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FILED

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

2018 NOV 26 P 3:20

CLERK OF COURTS
CUYAHOGA COUNTY

THE STATE OF OHIO
Plaintiff

RICHARD RODRIGUEZ,SR
Defendant

Case No: CR-18-629860-A

Judge: JOHN P O'DONNELL

INDICT: 2903.01 AGGRAVATED MURDER /FRM1 /FRM3
2903.01 AGGRAVATED MURDER /FRM1 /FRM3
2903.02 MURDER /FRM1 /FRM3
ADDITIONAL COUNTS...

JOURNAL ENTRY

THE DEFENDANT'S MOTION TO COMPEL DISCOVERY IS DENIED. O.S.J.

11/26/2018
CPJPO 11/26/2018 15:09:01

Judge Signature

Date
11/26/2018

HEAR
11/26/2018

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO	)	**CASE NO. CR 18 629860 A**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JUDGMENT ENTRY DENYING**
	)	**THE DEFENDANT'S MOTION TO**
RICHARD RODRIGUEZ, SR.	)	**COMPEL DISCOVERY**
	)	
Defendant.	)	

John P. O'Donnell, J.:

The indictment

Richard Rodriguez, Sr. is accused of aggravated murder for killing Steven Ray Heading on June 5, 2018. The June 25 indictment against Rodriguez sets forth 12 charges, including two counts of aggravated murder (counts 1 and 2), one count of murder (3), three counts of felonious assault (4-6), three counts of aggravated burglary (7-9), kidnapping (10) and having a weapon under disability (11). Count 13 of the indictment alleges a June 3 felonious assault on Heading. Rodriguez's son, co-defendant Richard Rodriguez, Jr., faces all of the same charges with the exception of the June 3 felonious assault.

Postindictment proceedings

Rodriguez was arraigned on June 28. The arraigning judge found him indigent and assigned two lawyers, John P. Parker, Esq. and Edwin J. Vargas, Esq. to represent him at the

expense of the state. On that same date Rodriguez filed a "motion for discovery" demanding from the prosecutor all items in the prosecutor's possession that are discoverable under Rule 16 of the Ohio Rules of Criminal Procedure. That rule provides that, "upon receipt of a written demand for discovery by the defendant," the prosecutor must disclose all materials within his possession that fall within the categories of items set forth in Criminal Rule 16(B). On July 13 the prosecutor produced discovery materials, and then supplemented that production on July 19.

The discovery produced by the state includes a video recorded statement of a witness named Edward Thornton.

The motion to compel discovery

According to the defendant, Thornton told the police that he suffered a traumatic brain injury through electrocution, and that since the injury he has had trouble remembering things and other cognitive difficulties. He admitted to memory loss and conceded he can't remember the day the murder happened. He acknowledged being a methamphetamine user; he also said he took over 3,000 doses of LSD during the 1990s. Additionally, the defendant's investigator learned from Thornton's father that Thornton's head injury "destroyed what was left of his mind" and he "has no sense of reality and can't remember things."[1]

Based on this information, Rodriguez filed on July 25 a "supplemental motion for discovery" which the plaintiff opposed on September 17, drawing a reply brief by the defendant on October 1. I will refer to the defendant's July 25 and October 1 briefs together as his motion to compel discovery. By the motion, the defendant seeks to compel the prosecutor to "provide the defense with medical and/or mental health records of [Edward] Thornton and any other witness

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[1] Hearing Exhibit A, affidavit of investigator Robert Slattery, paragraph 8.

that may affect his or her credibility."[2] At a November 1 hearing on the motion, the defendant expanded upon this request by describing the records he seeks as 1) any and all medical records, wherever situated, concerning Thornton's traumatic brain injury and brain damage, 2) any and all mental health records of Thornton, wherever situated, and 3) any and all mental health records of Thornton kept by the Cleveland police department, the Cuyahoga County jail, the Ohio department of rehabilitation and corrections and the probation and court psychiatric clinic departments of the Cuyahoga County Court of Common Pleas.

