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MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA, Petitioner, v. JOHN LEE STEPHENS, Respondent.	)	Case No. 2D18-4647

Opinion filed December 20, 2019.

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Mark D. Kiser, Judge.

Ashley Moody, Attorney General, Tallahassee, and Dawn A. Tiffin, Assistant Attorney General, Tampa; and Elba Caridad Martin, Assistant Attorney General, Tampa (substituted as counsel of record), and Peter Koclanes, Assistant Attorney General, Tampa, for Petitioner.

Julianne M. Holt, Public Defender, Tampa, and Kay Murray and Hanna M. Renna, Assistant Public Defenders, Tampa, for Respondent.

BLACK, Judge.

In this certiorari proceeding the State seeks review of the order granting John Stephens' motion to compel discovery of the operational plan that was prepared by the Hillsborough County Sheriff's Office (HCSO) prior to the controlled drug buy that resulted in the charges against him: possession and sale of cannabis. The State argues that the trial court departed from the essential requirements of law in granting Stephens' motion to compel because Stephens failed to make a showing of materiality as required by Florida Rule of Criminal Procedure 3.220(f). We agree and grant the State's petition.

"Certiorari is appropriate when a discovery order departs from the essential requirements of law, causes material injury to a petitioner throughout the remainder of the proceedings, and effectively leaves no adequate remedy on appeal." Bailey v. State, 100 So. 3d 213, 216 (Fla. 3d DCA 2012) (citing Allstate Ins. Co. v. Langston, 655 So. 2d 91, 94 (Fla. 1995)). Petitions for writs of certiorari have been granted in circumstances similar to those presented here. See State v. Gillespie, 227 So. 2d 550, 552, 561 (Fla. 2d DCA 1969) (granting State's petition for writ of certiorari which sought review of a trial court's order compelling an in camera inspection of all records, files, evidence, and grand jury testimony pertaining to the case); Demings v. Brendmoen, 158 So. 3d 622, 623-25 (Fla. 5th DCA 2014) (granting sheriff's petition for writ of certiorari seeking review of a trial court's order compelling production of a law enforcement operational plan where the trial court failed to give the sheriff a meaningful opportunity to be heard with regard to the defense's discovery request).

Stephens filed a motion to compel production of the law enforcement operational plan. Although law enforcement operational plans are not included in the

State's extensive list of discovery obligations set forth in rule 3.220(b), rule 3.220(f) provides that "[o]n a showing of materiality, the court may require such other discovery to the parties as justice may require." "In the discovery context, material means reasonably calculated to lead to admissible evidence." Demings, 158 So. 3d at 625 (quoting Franklin v. State, 975 So. 2d 1188, 1190 (Fla. 1st DCA 2008)). Importantly, "[t]he mere possibility that information may be helpful to the defense in its own investigation does not establish materiality." Id. (first citing United States v. Agurs, 427 U.S. 97, 109-10 (1976); and then citing Wright v. State, 857 So. 2d 861, 870 (Fla. 2003)).

At the hearing on the motion to compel, the State argued that Stephens bore the burden of establishing materiality as a threshold matter. In response, Stephens' counsel set forth the type of information that she anticipated might be contained in the operational plan, including an indication that law enforcement was familiar with Stephens' physical appearance, clothing preferences, and the locations he frequented. Defense counsel asserted that "there could be something in [the operational plan] that shows, they already knew who he was, but maybe they didn't. That could go to identification. I have no idea because I'm unable to see it." Following defense counsel's argument, the court found a material need for disclosure of the operational plan. Counsel for the HCSO was then given an opportunity to present argument and reiterated the State's assertion that Stephens was required to establish materiality: "I still would like to see something from the client explaining why this material - - this is a misidentification. The client should know it's a misidentification. It's the wrong person." In response, Stephens' counsel argued that the defense bore no

such burden. The court then ordered the State to produce the operational plan. The court did, however, permit the State to provide the court with an unredacted copy of the operational plan and a proposed redacted copy of the operational plan for consideration in camera.[1]

Despite defense counsel's contention to the contrary, the burden of establishing the materiality of the operational plan did fall on Stephens. See Jackson v. State, 202 So. 3d 97, 101 (Fla. 4th DCA 2016); Demings, 158 So. 3d at 625. Stephens failed in this regard as he advanced nothing more than a "mere possibility" that the operational plan might aid in his defense. Compare Taylor v. State, 612 So. 2d 626, 627, 630 (Fla. 1st DCA 1993) (holding that the trial court did not err in denying Taylor's motion to compel disclosure pursuant to rule 3.220(f) of law enforcement records containing information about all other controlled buys involving the confidential informant (CI) during the year of Taylor's arrest for the sale or delivery of cocaine as well as the CI's criminal history where the reason advanced for needing the information—"to use it to impeach [the CI] and/or [the officer] regarding the details of each drug transaction"—was too indefinite), State v. Zamora, 534 So. 2d 864, 871 (Fla.

