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Re: *Owens v. State of Delaware*
Superior Court Action No. 9909007522

*Upon Appeal from Defendant Below-Appellant,
William E. Ownes, Jr.'s Conviction in the Court of Common Pleas*

Dear Counsel:

Appellant, defendant below, William E. Owens, Jr. ("Owens") has filed an appeal from his conviction in the Court of Common Pleas for violation of 21 *Del. C.* § 4177.¹

This appeal focuses on a scrap of paper from a vest pocket notebook on which the police officer made notations which are not now intelligible to any, including him. (See attached)

Review of Testimony

¹ This section is entitled "Driving a vehicle while under the influence; evidence; arrests; and penalties," and provides in relevant part: "(a) No person shall drive a vehicle: (1) When the person is under the influence of alcohol."

At defendant's trial, the investigating police officer testified regarding Owens' performance on certain field sobriety tests conducted on September 2, 1999 shortly before Owens' arrest. During his testimony, the police officer made reference to field notes he had taken, the contents of which were subsequently transferred to the official Alcohol Influence Initial Report ("AIR").

Defense counsel objected to the mention of the officer's field notes, arguing that the State had failed to provide the officer's notes to the defense prior to trial in violation of Court of Common Pleas Criminal Rule 16. Defense counsel argued that this discovery violation had substantially prejudiced Owens' right to a fair trial. The Court overruled counsel's objection, stating that counsel would have access to the notes immediately after the State's direct examination of the officer and providing counsel with leeway in cross-examination.

Findings of Fact

Court of Common Pleas Criminal Rule 16 provides in relevant part:

(a) Disclosure of evidence by the State. (1) Information subject to disclosure. (A) Statement of defendant. Upon request of a defendant the State shall disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant ... or copies thereof, within the possession, custody, or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the Attorney General and that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a state agent. The State shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person known to be a state agent if the State intends to use that statement at trial.

Thus, under Rule 16, the defendant must first make a formal discovery demand before the State's obligation to produce discovery material arises.

In the instant case, defense counsel sent a formal written discovery request to the State on October 17, 1999. In the request, defense counsel asked for eleven specific items, including "the substance of any oral statement which the State intends to offer in evidence at the trial, made by the Defendant, whether before or after arrest, in response to interrogation by any person then known by the Defendant to be a law enforcement agent, or a private security guard, including but not limited to the tape of the conversation done while in custody." Defense counsel also requested "a list of books, papers, documents or other tangible objects in the possession of the State, relevant to the offense, whether or not the State intends to offer said tangible objects in evidence."

In response, the State provided, among other things, the AIR prepared by the arresting officer. The AIR was prepared in part from contemporaneous field notes taken by the officer at the time of Owens' arrest and contained detailed information regarding the officer's personal contact with Owens at that time, including statements made by Owens, his verbal and physical responses to various field sobriety tests, and his appearance. However, the State did not provide the actual field notes in their discovery response.

Defendant argues that the State violated Rule 16 when it did not provide copies of the officer's notes in response to counsel's discovery request. According to the defendant, the State's failure to provide the officer's notes was prejudicial to the defendant because the notes were inconsistent with the AIR. This inconsistency

² *Rose v. State*, Del. Supr., 542 A.2d 1196 (1988).

could have weakened the officer's credibility and may have led the defendant to file a Motion to Suppress the AIR.

The State argues that no discovery violation was committed when they failed to produce the officer's notes. The State notes that the rule requires them to disclose the statements of the defendant and documents or reports of scientific tests, and they fulfilled their obligation when they provided defense counsel with the AIR.

The State also maintains that the officer's notes were provided to defense counsel at trial prior to counsel's cross-examination of the officer. Thus, the State argues, discovery was only delayed, not denied.

In *Johnson v. State*, the Delaware Supreme Court examined whether a police officer's notes are subject to Superior Court Criminal Rule 16. In that case, the defendant made a detailed formal discovery request to the State and according to the Court, the State failed to respond in a business-like manner. The State provided some discovery materials, but the existence of the police officer's notes was not disclosed. At trial, after the State had concluded its case-in-chief and the defendant had testified, the State called the officer as a rebuttal witness. At that time, the State attempted to lay a foundation to introduce the officer's notes of the defendant's statement into evidence.

On appeal, defendant argued that the trial court erred by admitting the notes into evidence because the State had failed to provide the notes, which contained the substance of defendant's conversation with the officer, pursuant to the discovery request. The Court agreed with the defendant and held that "a

³ Del. Supr., 550 A.2d 903 (1988).

⁴ Superior Court Criminal Rule 16 and Court of Common Pleas Rule 16 are substantially similar.

careful reading of Superior Court Criminal Rule 16(a) reveals that the rule clearly entitles the defendant to discovery of the substance of the police notes in question.”

The case at bar is distinguishable from *Johnson*. In *Johnson*, the State had not provided any documentation prior to trial regarding the officer’s conversation with the defendant, and the State did not disclose the existence of the notes during its case-in-chief. Instead, the State attempted to enter the notes into evidence after the defendant testified, thus misleading the defense in a material manner and “sandbagging” the defendant.

However, in the instant case, Owens had received documentation, i.e. the AIR, prior to trial regarding the substance of his conversation with the arresting officer. The AIR contained Owens’ responses to the officer’s questions regarding his condition and his responses to requests to perform various field sobriety tests. The State did not withhold documentation of the substance of Owens’ statements to the officer. The substance of those statements is contained in the AIR. The field notes at issue are merely notations the officer made at the time of the arrest in order to accurately document the content of his contact with Owens for later transfer into the AIR. Although at trial, the officer could not interpret his field notes, he testified that he transferred the information from his notes into the AIR that same night while the incident was still fresh in his mind.

The Supreme Court in *Johnson* held that even if the State fails to comply with Rule 16, “the conviction will be set aside only if the violation prejudiced the defendant.” In the instant case, there is no Rule 16 violation because the notes are

⁵ *Id.* at 911.

⁶ *Id.* at 913.

⁷ *Id.* at 913.

useless. Defense counsel did receive documentation of the substance of Owens' pre-arrest statements as required by the rule. The delayed disclosure of the field notes is of no consequence because their contents are contained within the AIR. Further, the trial court allowed defense counsel to review the officer's notes and use them on cross-examination.

The State's failure to provide the officer's field notes did not violate Rule 16. There has been no prejudice to the substantial rights of the defendant.

The decision below is AFFIRMED.

IT IS SO ORDERED.

Very truly yours,

Susan C. Del Pesco

Original to Prothonotary

Attachment

xc: Court of Common Pleas (Cr. A. No. N99-11-0790 and 0791)