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NOT TO BE PUBLISHED OPINION

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RENDERED: DECEMBER 17, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000075-MR

NORMAN W. GRASCH — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
NOS. 10-CR-01342 AND 11-CR-01986

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Norman Grasch appeals from his conviction for manufacturing methamphetamine and for being a persistent felony offender in the second degree. For the following reasons, we affirm.

I. BACKGROUND.

Officer Satterly, responding to a complaint about a barking dog, discovered Grasch sleeping on a bench in his aunt's backyard. While he was attempting to awaken Grasch, Officer Satterly noticed a coffee grinder and a container of Coleman fuel in a backpack that was on the bench near Grasch. After waking Grasch, Officer Satterly patted him down and found 30 pseudoephedrine pills, which, in conjunction with the coffee grinder and fuel, led him to believe Grasch had a portable methamphetamine lab. Officer Satterly arrested Grasch and charged him with manufacturing

methamphetamine, and Grasch was subsequently charged with being a persistent felony offender in the second degree.

This case was assigned to Judge Perry, who presided over the majority of the pre-trial proceedings; however, because Judge Perry was scheduled to be out of town the week of trial, Judge Morris presided over the trial. At one of the pre-trial proceedings, the Commonwealth's attorney indicated that he had been advised by Grasch's counsel that she had a transcript of a previously held suppression hearing.[1] The Commonwealth's attorney moved the court to order Grasch's counsel to provide him with a copy of the transcript so that he could verify the transcript's accuracy in the event Grasch used it at trial. Grasch's counsel objected, noting that the Commonwealth could obtain a copy of the video recording and make its own transcript to use for comparison purposes at trial. Furthermore, Grasch's counsel noted that she was not going to introduce the transcript into evidence and would not know whether she would even need to use it until the witnesses from the suppression hearing testified. Judge Perry found that the transcript was attorney work product and that counsel had the obligation to use it in good faith, which he anticipated counsel for Grasch would do. Therefore, he did not order Grasch's counsel to give a copy of the transcript to the Commonwealth at that time. However, Judge Perry recognized the accuracy of the transcript might become an issue at trial, and he stated that Judge Morris could address the Commonwealth's motion then.

[1] For reasons that are unclear in the record, Judge Morris presided over the suppression hearing.

Following jury selection, the Commonwealth moved Judge Morris to order Grasch's counsel to provide a copy of the suppression hearing transcript. Counsel for Grasch argued that Judge Perry had already ruled against the Commonwealth on that issue. The Commonwealth argued that Judge Perry had stated the decision would be made at trial and, since trial had begun, it was renewing its request. Judge Morris stated that he would review the video of the hearing and determine from that review what Judge Perry had actually ruled.

The next day, Judge Morris stated that he had reviewed the video and concluded that Judge Perry had not ruled on the Commonwealth's initial motion, but had indicated the decision would be Judge Morris's to make. Judge Morris then stated that, although the transcript might be work product, it was not privileged, and he ordered Grasch's counsel to provide a copy to the Commonwealth. In support of his decision, Judge Morris noted that providing the transcript prior to the witness's testimony would make the trial run more smoothly. Neither party introduced the transcript into evidence when examining the two witnesses who testified at that hearing. Grasch's counsel did not use the transcript; however, the Commonwealth did use the transcript to impeach Grasch's aunt when she testified at trial.[2]

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[2] The Commonwealth, in its brief, states, "The transcript was never referred to or used; therefore, there must not have been any discrepancies between the officer's testimony at the hearing and his testimony at trial." While it is true that Grasch did not use or attempt to use the transcript, the Commonwealth did use it extensively during its cross-examination of Grasch's aunt. Therefore, that statement by the Commonwealth is not correct.

Grasch argues on appeal that, because Judge Perry had previously ruled on the Commonwealth's motion to compel production of the suppression hearing transcript, Judge Morris's subsequent ruling was contradictory and erroneous. Grasch also argues that Judge Morris's order requiring Grasch to produce that transcript violated the attorney work product protection afforded by Kentucky Rule of Criminal Procedure (RCr) 7.24. We set forth additional background information as necessary below.

II. STANDARD OF REVIEW.

We review a trial court's rulings regarding discovery issues for abuse of discretion. *See Commonwealth v. Nichols*, 280 S.W.3d 39, 43 (Ky. 2009).

