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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
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**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,) 1 CA-CR 09-0300
)
Appellant,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MARK STEWARD JOHNSON,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellee.)
)

Appeal from the Superior Court in Mohave County

Cause No. CR-2008-0545

The Honorable Lee Frank Jantzen, Judge

AFFIRMED

Matthew J. Smith, Mohave County Attorney Kingman
by Megan McCoy, Deputy County Attorney
Attorneys for Appellant

Mohave County Appellate Defender Kingman
By Jill Evans
Attorneys for Appellee

I R V I N E, Presiding Judge

¶1 The State of Arizona appeals the trial court's
dismissal without prejudice of ten counts of sexual exploitation

of a minor against Appellee Mark Johnson ("Johnson"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 A joint investigation by the Federal Bureau of Investigation ("FBI") and Kingman Police Department led to the search of Johnson's computer which allegedly contained several images of child pornography. A grand jury indicted Johnson on ten counts of sexual exploitation of a minor, all class two felonies.

¶3 Johnson requested that an identical copy of the hard drive be provided to his computer forensics expert under a protective order. The State asked the court to deny the motion, citing Arizona Rule of Criminal Procedure 15.1(j), which provides that an item of evidence should only be reproduced for or released to a defendant when it is necessary to protect a defendant's right to a fair trial.

¶4 At oral argument on Johnson's motion to compel release of a copy of the hard drive, defense counsel proffered reasons why allowing the expert to view the evidence at the FBI office would violate Johnson's right to a fair trial. Defense counsel stated that the expert was available to testify but he did not have her at argument because it would be too costly to have her come to Kingman from Tucson when he could speak on her behalf.

He said the expert told him it could take her up to a few days to complete the examination. He stated:

If it's going to take longer than a day, she'd have to leave the evidence there, rely upon the government not to interfere or tamper with her process while she goes back to her office, goes home to sleep, eat, live her life, and then eventually when the tests are done, to come back and retrieve it and assume that everything is okay [C]learly there's no safeguard that we are comfortable with that's going to assure that this stuff is not tampered with And the fact that it's not in our secured environment, we believe any test that is done while in the government's hands would simply be insufficient.

Defense counsel expressed concern that the expert's access to the evidence would be limited during trial because the hard drive would be at the Tucson or Phoenix FBI Office while the trial is in Kingman. He urged the trial court to find that the proffered accessibility, security and access to resources concerns associated with investigating the evidence at the FBI facility would deprive Johnson of his right to a fair trial.

¶15 The State responded that the hard drive evidence is of the type typically viewed in a state facility and that the FBI has "terminals and areas available for forensic experts to come and examine evidence, because this is part of [the FBI agent's] routine evidence provision." The prosecutor stated that "[t]here is no sign at this time that there will be any denial of time with the materials as needed."

¶16 The trial court ordered that a copy of the hard drive be made available to the defense expert at the FBI office in Tucson (where the expert resides) pursuant to the terms of the court's protective order. The trial court stated:

Every time I get one of these cases, I think this is a unique issue. But when I step back from it, I look and there's thousands of cases where evidence is taken into state custody that could never be released again to the defendant or anybody else. Including drugs, including other items that are not allowed back onto the streets once they're taken into custody And I believe, just like there could be an independent test of any drugs that are found, or any urinalysis that is taken, or blood tests that are taken, there can be an independent review of this particular evidence.

¶17 The State filed a Motion to Reconsider Releasing Child Pornography, stating that the FBI is prohibited from releasing child pornography images pursuant to the Adam Walsh Child Protection and Safety Act of 2006. See 18 U.S.C. § 3509(m) (2006). The Adam Walsh Act provides that courts must deny requests to reproduce or release child pornography images as long as the Government makes the property reasonably available to the defendant. See *id.* Therefore, the State argued, the FBI would not comply with the trial court's protective order and release a copy of the hard drive to Johnson's expert. The State claimed that it was making the hard drive reasonably available to Johnson by offering to make it available at the FBI office

location nearest to her and allowing the expert to conduct examinations at times convenient to her outside the view of law enforcement agents. Therefore, the State asserted, there was no finding that the offered access to the evidence deprived Johnson of a fair trial.

¶18 In his Response to Motion for Reconsideration and Motion to Dismiss, Johnson renewed his objections to the due process issues regarding accessibility, security, and resources under the State's proposed accommodations. The trial court affirmed its protective order.

¶19 At a status hearing on April 1, 2009, the trial court dismissed all ten charges against Johnson without prejudice due to the FBI's refusal to release the evidence under the terms of the court's protective order. The State timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") §§ 13-4032 (2010); -4031 (2010); 12-120.21(A)(1) (2003); and Arizona Constitution Article VI, § 9.

