STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 1, 2012
v	No. 302215 Macomb Circuit Court
EDWARD STEVEN SLUCK, Defendant-Appellee.	LC No. 2010-002372-FH

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals by leave granted a November 29, 2010, discovery order entered by the trial court requiring the prosecution to provide the lower court with the criminal histories of its own witnesses, including that of the complainant. For the reasons set forth in this opinion, we affirm in part, vacate in part, and remand for further proceedings.

I. FACTS & PROCEDURAL HISTORY

Defendant was charged with two counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a) (person 13 to 15). At the preliminary examination, the complainant, then age 15, testified that she and defendant engaged in sexual acts when she was age 13 and 14. The complainant also testified that she initially told her probation officer from juvenile court about the sexual conduct and that she was on probation when the last sexual act occurred with defendant. Defendant was bound over for trial.

The prosecutor's pre-trial witness list included the complainant, the complainant's grandmother, and another witness. On July 20, 2010, defendant filed a discovery request pursuant to MCR 6.201(A)(4) and (5), and requested, "any criminal record [of] both the purported victim and any other eye-witnesses in/of the incident." In addition, defendant filed a motion requesting criminal records of the complainant and other prosecution witnesses. Specifically, in the motion, defendant noted that, at the time of the preliminary examination, the complainant was being held at the Macomb County Youth Home, and that she had a history of substance abuse. Defendant stated that the complainant's credibility was the primary issue in the case and, pursuant to MCR 6.201(A)(4) and (5), he requested a copy of the complainant's "criminal record, and the criminal record of other Prosecution witnesses including any juvenile record."

On November 15, 2010, the prosecution filed its answer to defendant's motion for the criminal records, arguing that the complainant had no criminal record, as she was a juvenile, and juvenile records are quasi-civil in nature and sealed to the public. The prosecution also argued that, due to the broad nature of his request, which was not limited to admissible impeachment evidence, there was "no valid purpose" in defendant's request. Additionally, the prosecution maintained that, under the plain language of MCL 28.214, and case law, *People v Elkhoja*, 658 NW2d 153 (2003) (*Elkhoja II*),[1] a prosecutor cannot be compelled to conduct LEIN[2] searches on behalf of a defendant, and that disclosure of the requested criminal histories would violate the law. Finally, the prosecution argued that it was not in possession of any criminal histories of the complainant or the complainant's grandmother.

At a motion hearing, defendant argued that he needed the complainant's criminal records in order to present a defense because the case turned on the complainant's credibility. The prosecutor stated that the complainant was in a youth home at the time of the preliminary examination because "she had a juvenile matter." However, the prosecutor did not elaborate and instead stated, "I don't have her records." The prosecutor argued that MCL 28.214 barred release of the complainant's criminal history, and stated that she was not in possession of "LEIN or CCH information" with respect to the complainant and the complainant's grandmother.[3] With respect to the complainant, the prosecutor stated, "she was in the Macomb County Youth Home, so I guess, although I'm not in possession of [her juvenile records], *our office is*" (emphasis added).

On November 29, 2010, the lower court issued an opinion and order on defendant's motion. The court noted that MCL 28.214 and its attendant administrative regulation precluded the prosecution from conducting LEIN searches and turning the results of those searches directly over to defendant. The court acknowledged that the Michigan Supreme Court vacated this Court's decision in *Elkhoja I*, which had required a prosecutor to conduct LEIN searches on its own witnesses on behalf of the defendant, and adopted the dissent, which reasoned that MCL 28.214 prevented the prosecutor from conducting such searches and turning information over to a defendant. The trial court reasoned that denying defendant the ability to obtain evidence with which to impeach the complainant would render MRE 609 "virtually useless." The lower court concluded that "the prosecutor has failed to present any compelling authority that would specifically preclude the release of LEIN information to the Court itself or preclude the court from then disseminating it to defendant. Accordingly, the prosecutor shall be required to submit

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[1] In *Elkhoja II*, the Supreme Court issued an order that vacated, in part, this Court's majority opinion in *People v Elkhoja*, 251 Mich App 417; 651 NW2d 408 (2002) *(Elkhoja I)*, and adopted the dissent. The order is not published in the Michigan Reports.

