IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	**ID No. 0509027632**
	)	
WESLEY E. BARTHOLOMEW, JR.	)	
	)	

Submitted: July 5, 2006
Decided: July 13, 2006

R. David Favata, Esq., Deputy Attorney General, Department of Justice, Dover, Delaware. Attorney for the State.

Paul S. Swierzbinski, Esq., Public Defender, Dover, Delaware. Attorney for Bartholomew.

Upon Defendant's Motion Pursuant to 11 *Del.C.* § 3508:
For Hearing**:** **Granted**; For Admission of Evidence: **Deferred**
Upon Defendant's Motion for Issuance of Subpoena for
Information, Otherwise Privileged: **Granted**

YOUNG, Judge

State v. Bartholomew, Jr.
ID No. 0509027632
July 13, 2006

OPINION

Wesley E. Bartholomew, Jr. ("Defendant"), through counsel, has moved for a variety of Orders, all dealing with issues, which could be considered discovery matters. One is a request for a hearing outside the presence of a jury to question the complaining witnesses concerning prior sexual conduct, pursuant to 11 *Del.C.* § 3508(a)(3). Another is to permit the use of obtained information, after appropriate review, in evidence at trial. The last is for a subpoena of material from the Division of Child Protective Services ("Child Protective Services"), the information from which potentially would be utilized for cross-examination purposes.

These will be dealt with separately. The backdrop for each of the requests is the fundamental Delaware and U.S. Constitutional right of a defendant in a criminal case to a fair trial with the aid of competent legal counsel. This, of course, subsumes defendant's confrontation right,[1] the purpose of which is to provide defendant the opportunity to cross-examine witnesses effectively.[2]

Several regulatory provisions may be considered as coming into play in this analysis. Those include 11 *Del.C.* § 3508 (the Delaware "rape shield" law), 11 *Del.C.* § 3509 (admissibility of evidence in rape prosecutions), Superior Court Criminal Rule 16 (on mandatory discovery), Rule 26.2 (on production of witness statements) and 11 *Del.C.* § 9401 *et seq.* (the Victim's Bill of Rights).

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[1] *Weber v. State*, 457 A 2d 674 (Del. 1983).

[2] *Davis v. Alaska*, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985)

Circumstances

For the purposes of this determination, the following are assumed to be facts:

1) Defendant is charged with various kinds of unlawful sexual activities involving the complaining witnesses;
2) The complaining witnesses are brothers;
3) The father of the complaining witnesses is paraphrased in a police incident report as stating that the complaining witnesses had been arrested for molesting a younger brother;
4) The complaining witnesses provided video taped statements to the Child Advocacy Center;
5) The testimony of each complaining witness is critical to the prosecution of the charges against Defendant relative to each complaining witness respectively;

Defendant asserts that the conduction of a fair and complete defense requires his being able, during the pre-trial preparation for trial, to determine the factual nuances surrounding the alleged prior sexual activity of the complaining witnesses involving this younger brother for a variety of purposes. That information, it is claimed, may demonstrate that the present allegations against Defendant were wholly fanciful, having been created entirely to persuade the State to dismiss charges against the complaining witnesses in exchange for providing incriminating evidence against Defendant. Additionally, the "post- arrest" description of activity involving the younger brother, and possibly Defendant, might differ significantly from statements later given to police or to be formulated at a pre-trial (11 *Del.C.* § 3508) hearing. Other potential benefits to the defense can be hypothesized.

However, for these purposes, where limited scope and precision are of concern, the aforesaid reasons are pressed by Defendant.

The State refers to the regulations referred to above (Super. Ct. Crim. R. 16, Crim. R. 26.2, 11 *Del.C.* § 3508), as well as case law,[3] to buttress its position that no requirement exists demanding the provision of such material or opportunity to Defendant, at least at this pre-trial point. To some extent, however, that argument misses the mark.

Issue

The critical question is this: given the Defendant's Constitutional right to a fair trial, encompassing all that means and requires, is there anything which mandates that the Court, it its sound discretion, under the particular circumstances of a specific case, and in the interests of justice, cognizant of Defendant's Constitutional right to confront his accusers through counsel not rendered incompetent by interference with rational investigation and preparation, is prohibited from ordering specifically defined discovery before trial?

Discussion

Turning to the aforestated regulations, we look first to Delaware's Rape

[3] *Jencks v. United States*, 353 U.S. 657 (1957).

Shield law.[4] This statute expressly provides for a hearing, in which discovery testimony of the complaining witnesses may be taken out of the presence of a jury (thereby preventing disparagement of those witnesses in a public arena, where questioning could easily breach the limits that the Court would otherwise impose).

