

IN THE CRIMINAL COURT FOR DAVIDSON CUONTY, ENNESSEE
DIVISION V

FILED
AUG 18 2010
BTH

STATE OF TENNESSEE

V.

TIMOTHY P. GUILFOY

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Case No. 2009-B-2073

STATE'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL DISCOVERY

The Office of the District Attorney General, prosecuting on behalf of the State of Tennessee, offers the following argument and brief for the Court in response to the Defendant's Motion to Compel Discovery. The State submits that the Defendant's motion is legally insufficient because it does not comply with the laws of the State of Tennessee and of the United States. Specifically the State submits: a) neither the item nor it's contents are subject to discovery pursuant to Rule 16 of the Tennessee Rules of Criminal Procedure; b) the content of the item, not the item itself, would be subject to production to the defense pursuant to Rule 26.2 of the Tennessee Rules of Criminal Procedure; c) providing the requested item to the defense contravenes a significant public safety policy to which the State is firmly committed; and d) the defendant would in no way be prejudiced by failure to obtain the item and, therefore, the item itself is not material to preparing a defense.

Prior to launching into the legal analysis it is first necessary to make the Court fully aware of the procedural history of the issue thus far. Mr. Guilfoy was arrested on July 29, 2009 on multiple counts of rape a child and aggravated sexual battery. The State

answered the defendant's request for discovery on September 10, 2009. In keeping with our "open file" policy on cases involving child sexual abuse, the District Attorney's Office provided the defendant with copies of all records, statements, reports, and supplements including a detailed summary of the child victim's forensic interview. Strict adherence to Rule 16 would certainly not have required the State to provide much of this material. In addition to the written summary of the child's interview, the defendant was also noticed that a video recording of the child's interview exists and was invited to review that video recording in the District Attorney's Office at his convenience. This matter is currently set for trial on September 13, 2010, and has been set for trial since June 18, 2010. As such, the defendant has had access to that recording for some eleven (11) months prior to filing his Motion to Compel, and he has known of his pending trial date for two (2) months.

(a) Now comes the defendant requesting the Court to compel the State to provide him with his own personal copies of the recordings. The State submits such copies are not subject to discovery pursuant to Rule 16(a)(1) of the Tennessee Rules of Criminal Procedure. In asserting that they are subject to discovery, the defendant strangely relies on *State v. Mark A. Schiefelbein*, a 2007 opinion from our Court of Criminal Appeals. Such reliance is wholly misplaced as the video recordings in question in *Schiefelbein* were videos made by the defendant of the alleged victims and constituted the video evidence underlying multiple sexual exploitation counts with which Mr. Schiefelbein was charged. As such, they were clearly evidence to be used in the State's case-in-chief and therefore obviously fall within the type of evidence contemplated in Tennessee Rules of Criminal

Procedure (16)(a)(1)(F)(ii). The forensic interviews, which are the subject matter of the instant motion are not.

Rather, the State submits that these interviews obviously and unequivocally fall into the category of items anticipated in Rule 16(a)(2) entitled *Information Not Subject to Disclosure* (also known as the Tennessee Jencks Act) which reads in its entirety:

Except as provided in paragraphs (A), (B), (E), and (G) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. ***Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses*** (emphasis added). Rule 16(a)(2), Tennessee Rules of Criminal Procedure.

Simply put, statements of witnesses are not generally discoverable. The item in question is nothing more than a statement of a prospective witness. Although the State, via the District Attorney's Office, has and will continue to make the content of this item abundantly available to the defendant we are not required to do so upon a "straightforward" reading of Rule 16.

(b) Our Court of Criminal Appeals has acknowledged the fact that Rule 16, particularly in combination with Rule 26.2 of the Tennessee Rules of Criminal Procedure, has been the subject of "widespread misconceptions concerning the discoverability and producibility" of this type of information. *State v. Robinson*, S.W. 2d 754 (Tenn. Crim. App. 1981). For this reason the Court undertakes a careful analysis of what is discoverable material and what is Jencks material (i.e. material subject to production pursuant to Rule 26.2) and the distinction between the two. Specifically, the Court observes:

... to the extent that a [witness statement] contains the defendant's pretrial statement, his prior criminal record, or the results of tests related to the investigation in question, that [statement] is discoverable prior to trial by the defendant *for purposes of preparing his defense*.

