

STATE OF WISCONSIN
SUPREME COURT**FILED**

DEC 03 2003

Clerk of Supreme Court
Madison, WI

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

LAWRENCE NORTHERN,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

**PETITION FROM A DECISION OF THE WISCONSIN COURT OF
APPEALS, DISTRICT III DATED NOVEMBER 4, 2003**

Court of Appeals Case No. 03-0246-CR

Respectfully Submitted,

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ISSUES PRESENTED FOR REVIEW

I. DID THE PROSECUTOR'S FAILURE TO PROVIDE DISCOVERY OF HIS WITNESSES' CRIMINAL RECORDS, INDUCEMENTS TO TESTIFY AND PREVIOUS STATEMENTS IN A TIMELY MANNER OR AT ALL VIOLATE DUE PROCESS.

Trial Court answered: No.

Court of Appeals answered: No.

II DID THE PROSECUTOR'S VIOLATION OF THE DISCOVERY STATUTE, §971.23, WIS. STATS., PRESENT MR. NORTHERN WITH AN UNCONSTITUTIONAL ELECTION AS TO WAIVER OF HIS RIGHTS WHEN THE TRIAL COURT DENIED A MOTION TO EXCLUDE A WITNESS.

Trial Court answered: No.

Court of Appeals answered: No.

CRITERIA RELIED UPON FOR REVIEW

I. SECTION 809.62(1)(A) - THIS PETITION PRESENTS REAL AND SIGNIFICANT ISSUES OF CONSTITUTIONAL LAW

The principal issues dealt with in this case revolve around the rights of an individual to a fair and speedy trial regarding criminal charges for which a trial is scheduled, and the ability to effectively cross-examine witnesses presented by the

prosecution at his trial.

The exercise of a defendant's Due Process right to a fair trial requires that the prosecution comply with §971.23, Wis. Stats, regarding disclosure of discovery, containing information with respect to witnesses it intends to call at the trial of the case, including prior conviction information, oral statements of prosecution witnesses and disclosure of any promises, rewards or inducements made to any person by the State. In this case, the prosecution failed to provide comprehensive, requested information with respect to a co-defendant with whom a plea agreement was reached and of which defense counsel was advised on the day before trial. This failure jeopardized the rights of the defendant to prepare as adequate of a defense through cross-examination of that witness as might have otherwise been available had the complete information been presented in timely fashion.

In addition, as a result of the denial by the trial court of the defendant's motion to exclude this new defense witness, the defendant was presented with a constitutionally impermissible choice as to which was more important to him: the ability to effectively cross-examine a "new" accuser being called by the prosecution as a witness in his case versus his right to a speedy trial, with the potential for ending his incarceration upon acquittal.

STATEMENT OF THE CASE AND FACTS

On September 24, 2001, case number 01-CF-580 was filed in Eau Claire County Circuit Court charging Mr. Northern with five counts of violating §961.41(1m)(cm)5., Stats. (Possession of more than 100 grams of Cocaine with Intent to Deliver) and one count of violating §961.41(1m)(cm)3., Stats. (Possession of 15-40 grams of Cocaine with Intent to Deliver). Fourteen other persons were charged in the complaint, some in separate counts and some in counts with Mr. Northern. On October 3, 2001, defense counsel filed a demand for discovery which specifically asked for "a copy of the criminal record of any prosecution witness," for copies of recorded statements "and a summary of any oral statements made by witnesses" and disclosure of "any promises, rewards or inducements" made to any person by the State. At Mr. Northern's October 19, 2001, arraignment, his attorney reported that the district attorney had informed him that discovery materials were available. On November 28, 2001, however, the defense attorney withdrew from the case. Mr. Northern was appointed a new public defender on December 7, 2001, who filed a new discovery demand on December 18, 2001. On January 2, 2002, Mr. Northern renewed the discovery demand.

On January 8, 2002, the court heard Mr. Northern's motion to suppress and

denied it. On that date, the day before trial, the district attorney still had not provided criminal records of his witnesses to counsel, but had provided a letter listing the number of convictions for each witness. Counsel moved to exclude the testimony of a witness, Hollie Peterson, who had been a co-defendant until the day before, for failure to list her on the witness list and failure to provide discovery as to the witness. The court denied the motion. However, the trial court offered to adjourn the January 9, 2002 trial date until March, 2002, if the defendants were willing to waive their speedy trial rights. Following a conference with their attorneys, the defendants, including Mr. Northern, agreed to proceed to trial on January 9, 2002. During the trial, Mr. Northern and his co-defendants first learned that Ms. Peterson had given the State an oral statement after she had provided her initial written statement. After trial of this matter, Mr. Northern was convicted of two possession with intent to deliver charges.

