IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-86,409-01

In re STATE OF TEXAS ex rel. JENNIFER A. THARP, relator

ON STATE'S PETITION FOR WRIT OF MANDAMUS TO THE THIRD COURT OF APPEALS COMAL COUNTY

YEARY, J., filed a dissenting opinion in which KELLER, P.J., and KEEL, J., joined.

DISSENTING OPINION

The Texas Family Code makes any "video recording of an interview of a child" made by a children's advocacy center "the property of the prosecuting attorney involved in the criminal prosecution of the case involving the child." TEX. FAM. CODE § 264.408(d). Both the Family Code and the Texas Code of Criminal Procedure render such a video recording subject to discovery by a criminal defendant. *See* TEX. FAM. CODE § 264.408(d-1) ("A video recording of an interview described in Subsection (d) is subject to production under Article 39.14, Code of Criminal Procedure[.]"); TEX. CODE CRIM. PROC. art. 39.15(a)(3) ("In the manner provided by this article, a court shall allow discovery under Article 39.14 of property

or material . . . that is described by Section 2 or 5, Article 38.071, of this Code."). Thus, a trial court is required to permit discovery of this "property or material" belonging to the prosecutor, but that discovery must conform to the dictates of Article 39.15 of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. art. 39.14(a) (requiring the discovery of matters shown to be "material" "except as provided by Article 39.15").[1]

Article 39.15 contains an unmistakable prohibition: "A court shall deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce" property or material, including a video recording of a child victim's interview. TEX. CODE CRIM. PROC. art. 39.15(c). This prohibition, however, is subject to a proviso: "provided that the state makes the property or material reasonably available to the defendant." *Id*. Section 264.408(d-1) of the Family Code contains the same clear prohibition applicable to the specific context of video recordings of child-victim interviews: A court may not grant a defendant's request for a reproduction of that recording, subject to the same proviso that the prosecutor make the recording "reasonably available" to the defense "under Article 39.15(d), Code of Criminal Procedure." TEX. FAM. CODE § 264.408(d-1). Subsection (d) of Article 39.15, in turn, specifically defines what constitutes reasonable availability for purposes of Subsection (c).

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[1] Prior to amendment in 2013, but after the occurrence of the offense for which the real party in interest was indicted in this case, Article 39.14 made any discovery of certain "property or material," including pretrial recorded statements from child victims under Article 38.071, subject to the requirements of Article 39.15. Even today, under the current statute, court-ordered discovery is "[s]ubject to the restrictions provided by Section 264.408, Family Code, and Article 39.15" of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 39.14(a) (as amended by Acts 2013, 83rd Leg., ch. 49, § 2, eff. Jan. 1, 2014).

By its terms, a video recording of a child-victim's interview by a children's advocacy center is categorically to be regarded as having been made "reasonably available" to the defense "if, at a facility under the control of the state, the state provides ample opportunity for the inspection, viewing, and examination of the property or material by the defendant, the defendant's attorney, and any individual the defendant seeks to qualify to provide expert testimony at trial." TEX. CODE CRIM. PROC. art. 39.15(d).

In this way, Article 39.15 and Section 264.408(d-1) combine to comprehensively define the scope of permissible discovery of video recordings of child-victim interviews conducted by a children's advocacy center. Members of the defense team are given unfettered access to "inspect, view, and examine" the originals of such recordings; but, so long as that access is granted, they are not permitted to have them reproduced in any way. The legislative intent underlying these provisions is self-evident, as is the purpose behind a similar statute, Article 38.45 of the Code of Criminal Procedure, which prohibits a court from making such a recording available "for copying or dissemination to the public"—at least not "[d]uring the course of a criminal hearing or proceeding[.]" TEX. CODE CRIM. PROC. art. 38.45(a). In order to insulate child victims from the further trauma that dissemination of such interviews might cause, the Legislature has enacted a categorical prohibition against any kind of reproduction, even in the name of reasonable discovery. The Legislature is well within its prerogative to regulate discovery in just this way. *See Powell v. Hocker*, 516 S.W.3d 488, 497 n.15 (Tex. Crim. App. 2017) ("That it might be more convenient in facilitating [attorney

consultation] for a defendant to be able 'to have copies' of [discovery materials] does not mean that a legislative ban on obtaining copies violates either due process of the right to the effective assistance of counsel.").

Respondent's initial order granting the real party in interest's motion to obtain a transcript of the video recordings in this case (to which he has been granted the access Subsection (d) requires) was, therefore, unquestionably subject to a higher court's grant of mandamus relief.[2] The trial court is explicitly and categorically prohibited from granting such a discovery motion from the defendant under Article 39.15(c). Had the trial court stood by that order, Petitioner could now demonstrate a clear right to the relief he seeks. *See In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013) ("A clear right to relief is shown when the facts and circumstances dictate but one rational decision under unequivocal, well-settled (i.e., from extant statutory, constitutional, or case law sources), and clearly controlling legal principles.") (quoting *Bowen v. Carnes*, 343 S.W.3d 805, 810 (Tex. Crim. App. 2011) (internal quotation marks omitted). But the trial court subsequently un-granted the motion, instead ordering the transcription *sua sponte*. Is there sufficient wiggle room within the statutory scheme to allow the trial court to order on its own initiative that which it categorically cannot grant upon a defendant's request? The Court today believes that this possibility is tenable enough to render mandamus relief inappropriate. I disagree.

The Court's view might be more acceptable if the text of Article 39.15 ended with

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[2] There is no indication in the record that the real party in interest was denied the opportunity to examine the videos. His counsel told the trial court, "We've seen the videos."

Subsection (c). In that case, it would at least be possible to construe the proviso expansively enough to confer some discretion on the trial court to order a transcription of the video recording on the grounds that anything less would not, on the particular facts of this case, suffice to "make[] the property or material reasonably available to the defendant." TEX. CODE CRIM. PROC. art. 39.15(c). But the statute does not end there. The next subsection, (d), categorically defines reasonable availability in explicit terms—"inspection, viewing, and examination"—that exclude reproduction, consistently with the Legislature's manifest prophylactic judgment that *any* reproduction creates an unacceptable risk of harmful dissemination. To allow a trial court nevertheless to order reproduction *sua sponte* on the ground that reasonable discovery requires it (contrary to the Legislature's unqualified determination that reproduction is *never* necessary to adequate discovery and *always* too risky to the well-being of child victims)—simply because the statute *expressly* prohibits reproduction *only* when the defendant *asks* for it—is to gut the statute entirely.

In my view, the only plausible reading of the statutory scheme as a whole manifestly prohibits what the trial judge did in this case, regardless of whether he did it because the real party in interest asked him to. I would grant mandamus relief. Because the Court does not, I respectfully dissent.

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