

IN THE COURT OF COMMON PLEAS IN THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE

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)
) Case No.: 0909016626
) Cr.A. No.: K09-10-0537
)

v.

ROBERT S. MCCURDY

)
)
)
) Defendant.
)

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**DECISION ON DEFENDANT'S
MOTION TO COMPEL DISCOVERY**

The defendant has filed a motion to compel discovery relating to his arrest for Driving Under the Influence. The defendant contends that he is entitled to the KENTCOM audio tape regarding his arrest along with certain Standard Operating Procedures of the Smyrna Police Department and certain records for the intoxilyzer used to measure his blood alcohol content as part of his discovery for his case. After hearing oral arguments and reviewing submissions of the parties, the defendant's motion is denied.

BACKGROUND

On September 19, 2009, the defendant, Robert S. McCurdy, was arrested by a police officer with the Smyrna Police Department for Driving Under the Influence, in violation of 21 *Del. C.* § 4177(a). On October 27, 2009, the defendant submitted a discovery request to the State, seeking the following items:

- (1) a copy of the RECOM audio tape (“KENTCOM”);
- (2) the Standard Operating Procedures (“SOPs”) of the Smyrna Police Department concerning the retention of an investigating officer’s field notes, the use and retention of dashboard video recordings, and the use and retention of intoxilyzer room video recordings;
- (3) the most recent records of proficiency testing and certification of any forensic laboratory which calibrated the intoxilyzer;
- (4) the calibration, maintenance, and “out of service” records of scientific instruments relied on by the State’s witnesses, to include the intoxilyzer, gas chromatograph, PBT, radar or laser gun, or speedometer;
- (5) records reflecting the preparation of the solution used to calibrate the intoxilyzer, as well as records reflecting the determination that the solutions accurately simulate each of the readings;
- (6) records reflecting the date the intoxilyzer was put into service, the original certificate of calibration from the manufacturer, and the nature and extent of any modifications made to the intoxilyzer since it was put into service;
- (7) records reflecting the existence of a Radio Frequency Interference (“RFI”) detector on the intoxilyzer, and records reflecting whether the RFI detector had been adjusted from its factory settings, as well as the last date the RFI detector was calibrated;
- (8) records reflecting the existence of an ambient air module on the intoxilyzer, and records reflecting whether it had been adjusted from its factory settings, and the last date the ambient air module was calibrated;
and
- (9) computer records downloaded from the intoxilyzer reflecting all calibration checks for the last three months prior to the test run in this case.

The State did not provide the items requested from the defendant. On November 30, 2009, the defendant filed this Motion to Compel. The State filed a Response in Opposition to the Motion, contending that it has no obligation to produce the documentation and tangible objects requested by the defendant. Oral arguments were

heard on December 10, 2009. On January 4, 2010, at the Court's request, the State provided the Court with supporting case law for its proposition that SOPs are not generally discoverable.

DISCUSSION

Court of Common Pleas Criminal Rule 16 governs discovery and the disclosure of evidence by the State. Rule 16(a)(1)(C) provides:

Documents and tangible objects. -- Upon request of a defendant the State shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the State, *and which are material to the preparation of the defendant's defense* or are intended for use by the State as evidence in chief at the trial, or were obtained from or belong to the defendant.

CCP Crim. R. 16(a)(1)(C) (emphasis added). The burden is on the defendant to show that the requested items are material to the preparation of his defense. *State v. Johnson*, 2001 WL 34083582, at *3 (Del. Super.).

The documentation requested by the defense can be divided into three categories: (1) Item 1 - the KENTCOM audio tape; (2) Item 2 - the Standard Operating Procedures of the Smyrna Police Department; and (3) Items 3 through 9 - the intoxilyzer records. The Court will address each category separately.

