

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

COMMONWEALTH OF PENNSYLVANIA,

v.

**QU MAR MOORE,
RAYMARR ALFORD,
Defendant**

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CR: 1971-2012; 1969-2012

CRIMINAL DIVISION

OPINION AND ORDER

On December 3, 2013, this Court issued an Order precluding the testimony of Darryl Franklin based upon what the Court found to be a series of discovery violations. The Commonwealth filed a Motion for Reconsideration of Order on December 5, 2013. Due to the unavailability of the District Attorney, argument on this issue was not held until December 17, 2013.

Background

The following procedural background is relevant to this Court's decision to preclude the testimony. On November 19, 2012, Qu Mar Moore (Moore) and Raymarr Alford (Alford) had a preliminary hearing before Magisterial District Judge Allen Page III. On December 12, 2012, counsel for Moore filed a Request for Pretrial Discovery to the District Attorney's Office. On December 31, 2012, defense counsel for Moore filed a Motion to Extend Time to File Omnibus Pre-Trial Motion because they had only received partial discovery; the Court granted this motion. On January 4, 2013, counsel for Alford filed an Omnibus Pretrial Motion, which included substantial discovery requests.

On January 7, 2013, the Commonwealth filed a Motion for Protective Order requesting that defense counsel be precluded from "duplicating, distributing and disseminating Discovery outside of their offices." Following multiple hearings, this Court on March 1, 2013 ordered, in

part, that the Commonwealth provide defense counsel with an un-redacted version of discovery by March 8, 2013 or it would result “in sanctions and/or complaint to the Disciplinary Board of the Supreme Court of Pennsylvania.” The Commonwealth failed to comply with this Order; however, this Court did not issue sanctions.

On February 27, 2013, counsel for Moore filed an Omnibus Pre-Trial Motion, which again requested discovery. On March 18, 2013, counsel for Alford filed a Supplemental Motion to Compel Discovery. On April 19, 2013, this Court ordered the Commonwealth to give various items of discovery to defense counsel, including names and addresses of all eyewitnesses and prison phone call recordings within seven (7) days of receiving them. On May 14, 2013, as the Commonwealth did not comply with the Order of April 19, 2013, this Court further ordered the Commonwealth to comply within ten (10) days.

On May 10, 2013, this Court ordered the Commonwealth to provide opposing counsel expert reports by October 4, 2013. On October 4, 2013, the Commonwealth filed a Motion to Extend Time for Production of Expert Reports. On October 18, 2013, this Court granted the Commonwealth’s motion over the objection of the Defendants and allowed them until November 18, 2013 to provide expert reports.

On November 1, 2013, counsel for Moore filed yet another Pre-trial Motion which requested discovery and a finding of contempt against the Commonwealth for failing to provide names and addresses of all eyewitnesses as ordered by this Court on April 19, 2013. On November 4, 2013, the Commonwealth provided an interview and diagram drawn by eyewitness Anita Jackson, which took place in July of 2012. On November 5, 2013, the Commonwealth provided defense counsel with an interview with Chantel Hunter from March 26, 2013.¹ Hunter

¹ Around this time the Commonwealth represented to the Court that all discovery in possession by the Williamsport Bureau of Police had been provided to defense counsel.

was an eyewitness to the crime, however, the Commonwealth did not provide her name or address in compliance with the April 19, 2013 Order. Because the statement by Hunter was beneficial to a Defendant it could not have been precluded. On November 15, 2013, defense counsel received, at their request, a map and photographs identified and marked by Hunter during the March 26, 2013 interview. Around this time weekly conferences with this Court were now required to resolve discovery issues.

On November 6, 2013, the Commonwealth provided defense counsel with the in-car camera videos taken on July 9, 2012. On November 15, 2013, the Commonwealth provided counsel with eight (8) computer disks containing prison phone calls, many of which pre-dated the preliminary hearing as well as this Court's Order dated April 19, 2013.

On November 19, 2013, the Commonwealth provided counsel with a recorded statement of Darryl Franklin (Franklin), which took place on November 30, 2012. In the statement, Franklin states that while housed at the Lycoming County Prison he heard Moore implicate himself and Alford in this case. Counsel for Moore filed a Motion in Limine requesting that the testimony be precluded. On December 3, 2013, this Court ordered that the testimony of Franklin be precluded from trial due to the discovery violations. On December 5, 2013, the Commonwealth filed a Motion for Reconsideration of Order, which is the subject of this Opinion.

In addition, on December 3, 2013, the Defendants were also provided with an interview of Tyuana Wheeler that took place on November 26, 2013. Wheeler was an eyewitness to the crime, however, her name and address were not provided to defense counsel as ordered on April 19, 2013. Alford's counsel filed a Motion to exclude Evidence and Testimony on December 4,

2013. Defense counsel, however, was aware of her existence as she was mentioned in police reports provided by the Commonwealth.

