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Re: **State of Delaware v. John C. Johnson**
ID # 9908026980

Submitted: April 23, 2001
Decided: April 27, 2001

**On Defendant's "Motion to Compel Discovery." GRANTED IN PART.
DENIED IN PART.**

Dear Counsel:

Pending before this Court in the above capital murder case is Defendant's March 9, 2000 Motion to Compel Discovery of "any information relating to the behavioral characteristics of the victim, Theodore Smallwood, which tend to

indicate his reputation for violence”¹ This Court has also considered the State’s March 18, 2000 Response thereto and the State’s April 17, 2001 *ex parte* letter to this Court enclosing police reports for seven separate crimes allegedly committed by the victim in the 1990's. Defendant through counsel has advised that he will be asserting “self-defense” at trial. For the reasons set forth below, Defendant’s motion is **GRANTED IN PART and DENIED IN PART**. The State will be required to produce police reports with respect to five of the seven incidents involving Theodore Smallwood; the State will not be required to do so with respect to the two other incidents.

BRIEF SUMMARY OF FACTS AND PROCEDURAL HISTORY

On August 28, 1999, Theodore Smallwood (the victim) was fatally shot several times in his chest and torso area with a .40 caliber handgun. John C. Johnson (Defendant) allegedly fired these fatal shots that killed the victim. Wilmington Police Officers responded to the “shots fired” complaint at 201 W. 29th Street in Wilmington, Delaware very shortly after the shooting occurred. The police found the victim lying in a pool of blood on his back in the entranceway to an apartment building. The victim made various statements to police and paramedics about the identify of his assailant before he died about an hour later at Christiana Hospital.

¹ Defendant’s Motion to Compel at 1.

Defendant was indicted for Murder First Degree (11 *Del. C.* §636(a)(1)), Possession of a Firearm during the Commission of a Felony (11 *Del. C.* §1447A), and Possession of a Deadly Weapon by a Person Prohibited (11 *Del. C.* §1448).² Defendant filed a Motion in Limine to exclude various statements made by the victim in the very short period of time after he was shot and before he lost consciousness that helped to identify Defendant as the person responsible for the shooting. On March 9, 2001 this Court conducted an evidentiary hearing to determine the admissibility of the statements that the victim made to police officers and to emergency medical technicians who surrounded the victim immediately prior to his death.³ This Court denied Defendant's Motion in Limine.⁴

Defendant, through counsel, has advised the Court and the State that Defendant will rely on "self-defense" at trial. The State apparently contends that there was "bad blood" between the Defendant and the victim at the time of the fatal

² This charge has been severed pursuant to Super. Ct. Crim. R. 14.

³ Prior to this evidentiary hearing, this Court had denied the requested suppression of certain statements made by Defendant to Wilmington police officers. *State v. Johnson*, Del. Super., ID #9908026980, Silverman, J. (Oct. 31, 2000)(ORDER).

⁴ *State v. Johnson*, Del. Super., ID #9908026980, Cooch, J. (April 19, 2001) (Mem.Op.)(holding that the victim's statements to two Wilmington police officers and two New Castle County paramedics, made immediately prior to his death, were admissible into evidence as "statement[s] made under belief of impending death" (D.R.E. 804(b)(2) and as "excited utterances" (D.R.E. 803(2))).

shooting.⁵

⁵ *State v. Johnson*, Del. Super., ID #9908026980, Silverman, J. (Oct. 31, 2000) (ORDER).

In connection with his self-defense claim, Defendant has filed the instant “Motion to Compel Discovery” seeking “production of any information relating to the behavioral characteristics of the victim . . . which tend to indicate his reputation for violence, including but not limited to, any acts of violence prior to his death directed towards [Defendant].”⁶ Defendant also seeks “the victim’s criminal and arrest record, as well as any reports, witness, statements, etc . . . concerning altercations between [Defendant] and the victim prior to the victim’s death.”⁷ Defendant has submitted a two page affidavit dated January 28, 2001 describing three alleged aggressive incidents involving the victim and a general “aware[ness] that [the victim] was involved in several robberies in the Wilmington area.”⁸

⁶ Defendant’s Motion at 1.

