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

KEASLER, J., delivered the opinion of the Court, in which HERVEY, ALCALA, RICHARDSON, NEWELL, and WALKER, JJ., joined. YEARY, J., filed a dissenting opinion in which KELLER, P.J., and KEEL, J., joined.

O P I N I O N

In its petition for a writ of mandamus, the State of Texas, in essence, challenges the trial judge's order compelling the State to produce recorded forensic interviews of minor complainants to the official court reporter to be transcribed. The court of appeals denied the State's petition. We conclude the State fails to demonstrate that it seeks to compel a ministerial act and accordingly deny the State's motion for leave to file its petition for a writ of mandamus.

Background

Real Party in Interest, Mitchell Childers, stands accused by indictment of two counts of indecency with a child by contact pending in the 207th District Court.[1] Childers moved the presiding judge of the 207th District Court to order the State to deliver the two victims' video recorded Children's Advocacy Center (CAC) interviews to the official court reporter for transcription. Childers's motion also requested a copy of the transcripts be forwarded to his attorney at no cost. At a hearing on the motion, the State argued that granting the motion would violate Texas Code of Criminal Procedure Article 39.15(c) that mandates "[a] court shall deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce any property described by Subsection A," which includes the recordings of the forensic interviews. The judge's order granted Childers's motion over the State's objection with the following handwritten notation: "[Granted] with specific limitations: (1) to be transcribed by official court reporter; (2) for defense attorney's use only in preparation for trial; and (3) no additional copies are to be made. The State shall make the C.A.C. interview available to the court reporter for these limited purposes within 14 days." The State objected that the order violated Article 39.15(c) and informed the judge that it would likely seek mandamus relief.

The next day and without further hearing or pleadings, the judge amended the order substantially. Claiming to "[b]alanc[e] the need for the legislative proscriptions found in Texas Code of Criminal Procedure Art. 39.15 with constitutional due process and right of counsel to be afforded the defendant in preparation for trial," the amended order denied

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[1] *See* TEX. PENAL CODE § 21.11.

Childers's motion. Yet the amended order still ordered the videos transcribed. "[T]he Court, on its own motion, orders that the State, within 10 business days, provide the interviews in question to the Court's official reporter for transcription." The amended order continued:

> Adhering to [Texas Code of Criminal Procedure] Art. 39.15(b), the transcription of the interviews, within the parameters as described by Art. 39.15(a)(3), shall remain in the care, custody, or control of the court as provided by Article 38.45 of the Texas Code of Criminal Procedure. The court reporter will return the original interviews to the State as soon as possible.

The judge's amended order commanded the court reporter to place the transcriptions under seal pursuant to Article 38.45(b) and, with the Court's approval, would permit the parties' attorneys access to the transcriptions "in the manner provided by Art. 39.15, i.e., the transcriptions shall be reasonably available at a facility under the control of the state." "However," the order continues, "counsel for both the state and defense shall have ample opportunity to inspect, view and examine the transcription prior to trial."

The State filed a petition for a writ of mandamus in the Third Court of Appeals. After staying the proceedings in the trial court, the court of appeals denied Relator relief and lifted the stay.[2] The State then filed in this Court a motion for the emergency stay of proceedings below, a motion for leave to file a petition for a writ of mandamus, and a petition for a writ of mandamus to the court of appeals. This Court granted the motion to stay the proceedings below and filed and set this case.

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[2] *In re State of Texas ex rel. Jennifer A. Tharp*, No. 03-16-00827-CV, 2017 WL 562702 (Tex. App.—Austin Feb. 10, 2017) (mem. op, not designated for publication).

Mandamus Standard

A relator is entitled to mandamus relief if he shows that (1) he has no adequate remedy at law, and (2) he seeks to compel a ministerial act.[3] A relator satisfies the ministerial-act requirement if he shows a clear right to the relief sought.[4] "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.'"[5] A ministerial act cannot involve judicial discretion and must be "'positively commanded and so plainly prescribed' under the law 'as to be free from doubt.'"[6] The law supporting a relator's petition for a writ of mandamus must be definite, unambiguous, and unquestionably applicable.[7]

We review the court of appeals' judgment on a petition for writ of mandamus under a *de novo* review of the two-pronged test.[8] Because the judge's amended order rescinded the

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[3] *In re State ex rel.Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013).

[4] *Id*.

[5] *Id*. (citing *Bowen v. Carnes*, 343 S.W.3d 805, 810 (Tex. Crim. App. 2011)).

[6] *State ex rel. Hill v. Court of Appeals for Fifth Dist.*, 34 S.W.3d 924, 928 (Tex. Crim. App. 2001) (citing *Buntion v. Harmon*, 827 S.W.2d 945, 949 (Tex. Crim. App. 1985)).

[7] *State ex rel. Young v. Sixth Judicial Dist. Court of Appeals at Texarkana*, 236 S.W.3d 207, 210 (Tex. Crim. App. 2007).

