prosecutor misrepresented the facts and testimony to the jury.

{¶ 8} The New Tow Evidence is accompanied by an ECPD printout that additionally indicates that Burton's vehicle was towed on August 12, 2017, and not August 25, 2017, as indicated in the Trial Tow Evidence. Also submitted in support is ECPD investigative report 17-02826 authored by ECPD Officer Kaleal ("Officer Kaleal").[2]

[2] Burton offers that the New Tow Evidence and supporting documents additionally demonstrate ECPD's access to Burton's vehicle to secure the documents that ultimately appeared in the third-floor unit.

{¶ 9} The trial court initially issued a summary denial of Burton's petition. Burton requested findings of fact and conclusions of law.[3] The trial court ultimately issued findings and explained that Burton failed to support his arguments with additional records. The state argued and the trial court agreed that Burton possessed the "tow slip" before trial so that no *Brady* violation occurred.

{¶ 10} The trial court determined that no *Brady* violation occurred because: (1) Burton possessed the tow slip before trial; (2) Burton failed to demonstrate that the slip is exculpatory; (3) Burton could have rebutted the state's misstatement of facts during trial and the statements were not *Brady* material; and (4) Burton failed to support his claims with any evidence outside of the record. Journal entry No. 112835039 (Mar. 10, 2020). Burton reiterates that the state and trial court failed to distinguish between the New Tow Evidence and the Trial Tow Evidence and apparently failed to review and compare it.

{¶ 11} Burton counters that the state and trial court failed to distinguish between the New Tow Evidence and the Trial Tow Evidence. He adds that the New Tow Evidence proffered as an exhibit to his petition and the Trial Tow Evidence that served as a trial exhibit and resultantly was already part of the record could easily have been compared by the trial court. Instead, Burton contends, the trial court and state focused on the "tow slip" and "tow receipt" labels that Burton purportedly

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[3] Burton's initial request for findings of fact and conclusions of law filed on December 27, 2019, was denied on January 8, 2020. According to the record, on March 9, 2020, the state filed proposed findings of fact and conclusions of law. On March 10, 2020, the trial court issued a judgment entry with attached findings of fact and conclusions of law.

employed to reference the documents and applied them interchangeably instead of considering the substantive content of the documents.

{¶ 12} The trial court also determined that Burton was not entitled to a hearing because:

> Petitioner has failed to support any of his arguments with evidence outside the record in support of his claims. The evidence Petitioner submits does not demonstrate that any constitutional violations occurred. Rather, his claims could have been raised in the direct appeal wherein the court of appeal [sic] affirmed the validity of his plea.

Journal entry No. 112835039, p. 8-9 (Mar. 10, 2020).

{¶ 13} Burton appeals the trial court's denial of the motion without a hearing.

II. Assignments of Error

{¶ 14} Burton assigns two errors:

> I. The appellant was denied his right to due [process] and right to a fair trial guaranteed by the Fourteenth Amendment of the United States and Ohio Constitutions when the state committed a *Brady* violation by failing to disclose exculpatory evidence.
>
> II. Appellant was denied due process and a fair and impartial trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution and Article I, Section 16 of the Ohio Constitution based on prosecutorial misconduct.

III. Discussion

A. Postconviction Relief and *Brady*

{¶ 15} R.C. 2953.21, known as the Ohio Postconviction Remedy Act, was enacted in 1965 to afford prisoners a "'clearly defined method by which they may raise claims of denial of federal rights.'" *State v. Calhoun*, 86 Ohio St.3d 279, 281,

1999-Ohio-102, 714 N.E.2d 905, quoting *Young v. Ragen*, 337 U.S. 235, 239, 69 S.Ct. 1073, 93 L.Ed. 1333 (1949). The proceeding is a "collateral civil attack on the judgment" and is "not an appeal of the conviction." *Id*. at 281.

{¶ 16} Under R.C. 2953.21, a "person convicted of a criminal offense * * * and who claims that * * * the judgment [is] void or voidable" because the person's constitutional rights have been denied or infringed may petition the court that rendered the judgment to vacate the judgment or grant other relief. R.C. 2953.21(A)(1).

{¶ 17} As this court has stated:

> "The postconviction relief process is a civil collateral attack on a criminal judgment, in which the petitioner may present constitutional issues to the court that would otherwise be impossible to review because the evidence supporting the issues is not contained in the record of the petitioner's criminal conviction." *State v. Curry*, 8th Dist. Cuyahoga No. 108088, 2019-Ohio-5338, ¶ 12, citing *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102, 714 N.E.2d 905, and *State v. Carter*, 10th Dist. Franklin No. 13AP-4, 2013-Ohio-4058, ¶ 15.