In order to pursue this approach, Defendant must file a written motion stating that the defense has an offer of proof concerning the relevancy of the sexual conduct evidence to be investigated through testimony. Defendant has provided this, specifically though not exclusively in paragraphs five, eight, ten and twelve of his motion.

Defendant must accompany the motion with an affidavit "in which the offer of proof shall be stated." Though the State does not agree, the Court finds that Defendant's properly executed and verified Affidavit, indicating that "the information contained in [the attached] motion is true…," creates the required affidavit.

Then, following the questioning at such a hearing, the Court will determine what evidence evoked is relevant and is not inadmissible, following which the parameters of the questioning and the evidence to be introduced will be determined.

On the issue of relevancy and admissibility, 11 *Del.C.* § 3508 provides, in summary, that prior conduct evidence is expressly not admissible to the question of consent. On the other hand: "Nothing in this section shall be construed to make

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[4] 11 *Del.C.* § 3508

inadmissible any evidence to attack the credibility of the complaining witness."

Defendant, having stated that his pursuit of evidence is to provide for evidence, from at least two different approaches, to affect credibility, the request for a "3508 hearing" is ***Granted.***

As to the use of any discovered evidence at trial, the content must be examined. That, certainly, cannot occur until the testimony emerges at the "3508 hearing." Hence, no determination can be made at this time. When the time for that determination does arrive, all of the customary tests for relevancy and admissibility will be applied. In addition, a balancing analysis will be utilized, as well. The DRE Rule 403 determination will be considered. Further, the contrast between the probative value of any such evidence and the level of disparagement of the witness will be a factor. For example, and merely as a hypothetical example, if testimony of non-victims (through their being observers, for instance) present the same picture as the testimony of the complaining witnesses, then the value of the use at trial of prior conduct in an attempt to show a reason for falsification may be diminished to the point of creating an imbalance, which prevents admissibility.

Finally, then, we come to Defendant's request to obtain information from Child Protective Services, relative to the presumed, though not yet established, charges against the complaining witnesses for prior conduct.

Significant for this consideration is the actual language of the *Jencks* decision. Noting that the demand therein was for specific materials, the purpose was not some

"broad fishing expedition." Further, the statements sought were from witnesses, who were crucial to the case. Those criteria exist here, as well. The Court stated: "The impeachment of that testimony was singularly important to the petitioner." The Court then noted, in language that is critical to this entire consideration: "The interest of the [State] in a criminal prosecution is not that it shall win a case, but that justice shall be done."[5]

The State has, in its response, pointed out that the alleged acts of and potential charges against the complaining witnesses in the case at bar arose out of Maryland. That fact could diminish the effect of the victims' perception of leverage by alleging a Delaware crime to avoid a Maryland charge. It would not, however, eliminate the concern. If statements by these case-crucial complaining witnesses exist, they may very well present a viable course of defense. As *Jencks* observes: "Flat contradiction…is not the only test of inconsistency. The omission…or contrast in emphasis…or even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." Thus, says *Jencks*: in matters relating to the production of evidence, a large discretion must be allowed.

The State takes the position that Super. Ct. Crim. R. 16 and 26.2 prohibit any such discovery. To that effect, the language of the Rules must be addressed. Rule 16 is entitled "Discovery and Inspection." Subsection (a)(1)(A) and (B) require the

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[5] Citing: *Berger v. U.S., 295* U.S. 78.

State to disclose referenced material pertinent to the Defendant, himself. Those do not apply here. Subsection (a)(1)(C), requiring the production of various things "which are material to the preparation of Defendant's defense" may well encompass the requests being made by Defendant here. A requirement is that such items are "within the possession, custody or control of the state (emphasis added)." While not in the prosecuting attorneys's present case file, the material or information sought is clearly something the obtaining of which is under the control of the State.

Subsection (a)(2) does state that "statements by state witnesses or prospective state witnesses: constitute "information not subject to disclosure." However, the context of this section (memoranda, internal documents, investigation…) indicates, quite appropriately, that the defense is not entitled to invade the State's trial preparation. That is clearly the focus and intent of this prohibition.

Quite to the contrary, the defense in this case is looking to inspect statements recorded by agencies not associated, at least at the time of the creation of the statements, with the prosecution of this Defendant. When any such desired statements came into existence, they had little necessarily to do with the preparation for the prosecution of the instant case against Defendant.

Hence, Rule 16 does not bar the Court from acceding to Defendant's request. Consequently, we turn to Rule 26.2. This rule is, in effect, a codification of the principles of *Jencks*. Its terms mandate that the Court, on motion, order (in this case) the attorney general to produce any witness statement in his possession relating

to the subject matter of that witness' testimony, after direct examination, providing for a trial recess for examination by the other side. Interestingly, this requirement does not refer to various types of material "within the possession, custody or control of the state." It refers to a much narrower subject: statements in the possession of the attorney general. Thus, its applicability to this issue is open to debate. Yet, that is not the point. Rule 26.2 applies to a specific discovery order, upon which the Court has no discretion. The statement, in those defined circumstances, shall be ordered produced.