Similar discovery issues have occurred in other homicide cases. Specifically, in Commonwealth v. Kemp, defense counsel filed motions requesting discovery on June 4, 2012; December 27, 2012; January 24, 2013; January 31, 2013; February 28, 2013; and March 15, 2013.² Due to the discovery issues and expert reports not being timely provided, the defendant had to request a continuance. Trial was continued from February 25, 2013 to September 9, 2013. Finally, current homicide cases in ranging pre-trial stages have had the same discovery issues, which include Commonwealth v. Shabazz,³ Commonwealth v. Jackson,⁴ and Commonwealth v. Boyd.⁵ The specific discovery issues with these cases were covered in more detail during the hearing held December 17, 2013.

Motion for Reconsideration

The Commonwealth challenges this Court's order precluding the testimony of Franklin. Specifically, the Commonwealth alleges that any discovery violations that have occurred are not willful and should only, at the most, result in a continuation of trial. The Commonwealth states that they were notified of a confession made by Moore to Franklin almost a year before disclosing it to defense attorneys, however, the confession was forgotten and a member of the Williamsport Bureau of Police (WBP) misfiled the statement. After the District Attorney was reminded of the statement by another WBP officer a year later, he contacted the prosecuting

² CP-41-CR-525-2012.

³ CP-41-CR-407-2013.

⁴ CP-41-CR-708-2013.

⁵ CP-41-CR-1467-2013.

officer, who located the recorded statement in another file involving Franklin.⁶ The District Attorney received a copy of the interview on November 18, 2013 and provided it to the defense attorneys on November 19, 2013.

The first issue raised is whether the Commonwealth has failed to comply with discovery.

The Pennsylvania Rules of Criminal Procedure states what discovery is mandatory:

- (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 instance 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;
 - (c) The defendant's prior criminal record;
 - (d) The circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;
 - (e) Any results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examination or other physical or mental examinations of the defendant that are within the possession or control of the attorney for the Commonwealth;
 - (f) Any tangible objects, including documents, photographs, fingerprints, or other tangible evidence; and
 - (g) The transcripts and recordings of any electronic surveillance, and the authority by which said transcripts and recordings were obtained.

⁶ Franklin has cooperated with the Commonwealth regarding numerous cases, in which he testified regarding statements defendants have made to him while in prison.

Pa.R.Crim.P. 573(B)(1). These rules, however, do not apply in situations where evidence is discovered during pretrial. In these circumstances, each party has a continuing duty to promptly notify the opposing party for additionally discovered evidence. See Pa.R.Crim.P. 573(D).

In Boring, the Commonwealth only disclosed inculpatory statements made to a police officer the day before trial. Commonwealth v. Boring, 684 A.2d 561 (Pa. Super. 1996). The Superior Court of Pennsylvania discussed the Commonwealth's continuing duty to disclose:

The rules themselves contemplate situations where the Commonwealth does not discover evidence pre-trial. Thus, according to Pa.R.Crim.P. 305D, "if prior to or during trial, either party discovered additional evidence . . . which is subject to discover under this rule . . . such party shall promptly notify the opposing party or the court of the additional evidence . . ." Moreover, our supreme court in *Commonwealth v. Bonacurso*, 500 Pa. 247, 455 A.2d 1175 (1983), noted that the prevailing view in this Commonwealth is that "the prosecution does not violate discovery rules when it fails to provide the defense with evidence that it *does not possess and of which it is unaware* during pre-trial discover"

Id. at 613 (emphasis added). The Superior Court found that there was no discovery violation because the Commonwealth "was unaware of the existence of appellant's inculpatory statements made to Sergeant Hand until the day before trial." Id.

Here, the Commonwealth was notified of the mandatory discovery on or around November 30, 2012, after the preliminary hearing. Unlike Boring, the District Attorney had been notified of the inculpatory statement at some point and would have been aware prior to defense counsel's initial requests for discovery in the beginning of December 2012 and through the numerous other requests. While the District Attorney may have forgotten about the statement, he failed to comply with Pa.R.Crim.P. 573(B)(1) and 573(E). The Commonwealth should have disclosed the statements initially under Pa.R.Crim.P. 573(B)(1), if known before pre-trial, or under a continuing duty to disclose under Pa.R.Crim.P. 573(E). If the

Commonwealth had notified defense counsel “promptly,” as required, they would not have forgotten the statement for over a year.

While this Court believes that the non-disclosure of Franklin’s statement was a discovery violation and warrants sanctions by itself, other discovery violations have taken place in this case that have forced this Court to take action. Specifically, on November 5, 2013, the Commonwealth provided defense counsel with an interview with Chantel Hunter from March 26, 2013. The Commonwealth failed to disclose this eyewitness to defense counsel in violation of the April 19, 2013 Order. The statement, however, was favorable to a Defendant and could not be precluded due to the discovery violation. Further, following the District Attorney’s representation that he went page by page making certain that all discovery in the possession of both the WBP and the District Attorney’s Office was provided, the Commonwealth still provided additional discovery after the District Attorney’s assurance in November that was taken from the time of the incident in July 2012. This Court is at a loss to understand how this could happen if the District Attorney in good faith reviewed all of the discovery.