State v. McFeeture, 8th Dist. Cuyahoga No. 108434, 2020-Ohio-801, ¶ 11

{¶ 18} In addition, this court is aware that:

> "[C]ourts are not required to hold a hearing in every postconviction case." *State ex rel. Madsen v. Jones*, 106 Ohio St.3d 178, 2005-Ohio-4381, 833 N.E.2d 291, ¶ 10 (citations omitted). Before granting a hearing on a petition for postconviction relief, "the court shall determine whether there are substantive grounds for relief." R.C. 2953.21(D). "In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner * * *." *Id*.

Id. at ¶ 11.

{¶ 19} An appellate court reviews a trial court's decision on postconviction relief for an abuse of discretion. *State v. Gondor*, 112 Ohio St. 3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 45.

> The trial court does not abuse its discretion in dismissing a petition without a hearing if (1) the petitioner fails to set out sufficient operative facts to establish substantive grounds for relief, or (2) the operation of res judicata prohibits the claims made in the petition.

State v. Curry, 8th Dist. Cuyahoga No. 108088, 2019-Ohio-5338, ¶ 15, citing *State v. Abdussatar*, 8th Dist. Cuyahoga No. 92439, 2009-Ohio-5232, ¶ 15.

{¶ 20} Burton argues that the state's failure to provide the newly discovered evidence constitutes a violation of *Brady*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215. *Brady*

> governs situations when the state withholds evidence that tends to exculpate a criminal defendant. "When the prosecution withholds material, exculpatory evidence in a criminal proceeding, it violates the due process right of the defendant under the Fourteenth Amendment to a fair trial." *State v. Johnston*, 39 Ohio St.3d 48, 60, 529 N.E.2d 898 (1988). *Brady* violations may be found regardless of whether the defense requested the evidence and "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. 83, at 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

State v. Magwood, 8th Dist. Cuyahoga No. 108155, 2019-Ohio-5238, ¶ 19.

{¶ 21} In addition,

> [f]or *Brady* purposes, the United States Supreme Court "disavowed any difference between exculpatory and impeachment evidence * * *." *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 736, 31 L.Ed.2d 104 (1972), quoting *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

Id. at ¶ 21.

{¶ 22} Burton points to multiple discrepancies in the trial evidence and testimony to support his assertion that the ECPD planted evidence illegally secured from Burton's vehicle in the third-floor unit and that Burton was the target of the investigation from the start. Burton reiterates that residents testified they did not hear gunshots at the property, and they told police that Burton collected rent at the property, performed maintenance and repair services, but that he did not reside there. The shooting victim identified Burton from the single cellphone photograph displayed to him at the hospital by ECPD Officer Nevels ("Officer Nevels").

{¶ 23} Burton was arrested at the scene and said that he "was booked in with all of the property that I had and the only key I had was a Chevy Cruze key" to his car that was parked in the lot next door to the house. (Tr. 391.) Burton argues that the police used the key to illegally search the Chevy and place the contents in the third-floor unit. Officer Nevels testified that Officer Kaleal inventoried the Chevy. Thus, Burton offers that the New Tow Evidence confirms that the ECPD towed the vehicle the night of the incident and the Trial Tow Evidence falsely indicated that Burton's vehicle was not towed until August 25, 2017.

{¶ 24} Detective Harvey responded to the scene at 3:00 a.m. and secured a search warrant. Guns, drugs, and related contraband were located in the third-floor unit. Also discovered were various pieces of mail and miscellaneous papers and receipts, a Chase debit card with an expiration date of September 2017, and a pill

bottle with Burton's name. Based on the latter evidence, Detective Harvey determined that Burton was the third-floor resident.

{¶ 25} Detective Harvey also testified that the shooting victim told him that he was at the property to purchase drugs and that Burton, the drug dealer, shot him.[4] Detective Harvey admitted that this information was inserted into the search warrant affidavit but the basis for the search warrant was "incorrect." (Tr. 288.) In addition, Detective Harvey testified that he had no idea whether anyone towed Burton's vehicle from the scene "that night or the next day." (Tr. 297.)

{¶ 26} Burton testified in his defense that he was staying "between two places" at the time of the incident. (Tr. 376.) Burton resided on Kildare Road in Cleveland Heights and frequently stayed on Clarkstone Road in East Cleveland with Deanna Thomas, the mother of his recently born child and the owner of the property. Burton arrived at the property about 11:15 p.m. the night of the incident to repair a plumbing leak and returned to the property shortly after midnight with a rent receipt book to collect a rent payment from tenant D.S. who worked until midnight.

