

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,  
PENNSYLVANIA**

**COMMONWEALTH OF PENNSYLVANIA,:**

**v.**

**SHAWN BRISTER  
Defendant**

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**No. 955-2008; 1768-2008**

**CRIMINAL DIVISION**

**OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)  
OF THE RULES OF APPELLATE PROCEDURE**

The Commonwealth, jointly with the Office of Chief Counsel for the Pennsylvania State Police, appeals this Court’s Order dated December 18, 2009. The Court notes a Notice of Appeal was timely filed on January 14, 2010 and that the Defendant’s Concise Statement of Matters Complained of on Appeal was filed on February 3, 2010. Defendant asserts eight issues on appeal: (1) that the Court erred in its Order of December 18, 2009 when it ordered the Pennsylvania State Police (PSP) to provide to Defense Counsel “copies of any Disciplinary Action Report (DAR) and Notice of Disciplinary Penalty (NDP) for Trooper Tyson Havens; (2) the records are irrelevant and not probative to the instant two cases cited above in the caption hereto; (3) disclosure of the aforementioned records constitutes an invasion of privacy; (4) the order is overly broad because it does not specify which Disciplinary Action Reports or Notice of Disciplinary Penalties should be produced, effectively encompassing all Disciplinary Action Reports and Notice of Disciplinary Penalties issued to Trooper Havens throughout the duration of his career; (5) the records are not

material to the Defendant's pending criminal prosecutions; (6) Defendant failed to lay a foundation before the Court to support the materiality or reasonableness of the scope of his request for discovery pursuant to Pa R.C.P. 573 (F) ; (7) the court did not comply with Pa.R.C.P. 573 (F) in deeming the records relevant and discoverable without conducting an in-camera examination of the records to ascertain relevance; (8) a subpoena is required where the records are not Brady material, which makes the Rule 573 request for formal discovery insufficient.

### ***Background***

The following is a summary of the facts presented at the Preliminary Hearings for Shawn Brister (Brister) on June 20, 2008 and October 24, 2008, the Preliminary Hearing for Cory Ringkamp (Ringkamp) on May 30, 2008 and the Suppression hearing. On April 29, 2008, around 6:00 p.m., Trooper Tyson Havens (Havens) and Corporal Michael Simpler (Simpler) of the Pennsylvania State Police (PSP) were on aggressive patrol in the area of Hepburn Street and Locust Street. While engaged in conversation with four individuals on the street corner, the Troopers observed a white Chevy Impala, operated by Brister with Ringkamp as the passenger, travel north on Hepburn Street and park near the Troopers. Both Brister and Ringkamp exited the vehicle and walked over to the Troopers general location and then sort of walked away. The Troopers noted that both Defendants had their hands in their pockets and Brister had the hood of his sweatshirt up. At this time, the Troopers noted both Defendants' presence and found it to be suspicious.

After speaking with the four individuals, the Troopers drove their police cruiser to the 700 block of Louisa Street where they encountered six individuals playing basketball in the street, blocking traffic. The Troopers got out of the cruiser and started to talk to the individuals. One of the individuals made a call and within seconds Brister and Ringkamp showed up in the Chevy Impala, parked the vehicle and exited. Brister still had his hood up and both individuals still had their hands concealed in their pockets as they walked over and started talking to one of the six individuals the Troopers were talking to. Again, the Troopers noted the presence of both Brister and Ringkamp and felt it was suspicious.

Following the second stop, the Troopers observed a vehicle with an expired inspection in the 600 block of Locust Street where they conducted a third traffic stop. The traffic stop was conducted on two individuals, Michael Ballard and Devon Grissom, with the latter being a known Bloods' gang member. Within minutes of conducting the traffic stop, Brister and Ringkamp came walking up beside the Troopers, again with their hands in their pockets and Brister's hood still up. This time Havens also noticed a bulge in Brister's sweatshirt pocket. Havens testified he was very concerned as they were on a traffic stop with a known gang member, they were in a high crime area, the Defendants had shown up for the third time on a traffic stop and Brister had a bulge in his sweatshirt pocket. Simpler ordered Brister and Ringkamp to stop, but they continued on and went and sat down on a porch nearby. Havens approached the Defendants and ordered both down onto the porch; Havens then conducted a pat down in which he did not find any weapons, but he believed Brister had baggies in his pockets and that Ringkamp had money.

