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CLERK OF COURT

FOR PUBLICATION

**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,**

Plaintiff,

v.

DIXON KWON,

Defendant.

) Traffic Case No. 17-05312
)
) **ORDER FINDING THAT THE**
) **DEPARTMENT OF PUBLIC SAFETY**
) **INTERNAL AFFAIRS INVESTIGATION**
) **REPORT AND AUDIO RECORDING**
) **CONTAINS EXCULPATORY AND**
) **IMPEACHMENT EVIDENCE**
) **FAVORABLE TO THE DEFENDANT**
) **THEREFORE THE COURT GRANTS**
) **THE MOTION TO COMPEL TO**
) **TURNOVER THE MATERIALS**
) **PURSUANT TO *BRADY/GIGLIO***

I. INTRODUCTION

THIS MATTER came before the Court on July 18, 2018, at 1:30 p.m. for a hearing on Defendant Dixon Kwon’s Motion to Compel the Commonwealth of the Northern Mariana Islands (“the Commonwealth”) to disclose all exculpatory information its possesses regarding Officer Dixon Kwon’s arrest.

Assistant Attorney General J. Robert Glass, Jr. appeared for the Commonwealth. Assistant Attorney General Robert L. Pickett appeared for the CNMI Department of Corrections. Attorney Charity Hodson appeared for Defendant Dixon Kwon, who was also present. The Court heard testimony from Officer Olympio Muna and Officer Alexander Sakisat, counsels’ arguments, and now grants Dixon Kwon’s Motion to Compel.

II. BACKGROUND

Defendant Dixon Kwon is a police officer with the CNMI Department of Public Safety (“DPS”) who was arrested in July 2017 for allegedly driving while under the influence of

1 alcohol with a blood alcohol concentration of 0.08 percent or more,¹ driving under the influence
2 of alcohol,² reckless driving,³ fleeing the scene of an accident,⁴ failure to have motor vehicle
3 liability insurance while operating a vehicle on a public highway,⁵ and failure to have motor
4 vehicle liability insurance in possession while operating a vehicle on a public highway.⁶ Dixon
5 Kwon's brother, DPS Officer Norris Kwon, subsequently filed a police misconduct complaint
6 (the "police misconduct complaint") to the DPS Commissioner alleging that procedures were
7 not followed during Dixon Kwon's arrest. Specifically, the police misconduct complaint alleged
8 that the arresting officers committed police misconduct by: (1) failing to provide medical
9 assistance to Dixon Kwon, as he had a head injury at the time of his arrest because of a car
10 accident; (2) failing to advise Dixon Kwon of his constitutional rights; (3) failing to properly
11 administer a field sobriety test; (4) failing to allow Dixon Kwon to make a phone call; and (5)
12 failing to properly administer a breathalyzer test upon Dixon Kwon.
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15 **A. The DPS Internal Investigation**

16 DPS Internal Affairs Officers Olympio Muna and Alexander Sakisat received the police
17 misconduct complaint, and, as part of their investigation, interviewed DPS Officer Melvin
18 Cadiang, DPS Officer John Cabrera, DPS Officer Peter Aldan, DPS Officer Brian Ajoste, and
19 DPS Officer Joseph Magofna. However, the Internal Affairs investigation file and audio
20 recording were thereafter lost and neither Officer Muna nor Officer Sakisat could clearly recall
21 the police misconduct complaint or their resulting investigation. For example, Officer Muna
22 testified that he could not recall the exact procedures that the police misconduct complaint
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26 ¹ In violation of 9 CMC § 7105(a)(1).

27 ² In violation of 9 CMC § 7105(a)(2).

28 ³ In violation of 9 CMC § 7104(a).

⁴ In violation of 9 CMC § 6101(a).

⁵ In violation of 9 CMC § 8203.

⁶ In violation of 9 CMC § 8204.

1 alleged were not followed, and Officer Sakisat could not recall if there were any allegations
2 regarding the propriety of the field sobriety test or the altering of the police report.