The general factual background is also set forth in the opinion of the Court of Appeals, paragraphs 2, 3, 4, 5, 6 and 7.

ARGUMENT

I. THE PROSECUTOR'S FAILURE TO PROVIDE DISCOVERY OF HIS WITNESSES CRIMINAL RECORDS, INDUCEMENTS AND PREVIOUS STATEMENTS IN A TIMELY MANNER OR AT ALL VIOLATED DUE PROCESS.

The Sixth Amendment of the United States Constitution guarantees every accused in a criminal prosecution a basic right to confront and cross-examine his accusers. Davis v. Alaska, 415 U.S. 308, 315-316 (1974)(where defense prohibited from inquiring into witness' juvenile record, conviction reversed). In support of this fundamental trial right, the U.S. Supreme Court has repeatedly held basic Due Process requires that the State disclose to the accused any evidence which may be used to impeach the credibility of its witness. U.S. v. Bagley, 473 U.S. 667, 676-677 (1985)(no difference between impeachment evidence and exculpatory evidence for constitutional purposes); Giglio v. U.S., 405 U.S. 150, 154 (1972)(evidence affecting credibility comes within Brady rule). As this Court has put stated, "Due process requires the prosecutor to disclose all exculpatory evidence, including impeachment evidence relating to the credibility of witnesses for the prosecution." State v. Nerison, 136 Wis.2d 37, 54, 401 N.W.2d 1 (1987) citing Bagley, supra, and Brady v. Maryland, 373 U.S. 83 (1963). See DelReal, supra, 225 Wis.2d at 571(impeachment evidence is "material and subject to disclosure"). Wisconsin's discovery statute also requires prosecutors to follow the constitutional rule of disclosure. §971.23(1)(h), Stats. (requiring disclosure of exculpatory evidence on demand); State v. Sturgeon, 231 Wis.2d 487, 498, n.4. 605 N.W.2d 589 (Ct.App.1999) (Brady claims are claims under subsec. (1)(h)).

It is clearly the prosecutor's burden under the discovery statute to provide the criminal records of prosecution witnesses on demand. §971.23(1)(f), Stats. See State v. Randall, 197 Wis.2d 29, 38, 539 N.W.2d 708 (Ct.App.1995) (State's burden to provide updated information on pending charges). In the instant case, the prosecutor produced only a letter listing the number of convictions for each witness. This is a violation of the duty imposed by the statute, and also constitutes constitutional error since it foreclosed the possibility of using these crimes as "other acts" evidence in defense. See State v. Kimpel, 153 Wis.2d 697, 703-704, 451 N.W.2d 790 (Ct.App.1989) ("other acts" evidence may be used against prosecution witnesses). If the prior convictions of state witnesses Ms. Mitchell and Ms. Peterson were for the same or related crimes to those with which Mr. Northern was charged and they were not too remote in time, that information would support a defense showing that Mr. Northern was not the person committing these crimes: the information would be relevant to identity a motive on the part of these witnesses to lie. See State v. Johnson, 184 Wis.2d 324, 338-339, 516 N.W.2d 463 (Ct.App.1994) (where "other acts" evidence showed witness' motive to falsely accuse defendant, reversible error to exclude). Thus, the criminal records of key prosecution witnesses were potentially exculpatory evidence and it was prejudicial error to refuse to disclose them to trial counsel.

It is further constitutional error to withhold the nature of the promises made to a witness for her testimony. Bagley, supra; Giglio, supra. Here, although the prosecutor did finally disclose, during cross-examination of his witness, the nature of the charges against Ms. Peterson which he had dismissed, he never did disclose that, as an apparent result of her agreement to testify, she was also allowed contact visits with her children. Co-defendants' counsel only found out this information by speaking with Ms. Peterson's attorney. It was not disclosed by the prosecution.

The purposes of criminal discovery are to ensure fair trials and to encourage defendants to enter pleas. State v. DeLao, 2002 WI 49, ¶64, 252 Wis.2d 289, 634 N.W.2d 480. "Both purposes are thwarted when the State fails to provide the information required of it before trial." Id. Here, the complete nature of the deal with Ms. Peterson was not disclosed until she was already on the stand, and the defense had no opportunity to investigate the matter and appropriately prepare for cross-examination. The tardy disclosure prevented counsel from properly exercising Mr. Northern's right to confront and cross-examine and so prejudiced his case.