Havens then asked both Brister and Ringkamp for permission to search their pockets. The Defendants told Havens it was okay as they had nothing illegal. Havens uncovered fifty-six empty glassine baggies with dollar signs on them and \$115 in cash in Brister's pants pockets. In Ringkamp's pants pockets was \$670 in cash. Havens related Brister stated the bags were used for the jewelry he sells and the money came from his mother. Ringkamp stated the money was from a recently cashed check from his employer, Richard Hibler Painting.

After the pat down, Havens asked the Defendants where the vehicle was located and he was informed it was around the corner. Havens went to the vehicle and looked in the driver's window, where he observed a small bud of marijuana on the seat and a handle of what he believed to be a machete protruding from the front passenger seat. Havens summoned a K-9 unit and then had the vehicle towed to the police barracks. Trooper William Langman of the PSP responded with his dog Sarik to perform a sniff of the exterior of the vehicle. Sarik alerted positive to the presence of illegal drugs. Havens then obtained a search warrant for the vehicle. A machete was found under the passenger seat of the vehicle, and in the glove box were four large bags, three medium sized bags, and five small bags of marijuana. On top of the marijuana was a replica firearm or pellet gun and a camera. The marijuana field tested positive. Havens also determined the vehicle was registered to Ringkamp and his significant other, Emma Thompson. Havens also spoke with Richard Hibler regarding Ringkamp's employment and was informed that Ringkamp only worked for one week and never picked up his check.

At Brister's Preliminary Hearing on June 20, 2008, Magisterial District Judge James Carn dismissed the Conspiracy count and the remaining charges were held over for Court. On August 13, 2008, Havens re-filed the Conspiracy charge. On October 24, 2008, at a Preliminary Hearing before Magisterial District Judge (MDJ) Allen Page III, wherein no additional evidence was presented, the Conspiracy Count was held over for Court. At Ringkamp's Preliminary Hearing on May 30, 2008 before MDJ Page all charges were held over for Court.

### ***Discussion***

***The Court erred in its Order of December 18, 2009 when it ordered the Pennsylvania State Police (PSP) to provide to Defense Counsel "copies of any Disciplinary Action Report (DAR) and Notice of Disciplinary Penalty (NDP) for Trooper Tyson Havens"***

The Commonwealth asserts this Court erred in its Order of December 18, 2009, when it ordered the Pennsylvania State Police (PSP) to provide to Defense Counsel "copies of any Disciplinary Action Report (DAR) and Notice of Disciplinary Penalty (NDP) for Trooper Tyson Havens." Rule 573 of the Pennsylvania Rules of Criminal Procedure states:

#### Disclosure by the Commonwealth

- (1) *Mandatory*. In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.
  - (a) Any evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for

the Commonwealth;

(b) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made that is in the possession or control of the attorney for the Commonwealth...

(2) *Discretionary With the Court.*

(a) In all court cases, except as otherwise provided in Rule 230 (Disclosure of Testimony Before Investigating Grand Jury), if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense, and that the request is reasonable:

(i) the names and addresses of eyewitnesses;

(ii) all written or recorded statements, and substantially verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial;

(iii) all written and recorded statements, and substantially verbatim oral statements, made by co-defendants, and by co-conspirators or accomplices, whether such individuals have been charged or not; and

(iv) any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice...

Pa.R.Crim.P. 573(B)

Rule 573(B)(2)(a)(iv), which provides the Court with the discretion to require the disclosure of evidence, applies in this case. The Court can require the disclosure of evidence as long as the Defendant establishes that the disclosure is in the interest of justice.

On October 26, 2009 the Court held a hearing and argument on the Commonwealth's Motion for Protective Order. After the hearing and argument, the Court determined that the Defense Counsel set forth a reasonable basis to believe that disciplinary records against Trooper Tyson Havens exist, and that such records may

be relevant to the facts and circumstances of this case. The Court did not err in making this decision as the trial court has the authority to handle questions of discovery in a criminal case. Commonwealth v. McNeil 808 A.2d 950 (Pa. Super 2001). (citing Commonwealth v. Miller 765 A.2d 1151, (Pa. Super 2001)) (see also Commonwealth v. Shelton 640 A.2d 892 (Pa. 1994)). Therefore, the Court believes the Commonwealth's allegations do not raise a substantial question that the Court erred in its Order of December 18, 2009 and as such the Order should be affirmed.