3 **1. Officer Dixon Kwon's Head Injury**

4 As part of the Internal Affairs investigation, Officer Muna interviewed Officer Cadiang
5 about (1) the fact that Dixon Kwon was injured at the time of his arrest and was not provided
6 medical attention as required, and (2) the way the breathalyzer test was conducted on Dixon
7 Kwon. However, Officer Muna testified that he could not remember either the questions he
8 asked or the answers given.
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10 **2. Breathalyzer Test**

11 Officers Muna and Sakisat also interviewed Officer Aldan about whether a police radio
12 was turned-on during the administration of Dixon Kwon's breathalyzer test. However, Officer
13 Muna could not recall Officer Aldan's answer or whether he asked any questions regarding
14 whether the breathalyzer testing room door was open during the administration of Dixon
15 Kwon's breathalyzer test. Officer Sakisat provided no additional information about whether
16 Officer Aldan's radio was on during the breathalyzer test, but he did recall that there were
17 questions regarding whether or not the door to the breathalyzer testing room was open during
18 the administration of Dixon Kwon's breathalyzer test.
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21 In a separate interview, Officers Muna and Sakisat asked DPS Officer Joseph Magofna
22 about whether it mattered if a police radio was turned-on during the administration of a
23 breathalyzer test. Officer Muna testified that he remembered Officer Magofna's answer that a
24 handheld police radio when broadcasting or receiving transmissions during the administration
25 of a breathalyzer test would be an issue as it could affect the calibration and result of the
26 breathalyzer.
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3. Denial of Phone Call

Officer Muna testified that the police misconduct complaint alleged Dixon Kwon requested a phone call on the night of his arrest but his request was denied. Officer Muna did question Officer Aldan about this, but Officer Muna could not recall the questions he asked or the answers he received.

4. Failure to Advise of Constitutional Rights

Officer Muna reviewed the police reports made by the officers he interviewed. When asked whether any interviewed officers provided statements different from those contained in their police reports, Officer Muna testified that Officer Cadiang had provided inconsistent information. Contrary to Officer Cadiang's crash report, Officer Cadiang did not advise Dixon Kwon of his Miranda rights.

Officer Cadiang told Officer Muna that he did not advise Dixon Kwon of his constitutional rights because Dixon Kwon "is a police officer and should already know his rights."⁷ Officer Sakisat testified that Officer Cadiang only asked Dixon Kwon if he was aware of his constitutional rights but did not formally advise Dixon Kwon of his constitutional rights.

Officer Sakisat testified that Officer Aldan stated that Dixon Kwon signed a form entitled "Your Constitutional Rights," which provides that Dixon Kwon "did not want to acknowledge" his constitutional rights. However, the Constitutional Rights form does not contain Dixon Kwon's signature.

B. Failure of Internal Affairs to Recall its Own Findings

Officer Muna took notes of his interviews with the officers. However, the interview notes are now lost, and Officer Muna cannot now recall the questions he asked. The notes were

⁷ Recording of Hearing at 3:17:24, and earlier.

1 lost when the Internal Affairs office changed locations from Capitol Hill to Susupe. There are
2 no other copies of Officer Muna's notes or of the file.

3 Officer Sakisat recorded the interviews on his department-issued recording device.
4 However, Officer Muna never retrieved the recording device from Officer Sakisat to transcribe
5 the interviews as required by standard operating procedures. Officer Sakisat concluded that he
6 and Officer Muna "just forgot about it."⁸
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8 Sometime after the interviews with the five DPS Officers, Officer Sakisat admitted that
9 he mistakenly threw the device in the office trash can. Officer Sakisat kept the recording device
10 in his personal pouch, which he carried with him for many months. As a result, when Officer
11 Sakisat plugged the audio recording device into his computer, the device would not work.
12 Therefore, he threw it into the trash. All of the interviews regarding the police misconduct
13 complaint were kept on that audio recording device and there are no other copies.
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15 **C. Officer Dixon Kwon was Reinstated Based on Favorable Findings by Internal**
16 **Affairs**