III. ANALYSIS.

Grasch appears to be making three arguments: (1) Judge Morris incorrectly interpreted Judge Perry's ruling and impermissibly altered that ruling; (2) the Commonwealth impermissibly and unethically continued to raise the issue of the transcript after Judge Perry had ruled on it; and (3) the transcript was protected attorney work-product and not subject to discovery by the Commonwealth.

A. Judge Morris's Ruling Was Not An Impermissible Alteration of Judge Perry's Ruling.

Initially, we note that a trial court "retains broad discretion to revisit its interlocutory rulings at any time prior to the entry of a final judgment[.]" *Moore v. Com.*, 357 S.W.3d 470, 496-97 (Ky. 2011), *as modified on denial of reh'g* (Nov. 23, 2011). That discretion belongs to the trial court, not to a particular trial judge. Judge Perry would have been entitled to exercise his discretion to

alter his pre-trial ruling at trial and Judge Morris inherited that same discretion when he presided over trial in Judge Perry's place. While it is certainly a good practice for judges to refrain from making inconsistent rulings, the fact that Judge Perry may have ruled one way and Judge Morris another is not, in and of itself, an abuse of discretion.

Furthermore, whether Judge Morris's ruling contradicted Judge Perry's is not as clear cut as Grasch argues. As noted above, at a pre-trial hearing, Judge Perry stated that he would not order Grasch to give a copy of the transcript to the Commonwealth at that time. However, he stated that, if the accuracy of the transcript became an issue, either he or Judge Morris could revisit his ruling.

Grasch now argues Judge Morris mistakenly interpreted Judge Perry's ruling and should not have re-visited Judge Perry's order. After reviewing the record, it is clear to us that Judge Perry's ruling was open to interpretation. The interpretation Grasch espouses, that Judge Perry's ruling would not be revisited until Grasch attempted to use the transcript to impeach the Commonwealth's witness, is plausible. However, we cannot say that Judge Morris's interpretation, that Judge Perry left the issue undecided, is completely implausible. Judge Perry stated that, at trial, either he or Judge Morris would decide the issue if the accuracy of the transcript was an issue. The Commonwealth argued before Judge Morris that the only reason it wanted the transcript was to check its accuracy prior to its use by Grasch. Thus, the accuracy of the transcript was an issue at trial, albeit the same issue raised by

the Commonwealth prior to trial. Therefore, we cannot categorically say that Judge Morris's interpretation of Judge Perry's order was erroneous, or that he abused his discretion by making his ruling.

B. The Commonwealth Did Not Impermissibly and Repeatedly Raise the Issue Once Judge Perry Had Decided It.

In support of his argument that the Commonwealth impermissibly, unethically, and repeatedly raised the transcript issue, Grasch cites to *Moore v. Commonwealth*, 357 S.W.3d 470 (Ky. 2011) and *Kentucky Bar Ass'n v. Blum*, 404 S.W.3d 841 (Ky. 2013). However, the fact that the Commonwealth raised this issue twice is not the repetitious filing or raising of motions that we condemned in *Moore* and *Blum*.

In *Moore*, the court ordered the Commonwealth to perform DNA testing on several items, including pants and a pair of shoes. Following the court's order, the Commonwealth filed a motion to reconsider, advising the court that the pants and shoes had been lost. The Commonwealth then made a second motion asking the court to reconsider its order to test the pants and shoes. The court declared the order moot and therefore denied the motions to reconsider. The Commonwealth argued on appeal that the court erred by denying its motions to reconsider. This Court, noting that the Commonwealth had not been aggrieved by the trial court's denial of the motions to reconsider, stated that:

> Such repetitious motions are improper. While it is true that under CR 54.02 the trial court retains broad discretion to revisit its interlocutory rulings at any time prior to the entry of a final judgment, that discretion is properly invoked only when there is a

> *bona fide* reason for it, *i.e.*, a reason the court has not already considered. *See Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99 (Ky. App. 2011); *Bank of Danville v. Farmers National Bank of Danville*, 602 S.W.2d 160 (Ky. 1980). Otherwise a motion to reconsider amounts to no more than badgering the court, a practice that could well be deemed a violation of Civil Rule 11. The bench and bar are admonished to take notice that this practice of filing multiple vexatious motions to reconsider is not supportable under the Civil Rules and should be discontinued.