DISCUSSION

¶10 The State argues that the trial court abused its discretion by granting Johnson's Motion to Dismiss the ten counts of sexual exploitation based upon the FBI's refusal to comply with the court's protective order. The State asserts that to obtain a copy of the hard drive, Johnson needed to show substantial need for the copy or that the State's conditions

would deprive him of a fair trial under Rule 15.1(j) and he did not do so in this case. Specifically, the State argues, Johnson's complaints of cost, inconvenience and unfairness do not constitute substantial showing under Rule 15.1(j).

¶11 Johnson argues that the United States Constitution guarantees a defendant the right to a fair trial, which includes the ability to conduct reasonable investigation of the evidence against him to prepare and present a defense. He argues that the State was unable to reasonably accommodate his expert during her investigation of the hard drive and the access offered would constitute a due process deprivation. Therefore, he claims that the trial court correctly ordered a copy of the hard drive and when the FBI refused to provide it, the court correctly dismissed the charges against him.

¶12 The State presents two issues for review: (1) does a defendant's general assertion that due process requires release of evidence satisfy the "substantial showing" requirement of Arizona Rule of Criminal Procedure 15.1(j) and (2) when a prosecutor makes evidence reasonably available to a defendant for inspection, must a case be dismissed for failure to comply with the court-ordered disclosure? We review the trial court's decision to dismiss the charges for an abuse of discretion. See *State v. Hansen*, 156 Ariz. 291, 294, 751 P.2d 951, 954 (1988).

¶13 We conclude that Johnson's concerns were not general but specific enough to satisfy the "substantial showing" requirement under Rule 15.1(j). Therefore, the trial court did not abuse its discretion by ordering the FBI to release a copy of the hard drive pursuant to the protective order. Moreover, the trial court did not abuse its discretion when it dismissed the charges without prejudice after the FBI refused to follow the trial court's protective order.

¶14 Rule 15.1(j) of the Arizona Rules of Criminal Procedure provides:

Upon a substantial showing by a defendant that reproduction or release for examination or testing of any particular item is required for the effective investigation or presentation of a defense, such as for expert analysis, the court may require reproduction or release for examination or testing of that item, subject to such terms and conditions as are necessary to protect the rights of victims, to document the chain of custody, and to protect physical evidence. Reproduction of or release for examination and testing of such items shall be subject, in addition to such other terms and conditions as are ordered by the court in any particular case, to the following restrictions: (1) the item shall not be further reproduced or distributed except as allowed in the court's order; (2) the item shall only be viewed or possessed by the persons listed in the court's order; (3) the item shall not be possessed by or viewed by the defendant outside the direct supervision of defense counsel, advisory counsel, or defense expert; (4) the item must first be delivered to defense counsel or advisory counsel, or if expressly permitted by order

of the court, to a specified defense expert; (5) defense counsel or advisory counsel shall be accountable to the court for any violation of the court order or this Rule; and (6) the item shall be returned to the prosecutor by a deadline ordered by the court.

The comment to Rule 15.1(j) (effective July 1, 2005) provides:

Rule 15.1(e)(1) requires a prosecutor, absent a contrary order of the court, to make items contained in the list submitted under Rule 15.1(b)(5) [which includes images of child pornography] available to the defense for examination, testing and reproduction. However, when the possession or reproduction of the items listed would otherwise be prohibited by Title 13, Chapter 35.1, concern for the rights of potential victims requires a different approach. In all such cases, the prosecutor must make the items reasonably available for inspection by the defense, with such conditions as are necessary to protect the rights of victims. It is anticipated in most cases that the state will make the items available to the defense for inspection while continuing to maintain custody of the materials. Reproduction or release from state custody is allowed only upon court order. A court should order reproduction or release of such items only when such reproduction or release is necessary to protect a defendant's right to a fair trial. Such a circumstance may be present when the items must be examined by a[n] expert in order to determine whether actual minors are depicted in the materials or when a computer hard drive or other digital storage medium must be examined by an expert to determine whether the defendant was responsible for downloading the materials or had actual knowledge of the existence of the materials on the computer hard drive or digital storage medium, but only if the defendant shows that inspection of the items under the specific conditions

offered by the state is not sufficient to protect the defendant's rights to a fair trial. This rule does not contemplate reproduction or release of such materials simply for the convenience of a lawyer or other agents of a defendant. To protect the rights of potential victims, if reproduction or release is ordered, the court must impose restrictions, including those listed in this subsection.

(Emphasis added.)

¶15 Johnson raised valid concerns regarding accessibility, security, and access to resources in the State's requiring his expert to review the hard drive at the FBI Office.

I. Accessibility

¶16 Johnson argued that the expert's forensic review could take from an hour up to a few days. Moreover, his expert would not have complete access to the evidence during trial. The State responded to these accessibility concerns by claiming that access would be made nearest the expert prior to trial and the exam could be conducted at the expert's discretion anytime she needed it. Under these circumstances, we conclude that the State adequately rebutted Johnson's accessibility of evidence arguments.