{¶ 27} Burton knocked on D.S.'s door who did not answer. Burton walked back outside as D.S. pulled into the driveway and police walked through the perimeter bushes into the yard. The police asked Burton and D.S. whether they resided at the property and for identification.

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[4] The victim testified that he accompanied his friend to the property to meet two females for sexual relations and not to purchase drugs. We reiterate here that Burton was exonerated of the shooting charges.

{¶ 28} A bodycam video was played for the jury and Burton can be heard telling the police that he owned the house and he had the keys so that police could not enter the house. Burton added that, contrary to Officer Nevels's testimony, Officer Nevels was at the scene. When Burton was booked, the police "already had my address on file. It's on the police report. It says 3425 Kildare." (Tr. 390.) Burton observed Officer Kaleal entered his vehicle at the scene and took out a set of keys that were for Ms. Thomas's house on Clarkstone. Burton denied that he had keys to the property though Officer Kaleal testified that Burton used a key to lock the third-floor unit door to prevent entry.

{¶ 29} Burton said the mail, papers, pill bottle, and bank card were in his Chevy. "They even have the booklet from the car stuffed inside those papers." (Tr. 392.) Burton offered that the pills were old and must have been in the car as well. "I know for a fact the bank card was in my glove compartment. It's an old bank card. I think that Chase account closed back in 2015. I opened it in 2014." (Tr. 393.)

{¶ 30} Further regarding the mail evidence:

> Burton: I know for a fact that mail wasn't up there because it had — it was mail in there from old tenants and I know for a fact that the mail from the old tenants, I was going by my house mixing that mail up with my water bills and stuff like that. And it wasn't mail from Deanna Thomas. So if all of that mail was together, it was in my car.
>
> State: It was not upstairs?
>
> Burton: No.
>
> State: And you know that because the police report talks about your car being towed and inventoried?

Burton: Yeah. But that's what I couldn't understand. I never seen the inventory slip for the vehicle.

State: Right.

Burton: The things that were found.

State: Isn't it possible because your car was never inventoried, sir?

Burton: No. That's not possible because she said she got an inventory slip when she got the car out of the impound and Harvey —

State: Who?

Burton: Deanna Thomas.

(Tr. 420-421.)

{¶ 31} Further pertinent to the tow, during recross-examination, the Trial Tow Evidence, state exhibit Nos. 87 and 88, were referenced by Burton:[5]

State: Sir, you talked about how you own a Saturn Vue, right, that's the car you had?

Burton: I had a Saturn Vue and I had a Chevy Cruze.

State: Okay. Which one was inventoried that night?

Burton: The Chevy Cruze.

State: Okay. And you said you had an inventory slip for it?

Burton: It's a tow slip.

State: Where is that tow slip?

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[5] The defense rested at the conclusion of Burton's testimony. Defense counsel requested admission of state's exhibit Nos. 87 and 88 into the record. The state requested that state's exhibit No. 88 go to the jury as defendant's exhibit B. Also, exhibit No. 88 contains the cited information but is untitled except for headings that reference "Units/Times."

Burton: Sitting on the defense table. * * *

State: You handed me two pieces of paper, correct?

Burton: Uh-huh.

State: First one I marked here as State's Exhibit 88. What is that that you handed me?

Burton: This is — it says 8/12/2017, 05:00 I guess. Is that correct?

State: Yeah. It says 05:01:55 would be the time. Dispatcher 0992, 3169 arrived to the scene and is en route to secure a search warrant to search the property.

At 7:22:11, 3118 and first shift are out at 2062 Noble.

And then the next one is at 9:51:38 search warrant was served.

And then at 9:58:22 St. Clair Auto is on scene. And it's your testimony that St. Clair Auto was there to tow your vehicle?

Burton: Uh-huh.

State: And you handed me a receipt here, Number 87.

Burton: Uh-huh.

State: That's a receipt for when your vehicle was towed?

Burton: Uh-huh.

State: What is the date towed on that receipt, sir?

Burton: This is the date it was towed from East Cleveland city jail to St. Clair Auto Body.

State: How do you know that?

Burton: What do you mean how I know?

State: Here. St. Clair is on scene. St. Clair Auto Body says it was date towed 8/25/17, correct?

Burton: Yes.

State: Not 8/12, correct?

Burton: Uh-huh.

(Tr. 434-435.) The state reiterated and Burton confirmed that the tow date listed on the Trial Tow Evidence slip was August 25, 2017, and not the incident date of August 12, 2017.