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[1]It is somewhat unclear whether the court intended to allow the defense to have access to both the unredacted and redacted versions of the operational plan. After the trial court ordered the State to produce an unredacted and a redacted copy of the operational plan for an in camera inspection, Stephens' counsel asked whether she would be allowed to give her input on the redactions, to which the court responded, "No." However, the court also indicated the following shortly thereafter:

> [DEFENSE COUNSEL]: And you'll be given the original copy and the proposed redacted copy.
> THE COURT: You'll get an unredacted copy and a redacted copy. I'll review it and then can, on the record, state if I have any disagreements with those items that are redacted.
> [DEFENSE COUNSEL]: Okay. Great. Thank you.

3d DCA 1988) (holding that defendants were not entitled to the disclosure of the confidential informant where they "never even asserted a specific defense to the crimes charged below, much less made an evidentiary showing of same, and thus made utterly no showing that the confidential informant would be a material witness in support of a possible defense"), and Brown v. State, 493 So. 2d 80, 81 (Fla. 1st DCA 1986) ("In his motion [to compel], defendant alleged that the [files] might contain evidence which might be useful for impeachment of the inmates for their reputation for truth and veracity and might contain other evidence concerning bias. We hold the trial court properly denied access to the inmate [files] because the motion was too indefinite and was plainly in the nature of a fishing expedition."), with Franklin, 975 So. 2d at 1189-90 ("Not knowing the names of the inmates on the list prejudiced the defense's ability to prepare. The other inmates' presence in the prison yard at the time of the [mass disturbance in the prison yard] giving rise to the charge against Mr. Franklin[—striking a corrections officer from behind—]made their names material within the meaning of Florida Rule of Criminal Procedure 3.220(f). In the discovery context, material means reasonably calculated to lead to admissible evidence. Additional eyewitness testimony might have led to a different result at trial." (citations omitted)), and Briskin v. State, 341 So. 2d 780, 781-83 (Fla. 3d DCA 1976) (concluding that Briskin—who was charged with possession of a stolen vehicle and five counts of temporary and unauthorized use of a vehicle—should have been entitled to discovery of the police file pertaining to an individual who, according to Briskin, had conned Briskin and was arrested on similar charges). Moreover, "[t]here is no constitutional right to discovery, and the Supreme Court of the United States has said there is 'no constitutional requirement that the prosecution make

a complete and detailed accounting to the defense of all police investigatory work on a case.' " Perry v. State, 395 So. 2d 170, 173 (Fla. 1980) (quoting Moore v. Illinois, 408 U.S. 786, 795 (1972)).

We recognize that it may be difficult in certain circumstances for a trial court to properly evaluate whether a defendant has met his or her burden of establishing that the requested information is material to the defense without first revealing the information itself. But "[t]he rules provide a mechanism for a defendant to make a showing of materiality without revealing privileged or protected information." Jackson, 202 So. 3d at 101. Rule 3.220(m)(1) provides that "[a]ny person may move for an order denying or regulating disclosure of sensitive matters" and that "[t]he court may consider the matters contained in the motion in camera." See Jackson, 202 So. 3d at 101-02 (explaining that "to avoid revealing privileged communications or protected work product, petitioner could ask the trial court to review his showing of materiality for the additional discovery in camera" pursuant to rule 3.220(m)); see generally Brown v. State, 65 So. 3d 629, 630 (Fla. 4th DCA 2011) (discussing Brown's motion for disclosure of the confidential informant and the procedure under which the motion was considered, namely, an in camera hearing pursuant to rule 3.220(m) to determine materiality at which only the State, the confidential informant, and the judge were present). In this case, however, Stephens did not request that the court review the operational plan in camera prior to ordering its disclosure to determine if he had established that it was material to his defense. Cf. Little v. State, 754 So. 2d 152, 153 (Fla. 2d DCA 2000) (concluding that the trial court departed from the essential requirements of law by not permitting the testimony based on attorney-client privilege

without first conducting an in camera hearing as requested by Little to determine if in fact the testimony sought by Little was subject to that privilege (citing Fla. R. Crim. P. 3.220(m))).

The disclosure of the operational plan could impact the safety of law enforcement and compromise their investigatory techniques. See Demings, 158 So. 3d at 625 n.3 ("Requiring law enforcement officers to include irrelevant or sensitive material in their disclosures to the defense would not serve justice. Many investigations overlap and information developed as a byproduct of one investigation may form the basis and starting point for a new and entirely separate one." (quoting Fla. R. Crim. P. 3.220 (Comm. Notes, 1972 Amend.))). And because Stephens failed to show that the disclosure of the operational plan was material to his defense, the trial court departed from the essential requirements of law by ordering its disclosure. See State v. Borrego, 970 So. 2d 465, 468 (Fla. 2d DCA 2007) ("Because Borrego has not shown that disclosure was necessary for the preparation of his defense or that his constitutional rights were infringed upon, the trial court departed from the essential requirements of the law in ordering the State to disclose the CI's identity. Accordingly, we grant the State's petition and quash the order compelling disclosure."). Therefore, we grant the State's petition and quash the order compelling production of the operational plan.

Petition for writ of certiorari granted; order quashed.

MORRIS and BADALAMENTI, JJ., Concur.