[8] *In re State ex rel. Weeks*, 391 S.W.3d at 121-22.

previous order, we limit our review to the amended order.

Ministerial Act?

Because the State may not appeal the judge's amended discovery order,[9] it satisfies the no-adequate-remedy-at-law requirement. This matter turns on whether the amended order's entry, or the failure to rescind it, violated a ministerial act. The State claims that the judge's amended order violated no less than three statutes: Texas Code of Criminal Procedure Articles 38.45 and 39.15 and Texas Family Code § 264.408.

Article 38.45(a) provides that, "During the course of a criminal hearing or proceeding, the court may not make available or allow to be made available for copying or dissemination to the public property or material . . . (3) that is described by Section 2 or 5, Article 38.071, of this code." [10] The CAC recordings in question satisfy the description of those in Article 38.071, § 2 and § 5. Subsection (b) requires "[t]he court shall place property or material described by Subsection (a) under seal of the court on conclusion of the criminal hearing or proceeding." The State's attorney must provide access to the property and material described under Subsection (a) in the same manner as in Article 39.15 to the defendant, the defendant's attorney, and a potential defense expert witness.[11]

Article 39.15(a) permits discovery of the property and material like the CAC

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[9] *See* TEX. CODE CRIM. PROC. art. 44.01 (West 2012).

[10] TEX. CODE CRIM. PROC. art. 38.45(a).

[11] *Id.* art. 38.45(c).

recordings in question, among other things. But the recordings "must remain in the care, custody, or control of the court or the state as provided by Article 38.45.[12] "A court shall deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce any property or material described by Subsection (a), provided that the state makes the property or material reasonably available to the defendant."[13] Like Article 38.45(c), Article 39.15(d) permits the defendant, his attorney, or potential expert witness ample opportunity for inspection, viewing, and examination of the property or material, all while under the State's control.[14]

Texas Family Code § 264.408(d-1) incorporates nearly verbatim Article 39.15(c)'s mandate that a court shall deny any defense request to copy, photograph, or duplicate, or otherwise reproduce a video recording of a CAC interview.[15]

The State contends that ordering the CAC recordings' production to the court reporter violated Articles 39.15 and 38.45 because a court reporter is not specifically listed as someone who may inspect, view, or examine the protected property or material.[16] That observation is true enough, but Article 39.15 permits the court, in addition to the State, to

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[12] *Id*. art. 39.15(b).

[13] *Id*. art. 39.15(c).

[14] *Id.* art. 39.15(d).

[15] TEX. FAM. CODE §§ 264.401, 264.408(d-1) (West 2012).

[16] TEX. CODE CRIM. PROC. arts. 38.45(c), 39.15(d).

maintain care, custody, or control over the protected property and material.[17] In the absence of any language to the contrary, it is reasonable to assume that a court's official court reporter acts as the court's agent in this respect. Further, Article 39.15 references Article 38.45, which directs a court to place the protected property or material under the court's seal.[18] The amended order would place the transcriptions under seal.

In permitting the recordings' transcription, the State contends that the judge is permitting the copying (at least the audio portion of the video) contrary to statute. Article 38.45(a) mandates that, "During the course of a criminal hearing or proceeding, the court may not make available or allow to be made available for copying or dissemination to the public [identified] property or material . . . ." By its plain language, Article 38.45(a)'s applicability to the judge's amended order is less than clear. Viewed through the mandamus standard prism, we are unwilling to hold that Article 38.45(a) so plainly proscribes the amended order's entry under the law as to conclude that the judge is left with no choice but to vacate it.

The State further argues that the judge violated Article 39.15(c) that states, "A court shall deny any request by a defendant to copy, photograph, duplicate, or otherwise

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[17] TEX. CODE CRIM. PROC. art. 39.15(b) ("Property or material described by Subsection (a) must remain in the care, custody, or control of the court or the state as provided by Article 38.45.").

[18] *Id.* art. 38.45(b) ("The court shall place property or material described by Subsection (a) under seal of the court on conclusion of the criminal hearing or proceeding.").

reproduce" a recording of the interviews "provided that the state makes the property or material reasonably available to the defendant." While the initial order granted Childers's request to have the recordings transcribed and provided to his attorney, the amended order denied Childers's request, albeit ordering *sua sponte* that the interviews be transcribed nonetheless. The State's citation to a Beaumont Court of Appeals' unpublished opinion fails to support its argument. In *In re Ligon*, the court of appeals held that Article 39.15 was well-settled law proscribing a court reporter hired by the defendant from viewing a recorded forensic interview and transcribing the interview.[19] *In re Ligon* presented distinguishable facts, in addition to being an unpublished court of appeals opinion. Here, the judge denied the defendant's motion to reproduce the recorded interviews and ordered *sua sponte* the State to produce the recordings to the official court reporter. The State fails to prove that the superceding order violated Article 39.15(c) and that it is entitled to a clear right to relief under this theory.

