

COMMONWEALTH : No. CR-2-2014
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 vs. :
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 XTO ENERGY INC., :
 Defendant :

OPINION AND ORDER

This matter came before the court on the motion filed by Defendant XTO Energy Inc. (hereinafter XTO) for an order directing the Commonwealth to seek review of the federal government’s investigative file and for authority to issue a subpoena *duces tecum*.

By way of background, XTO is charged with several violations of the Solid Waste Management Act (SWMA) and the Clean Streams Law (CSL) related to an alleged release of fracking or production water from tanks at XTO’s Marquardt site onto the ground and into an unnamed tributary of Sugar Run. The Marquardt site is located in Penn Township, Lycoming County.

Before the charges were filed, both the Office of Attorney General (OAG) and the federal government conducted investigations of XTO’s activities at the Marquardt site.

XTO contends that the Commonwealth has an obligation to seek review of the federal government’s files for *Brady* material. XTO asserts that the OAG and the federal government worked as part of a “team” in conducting the investigation or had a “close working relationship”. It also claims that the fact that the federal government declined to bring a criminal prosecution and that it interviewed many of the same witnesses as the Commonwealth gives reason to believe that the federal government likely possesses *Brady*

material. XTO further asserts the Commonwealth has “ready access” to these *Brady* materials, as it could potentially obtain them by making a simple request to the individuals at the Department of Justice (DOJ) and Environmental Protection Agency (EPA) who engaged in the federal investigation. XTO also seeks authorization from the court to issue a subpoena *duces tecum* directly to the DOJ for *Brady* material, because the DOJ might refuse the Commonwealth’s court-ordered request.

The Commonwealth opposes XTO’s requests. First, the Commonwealth argues that XTO’s request for authorization from the court to issue a subpoena *duces tecum* is unnecessary, as any criminal defendant may obtain such a subpoena from the clerk of courts and serve it upon the party in possession of the requested information. Second, the Commonwealth asserts that XTO has neither alleged nor shown that *Brady* material exists or is being withheld; it merely raises unfounded speculation. Third, the Commonwealth contends that it does not have “cross-jurisdictional constructive possession” of federal government’s investigative files related to XTO. These materials are not in the Commonwealth’s possession or control, and the Commonwealth was not given access to any of the federal government’s reports of interviews, grand jury transcripts or subpoenaed documents, even when such were specifically requested.

Rule 573 of the Pennsylvania Rules of Criminal Procedure governs discovery in criminal cases and effectively codifies the *Brady* rule in Pennsylvania. Rule 573 requires the Commonwealth to disclose to the defendant’s attorney any “evidence favorable to the accused that is material either to guilt or punishment, **and is in the possession or control of the attorney for the Commonwealth.**” Pa.R.Crim.P. 573(B)(1)(a)(emphasis added).

Pennsylvania Supreme Court decisions have stated that the Commonwealth's responsibility to turn over *Brady* information is limited to information in the possession of the same government bringing the prosecution. *Commonwealth v. Simpson*, 66 A.3d 253, 267 (Pa. 2013)(“While the prosecution is responsible for ensuring the government's Brady responsibilities are met as regards evidence under the control of the police, we have not held Commonwealth prosecutors responsible under Brady for information held by federal authorities and Appellant does not provide any justification for doing so here.”)(internal citations omitted); *Commonwealth v. Puksar*, 951 A.2d 267, 283 (Pa. 2008)(“The obligation to turn over exculpatory evidence is limited to that information in the possession of the same government agency bringing the prosecution). Therefore, under Pennsylvania law, the Commonwealth does not have a responsibility to obtain and turn over *Brady* information in the possession of the federal government.

XTO relies on *Commonwealth v. Weiss*, 81 A.3d 767 (Pa. 2013) and *United States v. Risha*, 445 F.3d 298 (3d Cir. 2006) to argue that under the facts and circumstances of this case the Commonwealth has constructive knowledge or possession of *Brady* information in the federal government's investigative files. XTO's reliance on *Weiss* and *Risha* is misplaced.

Quoting *Weiss*, XTO states the following on page 3 of its brief: “Pursuant to *Brady* and its progeny, the prosecutor has a duty to learn of all evidence that is favorable to the accused which is known by others acting on the government's behalf in the case, including other law enforcement agencies.” XTO's quotation of *Weiss*, however, is taken somewhat out of context. When placed in context, *Weiss* does not suggest that the

Commonwealth is responsible for material in the possession of the federal government. The *Weiss* Court stated:

Pursuant to *Brady* and its progeny, the prosecutor has a duty to learn of all evidence that is favorable to the accused which is known by others acting on the government's behalf, including the police. *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Pursuant to *Kyles*, "the prosecutor's Brady obligation clearly extends to exculpatory information in the files of the police agencies of the same government bringing the prosecution." *Commonwealth v. Burke*, 566 Pa. 402, 781 A.2d 1136, 1142 (Pa. 2011). Moreover, there is no Brady violation when the defense has equal access to the allegedly withheld evidence. See *Commonwealth v. Spatz*, 587 Pa. 1, 896 A.2d 1191, 1248 (Pa. 2006)("It is well established that no Brady violation occurs where the parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence." (internal citation omitted)).