The second issue raised is whether precluding Franklin’s testimony is appropriate for the discovery violation. “Decisions involving discovery matters are within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion.” Commonwealth v. Hemmingway, 13 A.3d 491 (Pa. Super. 2011). Failure to comply with discovery may result in remedies encompassed in Pa.R.Crim.P. 573(E):

(E) Remedy. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

While not listed, in extreme and egregious violations a trial court may dismiss the charges.

Commonwealth v. Burke, 781 A.2d 1136, 1144 (Pa. 2001).

In Smith, which was argued by the Commonwealth in support of their position, the trial court precluded officer testimony which would have resulted in the dismissal of charges.

Commonwealth v. Smith, 955 A.2d 391 (Pa. Super. 2008). The Superior Court of Pennsylvania acknowledged that “the trial court was within its authority to preclude the officer’s testimony based on the discovery violation” Id. at 395. The trial court, however, did not have authority to dismiss the charges, which was the practical result of the preclusion. In addition, the Superior Court generally addressed what remedies a trial court may order:

The trial court possesses discretion in fashioning an appropriate remedy for a violation of the rules of discovery. However, we must remember its discretion is not unfettered. In most cases, ordering a continuance will be an adequate remedy. A continuance is appropriate where the undisclosed statement or other evidence is admissible and the defendant’s only prejudice is surprise.

Id. (citations omitted). The Commonwealth’s argument based on this small portion of the opinion is weakened by the Superior Court’s statement earlier in the opinion that the trial court may have precluded the evidence as long as it did not result in the dismissal of charges.

Here, the Court believes that preclusion is the only appropriate remedy. The District Attorney’s Office has shown an established record of disregarding court orders and failing to change discovery practices. In addition to the April 19, 2013 Order which has been violated at least three (3) times, the Commonwealth has also failed to comply with the March 1, 2013 Order requiring un-redacted discovery to be provided by March 8, 2013. This Court did not sanction the Commonwealth for the previous discovery violations and believes sanctions are now required in order to change the behavior of the Commonwealth.

In the homicide case prior to this one (Kemp) the Commonwealth's failure to provide discovery resulted in the case being continued. Instead of the Commonwealth improving the discovery process, it appears that the discovery practices have actually gotten worse with this case and the other pending homicide cases. The Court believes that the Commonwealth should not always be awarded continuances filed by Defendants for failing to provide discovery, especially when it appears that such delays constitute the Commonwealth's regular practice.

The Commonwealth additionally argues that the discovery violation was not willful and therefore preclusion is not warranted. This Court acknowledges that the District Attorney did not willfully *hide* discovery, however, the record speaks for itself regarding discovery non-compliance. It does, however, appear that the Commonwealth has willfully failed to correct the faulty discovery process that now appears to have plagued every homicide case in this county. The pre-trial practice of the Commonwealth in these homicide cases has completely broken down with this Court needing to micro-manage every piece of discovery by holding regularly scheduled court conferences. This Court believes that the failure to fix problems known to cause discovery violations is the functional equivalent to willfully violating the rules of discovery.

Finally, this Court believes that the remedy in this case is just. The Commonwealth was aware of the discovery a year before it was given to defense counsel. The statement of Franklin has resulted in additional issues raised including the severance of the Defendants for trial, which this Court first addressed in an Opinion and Order of June 10, 2013. Further, the Commonwealth has made representations to this Court and defense counsel that all discovery has been provided when it obviously has not been. Therefore, this Court finds that precluding the testimony of Franklin is a just remedy in this case and that the Commonwealth's Motion for Reconsideration is denied.

As this Court has precluded this evidence finding a discovery violation, it is fully aware that an interlocutory appeal may be filed by the Commonwealth. In order to take the appeal at this stage of the trial, the Commonwealth must certify that the ruling substantially handicaps the Commonwealth's case. The Court would argue that there is no substantial handicap to the prosecution for the following reasons. First, not only is there an additional witness to whom Moore made incriminating statements while in prison, but the incident occurred in public with numerous eye witnesses, including the victim's brother. Finally, in accepting the Commonwealth's representation that they were unaware of the statement of Franklin until very recently, they fully intended to go to trial for this past year all the while not remembering that there was an additional prison confession made to Franklin.

ORDER

AND NOW, this _____ day of December, 2013, based upon the foregoing Opinion, the Court finds that precluding the testimony of Darryl Franklin is a just remedy for the discovery violation committed by the Commonwealth. Therefore, the Commonwealth's Motion for Reconsideration of Order is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: Eric Linhardt, Esq.
Ken Osokow, Esq.
William Miele, Esq.
Nicole Spring, Esq.
Don Martino, Esq.
Eileen Dgien, Dep. CA