⁷ *Id.* The Court understands that although Defendant essentially seeks the requested discovery in connection with any separate penalty hearing that may occur in this trial, that Defendant has also asked for its production in connection with the “guilt phase” of the trial. Defendant’s Motion at 2. This appears to be Defendant’s position despite a statement in a letter of Defendant’s counsel to the Court of January 29, 2001 that “[a]lthough this evidence may not be admissible during the guilt phase of the trial . . . such evidence would be admissible in the event a penalty hearing is necessary.” *See* the Court’s letter of February 1, 2001 to counsel at ¶ 3. However, the Court understands from the pretrial conference held on April 20, 2001 that Defendant still does seek discovery of the police reports for possible use during the guilt phase at trial. *See* the Court’s letter of April 23, 2001 to counsel at ¶ 2. The State advised defense counsel by letter of April 17, 2001 that it was submitting the police reports to the Court “out of an abundance of caution...[for the Court] to make the final determination as to whether the victim’s arrest history falls within the parameters of the defendant’s knowledge of specific instances as required by *Ashley* and *Moore*.”

⁸ John C. Johnson’s affidavit dated January 28, 2001 states in its entirety:

“1. During late July or early August of 1999, [the victim] approached me as I sat on a doorstep on 29th Street between Market and Tatnall Streets at approximately 2:00a.m. [The victim] appeared to be high. He asked me for a cigarette, which I gave him. He then asked me for \$50.00, which I refused to give him. After some words between us, the two of us got into a brief physical altercation. Thereafter, [the victim] left yelling to me words to the effect of “you wait there, I’ll be right back.” Shortly thereafter he returned running down the street toward me appearing as if he had a gun in his pocket, which I believed he might use against me. I ran away, and was able to allude[sic] [the victim] at that time. Shortly thereafter, while I was in the passenger seat of a friend’s vehicle at the intersection of 23rd & Market Streets, [the victim] approached the vehicle. The passenger side window to the vehicle was open. I instructed the driver to drive away quickly; however, the light at the intersection of 23rd & Market was red, and the intersection had cars in it. Mr. Smallwood assaulted me with what appeared to be a kitchen knife. As I attempted to protect myself with my right arm, he plunged the knife into the elbow area of my right arm causing substantial pain and injury. At that time, the car was able to

Defendant's counsel also submitted a letter to the State dated March 13, 2001 in which Defendant's counsel relayed to the State further claims that 1) Defendant knew generally about the victim's prior general violent and aggressive behavior and 2) the victim's involvement in a 1998 robbery at which Defendant was present.⁹ Defendant, however, has not asserted specific knowledge of the facts of any of the victim's prior arrests, which arrest records Defendant is now nevertheless seeking in his Motion to Compel; he has asserted that at the time of the shooting, that he was "aware that [the victim] was involved in several robberies in the Wilmington area. During those robberies it is my understanding that [the victim] displayed either a weapon or made another show of force which caused individuals to give up property. These robberies occurred near where [the

drive away. I received medical treatment for the injury sustained in this assault at the Chester Hospital later that morning.

2. While visiting a female friend at the Bethel Villa community located off of East 5th Street in Wilmington during the middle part of August, 1999, the two of us were speaking outside of a car. Suddenly, [the victim] came around the corner brandishing what appeared to be a two by four board. He threatened me with the board and then struck the car we were leaning against with the board. [The victim] then proceeded to chase me. We then engage in a scuffle and I was able to cause [the victim] to leave me alone.

3. I am aware that [the victim] was involved in several robberies in the Wilmington area. During those robberies it is my understanding that [the victim] displayed either a weapon or made another show of force which caused individuals to give up property. These robberies occurred near where [the victim's] sister, Terry lives." Defendant's Affidavit dated January 28, 2001.