The State cites cases decided directly on the heels of the *Jencks* decision. That is not surprising, since *Jencks* undoubtedly evoked swift defense reactions and applications. Fifty years, nearly, have passed, though. All of the decisions, *Jencks* included, need to be studied for precisely what was said. Each refers to what must be done; what the State must produce.

The case at bar asks what the Court, in its discretion, under given circumstances, within prescribed parameters, may consider requiring. The *Thompson* case[6] relied upon heavily by the State itself states that one can assume the inherent power of the Court to order discovery. It goes on to indicate that sufficient reason needs to exist to exceed items specified in, for instance, Rule 16. That is exactly the texture and composition of discretion.

The State, however, argues that the Rule 26.2 requirement, by intent and by

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[6] *State v. Thompson*, Del. Super., 134 A. 2d. 266 (1951).

practice, decrees that no such disclosure may be ordered at any other time. That, the State asserts, is the present procedure, which provides clarity and predictability. The request by the defense, if granted by the Court, would, in the State's view, open the door to every defense lawyer's demand in every case, crating a very murky pre-trial environment.

Clarity (borrowing Dr. King's comment on longevity) admittedly has its place. It is not, though, the entire consideration. When a fair trial, requiring necessary pre-trial preparation, calls for the Court to determine whether a discovery request is appropriately necessary, nothing in Rule 26.2 prohibits that determination. Moreover, the Constitution's Bill of Rights, Amendment VI, re-adopted by the Delaware Constitution of 1897 in Article I, § 7, proclaims that "the accused shall enjoy the right…to have compulsory process for obtaining witnesses in his favor.

A "witness in Defendant's favor" contemplates a broad scope of possibilities. Certainly this guarantee provides the "compulsory process" of subpoena to enable an accused to present the testimony of his best friend, who can show that Defendant was in Maryland at the time the alleged criminal act occurred in Delaware. Witnesses, however, can be favorable in may other ways. Typically, that sort of thing could be gleaned only through compulsory discovery.

The defense in this case wants to find out if there is evidence, which the superficially antagonistic victims would be privy to or might have created by statements, which would be favorable to Defendant. In this case, the presence of

sexual activity involving the victims and other family members, the non-disclosure of which benefits the victim, could be favorably as a defense theory. Defense counsel in this case does not have self-evident material to support his theory. Here, defense counsel must probe with questioning into a relevant, potentially favorable area.

So, Defendant's requests can be put to the sound discretion of the Court.

Now, of course, this is a probe into the perhaps illegal, perhaps indiscreet, perhaps disparaging sexual background of the complaining witnesses. Accordingly, attention must be paid to Chapter 94 of the Delaware Code: the Victim's Bill of Rights, since § 9401(1) includes the charges herein involved (11 *Del.C.* § 773). Section 9403 addresses the areas to be protected from disclosure. These specifically concern identity issues: address, phone number, place of employment. Even there, the determination of good cause is left to the Court's discretion. However, none of that is pertinent here. Defendant does not request any such information.

Therefore, we look to Defendant's request. It is not a "fishing expedition." The Defendant requests inspection of official records for a specified and narrowly defined area of information: the description by the complaining witnesses of either their prior conduct regarding a younger brother or their confrontations with Defendant. Additionally, this request was made withing three weeks of the trial date. That is another significant factor. The request for potentially disparaging material was not pursued as some automatic, "shot-gun" discovery request early on,

where the need for any such invasion would have been questionable. Rather, it was made when the concerns for the actual trial preparation became acute; and, as noted, was properly constrained.

Accordingly, Defendant's Motion for an Order to require Records Custodian of Child Protective Services of the Department of Services for Children, Youth and Their Families, at the office of Paul S. Swierzbinski, The Sykes Building, 45 The Green, Dover, Delaware 19901, (or legible copies thereof) concerning Brandon Edwards, Devon Edwards, Kyle Christopher Edwards and Dillon Edwards on or before 2:00 p.m., Wednesday, July 12, 2006, is ***Granted.***

Conclusion

THEREFORE, Defendant's motion for *in camera* hearing to take the testimony of the complaining witnesses is ***Granted***, and is scheduled for Thursday, July 13, 2006 at 3:00 p.m.; decision on Defendant's motion to have admitted evidence obtained at said hearing is ***Deferred***, pending the taking of the said testimony; Defendant's motion to inspect specified records is ***Granted***.

SO ORDERED.

/s/ Robert B. Young

Judge

RBY/ds
oc: Prothonotary
cc: File