{¶ 32} The state argues that the petition to vacate contains the admission that Burton was in possession of the New Tow Evidence "as early as September 1, 2017, way before trial." (Appellee brief, p. 5.) The cited portion of the petition provides, "[o]n September 1, 2017, Petitioner's Chevy Cruze was released by St. Clair Auto to DeAnn Thomas, Petitioner's girlfriend. She was provided with the Tow Slip receipt [New Tow Evidence] and gave the same to Petitioner." (Petition, ¶ 50.)

{¶ 33} 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." *Id.* at 87. *Brady* is not implicated when the information "is not wholly within the control of the prosecution." *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir.1998). Further, the prosecution "is not required under *Brady* to furnish a defendant evidence which, with any reasonable diligence, he can obtain for himself." *United States v. Glass*, 819 F.2d 1142, 1987 U.S. App. LEXIS 7247, 6 (6th Cir.1987), citing *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir.1986) (1986).

McFeeture, 8th Dist. Cuyahoga No. 108434, 2020-Ohio-801, ¶ 13.

{¶ 34} The record in this case indicates that the New Tow Evidence directly challenges the testimony of ECPD regarding when the Chevy was towed and inventoried as purportedly supported by the Trial Tow Evidence, and Burton's claim

that the contents of the Chevy was placed in the third-floor unit at the scene the night of the incident to attribute possession of the unit to Burton.

{¶ 35} R.C. 2953.21(D) requires regarding consideration of petitions to vacate that:

> In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript.

Id. "Affidavits *may* be submitted in support of post-conviction relief motions." *State v. Eggers*, 2d Dist. Clark No. 2012-CA-33, 2013-Ohio-3379, ¶ 17; R.C. 2953.21(A)(1)(a) ("[t]he petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief").[6]

{¶ 36} In support of his petition, Burton submitted the New Tow Receipt, an ECPD towed vehicle report, an incident report by Officer Kaleal, excerpts from the trial transcript demonstrating that the trial testimony was misleading regarding when the vehicle was towed and accessed. The keys to the Chevy were removed from Burton upon his arrest.

{¶ 37} The trial court specifically commented during sentencing that "the jury did not believe" that the ECPD obtained the mail and other evidence from the Chevy and planted it in the unit. (Tr. 548.) The New Tow Evidence indicates that

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[6] To the extent it may be offered that this court's opinion in *State v. Cole*, 8th Dist. Cuyahoga No. 106930, 2019-Ohio-3089, holds that an affidavit is required, the issue in *Cole* was the trial court's failure to consider affidavits that were erroneously submitted with a concurrent filing by the pro se defendant.

the Chevy was towed by the ECPD on August 12, 2017, that two tows occurred during that period and the storage charge indicates the Chevy was stored with the storage company on August 25, 2017, for eight days. We find that the new evidence, if true, may be exculpatory and material pursuant to *Brady*. We also observe that the terms "tow slip," "tow receipt," and "tow slip receipt" appear to be used interchangeably in several of the postconviction records, particularly in the state's response to postconviction relief and the findings of fact and conclusions of law.

{¶ 38} We find that under these facts, the denial of Burton's petition without a hearing constitutes an abuse of discretion. The due process implications in this case warrant a hearing on Burton's petition for postconviction relief. *Johnston*, 39 Ohio St.3d 48, 60, 529 N.E.2d 898 (1988). The first assignment of error has merit and the trial court's judgment is reversed. The case is remanded for a hearing on the petition.

{¶ 39} In light of our resolution of the first assignment of error, we further find that the second assigned error is rendered moot. App.R. 12(A).

IV. Conclusion

{¶ 40} The trial court's judgment is reversed, and the case is remanded to the trial court for a hearing on the petition to vacate.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANITA LASTER MAYS, JUDGE

MARY J. BOYLE, A.J., and
MARY EILEEN KILBANE, J., CONCUR

KEYWORDS
#109658

R.C. 2953.21, petition to vacate convictions, *Brady* violation.

The trial court's denial without a hearing of appellant's petition for postconviction relief constitutes an abuse of discretion. Appellant supported the timely filed petition with allegedly newly discovered evidence that, if believed, may be material, exculpatory, or exonerating under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Petitioner denied that he resided in the unit where the contraband was located. The newly discovered evidence refutes the state's witness testimony and exhibits regarding when and where petitioner's vehicle was towed in support of petitioner's claim that the contents of his vehicle had been removed and placed within the living unit to establish petitioner's possession and control. The record also indicates confusion between the trial and postconviction exhibits during the postconviction proceedings.