[2] Michigan Law Enforcement Information Network.

[3] At the motion hearing, the parties agreed that they had been able to resolve issues related to the discovery request regarding one other prosecution witness, but they did not elaborate on what that meant.

the requested information to the Court." The trial court denied the prosecutor's motion for reconsideration on January 4, 2011.

On January 25, 2011, the prosecution filed an emergency application for leave to appeal in this Court with an accompanying motion for immediate consideration and a motion to stay proceedings pending resolution of the issue on appeal. In its application and supporting brief, the prosecution raised only the issue of whether it could be compelled to disclose LEIN information about its own witnesses to defendant. This Court granted leave to appeal and granted the accompanying motions.[4]

On appeal, the prosecution argues that the trial court erred in ordering it to obtain LEIN information and disclose it to the defense where such disclosure is prohibited by law. The prosecutor also argues that the trial court erred in ordering the disclosure of the complainant's juvenile record because such information is not criminal in nature and is not admissible under MRE 609(e).

II. ANALYSIS

We review a lower court's rulings on discovery requests for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). A trial court abuses its discretion when its decision falls outside the range of "reasonable and principled" outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). The interpretation and application of statutes and court rules involves a question of law that we review de novo. *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012).

Discovery in criminal cases is governed by MCR 6.201. *Phillips*, 468 Mich at 588. MCR 6.201(A), titled "Mandatory Disclosure," provides in relevant part:

> [i]n addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties . . .
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> * * *
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> (4) any criminal record that the party may use at trial to impeach a witness; [and]
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> (5) a description or list of criminal convictions, *known to the defense attorney or prosecuting attorney*, of any witness whom the party may call at trial . . . . [Emphasis added.]

Because disclosure under MCR 6.201(A) is mandatory, when a party requests information under the court rule, that information must be provided to the requesting party. *People v Laws*, 218 Mich App 447, 454-455; 554 NW2d 586 (1996).

[4] *People v Sluck*, unpublished order of the Court of Appeals, entered January 31, 2011 (Docket No. 302215).

In addition, although not generally admissible at trial, records of juvenile adjudications of a witness other than the accused may be admissible at a criminal trial under MRE 609(e) if "conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission is necessary for a fair determination of the case or proceeding." Crimes "admissible to attack the credibility of an adult" are covered by MRE 609(a), and are defined as those crimes an essential element of which is dishonesty or false statement, or those crimes an essential element of which involves theft, are punishable by over a year in prison, and which have "significant probative value on the issue of credibility." See *People v Parcha*, 227 Mich App 236, 241-242; 575 NW2d 316 (1997).

In this case, the complainant was the only witness to the alleged crime; thus, guilt or innocence will likely turn exclusively on the credibility of her testimony and the credibility of witnesses is always a material issue at trial. *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005). Defendant relied on MRE 6.201(A) and requested, in part, that the prosecution disclose the complainant's criminal history and the prosecuting attorney indicated at the motion hearing that her office had the information in its possession. Therefore, because the prosecution indicated that it already had at least some of the requested information in its possession, i.e. the complainant's juvenile history, the prosecutor was required to disclose that information to the defense in accord with MCR 6.201(A)(5). Accordingly, the trial court did not err when it ordered the prosecutor to provide that information to the court for an in-camera review. Necessarily, a trial court must have access to criminal records or juvenile adjudications in order to perform its gate-keeping function and determine if they are admissible under MRE 609. See *Laws*, 218 Mich App at 452 (a trial court may conduct an in-camera review to determine if evidence is discoverable); *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002), quoting MCL 768.29 ("[i]t shall be the duty of the judge to control all proceedings . . . and to limit the introduction of evidence . . . to relevant and material matters . . .").

