Mandamus Conditionally Granted and Opinion Filed May 31, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00462-CV

IN RE SUSAN HAWK, Relator

Original Proceeding from the County Criminal Court No. 4
Dallas County, Texas
Trial Court Cause No. M15-52765-E

MEMORANDUM OPINION

Before Chief Justice Wright and Justices Lang and Brown
Opinion by Chief Justice Wright

In this petition for writ of mandamus, the State requests that we order the trial court to withdraw its April 7, 2016 Order on Defendant's Motion for Inspection of Evidence. In its order, the trial court directed that Joshua Barton be allowed to photograph, physically examine, and conduct forensic tests on a chair used in the Dallas County jail for blood tests of individuals accused of driving while intoxicated. Because we conclude Barton did not establish the materiality of the testing to his defense, we conditionally grant the petition for writ of mandamus and order the trial court to vacate its order.

Factual and Procedural Background

Barton is charged with driving while intoxicated, second offense. Following Barton's February 19, 2015 arrest, a magistrate issued a search warrant for a specimen of his blood, which was taken. Almost a year later, Barton filed his "Motion for Inspection of Premises" in which he requested that the trial court issue an order permitting his attorney and an expert witness to

inspect and take samples in the room in the jail where his blood was drawn. The stated purpose of the motion was to determine whether the premises where the blood sample was drawn were sanitary and did not cause an unreasonable risk of infection.

The trial court held two hearings on the motion. During the first hearing, it heard testimony from a practicing nephrologist, who admitted he was not familiar with the conditions at the jail, but testified generally that blood draws conducted in rooms contaminated by blood, urine, feces, vomit, and other bodily excrements that had not been properly cleaned would pose a risk of infection. The trial court also took judicial notice of the testimony in two unrelated cases in which a different Dallas County court had considered a similar motion.

During the second hearing, the trial court heard testimony from the arresting officer, who testified the room where Barton's blood was drawn was "visibly clean," and also heard from an infection prevention specialist whose work includes inspecting the jail blood draw rooms for appropriate sanitation. The State offered a video recording of Barton's blood draw, which showed the blood draw took place in a room without any obvious foreign substance on any surface in the room. The video also showed the technician who drew Barton's blood cleaning the blood draw chair before Barton sat in the chair. The State also offered documents showing that an infection prevention inspection had been performed on the blood draw room without any negative findings on the morning of the day Barton was arrested and the room had been cleaned daily during the month in which Barton was arrested.

The trial court granted Barton's motion in part. The trial court ordered the State to retrieve the chair that was used for blood draws on April 14, 2016, wrap it in an appropriate evidence bag, and make it available for testing by Barton. The trial court directed that the chair not be cleaned or handled in any way that was "out of the ordinary" so the chair would be "preserved in a state that reflect[ed] its normal condition immediately after being in use." The

trial court required that the chair be placed in a location in the district attorney's office to allow the defense access for "forensic testing." The trial court's order permitted the chair to be photographed, physically examined and "forensically tested" by the defense and allowed the defense to make audio and video recordings "to reflect their interaction with the chair." The State then filed this petition for writ of mandamus arguing the trial court lacked authority to order the blood draw chair produced for testing by the defense.

Availability of Mandamus

To establish a right to mandamus relief in a criminal case, the relator must show the trial court violated a ministerial duty and there is no adequate remedy at law. *In re State ex rel. Weeks,* 391 S.W.3d 117, 122 (Tex. Crim. App. 2013) (orig. proceeding). The ministerial act requirement is satisfied if the relator can show a clear right to the relief sought. *Id.* "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.' " *Id.* When a trial court acts beyond the scope of its lawful authority, a clear right to relief exists. *See, e.g., State ex rel. Watkins v. Creuzot,* 352 S.W.3d 493, 506 (Tex. Crim. App. 2011) (orig. proceeding) (holding State entitled to mandamus relief because there was no basis under Texas law to conduct a pretrial evidentiary hearing to determine adequacy of mitigation case in capital-murder proceeding); *State ex rel. Lykos v. Fine,* 330 S.W.3d 904, 919 (Tex. Crim. App. 2011) (orig. proceeding) (holding State entitled to mandamus relief because there was no state law or state procedure permitting pretrial hearing and ruling that would deprive relator of the opportunity to try its capital case and seek the death penalty). An issue of first impression can qualify for mandamus relief even though the factual scenario has never been precisely addressed when the principle of law has been clearly established. *Weeks,* 391 S.W.3d at 122.

Scope of Discovery in Criminal Cases

While the scope of discovery in a criminal case is committed to the sound discretion of the trial court, that discretion is statutorily limited. *State ex rel. Wade v. Stephens*, 724 S.W.2d 141, 143–44 (Tex. App.—Dallas 1987, orig. proceeding). We have noted that aside from the requirements imposed under *Brady v. Maryland*:

> [T]he Texas Legislature intended article 39.14 [of the Texas Code of Criminal Procedure] to constitute a comprehensive pretrial discovery statute, and that criminal discovery orders must fall within the confines of that article's limited authorization. A corollary of this rule is that trial courts lack inherent authority to order pretrial discovery any greater than that authorized by article 39.14.

Id. at 144 & n.2. Article 39.14 authorizes a judge to order the State to allow discovery of tangible objects that are not privileged and that constitute or contain evidence. TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West Supp. 2015); *Stephens*, 724 S.W.2d at 144. But to obtain discovery under article 39.14, a defendant must establish that the item is material to his defense, and the item is possessed by the State. TEX. CODE CRIM. PROC. ANN. art. 39.14(a); *Stephens*, 724 S.W.2d at 144 (citing *Hoffman v. State*, 514 S.W.2d 248, 252 (Tex. Crim. App. 1974)). When the evidence the defendant seeks to inspect or test is in itself indispensable to the State's case, the materiality standard is met by the simple fact that exclusion of the evidence would affect the essential proof that the appellant committed the offense. *Ehrke v. State*, 459 S.W.3d 606, 611 (Tex. Crim. App. 2015) (concluding in a case that alleges possession of a controlled substance, a trial court must permit inspection of the alleged controlled substance). This is not such a case.