¶17 The expert might not have 24-hour access to the evidence during trial but this is a common issue in criminal trials and one that the trial court can deal with if it arises. Johnson's argument about his expert having to review it at the

FBI office instead of her home or office is not persuasive; the comment to Rule 15.1(j) provides that a request for reproduction and release cannot be based on convenience to the defendant's agents.

II. Security

¶18 Johnson next argues that government agents could observe his expert's investigative process and could tamper with the process while she is gone. The State claimed the expert could conduct the investigation outside the view of law enforcement agents. The State, however, did not offer to provide a secure location to prevent possible government tampering with the investigation. Instead, it argued that government tampering is an issue in all cases.

¶19 In *United States v. O'Rourke*, 470 F.Supp.2d 1049 (D. Ariz. 2007), the court entered a preliminary order governing the examination of the hard drive allegedly containing child pornography images. *Id.* at 1057. The order included the following terms: "the examination would occur at the office of the United States Attorney at a mutually agreed upon date and time, that the Government must allow defense counsel and their experts to examine a copy of the hard drive in a private office, that the Government *must ensure that the office is locked and that all persons are prohibited from entering the office without defense counsel or experts present* (including during any times

when defense counsel or experts leave computer equipment in the room), and that a copy of the Court's order must be posted on the door of the room." *Id.* (emphasis added). The court found that these terms made the evidence reasonably available to the defendant in compliance with the Adam Walsh Act.

¶20 In *United States v. Knellinger*, 471 F.Supp.2d 640 (E.D. Va. 2007), the FBI offered to provide the defense expert a private room in its Richmond, Virginia facility. *Id.* at 646. Similarly, in *United States v. Flinn*, 521 F.Supp.2d 1097 (E.D. Cal. 2007), the FBI agent testified that the review facility was located in a secure office complex of the location, the expert's materials could be secured in a locked case when not in use, and a portion or all of the review room could be reserved for the expert. *Id.* at 1100. These cases indicate that the FBI could ensure a secured facility in which the expert could review the hard drive.

¶21 In this case, however, the State did not adequately rebut Johnson's security concerns despite the FBI's willingness to provide a secure facility in previous federal cases. Therefore, the trial court did not abuse its discretion in concluding that Johnson made a substantial showing that inspection of the items under the State's conditions would undermine his right to effectively investigate the evidence against him.

III. Resources

¶22 Johnson argues that the expert could not access her reference materials if required to conduct the exam at the FBI office. Moreover, Johnson argues, the expert could not do other work while waiting for exam results, which could increase the costs of the examination to \$20,000. While the latter argument is akin to a convenience argument, the former argument is persuasive. The State did not proffer a remedy to the expert's inability to access her reference materials at the FBI facility.

¶23 In *Knellinger*, two defense experts described the significant cost and effort that would be required to conduct their investigations in the government facility. *Knellinger*, 471 F.Supp.2d at 647. One expert testified that it would cost an additional \$400,000 for him to do the investigation at the government facility instead of his office, as it would take about one week and approximately three movers to move his equipment. *Id.* He testified that he would need to move his own equipment because the "United States has not offered to provide the requisite equipment in a Government facility for the expert's use." *Id.* at n.8. In that case, given the transportation costs and the Government's failure to present any evidence to contravene the defendant's concerns, the court determined that ordering the Government to provide a copy of the

hard drive was necessary to ensure a fair trial for the defendant. *Id.* at 648-50.

¶124 In *Flinn*, the defense expert was concerned about using government computers to conduct the examination because he could not bring his own equipment to the federal facility. *Id.* at 1100. To address these concerns, the Government offered the expert Government computers, ram, drive docks, fire wire cards, internet access, software for forensic computer analysis (EnCase, which is used by Johnson's expert), all of which are typically used in the investigation process. *Id.* The defense expert could use, and the government guaranteed to erase, the hard drives so work product would not be exposed. *Id.* Therefore, the court concluded, reproduction and release of the hard drive was not required to ensure the defendant's right to a fair trial. *Id.*

¶125 In this case, the State did not rebut Johnson's argument that his expert would not be able to access the resources she typically uses in these types of investigations despite the FBI offering similar resources to experts in the aforementioned federal cases. Therefore, we conclude that Johnson's access to resources concern amounts to a substantial showing that a copy of the hard drive was required to ensure his right to a fair trial.

CONCLUSION

¶26 Johnson's issues of security and resources amounted to a "substantial showing" that reproduction and release of the hard drive was "required for the effective investigation . . . of a defense" See Rule 15.1(j). It was within the trial court's discretion to compel a copy of the hard drive to the defense expert provided that the protective order complied with Rule 15.1(j). There is no argument that the protective order did not comply with the rule; in fact, the court accepted the order drafted by the State. The FBI refused to comply with the state court's valid protective order. This left the State unable to produce evidence Johnson was entitled to review. Consequently, it was within the court's discretion to dismiss the charges without prejudice. Therefore, we affirm.

/s/

PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

DONN KESSLER, Judge