***The records are irrelevant and not probative to the instant two cases cited above in the caption hereto.***

The Commonwealth asserts that the DAR and NDP records are irrelevant and not probative to the instant two cases involving the Defendant. In this case, Defendant was charged with Conspiracy and Possession with Intent to Deliver a Controlled Substance (marijuana) and related charges. The charges stem from an encounter on April 29, 2008 in the City of Williamsport between the Defendant, his co-defendant, Trooper Havens and Trooper Simpler. During the encounter, Trooper Havens seized the Defendant and his co-defendant and conducted a search of their respective persons. Trooper Havens detained the individuals and asked for the location of their vehicle. Trooper Havens stated that he observed a "bud" or "flake" of marijuana on the driver's seat and what appeared to be a machete under the passenger seat. The vehicle was ultimately seized. On April 30, 2008, the vehicle was subjected to a drug detection canine search.

Defense counsel subsequently learned that Trooper Havens was recently disciplined by the State Police. Trooper Havens is involved in the federal case of United States v. Earl Sampson, et al., No. 4:07-CR-389. On May 19, 2009 the co-defendant in the Sampson case filed a Motion to Extend a Briefing in which he alleged that Trooper Havens was disciplined for conducting an illegal search, confiscating drugs and intending or attempting to justify the search with the subsequent use of a drug-sniffing dog. It appears that the allegations against Trooper Havens concern facts very similar to the facts of this case. As the circumstances of Trooper Havens disciplinary action appear to be similar to the Defendant's case, the Defendant requested information from the PSP relating to Trooper Havens service as a police officer. The Defendant is entitled to this information as "A defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed." Commonwealth v. Rutledge Pa. D & C. (2006). While it is unclear at this time whether the information requested by the Defendant will be admissible at trial, the Court is satisfied that Defense Counsel has set forth a reasonable basis to believe disciplinary records against Trooper Havens exist, and that such records may be relevant to the facts and circumstances of this case. Therefore, the Court is satisfied the Defendant has established that the disclosure of the records is in the interest of justice, per Pa. R. Crim. P. 573(B)(2)(a)(iv). The Court believes the Commonwealth's allegations do not raise a substantial question that the records are irrelevant and not probative of the instant two cases, and as such the Court's Order of December 18, 2009 should be affirmed.

*Disclosure of the aforementioned records constitutes an invasion of privacy*

The Commonwealth asserts that disclosure of the DARs and NDPs constitutes an invasion of privacy. The Court in Bass v. Philadelphia 10 Pa. D. & C.3d 5 (1978) declared that “Nothing encourages suspicion more than secrecy. We believe it is the appropriate function of the judiciary to strike a proper balance between the public's right to know what its government is doing and the rights of governmental officials and employees to confidentiality or privacy under appropriate circumstances.” Even though the plaintiff in Bass requested discovery under Pa.R.C.P. 4111, the Court believes that the standard established by the Bass Court is relevant here. The plaintiff in Bass filed a claim for alleged police brutality. Id. The plaintiff “filed a request for the production of certain reports, statements, summaries or memoranda made in connection with the incident of August 24, 1975 which is the subject of the present suit.” Id. The Bass Court stated that

It is inherent in the law enforcement process that where a crime is reported to the police, they make at least a preliminary investigation to determine whether a charge is founded. Both general law enforcement and departmental discipline require such a determination in case of allegations against police officers. Such investigations are conducted at public expense and for the public benefit in pursuit of enforcement of the law....

Id. at 8.

The Bass Court made a distinction between the police investigative reports described above and police personnel records. Id. at 15. Police investigative reports, the Bass Court determined, are not exempt from discovery. Id. at 14-15.