The prosecution argues that it is statutorily barred from releasing the complainant's records under the LEIN statute, MCL 28.214, and its attendant administrative regulation, Mich Admin Code R 28.5208. MCL 28.214 provides in relevant part:

> (5) A person shall not disclose information governed under this act in a manner that is not authorized by law or rule.
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> (6) A person who intentionally violates subsection . . . (5) is guilty of a crime ….

Mich Admin Code R 28.5208 provides in relevant part:

> (3) LEIN, AFIS, or other information systems shall only be used for the administration of criminal justice or public safety purposes.
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> (4) Except as permitted in these rules or if authorized by statute, information from LEIN, AFIS, or other information systems shall not be disseminated to an unauthorized agency, entity, or person. [1981 AACS R 28.5208(4).]

The prosecution cites *Elkhoja II*, 658 NW2d at 153, to contend that it cannot be compelled to comply with defendant's discovery request. In that case, the defendant "sought information regarding any felony convictions that occurred in the previous ten years involving theft, dishonesty, or false statement to enable [the] defendant to challenge the [prosecution] witnesses' credibility." *Elkhoja I*, 251 Mich App at 419. The prosecutor objected, arguing that he had not run criminal history searches on the LEIN system of any of his witnesses and could not be compelled to do so. *Id*. at 419-420. The trial court granted the defendant's discovery request, and required the prosecution to provide the names of its witnesses to the local police department so that the department could conduct LEIN searches for the benefit of the defendant at trial. *Id*. at 420. A majority of this Court upheld the discovery request. *Id*. at 438. In doing so, the majority relied in large part on the reasoning from *People v Mack*, 218 Mich App 359; 554 NW2d 324 (1996), lv den, precedential effect nullified 455 Mich 864 (1997). See *Elkhoja I*, 251 Mich App at 437-438. In *Mack*, this Court held that the trial court erred by failing to order the prosecutor to conduct LEIN searches on its own witnesses on behalf of the defendant. *Mack*, 218 Mich App at 363.

The dissent in *Elkhoja I* reasoned that MCL 28.214 barred the release of LEIN information to any unauthorized party, and the trial court, in essence, "commanded the city and its employees to commit criminal offenses" when it required the police department to conduct LEIN searches on behalf of the defendant. *Elkhoja I*, 251 Mich App at 451 (SAWYER, J, dissenting). The dissent stated, "while I might agree that the prosecutor has an obligation to turn over information regarding a witness' criminal background that would be beneficial to the defendant *and* that the prosecutor otherwise has in his file, I am aware of no authority that supports the proposition that the prosecutor is obligated to seek out such information." *Id*. at 452-453 (SAWYER, J., dissenting). Our Supreme Court agreed with the dissent, and, in an unpublished order, vacated the Court's majority, "for the reasons articulated by the dissenting opinion in the Court of Appeals." *Elkhoja II*, 658 NW2d at 153.

The prosecution argues that the dissent in *Elkhoja I* is controlling. However, *Elkhoja I* and *Mack*, on which the *Elkhoja I* majority relied, are inapplicable. Both of those cases addressed scenarios in which the defendant requested that the prosecution go beyond information to which it already had access and independently conduct LEIN searches on its own witnesses on behalf of the defendant. See *Elkhoja I*, 251 Mich App at 419-420 (police department ordered to conduct LEIN search on behalf of the defendant); *Mack*, 218 Mich App at 361 ("the trial court abused its discretion in failing to order the prosecution to prepare the [LEIN] reports in question"). In other words, in those cases, the prosecution was ordered to take some additional affirmative step beyond what is required by MCR 6.201(A). The dissent recognized as much when it said that although prosecutors are not required to affirmatively conduct LEIN searches on a defendant's behalf, they are still obligated to disclose "a witness' criminal background that would be beneficial to the defendant *and* that the prosecutor otherwise has in his file." *Elkhoja I*, 251 Mich App at 452-453 (SAWYER, J., dissenting) (emphasis in original). Indeed, the dissent's analysis focused on whether the prosecution was required to "seek out" its own witnesses' LEIN information by taking the additional, affirmative step of conducting a LEIN search, not whether it was required to disclose information already in its possession. *Id*. at 453. This rationale is consistent with the plain language of MCR 6.201(A)(5), which requires the disclosure of "a description or list of criminal convictions, *known to the defense attorney or prosecuting attorney*, of any witness whom the party may call at trial. . . ." (Emphasis added).

