

DISCOVERY ABUSE IN THE AGE OF OPEN-FILE DISCOVERY

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We now litigate in the age of “open-file discovery.” Under 15A-903, defendants should seldom, if ever, face a surprise at trial. The philosophy is that defendants should go into trial knowing the evidence upon which the State will rely in seeking a conviction, and be prepared to meet that evidence. We also litigate in the post-Nifong era, in which one would hope that prosecutors would comply with both the letter and spirit of the law on discovery, if only out of a sense of self-preservation.

The good news is that most prosecutors and law-enforcement officers are honest and professional, and most cases are resolved without ambush by the prosecution. That good news, however, does not mean that discovery abuse is a thing of the past. Cases are still tried without all of the discoverable information being turned over; sometimes by neglect and sometimes by design. Counsel representing a citizen charged with a crime cannot simply assume that all of the discovery is provided. You must still work to ensure that your client receives all of the information to which they are entitled.

A. What the Open File Should Contain

15A-903 contains the key provisions setting forth the substance of a defendant's right to open file discovery; in essence, it defines what the "file" should contain. Specifically, the State has the obligation to::

(1) Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. The term "prosecutorial agency" includes any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor in connection with the investigation of the crimes committed or the prosecution of the defendant. Oral statements shall be in written or recorded form, except that oral statements made by a witness to a prosecuting attorney outside the presence of a law enforcement officer or investigational assistant shall not be required to be in written or recorded form unless there is significantly new or different information in the oral statement from a prior statement made by the witness. The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein.

(2) Give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court

The statutory right to discovery is intentionally broad. The purpose of the discovery statute is to protect a defendant from unfair surprise by the introduction of evidence that he cannot anticipate. *State v. Moncree*, 655 S.E.2d 464 (N.C. App. 2008). Indeed, the Court of Appeals in *Moncree* recognized that the failure of a district attorney to provide the required discovery “erodes the public trust not only in district attorneys but in any public official.” 655 S.E.2d at 468.

The Court of Appeals has recently had to remind prosecutors of the breadth of the statute. In *State v. Dunn*, 154 N.C. App. 1, 571 S.E.2d 650 (2002), Defendant was charged with the sale of heroin. A significant issue was whether the material in fact was heroin. Prior to trial, Defendant unsuccessfully attempted to obtain documentation necessary to challenge the SBI’s analysis of the substance.

Defendant filed a Motion for Discovery on 28 March 2000 requesting documents from SBI agents who tested the substance bought from defendant. He requested “access to and a copy of all case notes ... describing, without limitation, the details of the samples received, and the condition thereof, as well as the full experimental records of the test(s) performed.” *5 Defendant also asked for laboratory protocol documents, any reports documenting “false positives” in SBI laboratory results, and information about the credentials of the individuals who tested the substance on behalf of the State. Eleven pages of laboratory notes from the SBI are included in the record. The record contains no reports concerning false positives at the SBI laboratory, laboratory protocol

documents, or credentials of the laboratory employees involved in this case, which apparently were not given to defendant.

The Court of Appeals examined the scope of discovery relating to the underlying procedures used by an expert. After examining existing precedent in North Carolina, including *State v. Cunningham*, 108 N.C. App. 185, 423 S.E.2d 802 (1992), cases interpreting Rule 16 of the Federal Rules of Criminal Procedure, and holdings from other states, the Court concluded that Defendant was entitled to the requested material. The Court recognized that it is not enough to simply allow defense counsel to cross-examine the expert about their methodology; rather, counsel must be given the information needed to prepare for a meaningful cross. “[A]llowing the discovery would enhance preparation for cross examination, and permit both sides to assess the strengths and weaknesses of this aspect of the evidence.” 154 N.C. App. At 8. The right to this discovery, however, is not so broad as to reach articles or publications that cast doubt on the scientific validity of any testing. *State v. Fair*, 164 N.C. App. 770 (2004).