On the other hand, paragraph (E) (the 'Tennessee Jencks Act') [now encoded as Rule 16(a)(2)] does not apply to pretrial discovery. Instead, it involves the right of defense counsel during trial to inspect prior statements of prosecution witnesses following their testimony on direct examination for purposes of impeachment (emphasis added). *State v. Robinson*, S.W. 2d 754 (Tenn. Crim. App. 1981).

The State acknowledges that Mr. Guilfoxy would have the right to inspect for impeachment purposes the child witnesses' statements, including the forensic interview tapes, after they testify on direct as required by Rule 26.2. However, nowhere in *Robinson*, nor any of the cases that follow, does the Court suggest that such statements must be provided pre-trial.

(c) As mentioned earlier, in this and all cases assigned to our Child Sexual Abuse Division the State allows for open file discovery with this one exception of not reproducing and providing copies of the forensic interviews. It is important to point out that in addition to the fact that the law does not support the defendant's motion to compel reproduction of these recordings, there is also an important public safety reason for denying this motion and others like it. Video recordings of children talking graphically about sexual activity with adults are not to be proliferated. To release those out into the world is akin to proliferating child pornography and would re-victimize that child every time a person who derives sexual gratification from children has the opportunity to view it -- which neither the State nor the Courts would have any way of controlling and which most assuredly would occur if the State is required to make copies and hand them out to child sex abuse defendants and their attorneys. This is the very important justification for

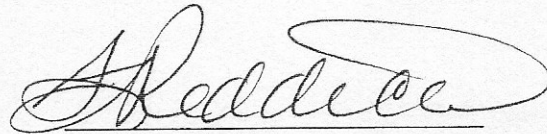
the District Attorney General's exception to our general open file discovery policy with regard for child sexual abuse cases; and the State submits that the courts as well as the defense bar have an interest in furthering this public safety concern as well.

(d) Finally, the State submits that there is absolutely no prejudice in disallowing the defense to have his own personal copy of the forensic interview in question and that the defendant can show no cause to support an assertion that "the item is material to preparing his defense" as would be required even if this Court were to determine that the interview is subject to Rule 16. The State allows that knowledge of the content of the item, i.e. the interview itself, would assist the defense in understanding the precise nature of the charges and in preparing for cross-examination of the victim. This forms the basis for our open file discovery and for allowing the defendant abundant access to the recording. However, given that the defendant has had eleven (11) months to review the recording there is no legitimate justification for demanding his own personal copy. To quote our Court of Criminal Appeals, "The defendant must do more than emphatically state that he needed certain discovery. He must show how the discoverable items were material to the preparation of his defenses." *State v. Huskey*, 2002 WL 140059 (Tenn. Crim. App. 2002). The State submits that, even if this Honorable Court were to determine that this item is discoverable (which the State emphatically asserts that it is not), the defendant must but could not show cause for how a copy of the recording is material to his defense.

For these reasons the State respectfully requests that the Court deny the Defendant's motion to compel.

Dated this 18th day of August, 2010.

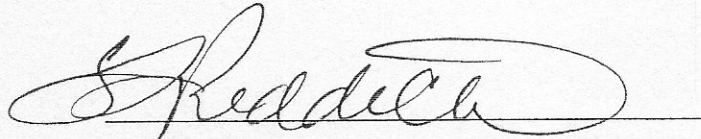
Respectfully submitted,



Sharon L. Reddick
TN Supreme Court No. 22984
Assistant District Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing State's Motion has been forwarded via electronic mail to Bernard F. McEvoy, Attorney for the Defendant, on this the 17th day of August, 2010.



Sharon L. Reddick