The rationale is also consistent with the LEIN statute itself, when the statute is read in its entirety. The LEIN statute is concerned, principally, with "nonpublic information" which it defines as "information to which access, use, or dissemination is restricted by a law or rule of this state or the United States." MCL 28.211a(b). The LEIN statute's principal purpose with respect to disclosure is to prevent the use of nonpublic LEIN information for "personal use or gain." MCL 28.214(3). MCL 28.214(5), which the prosecution cites as one basis that prohibits it from disclosing LEIN information, merely prohibits dissemination of LEIN information "*in a manner*" not authorized by law (emphasis added). Nothing in the LEIN statute prohibits a prosecutor from disclosing LEIN information it has previously unearthed where that information would be exculpatory in a separate case.

In short, when the dissent, MCL 6.201(A)(5), and the LEIN statute are read in conjunction, the rule that emerges is that a prosecutor cannot be compelled to conduct a LEIN search on behalf of a defendant, but nothing prevents a court from compelling a prosecutor to compile a list of its own witnesses' criminal records by review of its own files without resorting to an independent search of the LEIN database. Records of criminal convictions, unearthed by the prosecution in prior cases, are "known" to the prosecution for purposes of MCR 6.201. To hold otherwise would allow prosecutors to remain willfully ignorant of valuable impeachment evidence to which defendants are otherwise entitled.

In this case, to the extent that the prosecution has the requested information in a file in its office, that information is "known" to the prosecution within the meaning of MCR 6.201(A)(5), and the prosecution must disclose the information. Unlike in *Elkhoja I*, in this case, the prosecutor was not required to affirmatively conduct a LEIN search. Defendant's discovery request did not ask the prosecution to conduct LEIN searches on its behalf. Rather, it merely requested, under MCR 6.201, "a copy of [the complainant's] criminal record, and the record of other prosecution witnesses including any juvenile record." The prosecutor admitted at the motion hearing that the complainant's juvenile adjudications were "known" to the prosecutor's office when she said that, "although I'm not in possession of [the complainant's juvenile records], our office is." Similarly, to the extent that the prosecution has files containing the criminal records of its other witnesses, it must disclose those records so that the trial court can perform its gate-keeping function and determine whether they are admissible under MRE 609. To the extent the trial court assumed that defendant requested the prosecutor to conduct a LEIN search to obtain information that it did not already possess, the trial court erred in doing so and we vacate that aspect of the court's order. However, in all other respects the trial court properly ordered the prosecutor to disclose the information that it had in its possession, and, accordingly, we affirm that part of the court's order. See *People v Mayhew*, 236 Mich App 112, 118 n 2; 600 NW2d 370 (1999) (reversal is not warranted where the trial court reached the right result albeit for the wrong reason).

The prosecution has repeatedly insisted, both at the lower court and on appeal, that it does not have "possession" of the requested discovery information, and therefore, cannot be compelled to disclose it, because such disclosure would necessitate a LEIN search, which would amount to the prosecution conducting discovery on defendant's behalf. In advancing this argument, the prosecution relies, to a large extent, on one section of the dissent, where it stated that "the prosecutor has an obligation to turn over information regarding a witness' criminal background that would be beneficial to the defendant *and* that the prosecutor otherwise has in his

file." *Elkhoja I*, 251 Mich App at 452-453 (SAWYER, J., dissenting) (emphasis in original). The prosecution appears to narrowly construe this passage to mean that, because it did not include the complainant's criminal history in its case file for this specific case, it does not "possess" the records and cannot be compelled to disclose them. This argument lacks all merit. As explained, the prosecution is required to disclose information of which it has knowledge, and, at the motion hearing, the prosecutor admitted that she "knew" of the complainant's juvenile record. Accordingly, the prosecutor must disclose that and similar information on its other witness.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher