

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE)	
)	
)	C.R. No. 0503002389
vs.)	
)	
JONATHAN WALKER,)	
)	
Defendant.)	

Submitted July 13, 2005
Decided August 5, 2005

Carole E.L. Davis, Esquire, Deputy Attorney General.
Eric G. Mooney, Esquire, counsel for Defendant.

DECISION AND ORDER ON DEFENDANTS MOTION TO COMPEL

A hearing was held on July 13, 2005 on the Defendant’s motion to compel discovery. After hearing oral arguments and reviewing additional information submitted by the attorneys, the Court finds and determines as follows.

BACKGROUND

On February 20, 2005, Jonathan Walker (hereinafter, “Defendant”), was arrested for a violation of 21 *Del. C.* § 4177. On March 4, 2005, the Defendant submitted a discovery request to the State. The Defendant sought several items of evidence, including the in-car videotape that recorded his stop and arrest, and the Troop intoxilyzer room surveillance videotape. Defense counsel believes that the tapes may contain exculpatory evidence. On June 7, 2005, the State responded to the Defendant’s request and provided that the tapes would be available for defense counsel to view at the Attorney General’s office at a convenient time.

On June 15, 2005, defense counsel sent an additional letter to the State, specifically requesting copies of the tapes at issue. According to the letter, defense counsel also sent a blank tape for the State's convenience. The State again responded that defense counsel could schedule an appointment to view and/or copy the tapes at the Attorney General's office, with his own equipment. Subsequently, on July 8, 2005, the Defendant filed this motion to compel.

DISCUSSION

The parties agree that the videotapes at issue are discoverable pursuant to this Court's Criminal Rule 16(a). Notwithstanding the State's admission that, until the present case, its policy was to routinely provide copies of such tapes in response to discovery requests, the State now argues that it has complied with the Rule by making the tapes available at the Attorney General's Office for the defense counselor to view and/or copy the tapes by appointment, with his own equipment. The State informs the Court that it recently changed this policy with respect to cases residing in this Court, and only as to requests by certain defense attorneys, due to "insufficient resources." The Defendant argues that the way in which the State offers to make the tapes available is so over-burdensome for the Defendant and his counsel that the State's action amounts to making the evidence unavailable.

The tapes at issue are tangible objects, containing recordation of the defendant's conduct directly at issue in the pending charge, and evidence regarding the reliability and admissibility of the intoxilyzer test. Thus, Court of Common Pleas Criminal Rule 16(a)(1)(C) controls the State's duty to disclose the evidence to the Defendant. That Rule provides that 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). This rule is essentially identical to Superior Court Criminal Rule 16 (a)(1)(C). Generally, the State has no affirmative duty to provide a defendant with copies of the evidence, and the State complies with the Rule when it merely makes the items available for inspection and copying. *Robinson v. State*, 1996 WL

145828, at *1 (Del.). *See also Winchester v. State*, 790 A.2d 477, 2002 WL 181214 (Del.). Accordingly, the State must either allow a defendant to view and/or copy the evidence, or directly transmit copies of the evidence to the defendant.

The Court, however, has the authority to regulate discovery and may specify the time, place and manner of the production of such evidence. “While this Rule requires that the defendant be allowed the inspection he seeks, it also contemplates either an agreement of the parties, or failing that, *the regulation by the Court of how the inspection will be conducted.*” *State v. White*, 3001 WL 1739452, at *1 (Del. Super.) (emphasis added). Authority to regulate discovery is rooted in the Court’s inherent power to manage the affairs of the Court and to achieve the orderly disposition of cases. *State v. Wright*, 821 A.2d 330, 333 (Del. Super. 2003)(citing *U.S. v. Hastings*, 461 U.S. 499, 505 (1983)). In *Wright*, the court held that it had the power to order the State to “supply” certain discoverable evidence to the defendant on a date prior to trial that would provide the defendant an adequate opportunity to prepare. *Id.* The State argued that the court rules did not expressly grant the court such authority. *Id.* However, the court opined that it could issue the order in accordance with its inherent authority to achieve the orderly disposition of its business. *Id.* The court reasoned that this inherent authority necessarily includes the power to issue orders specifying the manner and time for discovery between the parties. *Id.* “[T]he Court’s inherent power is not *per se* restricted by the Court’s rules of procedure. Indeed, guided by considerations of justice, and ‘in the exercise of [inherent] powers, courts may, within limits, formulate procedural rules not specifically required by the Constitution or the [legislature].’” *State v. Wright, supra at 333* (citing *United States v. Hastings, supra at 505*).

It is the holding of this Court, that in the interest of fairness and efficiency, and to promote the orderly disposition of its business, the State should bear the burden of making and producing copies of in-car videotapes and intoxilyzer surveillance videotapes, when such tapes are within the possession, custody or control of the State. This is an appropriate exercise of the Court’s authority for the following reasons. First, allowing defendants or their attorneys to obtain custody of such tapes may unnecessarily raise a chain of custody issue. Second, although the Court sympathizes with the State’s situation of

dealing with limited resources, the State remains in a better position than defendants to shoulder the burden of producing copies of the tapes.