The State next argues that the judge did not have authority to *sua sponte* enter a discovery order because the version of Article 39.14 applicable to this prosecution (since amended) required a "motion of the defendant showing good cause therefor and upon notice to the other parties."[20] But the trial judge had before him a motion from the defendant, even though the motion sought discovery that under Article 39.15 the judge could not grant. The

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[19] *In re Ligon*, 2014 WL 2902324, at *1 (Tex. App.—Beaumont June 26, 2014, no pet.) (mem. op, not designated for publication).

[20] TEX. CODE CRIM. PROC. art. 39.14(a) (West 2012).

judge's amended order denied Childers's request for a "copy" of the interview in accordance with Article 39.15. The remainder of the amended order does not, on its face, clearly violate Article 39.14. The State fails to cite any controlling authority addressing the legislative gaps this matter's facts present.[21]

In the same vein, the State maintains that the judge lacked the authority to issue the amended order because it exceeded Article 39.14's scope. Article 39.14 details the rules of discovery requests and discovery related to criminal law matters. But Article 39.14 itself does not address whether it sets the outer limits of proper discovery in criminal matters. To fill in what Article 39.14 leaves unsaid, the State relies on case law to argue the judge "had no express, inherent, or implied authority to enter such an order."

We find the State's cited authority insufficient to establish a ministerial act. While it is well-settled that criminal defendants in Texas do not have a general right of discovery,[22] it is not equally well-settled that Article 39.14 establishes the bounds of criminal discovery. The State cites several court of appeals' opinions that purport to stand for the contrary

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[21] *See In re State of Texas*, 162 S.W.3d 672, 676, 678 (Tex. App.—El Paso 2005) (concluding that judge did not have authority to *sua sponte* order discovery in 652 pending criminal cases when no motion was filed nor was the State given an opportunity to assert work-product privilege).

[22] *Pena v. State*, 353 S.W.3d 797, 809 n.10 (Tex. Crim. App. 2011); *Washington v. State*, 856 S.W.2d 184, 187 (Tex. Crim. App. 1993); *Perkins v. State*, 902 S.W.2d 88, 101 (Tex. App.—El Paso 1995, pet. ref'd).

position.[23] Indeed those cases stand for the proposition that Article 39.14 comprehensively defines criminal discovery. But the opinions' holdings do not express a well-settled and clear legal principle sufficient to establish a ministerial act for mandamus purposes, at least as it pertains to the amended order. First, the opinions are from intermediate appellate courts with limited precedential value outside of their districts. The State fails to cite a published opinion from the Third Court of Appeals. Second, the cited opinions do not purport to express the overwhelming consensus of the courts of appeals.

As the State cites, our own precedent has touched on the scope of Article 39.14 in addressing, on direct appeal, whether a trial judge erred in denying a defendant's discovery request.[24] Those cases all dealt with judges' denials of defendants' requests for discovery—reviewed for an abuse of discretion—and largely turned on defendants' deficient discovery requests or requests for items specifically excepted from Article 39.14. Our precedent neither speaks directly to *sua sponte* discovery orders nor addresses orders like the judge's amended order. Failing to cite definitive authority dictating that the judge's amended order was impermissibly entered so as to leave the judge with no choice but to rescind it, the State has failed to demonstrate that the amended order fell outside the

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[23] *In re State ex rel. Robinson*, 116 S.W.3d 115, 118 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *Martin v. Darnell*, 960 S.W.2d 838, 841 (Tex. App.—Amarillo 1997, orig. proceeding); *State ex rel. Wade v. Stephens*, 724 S.W.2d 141, 144 (Tex. App.—Dallas 1987, orig. proceeding).

[24] *Hoffman v. State*, 514 S.W.2d 248, 252 (Tex. Crim. App. 1974); *Feehery v. State*, 480 S.W.2d 649, 650-51 (Tex. Crim. App. 1972); *Sonderup v. State*, 418 S.W.2d 807, 808 (Tex. Crim. App. 1967).

"discretion of the trial court in matters of discovery."[25] We hold that the relief the State seeks is not "positively commanded and so plainly prescribed under the law as to be free from doubt."[26]

We therefore deny the State's motion for leave to file its petition for a writ of mandamus and lift the stay previously entered.

DELIVERED: September 20, 2017

DO NOT PUBLISH

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[25] *See In re Harris*, 491 S.W.3d 332, 335 (Tex. Crim. App. 2016) (quoting *In re Dist. Attorney's Office of the 25th Judicial Dist.*, 358 S.W.3d 244, 246 (Tex. Crim. App. 2011)).

[26] *See State ex rel. Hill v. Court of Appeals for Fifth Dist.*, 34 S.W.3d at 928.