The Bass Court considered a number of factors before reaching its conclusion that the plaintiff was entitled to his discovery request. Initially, the Bass Court reflected on the ruling in United States v. Nixon, 94 S. Ct. 3090 (1974), where the Supreme Court refused to allow the executive branch to claim executive privilege and avoid liability to the public. Bass at 6. The Bass Court also considered as relevant Section 5.5-1104 of the Philadelphia Home Rule Charter, 351 Pa. Code, which provides for the “Public Right to Inspection” of city records. The Bass Court elaborated that even if the Philadelphia Home Charter Rule did not call for the public right to the inspection of city records, public policy would require such a right for records relating to charges of abuse against a police officer. Id. at 11. Additionally, the Bass Court found pertinent the holding of the United States Supreme Court in Brady v. Maryland 83 S. Ct 1194 (1963), 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 good faith or bad faith of the prosecution.” Bass at 10. Ultimately, the Bass Court concluded that

Logically, Brady is as applicable to civil cases involving a charge of governmental abuse of power as to criminal cases. Both situations represent a contest between the government and a private citizen. In both situations, the government has the benefit of vast investigative machinery in contrast to the individual's presumably more limited resources. Brady holds, in essence, that where the governmental investigative machinery has developed evidence favorable to an accused, it would be basically unfair not to require the government, upon request, to turn over such information to the accused. Where, as in the present case, there is a charge of governmental abuse, not only would it be unfair to the complaining citizen to permit the government to conceal evidence of such an abuse, but also the public interest requires that the government not be permitted to conceal governmental abuse of power.

Id. at 11.

In the present case, the Court ordered the PSP to provide to Defense Counsel copies of DARs and NDPs for Trooper Havens. The DARs and NDPs are clearly investigative reports, as they are reports related to the alleged misconduct of Trooper Havens. The transcript of the proceeding regarding the Commonwealth's Motion for Protective Order on October 26, 2009 explains the nature of the Defendant's request for documents:

COURT: Internal investigation personnel file relating to complaints alleging misconduct and any disciplinary action is what's listed in 14.

MR. RYMSZA: That's correct. I think it speaks for itself, Judge.

Although the words "personnel file" were used in the proceeding, the Order of the Court states that the Commonwealth is to provide copies of any Disciplinary Action Report and Notice of Disciplinary Penalty. The Court believes the Commonwealth's allegations do not raise a substantial question that disclosure of the DARs and NDPs constitutes an invasion of privacy, and as such the Court's Order of December 18, 2009 should be affirmed.

***The order is overly broad because it does not specify which DARs or NDPs should be produced, effectively encompassing all DARs and NDPs issued to Trooper Havens throughout the duration of his career***

The Commonwealth complains that the Order is overly broad because it does not specify which DARs or NDPs should be produced, effectively encompassing all DARs and NDPs issued to Trooper Havens through the duration of his career. The

transcript of the proceeding regarding the Commonwealth's Motion for Protective Order on October 26, 2009 reveals that counsel for the PSP suggested the production of DARs and NDPs because of the limited scope of such reports:

MS. NEARY: If I might offer to the Court the formatting that the State Police uses we could be talking about hundreds or thousands of pages of investigative reports. Troopers have complaints made against them all the time in the course of their duties. It might be more appropriate if the Court considers the disciplinary action, the summary thereof, to see if the investigation that led to that investigation is warranted.

The Court's Order of December 18, 2009 called for the production of DARs and NDPs, the form of report suggested by the PSP's counsel for its concise nature. Furthermore, the Court has already established that the trial Court has discretion to handle discovery in criminal matters. McNeil at 953. (citing Miller) (see also Shelton). The Commonwealth has failed to raise a substantial question as to the overly broad nature of the Court's Order to produce DARs and NDPs, and as such the Court's Order of December 18, 2009 should be affirmed.

***The records are not material to the Defendant's pending criminal prosecutions.***

The Commonwealth claims that the DARs and NDPs are not material to the Defendant's criminal case. "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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Commonwealth v. Jones 637 A.2d 1001, 1004 (citing Commonwealth v. Redmond, 577 A.2d 547, 553 (Pa. Super.

1990)), (quoting Pennsylvania v. Ritchie, 107 S. Ct. 989, 1001 (1987)). This argument is essentially the same as the Commonwealth's plea, located in section two of this discussion, that the DARs and the NDPs are irrelevant and not probative to the instant two cases cited above in the caption hereto. This being so, the Court refers to its answer, located in section two of this discussion, in response to the Commonwealth's present assertion.