During the course of oral arguments, the parties discussed several ways in which the State might consider making the evidence available to the Defendant for inspection and copying purposes. The State provided that it would permit the Defendant's attorney to come to the Attorney General's office to view and copy the tape. Alternatively, the Deputy Attorney General stated that she would consider allowing defense counsel to take the tape away from the Attorney General's office to produce a copy. Either of the foregoing scenarios may create a chain of custody issue. Thus, the Deputy Attorney General in the present case stated that a staff member of the Attorney General's office would have to supervise the defense attorney while he viewed or created the tape in the State's office. Although this may eliminate the chain of custody problem, it would certainly not save the State any resources over having that same staff member simply create the tape. If the Defendant's attorney were permitted to take the tape out of the State's possession, the chain of custody problem would only be compounded. Indeed, in the past the State has opposed defendants' requests to take possession of original tangible evidence in discovery because "the chain of custody would be compromised." *See, e.g., State v. White, supra*, at *1. The burden on the State to establish the chain of custody at trial is a lenient one. *State v. McDowell*, 2000 WL 33114375, *3 (Del. Super.). However, this Court is of the opinion that if it can eliminate such foreseeable issues, it should do so in the interest of judicial economy and the administration of justice.

The State primarily relies on its lack of resources argument to support its contention that it should not be required to transmit copies of the tapes directly to the Defendant. The Court is not insensitive to the State's position. However, the Court examines the State's predicament in light of the burden that it seeks to place on the Defendant. Under the State's proposition, defendants and/or their attorneys will be required to purchase and maintain equipment that would allow them to properly inspect and create copies of evidence. Additionally, defendants would be required to make appointments to inspect and copy the evidence during the Attorney General's hours of operation. Further, defendants will have to transport the necessary equipment back and forth on each occasion that they wish to inspect or copy evidence. Finally,

if a defendant lacks the ability to copy a tape, he would be forced to view the tape in the office of the prosecutor, with his attorney, which could severely compromise a defendant's attorney-client privacy and privilege and his ability to meaningfully participate in the preparation of his defense.

In contrast, the State already possesses and maintains tape copying equipment necessary to copy its own tapes, and does not face the additional hardship of transporting such equipment and verifying equipment compatibility. The risk of either inadvertent or intentional alteration or destruction of evidentiary tapes is less likely if the copying process is conducted wholly by the State, which has custody of the tapes, and only a State-produced copy enters the hands of the defendant. It is the Court's understanding that the State has not altered its policy of producing copies of tapes, like the ones at issue, directly to defendants upon request in cases tried in either the Superior Court, or the Court of Common Pleas in other counties. Nor does the State intend to not copy similar tapes in all prosecutions in this Court, but only in those cases defended by a few members of the Bar, according to the Deputy Attorney General's candid admission. Thus, although the State characterizes its justification for refusal to copy tapes as a lack of resources, the real problem appears to be the way in which the State chooses to allocate its resources. It is not the role of this Court to enable the State to wilfully stint on resources that should be devoted to the administration of justice in this Court. The Court finds that the State is in the better position to bear the burden of generating and producing copies of tapes directly to the Defendant in this and all similar cases.

For the foregoing reasons, the Court finds that the State's refusal to make and provide copies of discoverable video tapes to some defendants in this Court creates such a burden on those defendants that it is tantamount to a failure to make discovery available within the spirit and intent of this Court's criminal rules of discovery. In the exercise of its inherent authority to regulate discovery and provide for the orderly administration of justice, it is the decision of the Court that any discoverable video tapes in the possession, custody or control of the State, properly sought by a request for discovery, in the present case and in any pending or future cases, shall be copied by the State and produced to the Defendant. To reduce

the burden on the State's resources, the Defendant must provide in advance a blank videotape or other sufficient medium on which the State may generate and produce the copy.

Although it is the order of this Court that the State must now directly transmit copies of the in-car videotape and intoxilyzer surveillance videotape, inasmuch as the State did have a minimally-tenable argument based on its narrow reading of this Court's rules of discovery, under the facts of the present case the Court declines to impose sanctions for a discovery violation. However, the Court is greatly concerned by the Deputy Attorney General's admission that she intended to apply this new discovery "policy" only to defendants who chose to retain one of two or three members of the Bar, and then only to such defendants prosecuted in *this* Court. This decision shall serve as notice to the State that any future similar attempts at unequal treatment of defendants or their counsel in the discovery process, or refusal to comply with not only the letter but also the spirit and intent of the Court's rules of discovery, will give rise to the imposition of appropriate discovery and other sanctions.

CONCLUSION

Defendant's motion to compe is **GRANTED**. The State must make and produce copies of both the in-car videotape and the intoxilizer surveillance videotape to defense counsel within seven (7) days. This matter will be scheduled for trial thereafter.

IT IS SO ORDERED, this ____ day of August 2005.

Kenneth S. Clark, Jr., Judge