⁹ The letter from Defendant's counsel to the State states in pertinent part, "[Defendant] did recall actually being present during one robbery which took place in 1998 in front of the gas station located at 30th & Market Streets in Wilmington. Mr. Johnson indicated to me that he and several others were standing on a corner when [Theodore] Smallwood approached them and pointed to a group of individuals standing across the street. Smallwood asked "Justin" who was standing in the group whether he knew the people standing on the opposite corner, to which all shook their heads "no." Smallwood then walked up and asked one of the members of the group if he had any "weed." That individual (who then became the victim) started to reach into his pocket to pull out a bag of marijuana, whereupon Smallwood put a small, nickel-plated gun in the chest of the person to whom he was speaking. He then went through that person's pockets removing United States currency, and then took the chain off his neck. After that he pistol whipped the victim while the others scattered behind the gas station. Mr. Johnson indicated to me (defense counsel) he was only 10 to 15 feet away from this incident, and does not know whether or not Wilmington Police were notified of its happening." Mr. O'Connell's letter to the State dated March 13, 2001.

victim's] sister, Terry lives.”¹⁰

Defendant appears to contend that the victim's character is material, so that the police reports sought by Defendant are discoverable. Defendant points out that, “to prove self-defense, the victim's character may be admissible to prove defendant's ‘knowledge or awareness of the victim's past acts of violence’” but not to prove that the victim acted in conformity with this character trait on the particular occasion in question.¹¹

¹⁰ Affidavit of John C. Johnson at ¶ 3.

¹¹ Defendant's Motion at 2 (citing *Tice v. State*, Del. Supr., 624 A.2d 399, 402 (1993)).

The State responds that “while the [D]efendant may wish to admit evidence which might support a justification/self-defense claim, the material requested by [D]efendant is not admissible for such a claim and therefore is not discoverable.”¹²

The State further contends that “a request for discovery of specific evidence of specific instances specifically identified by [D]efendant may be [a] permissible request,” but that Defendant in this case “wishes now to discover any possible evidence of the victim’s character to use at trial.”¹³ The State asserts Defendant’s request is not permissible in this case where self-defense is expected to be raised by Defendant. The State argues that this discovery request should be denied unless Defendant proffers “specific instances of which he was aware of at the time of the offense.”¹⁴ The State opposes the discovery request. In its view, “the defendant has failed to establish a nexus between the specific instances of the victim’s prior violent conduct and the Defendant’s state of mind [at the time of the shooting].”¹⁵

In an *ex parte* letter of April 17, 2001 to this Court, the State submitted short summaries of seven offenses alleged to have been committed by the victim in the 1990’s. The police reports for all the listed offenses were chronologically attached to the summary of offenses. Although none of the offenses contained in the State’s police reports match Defendant’s stated incidents involving the victim, as set forth above, five incidents are described by the State as follows:

Date: On July 4, 1997
Location: 331 Townsend Street, Wilmington, Delaware
Offense: Burglary First Degree, Possession of a Dangerous Weapon
During the Commission of a Felony.
Summary: Theodore Smallwood and an unknown co-defendant broke into the victim’s house through a window. The victim confronted the defendants at which time Smallwood grabbed a knife from the kitchen counter and stabbed the victim in the middle of the back. Smallwood and his co-defendant then fled the residence.

¹² State’s Response at 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ State’s April 17, 2001 *ex parte* letter to the Court.

Date: On May 17, 1997,
Location: 200 Block of W. 7th Street, Wilmington, Delaware
Offense: Attempted Robbery First Degree
Summary: Theodore Smallwood was charged with Smallwood approached the victim and asked her for \$1.00. The victim did not have \$1.00 to give to Smallwood who then asked for a cigarette. As the victim gave Smallwood a cigarette, he became upset, threatened the victim and began rifling through her pockets. Smallwood then broke a bottle. He then began throwing bricks at the victim and chased her to a nearby McDonald's.

Date: July 3, 1997
Location: 900 Block of S. Claymont Street, Wilmington, Delaware
Offense: Assault First Degree
Summary: Theodore Smallwood approached the victim (his girlfriend) and struck her in the eye with a sharp object. As a result of the assault, the victim sustained two fractures to her eye socket.