Moore v. Com., 357 S.W.3d 470, 496-97 (Ky. 2011), *as modified on denial of reh'g* (Nov. 23, 2011). In *Blum*, the attorney did not simply ask the court to reconsider a previous ruling, he "engaged in conduct intended to disrupt the tribunal when he filed repetitive pleadings, delayed the adjudicatory process, and sought extra-judicial resolution in order to receive a *de novo* tribunal hearing contrary to the Order of the Harlan Circuit Court." 404 S.W.3d at 853.

The Commonwealth's behavior in this matter, asking Judge Morris to make a ruling on its motion to compel production of the suppression hearing transcript, does not rise to the level of the conduct we warned against in *Moore* and *Blum*. Because Judge Perry's ruling was open to interpretation and dependent on subsequent circumstances, we cannot say that the Commonwealth's motion even amounted to a motion to reconsider let alone an impermissibly repetitive motion to reconsider.

For the foregoing reasons, Grasch's argument regarding the Commonwealth's behavior is not persuasive.

C. Judge Morris Did Not Commit Reversible Error When He Ordered Grasch to Give a Copy of the Suppression Hearing Transcript to the Commonwealth.

Kentucky Rule of Criminal Procedure (RCr) 7.24 provides for both mandatory and permissive discovery by the Commonwealth. Pursuant to RCr 7.24(3)(a), if the Commonwealth complies with a defendant's request to produce "results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth," (RCr 7.24(1)(b), then the defendant is required to permit the Commonwealth access to defense materials in those same categories. Pursuant to RCr 7.24(3)(b), if the court grants a defendant's motion for an order permitting "the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth," RCr 7.24(2), then the court may grant reciprocal discovery to the Commonwealth. However, the Commonwealth's discovery under both RCr 7.24(3)(a) and (b) is limited to those items the defendant intends to introduce as evidence.

Grasch stated at the pre-trial hearing and during trial that the transcript was not subject to discovery because it was work product, and he did not intend to introduce it into evidence. The Commonwealth argues that, because Grasch indicated he might use the transcript at trial, it was discoverable under RCr 7.24. According to the Commonwealth, because the parties cannot know

what will be admitted into evidence until the trial begins, the rule should be interpreted to cover what the defendant intends to use, not just what he intends to introduce as evidence. We disagree with the Commonwealth. The language in RCr 7.24 is clear, only that which the defendant intends to introduce into evidence is discoverable. Therefore, Grasch is correct that the transcript was not discoverable under either the mandatory or permissive discovery rules of RCr 7.24.

However, our analysis does not end there.

> Our case law strongly supports the trial court's discretion in interpreting the meaning of RCr 7.24, as well as in making rulings outside the strict confines of the criminal rule in order to enforce the "spirit" it is intended to advance. Broad discretion in discovery matters has long been afforded trial courts in both civil and criminal cases.

Commonwealth v. Nichols, 280 S.W.3d 39, 42-43 (Ky. 2009). Trial courts' discretion is not unfettered. While it "should not be cribbed by the exact wording of RCr 7.24," the court must remain "sensitiv[e] to the dominant rule of due process and all which that affords a criminal defendant must always be close at hand. This is not easy. It is the rocket science of trial judging." 280 S.W.3d at 45.

In this case, Grasch sought to protect from disclosure a transcript of a public hearing. The Commonwealth sought a copy of the transcript to ascertain whether it accurately reflected what took place during that hearing in the event Grasch used the transcript at trial. Grasch did not argue, and does not now argue, that anything in the transcript reflected counsel's impressions, conclusions, opinions, or legal theories. It simply contained a verbatim

recitation of a public hearing. Judge Morris, recognizing that any issues regarding the accuracy of the transcript could result in a significant delay while the parties compared the transcript to the video, ordered Grasch to provide a copy of the transcript to the Commonwealth. We cannot say that Judge Morris abused his discretion by doing so.

Furthermore, while Grasch's argument that the Commonwealth could have generated its own transcript is correct, if the Commonwealth had generated its own transcript that would not have been determinative of the accuracy of Grasch's. In the event the two transcripts differed, the parties would have had to stop the trial, review the video, and then obtain a ruling regarding which transcript was correct. Judge Morris was correctly and appropriately attempting to eliminate that possibility.