What Barton hopes to exclude is not the blood draw chair but rather the results of the test taken in the chair. Thus, to show he is entitled to inspect and test the chair, Barton must show the inspection of the chair itself is material to his case.

Materiality of Blood Draw Chair

Barton contends the condition of the blood draw chair is material to his defense because the evidence at the hearing established there is a "strong possibility that something will be found on the chair." Specifically, he argues the evidence presented at the hearings showed "a likelihood that the blood draw room in the jail is a filthy, unsanitary room that causes an unreasonable risk of infection to the persons from whom the blood is being drawn" and argues that testing the chair is effectively the only way that he will be able to establish his claim that the conditions in the room were so unsanitary they violated his right under the United States Constitution to be free from unreasonable searches and seizures.

A compelled blood draw is a search and seizure under the Fourth Amendment. *Schmerber v. California,* 384 U.S. 757, 767 (1966). A search for evidence of a crime may be unjustifiable if it endangers the life or health of the suspect. *Winston v. Lee,* 470 U.S. 753, 761 (1985). The United States Supreme Court has noted in the context of warrantless compelled blood draws that "serious questions" could arise concerning the reasonableness of a blood test made under conditions that might invite an unjustified element of personal risk of infection and pain. *Schmerber,* 384 U.S. at 771–72.

As an initial matter, we reject Barton's contention that the belated testing of the chair in the blood draw room is the only way to assess the conditions in the room at the time Barton was subjected to testing. The videotape of the blood draw belies the claim that there is no other possible evidence of the condition of the blood draw room at the time of his test and supports the conclusion that testing the chair is not material to Barton's defense.

Moreover, the possibility that "something" will be found on the chair now more than a year after Barton's arrest—even if there is a "strong possibility" "something" will be found—does not rise to the level of materiality required to permit inspection and testing of the chair.

"Materiality" requires more than the mere possibility that the information might help the defense or affect the outcome of the trial. *Stone v. State*, 583 S.W.2d 410, 415 (Tex. Crim. App. [Panel Op.] 1979). Evidence is material if its omission would create a reasonable doubt that did not otherwise exist. *Ehrke*, 459 S.W.3d at 611 (citing *United States v. Agurs*, 427 U.S. 97, 112 (1976)). To establish materiality the defendant must show there is a reasonable probability that the evidence, if disclosed to the defense, would result in a different outcome in the proceeding. *See Amos v. State*, 819 S.W.2d 156, 159 (Tex. Crim. App. 1991). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the case. *Ex parte Kimes*, 872 S.W.2d 700, 702 (Tex. Crim. App. 1993).

Barton failed to establish that testing the blood draw chair more than a year after his arrest would assist him in any way in establishing his blood was drawn under conditions that subjected him to such a serious risk of infection that the compelled blood test violated his rights under the Fourth Amendment. *Cf. In re Goodyear Tire & Rubber Co.*, 437 S.W.3d 923, 929 (Tex. App.—Dallas 2014, no pet.) (request to create video of tire plant that would document work performed by different workers, using either a different machine or making a different tire, under different conditions seven years after tire involved in suit was manufactured went beyond bounds of permissible discovery in civil case); *In re Kimberly-Clark Corp.*, 228 S.W.3d 480, 489 (Tex. App.—Dallas 2007, no pet.) (concluding environmental testing a year after contract for sale was signed would not prove defendant's knowledge of environmental contamination at time contract was signed). Although Barton now argues the State's witnesses agreed the blood draw room and chair are in "substantially the same condition," as they were when Barton's blood was drawn, the evidence contradicts that assertion by showing the chair has been used and cleaned daily since Barton's arrest. While the current condition of the chair may be similar, that is not tantamount to the condition of the chair being substantially the same.

Barton was required to show how the specific tests he proposed to conduct on the chair would create a reasonable doubt concerning his guilt that would not otherwise exist. He did not establish how the results of the testing he proposed to conduct would be admissible in the proceeding, which is a prerequisite to showing materiality to his defense. *See Iness v. State*, 606 S.W.2d 306, 310 (Tex. Crim. App. 1980). He neither explained what tests he would conduct nor the degree to which any sort of contaminant that might be found as a result of those tests could have endangered his life or health. He presented no evidence he actually suffered illness that could in some way be linked to the blood test. At best, Barton established that unidentified tests a year after his arrest would show the existence of contaminants on the chair that might harm some hypothetical person but that did not actually harm him. We cannot conclude such a showing provided a basis for the trial court's conclusion that inspection and testing of the chair is in any way material to Barton's defense.

Conclusion

Because the trial court ordered discovery of an object not shown to be material to any matter in the case, we conclude the trial court exceeded its authority under article 39.14 by ordering the State to produce the blood draw chair for inspection and testing. Moreover, the State has shown it lacks an adequate remedy by appeal because an appeal will not protect it from having to produce improperly ordered discovery. *In re Watkins*, 369 S.W.3d 702, 707 (Tex. App.—Dallas 2012, orig. proceeding). Accordingly, we conditionally grant the State's petition for writ of mandamus.

We order the trial court to vacate its April 7, 2016 Order on Defendant's Motion for Inspection of Evidence.

A writ will issue only if the trial court fails to comply with our order.

/Carolyn Wright/
CAROLYN WRIGHT
CHIEF JUSTICE

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