81 A.3d at 783.

Here, the information that the defense wants the Commonwealth to provide is not in the files of an agency of the same government; rather, the information is in the files of agencies of the federal government over which the Commonwealth has no control. In fact, the prosecuting attorney submitted an affidavit stating that she requested copies of the federal grand jury testimony and reports of interviews related to XTO from her federal counterpart, but no such information was received. In response to the request, the Commonwealth was informed that these materials would only be released to state officials if a substantial need was demonstrated, but based on the Assistant United States Attorney's experience there would not be a substantial need in this instance because the Commonwealth had access to its own grand jury and had subpoena power to obtain the same information.

Risha also does not compel the result XTO seeks for several reasons. First, the court cannot ignore Pennsylvania Supreme Court decisions in favor of nonbinding case

law from the Third Circuit. See *Goldman v. SEPTA*, 618 Pa. 501, 57 A.3d 1154, 1169 n.12 (2012) (pronouncements of the Third Circuit Court of Appeals have only persuasive, not binding, effect on the courts of this Commonwealth). Second, *Risha* did not find that there was cross-jurisdiction constructive knowledge in that case, but rather the Third Circuit noted certain facts which arguably could support such a finding and remanded the matter to the district court for a factual hearing to make such a determination in the first instance. Third, *Risha* is clearly factually distinguishable. In *Risha*, the investigation began as a joint federal-state effort and a state agent actually sat at the government counsel table during *Risha*'s first federal trial. Here, the Commonwealth has submitted affidavits that the Pennsylvania Office of Attorney General (OAG) did not conduct a joint investigation with the United States Attorney's Office. Instead, the OAG investigation was "conducted independent of any other criminal or civil investigation."

Even if this court was bound by *Risha*, the record in this case does not support a finding of cross-jurisdiction constructive knowledge. In addressing this issue, the Third Circuit Court of Appeals looks to the following questions: "(1) whether the party with knowledge of the information is acting on the government's 'behalf' or is under its 'control'; (2) the extent to which state and federal governments are part of a 'team,' are participating in a 'joint investigation' or are sharing resources; and (3) whether the entity charged with constructive possession has 'ready access' to the evidence." 445 F.3d at 304.

There is no evidence in this case that when the federal government conducted its interviews or its grand jury proceedings that it or any of its agents were acting on the Commonwealth's behalf or under its control. The Commonwealth also submitted affidavits

that it did not conduct a joint investigation with the federal government. If there was any cooperation or coordination, it was minimal at best. In its brief, XTO pointed to four meetings at which officials or attorneys from both governments were present. Statements in briefs, however, are not evidence. Moreover, four meetings over the course of nearly three years between the discovery of the incident in mid-November 2010 and the filing of the charges in September 2013 does not establish that the state and federal governments were working as a “team” or that there was a “close working relationship” between the state and federal investigators. Finally, one of the prosecuting attorneys requested the grand jury transcripts and interviews which the defense believes may contain *Brady* material, but did not receive any information in response to its request. Therefore, the Commonwealth does not have ‘ready access’ to this information.

XTO also seeks authorization to issue a subpoena *duces tecum* directly to the Department of Justice for *Brady* material contained in the federal government’s files. The court agrees with the Commonwealth that XTO does not need court authorization or approval to issue a subpoena *duces tecum*. XTO merely needs to request such a subpoena from the clerk of courts and pay a small fee. Nevertheless, the court authorizes XTO to issue a subpoena, because several of the same witnesses were interviewed by both the Commonwealth and the federal government, there is a possibility that the witnesses could have given inconsistent statements, and the court is hopeful that its authorization will assist the parties in this case in receiving information from the federal government.

ORDER

AND NOW, this ___ day of October 2014, the court DENIES Defendant's request for a court order directing the Commonwealth to seek review of the federal government's investigative files. The Commonwealth has already attempted to obtain information from the federal government without success. The court, however, authorizes XTO to issue a subpoena *duces tecum* for materials in the federal government's possession or control that would qualify as exculpatory or impeachment material under *Brady*, despite the fact that the court does not believe its authorization is required for XTO to obtain a subpoena from the clerk of courts.

By The Court,

Marc F. Lovecchio, Judge

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