

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**

WILMINGTON, DELAWARE 19801

John K. Welch
Judge

October 27, 2010

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Re: *State of Delaware v. Tiffany M. Smith*
Case No.: 0912009172

Date Submitted: October 4, 2010

Date Decided: October 27, 2010

MEMORANDUM OPINION

Dear Counsel:

This matter was set for trial on October 4, 2010 in the Court of Common Pleas, New Castle County, State of Delaware. During pre-trial defendant brought to the Court's attention a potential discovery violation by the State and Moved to Dismiss the instant matter (the "motion"). Following the receipt of counsel's cross-memoranda of law filed, the Court reserved decision. This is the Court's Final Decision and Order on the discovery violation alleged by defendant.

I. Background

The defendant was charged by Information filed by the Attorney General with the Clerk of the Court as follows: one Count Failure to Have Insurance Identification in Possession Driving in violation of 21 *Del.C.* §2118(p); one Count Failure to Have License in Possession in violation of 21 *Del.C.* §2721(b); one Count Failure to Have Registration Card in Possession in violation of 21 *Del.C.* §2108; one Count Driving off Roadway, Main Traveled Portion/Lanes in violation of 21 *Del.C.* §4177(a); one Count of Improper Lane Change in violation of 21 *Del.C.* §4122(1); one Count Driving Across a Median in violation of 21 *Del.C.* §4121; one Count of Reckless Driving in violation of 21 *Del.C.* §4175(a); one Count of Inattentive Driving in violation of 21 *Del.C.* §4176(b); and one Count of Driving a Vehicle Under the Influence of Alcohol in violation of 21 *Del.C.* §4177(a) while traveling on 754 Pulaski Highway, eastbound, New Castle, Delaware.

II. The Facts

A formal Case Review took place in this Court on May 12, 2010. The Attorney General responded, in part, paragraph by paragraph to defendant's previous Discovery Request on or about April 23, 2010. The Attorney General noted in its Discovery Response that the MVR Video may exist and would be provided. In addition, due to a copying error, the State, did, in fact, fail to provide pages 2 and 4 of the Alcohol Influence Report ("AIR") because the pages were double-sided and a clerical error caused the State to copy only the front page. On May 12, 2010 at the

Case Review, defense counsel requested a copy of the MVR Video and pointed out the two missing pages of the AIR. The Court set a discovery deadline of August 4, 2010 in its Case Review Order on May 12, 2010. Thereafter, on or about May 21, 2010 the Attorney General provided a copy of the MVR. Neither party communicated regarding any other discovery issues, including the two (2) missing pages of the AIR Report. Nor did defendant file a Motion to Compel or place the Attorney General on notice of the problem by written correspondence, e-mail, or through a telephone call to the Department of Justice, Criminal Division.

Thereafter, on the morning of trial, October 4, 2010, because of the missing two (2) pages of the AIR, the defendant Moved to Dismiss the instant case. The Court ordered cross-memoranda be filed with the Clerk of the Court and Chambers within ten (10) calendar days.

III. Discussion

The issue pending before the Court is what, if any, appropriate sanction should the Court impose because the Attorney General failed to provide the missing two (2) pages of the AIR Report as Ordered in the Case Review Order on May 12, 2010.

Counsel has filed cross-memoranda with the court clerk and chambers. There is no doubt that the May 12, 2010 Case Review Order required the State to provide the two (2) missing pages of the AIR Report on May 12, 2010. What appears to be dispositive in this proceeding is that neither counsel, including defense counsel, communicated with each other until the morning of trial. The defendant presented an

oral Motion to Dismiss all the charges on the date of trial. The State offered on the trial date to provide to defense counsel the missing two (2) pages of the AIR Report. No written Motion was ever docketed or filed with the Clerk of the Court, Chambers, or served on the Attorney General to Dismiss the Action, or to Compel the State to produce the missing two (2) pages of the AIR Report.