Date: December 15, 1992
Location: Lobdell and S Heald Streets, Wilmington, Delaware
Offense: Robbery First Degree
Summary: The victim was in her car when Theodore Smallwood approached her and asked for a ride. The victim refused and Smallwood smashed the passenger side window of the vehicle. Smallwood then demanded that the victim give him the car. The victim was then pulled from the vehicle and assaulted by Smallwood who fled from the scene immediately thereafter. Smallwood was later identified by an eyewitness.

Date: November 29, 1992
Location: B and New Castle Streets, Wilmington, Delaware
Offense: Robbery Second Degree
Summary: The victim was walking with her friend at the above location when Theodore Smallwood approached them from behind and grabbed the victim's purse. After a brief struggle Smallwood was able to get away with the purse. He was later identified from a photo.

The State has acknowledged at least one prior instance of violent or aggressive behavior of the victim. It has provided to Defendant, in connection with a “knife assault by Theodore Smallwood on John C. Johnson, “a copy of a portion of a statement made by Sherese Williams, specifically pages 29 to 32 and page 38, indicating that she was aware that [the victim] had had a previous altercation with [Defendant].¹⁶ Additionally, in that same letter, the State enclosed “a copy of a portion of [a] detectives supplement report regarding the statement of Tiffany Peters regarding her knowledge of an incident where [Defendant] was cut.¹⁷

Defendant’s albeit general claim that he was aware that Smallwood “was involved in several robberies in the Wilmington area [and that] during those robberies it [was Defendant’s] understanding that Mr. Smallwood [the victim] displayed either a weapon or made another show of force which caused individuals to give up property” is generally corroborated by the police reports in the State’s possession.

DISCUSSION

Under Superior Court Criminal Rule 16(a)(C), the State Must Produce Certain Prior Police Reports concerning Theodore Smallwood to Defendant.

The issue presently before this Court pursuant to the “Motion to Compel Discovery” is one of discovery. Specifically, the issue is whether the State must provide Defendant with the victim’s prior arrest record, which the State has in its possession, even where Defendant has not specifically identified the exact prior violent or aggressive behavior of the victim that is reflected in those police reports.

¹⁶ State’s letter of April 17, 2001 to Defendant’s counsel.

¹⁷ *Id.*

Superior Court Criminal Rule 16(a)(C) states in pertinent part that “[u]pon request of the defendant the State shall permit the defendant to inspect and copy . . . documents, . . . which are within the possession, custody or control of the State, and which are material¹⁸ to the preparation of the defendant’s defense. . . .”¹⁹ In emphasizing the requirement that documents sought by a defendant be “material to the preparation of the defendant’s defense,” the United States Supreme Court has held that “[Federal] Rule 16(a)(1)(C) authorizes defendants to examine Government documents material to the preparation of their defense against the Government’s case-in-chief”²⁰ To satisfy the requirement of materiality Defendant must show some evidence that the requested pretrial disclosure of the disputed evidence would enable him to alter the quantum of proof in his or her favor . . . too much should not be required in such a showing.²¹ The United States District Court for the District of Columbia, has held that the government should interpret the phrase “material to the preparation of defendant’s defense” in a discovery rule broadly to ensure fairness to the defendant.²²

The Delaware Supreme Court has held that “[i]n a claim for self-defense, the essential element is whether the defendant subjectively believed the use of force was necessary for his protection. . . .”²³ Defendant has represented through counsel that he will rely on the defense of “Justification-use of force in self protection” (11 *Del. C.* §464) (commonly known as self-defense) at his upcoming

¹⁸ Material: “having some logical connection with the consequential facts...of such a nature that knowledge of the item would affect a person’s decision-making process; significant; essential.” Black’s Law Dictionary 991 (7th ed. 1999).

¹⁹ Super. Ct. Crim. R. 16(a)(C).

²⁰ 2 Charles Alan Wright, *Federal Practice and Procedure* §254(2000) (citing *U.S. v. Armstrong*, 517 U.S. 456, 461, (1996).

²¹ Wright at §254.