Copies of recent orders directing the production of data underlying DNA analysis are attached, including an order allowing on site inspection.

While the courts are willing to grant broad discovery of information relevant to testing expert opinions, this breadth does not extend to

information in the possession of agencies that are not directly involving in investigating or prosecuting the crime. In *State v. Pendleton*, 175 N.C. App. 230, 622 S.E.2d 708 (2005), the defendant was charged with various sex offenses, and sought a continuance when DSS notes were produced on the morning of trial. The notes contained names of possible witnesses, and Defendant wanted time to conduct interviews. Although the a DSS employee sat in on the interview of the complaining witness conducted by the detective, the Court of Appeals held that DSS is not a law enforcement or prosecutorial agency, and that DSS files are therefore not covered by 15A-903.

The requirement that material be in the file of a prosecutorial agency would seem to be straightforward; however, it appears that some law enforcement agencies have made the decision that some material should simply not be placed in their files, and thereby try to avoid the obligation of disclosure. This is reflected in a computer database of gang related information, known as Gang Net. Gang Net is used by law enforcement agencies, and Gang Net users sign a User Agreement that states that :”The Gang Net database shall not be mentioned in any reports, supplements or documentation open to discovery. Printouts shall not be held in filing packages or investigative files.” As a result, information that may be

relevant in a specific prosecution never finds its way into reports or investigative files. Attached is a recent order requiring production of relevant Gang Net material to defense counsel.

B. Timing Is Everything

Discovery, of course, should be produced in time to allow the defense to prepare for trial. The State, however, seems to often produce discovery on the eve of trial, or during trial. The trial of Joshua Tuck exemplifies the problems that are caused by late production of discovery.

Tuck was charged with participating in an armed robbery in which two men took a van at gun point and fled. When the van crashed, the driver – Cofield – was arrested. Police did not see a second person fleeing from the van. The victim identified Cofield and also identified Tuck as the second person. Cofield entered a guilty plea. At Tuck’s trial, Cofield testified for the defense, and stated that he alone was responsible for the robbery. This account was consistent with his initial statement to the police. During his direct examination, Cofield claimed that he did not know Tuck. Cofield was then impeached on cross-examination with a statement he made to a law enforcement officer the day before the crime, in which he stated that he knew Tuck. Defense counsel objected as the report of Cofield’s statement had not been disclosed in discovery.

The Court of Appeals first held that the report was subject to disclosure under 15A-903. Although Cofield ultimately testified as a defense witness, he had been a co-defendant, and his statement was therefore covered by 15A-903. The fact that the statement was used to impeach Cofield does not change the analysis of whether it should have been disclosed. The Court also rejected the argument that the prosecution had no duty to turn over the statement before the detective handed it to the prosecutor. The statute makes clear that the “file” to which a defendant is entitled applies to all law enforcement and prosecutorial agencies.

Thus, for the purposes of the discovery statute the State is both the law enforcement agency and the prosecuting agency. Accordingly, the State would be in violation of the discovery statute if: (1) the law enforcement agency or prosecuting agency was aware of the statement or through due diligence should have been aware of it; and (2) while aware of the statement, the law enforcement agency or prosecuting agency should have reasonably known that the statement related to the charges against defendant yet failed to disclose it.

As the trial court did not make findings on these issues, the case was remanded for a hearing on whether the statement was known to, or should have been known to the law enforcement agency and whether the agency

should have known that the statement related to the charges against the defendant.¹

Tuck should be read as making clear that law enforcement agents cannot undermine a defendant's right to discovery by failing to provide information to the District Attorney; the obligation to comply with discovery rests on the investigating agents as much as on the prosecutor. *Tuck* also makes clear that the State has a duty to exercise some level of due diligence in seeking out the information that is subject to discovery.

C. When Is An Expert Not An Expert?

15A-903 requires the State to provide meaningful discovery when it seeks to provide an expert opinion as part of its case. A number of cases highlight the practice of the State not providing discovery, and then calling the witness as something other than an expert.