I. KENTCOM Audio Tape

The defendant contends that the KENTCOM audio tape is material to his defense because it may contain information setting forth the reasons why the officer stopped the defendant's vehicle. The defense also maintains that there may be a discrepancy between the tape and the police report concerning the officer's probable cause to arrest the defendant. The State initially opposed the defendant's request for the KENTCOM audio tape, but, at oral argument, the State agreed to provide the defense with a copy if one exists. Therefore, the defendant's motion to compel is moot with respect to this item.

II. Standard Operating Procedures

The defense requests the Standard Operating Procedures (“SOPs”) of the Smyrna Police Department concerning the retention of an investigator’s field notes, the use and retention of dashboard video recordings, and the use and retention of intoxilyzer room video recordings. At oral argument, the defense indicated that it requests the SOPs only if the field notes and video recordings are not provided by the State, in order to address the officer’s credibility. The State maintains that SOPs are not generally discoverable, regardless of whether the field notes and video recordings are available.

Before the State can be compelled to produce requested documents, a defendant must show that the items he seeks “may be material to the preparation of his defense.” *State v. Traenker*, 314 A.2d 202, 204 (Del. Super. 1973). In *United States v. Garcia*, the United States District Court held that a defendant must demonstrate a “non-speculative basis” for asserting that SOPs constitute *Brady*¹ material. 2001 WL 173784, at *3 (D. Del.). A defendant must also raise a “colorable claim” that the SOP contains information that bears on the officer’s credibility, in order for a court to compel the State to produce such records. *Id.* The Superior Court, in *Koyste v. Delaware State Police*, called the records requested in *Garcia*, “thoroughly considered and soundly rejected.” 2001 WL 1198950, at *3 (Del. Super) (rejecting a Freedom of Information Act request for the SOPs denied in *Garcia*).

In the case at hand, the defense has not demonstrated a non-speculative basis for its request for the SOPs. Nor has the defense raised a colorable claim that the SOPs contain information that bears on the officer’s credibility. Therefore, the defendant’s motion to compel the Standard Operating Procedures of the Smyrna Police Department is denied.

III. Intoxilyzer Records

The defense requests records pertaining to the intoxilyzer used in this case, including records concerning service, modifications and calibration checks on the intoxilyzer. The defense contends that *Melendez-Diaz v. Massachusetts*, 2009 WL 1789468 (U.S.), supports its request for these intoxilyzer records. The State objects to

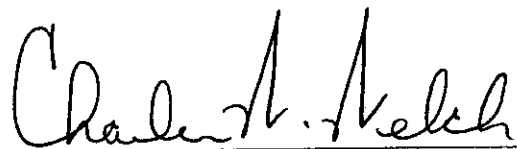
¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

this request, and maintains that it is overbroad and unduly burdensome. The State maintains that *Melendez-Diaz* is immaterial to the case at hand because the Forensic Chemist should be available to the defendant for questioning.

The United States Supreme Court, in *Melendez-Diaz*, held that an analyst's affidavits are testimonial statements and, therefore, an analyst is a witness for purposes of the Sixth Amendment. 2009 WL 1789468, at *4. If, as the State maintains, the Forensic Chemist will be made available to the defense for questioning, the *Melendez-Diaz* ruling is immaterial to the Court's consideration of the defense's motion to compel the intoxilyzer's records.

In Delaware, the only prerequisite to introducing intoxilyzer test results into evidence "is to present the certifications of the State Chemist that the intoxilyzer machine was operating accurately before and after testing the breath of the defendant on trial." *Anderson v. State*, 675 A.2d 943, 944-45 (Del. 1996). The defendant seeks records which delve far deeper into the maintenance and calibration of the intoxilyzer than the standard set forth in *Anderson*, but, has not shown that these records are material to his defense. Therefore, the Court agrees with the State that this request is overbroad and unduly burdensome. Defendant's request for intoxilyzer records (items 3 through 9 of its motion to compel) is denied.

IT IS SO ORDERED this 3rd day of February, 2010.



CHARLES W. WELCH
JUDGE