Finally, we note that Grasch made the following argument:

> It is clear that the prosecution had every opportunity to obtain video of the suppression hearing on its own and, with its own effort and sweat, prepare a transcript of such. It was simply faineance on the part of the prosecution; the prosecution, learning that . . . defense counsel had caused a transcript to be made, and not wanting to waste its own effort, or lacking the industry to cause a transcript to be made by its own effort, sought the path of least resistance, and the successor trial court facilitated such sloth.

Such personal attacks are, at best, unpersuasive, particularly when Grasch did not attempt to use the transcript during trial and has not specified how he was harmed by its disclosure.

IV. CONCLUSION.

For the foregoing reasons, we affirm.

All sitting. Minton, C.J.; Abramson, Cunningham, Keller, Venters, and Wright, JJ., concur. Noble, J., dissents by separate opinion.

NOBLE, J., DISSENTING: I disagree with the majority opinion to the extent that it affirms the trial court's order requiring disclosure of the defense's unofficial transcript of the suppression hearing. The majority discusses only Criminal Rule 7.24 in deciding this question but ignores the work-product rule, Civil Rule 26.02(3), which expressly prohibits disclosure of any document produced in anticipation of litigation absent a substantial showing by the party seeking the document. Because the trial court did not make the required finding and, more importantly, the transcript was obviously made in anticipation of litigation, the order of its production was error. And such an order undermines the adversary process and harms the administration of justice. I would thus reverse the Appellant's conviction.

Criminal Rule 7.24, referenced by both parties, provides for the discovery of documents and other physical evidence in the Commonwealth's possession if the "items sought may be material to the preparation of the defense and that the request is reasonable." RCr 7.24(2). (Of course, the Commonwealth must also provide any evidence that is exculpatory in nature.) If the defendant obtains this discovery, he must reciprocate, but only as to items he "intends to introduce into evidence." RCr 7.24(3)(a). The rule allows broader discovery against the Commonwealth than it does against the defense, but in either case, the discovery allowed is narrower than that in a civil case. The rule concerns

only items that are material to the defense or those that the defense *intends to introduce at trial.*

But this rule does not allow discovery of an attorney's work product. In fact, it does not address attorney work product at all. To address that issue, which is actually the one before us, we must look to the Civil Rules, which also apply in criminal cases unless a specific criminal rule is to the contrary. RCr 13.04.

The rule in question is Civil Rule 26.02(3), which we have held applies to criminal proceedings, *O'Connell v. Cowan*, 332 S.W.3d 34, 42 (Ky. 2010). The rule is sometimes called the "work-product rule," and is frequently thought to be aimed at protecting against the disclosure of a lawyer's impressions or strategies. But that is not the rule's only purpose; it is also to protect the work-product documents themselves from discovery. That rule specifically provides that documents or other things "prepared in anticipation of litigation or for trial" are, by default, *not* discoverable. Instead, they may only be ordered produced "upon a showing that the party seeking discovery has *substantial* need of the materials in the preparation of his case and that he is *unable* without *undue hardship* to obtain the substantial equivalent of the materials by other means." CR 26.02(3) (emphasis added). Even then, *after* the court has determined that the moving party has satisfied the requirement of showing substantial need and undue hardship, and is entitled to the materials, the court must go one step further and protect impressions and strategies in the material the court is ordering to be turned over. *Id.*

There is little question that the transcript produced by the defense, as opposed to the recording of the hearing itself, is a document produced in anticipation of litigation and thus is work product. A working transcript of a hearing is often made by defense counsel to help counsel discuss with the defendant the testimony given at that hearing. The transcript obviously is not certified to be an accurate copy of the proceedings sufficient to be admitted into evidence in court. In fact, counsel often do these transcriptions themselves while listening to the recordings, or have a staff person do it for them. Perfect accuracy is not required, because this is simply a *working* document. There could be no clearer example of attorney work product. And that is exactly what the transcript which is at issue in this case was—attorney work product.

Somehow, the Commonwealth's Attorney learned from defense counsel that she had made a transcript of the suppression hearing. The Commonwealth's Attorney then asked the trial court to order discovery of that transcript in order to check its accuracy, in the event defense counsel used it at trial. Defense counsel properly objected, stating that the Commonwealth had access to the recording and could make its own copy. Defense counsel further informed the court that she did not intend to introduce the document at trial, and that it was merely for possible reference if the witnesses at the suppression hearing testified at trial.