In *State v. Blankenship*, 178 N.C App. 351, 631 S.E.2d 208 (2006), Defendant was arrested after boxes of matches, Sudafed, bottles of hydrogen peroxide, rubbing alcohol and iodine were found in his pick up truck. Defendant was charged with possession of precursor chemicals. During the

¹ I have been informed that following the recently concluded hearing, the trial court ruled that the statement was not improperly withheld. This is likely to be appealed.

trial, the State called S.B.I. Agent Razzo to testify about the manufacturing process for methamphetamine. Defendant objected as the State failed to provide the required discovery for an expert witness. The State responded to the objection by stating that they did not know who they would call as a witness on this point until that morning. The trial court overruled the objection on the basis that Agent Razzo had not performed any tests on the evidence seized from Defendant and would not be providing any opinion on the facts of Defendant's case. The State then called Razzo, and attempted to qualify him as an expert. The trial court ruled that Razzo could only testify as a "fact" witness, and allowed Razzo to testify about the manufacturing process of methamphetamine.

The Court of Appeals was unimpressed with the notion that Razzo testified as something other than an expert. "The jury was permitted to hear testimony about his extensive training and experience in the process of manufacturing methamphetamine and clandestine laboratory investigations, along with his specialized knowledge of the manufacturing process of methamphetamine." 178 N.C App. At 356. The prosecution's claim that it did not know the identity of its own expert until that morning did not relieve it of the duty of providing discovery. Similarly, in *State v. Moncree*, 655 S.E.2d 464 (2008), the State presented testimony from Agent Pintacuda that

a substance found on Defendant at the time of his arrest was marijuana, although no testing had ever been done on the substance. The State did not provide discovery identifying Pintacuda as an expert. The Court of Appeals found that the State failed to comply with the requirements of 15A-903.

This Court has held “that in order to qualify as an expert witness, the witness need only be better qualified than the jury as to the subject at hand, such that the witness' testimony would be helpful to the jury.” *Blankenship*, 178 N.C.App. at 354, 631 S.E.2d at 211. Here, upon calling Agent Pintacuda to the stand, the State immediately questioned him regarding his education, training, and experience. Agent Pintacuda testified regarding his experience in forensic analysis, his employment at various sheriff's departments, and his extensive training in analyzing physical evidence. Clearly, Agent Pintacuda was “better qualified than the jury” in determining if marijuana was the substance found in defendant's shoe. However, Agent Pintacuda's extensive education and training in forensic analysis makes it difficult to imagine how he was able to separate his education, training, and experience while working for the SBI to determine the substance found in defendant's shoe was marijuana based solely on his lay opinion. Therefore, Agent Pintacuda testified as an expert witness concerning the substance found in defendant's shoe and the State did not properly comply with the discovery requirements pursuant to N.C. Gen.Stat. § 15A-902(a)(2).

In contrast, in *State v. Hall*, 186 S.E.2d 267, 650 S.E.2d 666 (2007), the Court of Appeals held that a physician's assistant who examined the victim of a robbery, and a deputy who testified about lifting finger-prints, were properly allowed to testify as fact witnesses, and that the State therefore did not violate the discovery statute as to either witness. The physician's

assistant described tenderness caused by an assault during the robbery. Although the witness “apprised the jury of his diagnosis of [the victim’s] muscle tenderness – an opinion informed by his specialized training and experience – he offered no opinion and brought no expertise to bear ‘as to the subject at hand’ at defendant’s trial.” As the opinion was “not germane to the issue before the jury,” the trial court did not err in treating this as fact testimony. The Court also found that what ever skill an officer must have to lift fingerprints did not mean that they were an expert when they testified about their work at trial. In short, the Court seemed to take the position that an opinion based upon training and experience is not really an expert opinion when it has little or nothing to do with the issues before the jury; it would probably have been more accurate to identify the failure to produce the discovery as error, although harmless in the context of the case.