IV. The Law

As counsel has pointed out, when addressing issues dealing with discovery, the Court has broad discretion.¹ In *Duran* the Delaware Supreme Court discusses several factors which weigh in the Court's decision dealing with discovery issues; (1) the reason for the delay; (2) the extent that prejudice; (3) whether the Court can grant a continuance or recess to cure the prejudice.²

The Court must first determine whether there was in fact, a discovery violation that existed in the record and consider what if any, sanctions are available after reviewing these factors.³ Included in those sanction options are an Order of prompt compliance; an Order granting a continuance; an Option to exclude or suppress the material, not disclose them; or appropriate relief.⁴

The State points out in its Memorandum at 2 that in *DeJesus v. State*, 655 A.2d 1180 (Del. 1995) an issue of notice of expert testimony was raised on the first day of

¹ *Duran v. State*, 606 A.2d 743, 745 (Del. 1992).

² *See Duran*, 606 at 745.

³ *Id.*, *Duran* at 745.

⁴ *Id.*

trial. When the testimony ran beyond the scope of the notice, the prosecution objected. The trial court ruled the opinion offered by the expert would remain limited to that which was at the beginning of the trial and the previous notice to counsel.

In other Superior Court decisions, the Superior Court held that in DUI cases, “discovery rules are a means to an end.”⁵ The *Wood* decision dealt with a defense objection prior to the testimony of the State Chemist alleging a discovery violation because the State Chemist’s qualifications had not been produced in discovery to the defense.

In *Wood*, the Superior Court noted, “... [a]s soon as defendant revealed his concern, ‘the Court took steps to rectify this situation’.” *Id.* The Court in *Wood* also noted that there was an utter failure of the defendant in demonstrating “prejudice”.⁶ In *Wood*, the Court cited *Clawson* noting that “*Clawson* does not turn the discovery process into a game of ‘Gotcha’.” As the Superior Court further noted “... [i]t is something quite different for Defendant to wait several weeks, or months, to raise a discovery violation that could be rectified overnight, if it had been revealed.”⁷ The Superior Court ruled as the State has noted in their cross-memorandum in this case the defense appeared to seek a tactical advantage from the delay of the State in providing the records as distinguished from any case preparation or error.

⁵ See *State v. Wood*, 2006 WL 515451 (Del.Supr. 2006).

⁶ *Id.* at page 2.

⁷ *Id.*

In the instant case, the defense waited from the date of the case review, May 12, 2010 until the date of trial, October 4, 2010 to bring to the State's and Court's attention that two (2) pages of the AIR Report were missing. The State offered on the trial date to produce the two (2) missing pages of the AIR Report before trial notwithstanding that the Court already continued the trial in this case until another date.⁸

Scrutinizing the factors in *Duran* it is clear the original reason for the delay was an unintended photocopying error of the Attorney General in producing the missing two (2) pages from AIR Report. In addition, the matter was already continued on the date of trial when the defense Moved to Dismiss without a formal written motion. No Motion to Compel was filed and no written letter, email or correspondence was directed to the Attorney General to bring the missing pages to the Department of Justice's attention. The Court notes as defendant has agreed that much of the detailed factual basis for the stop appears in the two missing pages of the AIR Report. Information as defendant asserts, including the defendant's eyes, clothing, breath, face, complexion, attitude, speech and action were all contained on page two of the AIR Report, as well as other information concerning the defendant's performance on the Field Coordination Tests.

However, as Superior Court pointed out in *Wood*, waiting for an extended period of time only to bring the discovery violation on the date of trial and then

⁸ Another DUI Case was called for Court.

waiting to move to dismiss after a lengthy period will not cause the Court to impose a sanction other than what the Court has already done; require the Attorney General to produce the two pages of the AIR. After the case was continued on October 4, 2010, the Court, on the record, ordered the State to provide the two pages to the defendant and the State has completed.

Discovery violations are the sound discretion of the Court.⁹ In the instant case the Court finds the appropriate remedy is an Order of continuance which the Court has already entered on the date of trial on October 4, 2010, and an Order of Compliance to provide the two (2) missing pages of the Air Report. No further sanction is warranted and the Attorney General has already complied with an Order of Prompt Compliance. The matter is now moot.

The Criminal Clerk shall forthwith schedule the matter for trial with notice to all parties.

IT IS SO ORDERED this 27th day of October, 2010.

John K. Welch
Judge

/jb

cc: Ms. Diane Healey, Case Processor
CCP, Criminal Division

⁹ See *Duran*, 606 A.2d 745.