²² *U.S. v. NYNEX Corp.*, 781 F. Supp. 19, 25 (D.C.D.C. 1991)(holding that although the defendant’s **objection “was so generalized and lacking in supporting evidence as not to warrant a ruling[] [the] Court reiterate[d] that the government should interpret the “material to the preparation of the defendant’s defense” language in Rule 16(a)(1)(C) broadly to ensure fairness to the defendant.”**)

²³ *Tice v. State*, Del. Supr., 624 A.2d 399, 401 (1993).

trial.²⁴ Since Defendant is relying upon the affirmative defense of “self-defense,” this Court, after review of the police reports submitted *in camera* by the State, finds that police reports concerning the victim’s past aggressive and violent behavior in five instances are “material to the preparation” of Defendant’s case in his trial. Police reports for two separate incidents that do not appear to involve aggressive or violent behavior on the part of the victim will not, however, have to be produced.

Defendant’s original Motion is a motion to compel discovery of these offenses, not to determine admissibility. However, the State has essentially argued theories of admissibility, not discoverability. These police records may tend to not only aid in the preparation of Defendant’s defense, but insofar as evidence of these offenses’ admissibility is concerned, may also help establish Defendant’s subjective state of mind at the time of the shooting incident.

²⁴ 11 *Del. C.* §464 states: “The use of force upon or toward another person is justifiable when the defendant believes that such force is immediately necessary for the purpose of protecting the defendant against the use of unlawful force by the other person on the present occasion.”

The State has in effect acknowledged that if a nexus can be shown between the requested material and certain past offenses of the victim, that the requested police reports are discoverable. Specifically, the State maintained in its March 18, 2000 Response to Defendant's Motion that "under [D.R.E.] 404(b), the defendant may be permitted to enter evidence of the victim's past conduct of which he was aware at the time of his alleged defensive act."²⁵ The issue is over Defendant's knowledge or awareness of specific acts of violent or aggressive behavior on the part of the victim.

This Court finds support in this holding in recent Delaware case law discussing admissibility. In *Tice v. State*, the Delaware Supreme Court stated that "[s]ince one of the factors that influences the reasonable belief of a defendant, threatened with imminent assault, is the defendant's knowledge or awareness of the victim's past acts of violence, these instances are relevant for their proper non-character purpose."²⁶

²⁵ State's Response at ¶ 4. The State also asserted in its *ex parte* letter to this Court that even though the State did not believe the records discoverable under Super. Ct. Crim. Rule 16, "out of an abundance of caution, the State [] enclos[ed] the police reports for *in camera* inspection by the Court." State's *ex parte* letter of April 17, 2001 at ¶ 1.

²⁶ *Tice* at 402.

“Knowledge” and “awareness” are not capable of precise definition. However, “knowledge” has been defined as an “acquaintance with fact; hence, scope of information.”²⁷ “Awareness” has been defined as “having knowledge of something that is not obvious or apparent. Aware usually implies vigilance in observing or *in drawing inferences* from what one sees, *hears*, etc.”²⁸ “Awareness” seems to be a somewhat broader term than “knowledge.”

Defendant may not simply request that the State produce any and all prior arrests or prior instances of aggressive conduct of the victim, without a sufficient showing that Defendant had knowledge or awareness of those instances.²⁹ Defendant here has made a sufficient showing that he was generally “aware” of the victim’s prior violent incidents at the time the victim’s shooting occurred. Defendant has shown a sufficient “connection” between the victim’s prior violent or aggressive behavior and Defendant’s knowledge or awareness of certain incidents and the State has corroborated the existence of some prior violent or aggressive behavior as well as the existence of “bad blood” between Defendant and the victim. This connection could demonstrate Defendant’s state of mind (that he was in fear of the victim) at the time of the shooting incident, and would thus be material to his claim of “self-defense.”

²⁷ Webster’s New College Dictionary 466 (1961).

²⁸ Webster’s New College Dictionary 62 (1961)(emphasis added).