Further, the prosecution never disclosed oral statements Ms. Peterson made to investigators after she signed her written statement. This is constitutional error because it frustrated Mr. Northern's exercise of his right to confront and cross-

examine. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis, supra, 415 U.S. at 316. Counsel could not properly test Ms. Peterson's testimony without knowledge of her previous statements.

This failure to disclose criminal records, inducements and witness statements was prejudicial because it prevented the effective impeachment of Ms. Peterson and further impeachment of Ms. Mitchell. They were the only witnesses connecting Mr. Northern to the conspiracy charged in Count One; further impeachment of them could have produced a different result at trial.

II THE PROSECUTOR'S VIOLATION OF THE DISCOVERY STATUTE, §971.23, WIS. STATS., PRESENTED MR. NORTHERN WITH AN UNCONSTITUTIONAL ELECTION AS TO WAIVER OF HIS RIGHTS WHEN THE TRIAL COURT DENIED A MOTION TO EXCLUDE A WITNESS

As was previously iterated herein, the prosecutor's failure to make a complete discovery disclosure jeopardized the defendant's right to effectively defend himself by informed cross examination of a newly named defense witness. Counsel for the defendant raised the issue of failure to provide complete criminal records of the prosecution's witnesses by motion to exclude, which motion was denied. Counsel also objected to the testimony of Ms. Peterson. The Trial Court

also denied that motion, but presented the defendant with a choice of delaying the trial for roughly two months, until March, 2002. After consultation with counsel for the various defendants, Mr. Northern elected to proceed to trial as scheduled on January 9, 2002. The defendant asserts that being presented with such an option, after a last minute disclosure of a new witness with less than full discovery disclosure of statements made by that defendant, coupled with an apparent failure by the State to fully disclose the concessions for that defendant's testimony, is constitutionally impermissible.

The effect of the prosecutor's violations here forced Mr. Northern to choose between his right to the speediest possible trial and his right to a fair trial with access to all constitutionally and statutorily required discovery. This is not a mere choice of defense tactics. The courts usually find such forced choices between constitutionally protected rights "intolerable." Simmons, supra, 390 U.S. at 394. Cf., e.g., U.S. v. Herrera-Ochoa, 245 F.3d 495, 499-500 (5th Cir.2001) (accused cannot be forced to choose between 6th Amendment right to be present at trial and due process right to put government to its proof); Greene v. Brignano, 123 F.3d 917, 921 (6th Cir.1997)(accused cannot be forced to choose between 6th Amendment right to self-representation and 14th Amendment right to transcript on review); U.S. v. Scott, 909 F.2d 488, 493 (11th Cir.1990)(accused cannot be

forced to choose between right to counsel and self-incrimination privilege). Such a forced choice between rights is approved only if the challenged governmental practice is legitimate and if the policies behind the rights are not significantly impaired. See also generally, State v. Schultz, 152 Wis.2d 408, 423-425, 448 N.W.2d 424 (1989).

In the instant action, however, the premise that the government's practice was legitimate is suspect. There is nothing legitimate about a prosecutor's violation of his constitutional and statutory duty to disclose, and the policy behind the right to discovery of, potentially exculpatory evidence. This failure muddies, if not renders nugatory, the truth-seeking function of the trial. The State did not disclose the nature of oral statements made by Ms. Peterson, only a written statement made by that witness. The State did not disclose, and defense did not become aware of, concessions made to Ms. Peterson by the State as a result of her agreeing to testify on behalf of the State until after the commencement of the trial. Whether these concessions were an integral part of any agreement between the State and Ms. Peterson, or merely appeared to be so, they were certainly material with respect to the ability to cast doubt on the motives for Ms. Peterson's testimony and were therefore relevant. The attempt by the State to keep such information secret is not a practice which is to be condoned when dealing with the

rights an accused defendant facing significant time of incarceration depending on a jury's view of the evidence, including an analysis of the character and credibility of the witnesses.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the petitioner respectfully asks this Court to grant his Petition for Review.

Dated this 2nd day of December, 2003.

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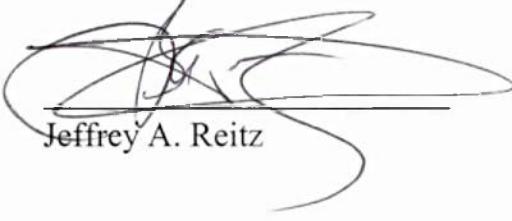
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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportion serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 12 points, maximum of 60 characters per full line of body text; doublespaced. The length of this brief is ~~4,448~~ words.
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JR

Dated this 2nd day of December, 2003.



Jeffrey A. Reitz