17 In October 2017, the investigation of the police misconduct complaint concluded when
18 Officer Dixon Kwon was reinstated to work at DPS after a three-day suspension for being
19 involved in an auto crash. Officer Muna testified that Officer Dixon Kwon was reinstated
20 "based on [my] findings."⁹ Officer Muna found that Officer Cadiang did not advise Dixon
21 Kwon of his constitutional rights at the time of Dixon Kwon's arrest. Officer Muna could not
22 recall his other findings but admitted that those findings were favorable to Dixon Kwon.¹⁰
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28 ⁹ Recording of Hearing at 2:27:52.

¹⁰ Recording of Hearing at 2:31:20-26.

III. LEGAL STANDARD

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2 Under the due process clause of the Fourteenth Amendment of the United States
3 Constitution, “suppression by the prosecution of evidence favorable to an accused upon request
4 violates due process where the evidence is material either to guilt or to punishment, irrespective
5 of the good faith or bad faith of the prosecution.” *Commonwealth v. Campbell*, 4 NMI 11, 3
6 (1993) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)); see also *Giglio v. United States*,
7 405 U.S. 150, 154 (1972). Favorable evidence includes exculpatory and impeachment evidence.
8 *United States v. Bagley*, 473 U.S. 667, 676-77 (1985).

IV. DISCUSSION

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11 Officers Muna’s and Sakisat’s testimonies showed, at the very least, that Dixon Kwon
12 was not advised of his constitutional rights. Furthermore, the Internal Affairs investigators could
13 not recall any other findings regarding the police misconduct complaint, and Officer Sakisat
14 not recall any other findings regarding the police misconduct complaint, and Officer Sakisat
15 destroyed the only audio device that recorded the interviews. Officer Sakisat also did not use an
16 information technology expert to attempt to recover the recordings.¹¹ The Internal Affairs
17 investigation findings were generally favorable to Dixon Kwon, as Dixon Kwon was reinstated
18 to regular police duty after a minor brief three-day suspension.¹² Accordingly, the Court hereby
19 finds that the Internal Affairs Investigation that followed the police misconduct complaint
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24 ¹¹ Defendant argued in his proposed Findings of Fact and Conclusions of Law that the *Youngblood/Trombetta* test
25 outlined in *Commonwealth v. Barcinas*, Crim. No. 15-0206 (NMI Super. Ct. Aug. 8, 2016) requires the
26 Commonwealth to preserve evidence that was in its care, custody, and control. However, because Defendant’s
27 motion only seeks the exculpatory information outlined in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *Giglio v.*
28 *United States*, 405 U.S. 150, 154 (1972), the issue of whether the Commonwealth violated Defendant’s due process
rights as outlined in *Youngblood/Trombetta* is not presently before the Court and is not ripe for review.


¹² The Parties also argued in their briefs about whether some of the documents would be exempt from disclosure
under NMI R. CRIM. P. 16(a)(2). However, Defendant filed a “Motion to Compel Production of *Brady Material*”
(emphasis added). Therefore, because a request for *Brady* material is different from a request for Rule 16 material,
the issue of whether any of the information would be exempt from disclosure under Rule 16(a)(2) is not ripe for
review.

1 produced evidence that is favorable to Defendant, and therefore, pursuant to *Brady*, the
2 favorable evidence should be disclosed to Defendant.

3 **V. Conclusion**

4 For the foregoing reasons, the Court hereby **GRANTS** Defendant Dixon Kwon's
5 Motion to Compel.¹³

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8 **SO ORDERED** this 12th day of March, 2019.

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11 **JOSEPH N. CAMACHO**, Associate Judge

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28 ¹³ The Court shall issue a separate order detailing the items to be disclosed and deadlines for those items to be turned over.