***Defendant failed to lay a foundation before the Court to support the materiality or reasonableness of the scope of his request for discovery pursuant to Pa.R.Crim.P. 573.***

The Commonwealth claims that the Defendant failed to lay a foundation before the Court to support the materiality or reasonableness of the scope of his request for discovery pursuant to Pa. R. Crim. P. 573. The Court agrees with the Commonwealth to the extent that a defendant should lay a foundation before the court, stating the reasons for the discovery request. The Briggs court acknowledged that "the Defendant has the burden of proving that the evidence requested in discovery is material, reasonable and in the interest of justice." Commonwealth v. Briggs 76 Pa. D. & C.4<sup>th</sup> 225 (2005) (citing Commonwealth v. Jones 637 A.2d 1001 (Pa. Super. 1994). "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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" Jones at 1004. (citing Redmond) (quoting Ritchie).

This Court is satisfied that the Defendant in this case has met his burden by setting forth a reasonable basis to believe disciplinary records against Trooper Havens exist and may be relevant to the facts and circumstances of this case. The foundation for the materiality or reasonableness of the scope of Defendant's request for discovery is detailed in section two of this discussion. Therefore, the Court does not believe the Commonwealth's allegations set forth a substantial question that the Defendant failed to lay a foundation before the Court to support the materiality or reasonableness of the scope of his request for discovery. As such, the Court's Order of December 18, 2009 should be affirmed.

***The Court did not comply with Pa. R. Crim. P. 573 (F) in deeming the records relevant and discoverable without conducting an in-camera examination of the records to ascertain relevance.***

The Commonwealth states that the Court did not comply with Pa.R.Crim.P. 573 (F) in deeming records relevant and discoverable without conducting an in-camera examination of the records to ascertain relevance. The Pennsylvania Rules of Criminal Procedure state the following:

(F) Protective Orders. Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion of any party, the court may permit the showing to be made, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court(s) in the event of an appeal.

Pa. R. Crim. P. 573(F).

The language of Pa. R. Crim. P. 573(F) makes it clear that the Court **may** conduct an in camera inspection of records to ascertain relevance, but such inspection is not required. Furthermore, the court in Bass reiterated the distinction between police investigative reports and police records personnel as it relates to in-camera inspection,

Moreover, in Tataren, the court rejected, as we do here, the city's "bare assertion of privilege." Admittedly, Judge Chalfin's order requested that all the material referred to in his order be submitted to the court for in camera inspection. A reading of the opinion suggests to us, however, that his primary concern in camera inspection was not police investigative reports, but police personnel records (not here at issue).

Bass at 15. (See Tataren v. Little et al., C.P., First Judicial District, November Term, 1975, No. 1473).

Therefore, the Court believes that the Commonwealth's assertions do not raise a substantial question that the Court failed to comply with Pa. R. Crim. P. 573(F) when it deemed records relevant and discoverable without conducting an in-camera examination. As such, the Court's Order of December 18, 2009 should be affirmed.

***A subpoena is required where the records are not Brady material, which makes the Rule 573 request for formal discovery insufficient.***

The Commonwealth claims that the records requested by the Defendant are not Brady material. The Court in Brady v. Maryland stated 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." Brady at 1197. It appears to the Court that the DARs and NDPs requested by the Defendant are material either to guilt or

punishment and are therefore Brady material. The Court reiterates that the Defense counsel set forth a reasonable basis to believe that disciplinary records against Trooper Havens exist and may be relevant to the facts and circumstances of this case. Consequently, a subpoena is not required, the request for formal discovery is sufficient and the Court's Order of December 18, 2009 should be affirmed.

***Conclusion***

As none of the Commonwealth's affirmations appear to have merit, it is respectfully suggested that the Court's Order of December 18, 2009 be affirmed.

By the Court,

Dated: \_\_\_\_\_

Nancy L. Butts, P.J.

xc: Henry Mitchell, Esq.  
Keli Neary, Esq.  
Office of Chief Counsel  
I.D. # 205178  
Pennsylvania State Police  
1800 Elmerton Avenue  
Harrisburg, PA 17110  
Edward Rymysza, Esq.  
Amanda Browning, Esq. (Law Clerk)  
Gary L. Weber, Esq. (LLA)