²⁹ *Id.*

In *State v. Ashley*, the defendant, a maximum security prisoner, allegedly fatally stabbed another maximum security prisoner. The issue raised in that case was whether the State should produce “the dead inmate’s criminal history and other records relating to his violent propensities.”³⁰ The defendant in *Ashley* asserted that he was entitled, “as part of a possible justification defense, to establish that the victim was prone to violence.”³¹ The State in *Ashley* contended that the defendant’s defense “turns on Defendant’s subjective beliefs . . . [and that] the victim’s actual record is beside the point.”³² The Court held that in order for the “victim’s aggressive character traits to be admissible,” Defendant must demonstrate that there was a connection between his subjective State of mind and the victim’s propensity for violence.³³ Stated differently, the defendant must show he was aware of instances, which concerned the victim.³⁴ The defendant in *Ashley* was not able to show a “connection” between his subjective state of mind and the victim’s propensity for violence.³⁵ Although the victim’s character is not an essential element of a defendant’s self-defense claim, evidence of the victim’s character may be admissible for a non character purpose to prove Defendant’s “knowledge or awareness of the victim’s past acts of violence”³⁶ (However, the Court in *Ashley* considered whether the evidence sought by Defendant as admissible, not discoverable.)

In *Moore v. State*, the defendant’s appeal to the Delaware Supreme Court had alleged one claim of error, that the trial court abused its discretion in forbidding the defendant to present evidence concerning the alleged prior aggressive behavior of the victim.³⁷ The defendant asserted that “this was a

³⁰ *State v. Ashley* at 1.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *State v. Ashley*, Del. Super., ID # 9605003410, 1998 WL 109832, Silverman, J. (Mar. 5, 1998)(Op. and Order)(citing *Tice v. State*, Del. Supr., 624 A.2d 399, 401-402 (1993)).

³⁷ *Moore v. State*, Del. Supr., 1994, 1994 WL 202289 *1 Holland, J. (May 9,

pertinent character trait of the victim of the crime.”³⁸ The Supreme Court affirmed the defendant’s conviction and held that the trial court did not abuse its discretion as it “properly concluded that both the *Tice* holding with respect to D.R.E. 404(b) and the word “pertinent” in D.R.E. 404(a)(2) require a “connection” between the proffered evidence and the defendant’s State of mind.”³⁹

In this case, Defendant’s submitted affidavit and defense counsel’s letter of May 13, 2001 recounts a total of four incidents, allegedly known by Defendant that involved violent or aggressive conduct by the victim. The State, in response to these claims, responds that no police reports exist for these incidents, but it is possible that, assuming these incidents did in fact occur, they were never reported to the police. It is uncontroverted by the State that the victim stabbed the Defendant with a knife about a month before Defendant’s alleged shooting of the victim. Moreover, the police reports indicate the commission of three robberies, an assault “with a sharp object” and a burglary with a “knife” in recent years that occurred in the same general area of Wilmington.

1994)(ORDER).

³⁸ *Id.* at 1.

³⁹ *Id.* at 3.

Therefore, under the particular circumstances of this case (including the fact that evidence of the victim's prior violent acts may be admissible in any penalty hearing but this Court does not reach that issue in this decision), this Court finds that Defendant has made a sufficient showing that he was "aware" of Defendant's prior violent and aggressive behavior; as stated earlier, "aware[ness] usually implies vigilance in drawing inferences from what one hears. . . ." ⁴⁰ The connection required between the police reports and Defendant's statements has been sufficiently established.

This Court will not however order disclosure of the police reports for the two additional incidents in 1993 and 1995 involving Theodore Smallwood which do not seem to involve "aggressive" or "violent" behavior on Theodore Smallwood's part.

For the reasons set forth above, Defendant's March 9, 2000 Motion to Compel is **GRANTED IN PART and DENIED IN PART**. The Court will make available the State's *ex parte* April 17 letter to Defendant. The State shall immediately produce the police reports for the above described five incidents to Defendant's counsel.

IT IS SO ORDERED.

Enclosure

Very truly yours,

cc: Prothonotary

⁴⁰ Webster's New Word Dictionary 62 (1961).