In fact, the "transcript" was no more than if defense counsel had made notes while listening to the recording. There can be no debate that such notes would not be discoverable. CR 26.02(3). Neither is this "transcript."

The trial judge, at that time Judge Perry, initially, and correctly, found that the document was work product, stated that he was certain defense counsel would use the document ethically, and did not order defense counsel to provide the Commonwealth with a copy. Judge Perry recognized that the accuracy of the transcript could become an issue at trial, if used for impeachment. He told the Commonwealth's Attorney that if it arose, Judge Morris, who was going to preside over the trial due to Judge Perry's unavailability, could address the issue then.

Had that been the end of the issue regarding the "transcript," all would be well. However, at trial, the Commonwealth again asked for a copy of the transcript. Defense council rightfully claimed that Judge Perry had ruled on the issue, but Judge Morris reviewed the hearing on the motion, and concluded that the issue was not final. He was correct, of course, because a trial court can modify its previous orders until it loses jurisdiction of the case. *See J.P.Morgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902 (Ky. 2014). Judge Morris found that while the transcript might be work product, it was not privileged, and giving the transcript to the Commonwealth would make the trial run smoother.

As it turned out, defense never used the transcript at trial, but the Commonwealth *did*. This ironically put the defense in the position of having its own work product used against it.

The trial court simply applied the wrong rule, confusing the evidentiary rules on privilege (which go to admissibility and do not address work product),

instead of the procedural rule limiting discovery of work product. Certainly the transcript was not privileged material—it was an approximation of material contained in the court record. But it certainly was material not subject to discovery.

Though the privilege against producing work product is not absolute, there is no question that the Commonwealth did not make the required showing to obtain the transcript here. The Commonwealth did not need the defense counsel's "transcript" in order to prepare its case. Nor was it an undue hardship to either listen to the recording or make its own "transcript." The Commonwealth could not justify forced discovery of this document. It is crystal clear that this document was prepared in anticipation of litigation or for trial.

And Judge Perry put his finger on the real problem: whether the "transcript" was accurate or not. To be admitted into evidence, accuracy of a document purporting to be the testimony given in a court proceeding is necessary. To that end, court reporters are required to certify the accuracy of the document, and to submit an official transcript to opposing parties to allow for errata review. By the time a document makes its way into the court record, the reporter and both sides are in agreement as to the accuracy of a document, or that the accuracy of some parts cannot be confirmed. This process is not a nullity. To be admitted, both sides must agree on accuracy of a document.

But defense counsel had no intention of trying to admit the transcript, and so informed the court. And, at best, the document could be used to help defense counsel formulate questions to ask the witnesses. It could not be used

for verbatim impeachment purposes unless both parties agreed the statement was accurate. Judge Perry was correct when he said that was a question for the trial judge, when and if such an issue arose.

For that reason I strongly disagree with the majority holding that Judge Morris committed no error in ordering the discovery. He obviously did. And, under different circumstances, such an error could have had a catastrophic effect on the defense. But the Appellant has made no argument showing how he was prejudiced by this ruling. If Appellant could point to inaccuracies in the transcript, or that the Commonwealth used the material improperly, then this Court could give weight to the error. Here, there is no showing of prejudice from the ruling other than to state that the material is work product.

Nevertheless, this conviction should be reversed. This Court has previously recognized that work product plays a unique role in a criminal case and that the prejudice in such a case caused by erroneously ordered production of work product goes to the adversary process itself:

> The need to freely formulate legal theories, discuss the investigation of the case, and speak with victims and witnesses, is most especially true in criminal prosecutions, where prosecutors must constantly be cognizant of the rights of all involved—the defendant, the victim(s), witnesses and the Commonwealth. As recognized by the Supreme Court,
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> > Although the work-product doctrine most frequently is asserted as a bar to discover [sic] in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.

O'Connell v. Cowan, 332 S.W.3d 34, 42 (Ky. 2010) (quoting *United States v. Nobles*, 422 U.S. 225, 238 (1975)). Though *O'Connell* was about the prosecution's work product, its concerns necessarily have more force when applied to the defense's work product. Simply put, work-product violations have a weight all their own, essentially allowing the party who is wrongfully allowed to discover it to put its thumb on the scales of justice.

Consequently, I would reverse this case. Failing to recognize this error as error, and error going to fundamental fairness at that, can only invite further improper requests for discovery of work-product material, to the detriment of the adversary process.

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