The plaintiff opposes the motion on the basis that the records sought are not in the prosecutor's possession and are, in any event, not admissible at trial.

Criminal discovery

There is no general constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). But the United States Supreme Court has held, in *Brady v. Maryland*, 373 U.S. 83 (1963), that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, and, in Ohio, Criminal Rule 16 has created a procedural right to discovery that encompasses so-called *Brady* material – i.e., any evidence favorable to the defendant and material to guilt or punishment – and a long list of other items. But a prosecutor's duty to produce discovery materials under the rule is limited to only those things "within the possession of, or reasonably available to," the prosecutor.

Thus, the threshold question here is whether Thornton's medical and mental health records are within the possession of, or reasonably available to, the prosecutor. If they are not, then there

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[2] July 25 motion to compel, page 2.

is no constitutional, statutory or rule basis to require the prosecutor to turn over the records and the motion to compel their production should be denied. If, however, the state does have the records, or they are deemed reasonably available, then the records would have to be shown to be material to either guilt or punishment before they would be ordered produced.

In the possession of, or reasonably available to, the state

The prosecutor denies possessing the records sought. At the motion hearing defense counsel seemed to accept the state's denial by arguing that the prosecutor cannot just "stick his head into the sand" and ignore the records. Since the prosecuting attorney does not have the records, I must consider whether they are "reasonably available to the state" as that phrase is used in Criminal Rule 16(B). Because the prosecutor does not have the duty to assemble the evidence needed to buttress Rodriguez's defense, implied within the rule's language is that the materials must not also be reasonably available to the defendant.

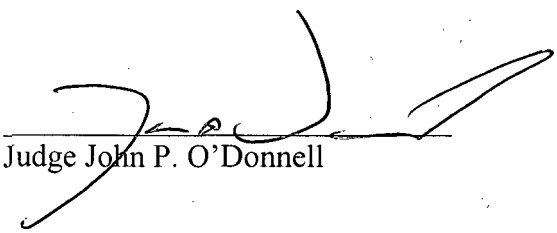
In this case, the prosecutor could take reasonable steps to acquire the information sought by Rodriguez. The state's investigators can simply interview Thornton to identify the doctors and other health professionals who have treated his brain injury and mental illnesses over the years and then subpoena the records of those witnesses. If the witnesses moved for a protective order or to quash the subpoenas on the basis of confidentiality then the state could litigate the subpoena. But Rodriguez has the same ability to take these same, reasonable steps to procure the records, and due process does not require the prosecutor to do for the defendant what he can do for himself.

Ohio's Second District Court of Appeals has acknowledged this concept. In *State v. Grigley*, 2d Dist. No. 21632, 2007-Ohio-3159, the defendant was arrested in the parking lot of a bar for carrying a concealed weapon. Grigley learned that the bar used a video surveillance system and asked the prosecutor for the system's tapes pursuant to Criminal Rule 16(B). The state never

produced the videos and the defendant moved to dismiss the indictment as a sanction for not producing the tapes. The motion to dismiss was denied and Grigley eventually appealed. The appellate court found no violation by the prosecutor of the duty imposed by Criminal Rule 16(B), noting that the videotape was not an item of evidence produced, maintained, or in any way controlled by the state. Instead, it was made by a private entity having no connection with the executive branch of government. Moreover, it was "as readily available to the defense as it was to the prosecution; Grigley's attorney knew about the possibility of a videotape days after the incident and could have tried to obtain it." *Id.*, ¶¶ 26 and 35.

The same is true of Thornton's medical records in this case: they are just as reasonably available to the defendant as they are to the state, thus the prosecutor has no duty under Criminal Rule 16(B) to procure and then produce them. As a result, Rodriguez's motion to compel is denied.

IT IS SO ORDERED:



Judge John P. O'Donnell

November 26, 2018

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A copy of this judgment entry was emailed to the following on November 26, 2018:

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Judge John P. O'Donnell
11/26/2018