Discovery – Issues in Criminal Discovery

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I. Required disclosures under N.C. Gen. Stat. §§15A-901 to 910.

A. Initial notes: N.C. Gen. Stat. § 15A-902.

Prior to filing a motion for discovery before a judge, a party is required to provide a written request to the opposing party regarding voluntary production of materials; this requirement is waived if both parties certify in writing that they intend to comply with the discovery provisions enumerated in N.C. Gen. Stat. § 15A-902(a). If the party receives an unsatisfactory response, including no response at all, she may file a motion for discovery before a superior court judge. *Id.*; N.C. Gen. Stat. § 15A-902(c).

B. State's burden to disclose.

Generally speaking, the State is required to provide a copy of (1) all files involved in the investigation or prosecution of the defendant; (2) the names and associated documents of all expert witnesses the state plans to call during the trial; and (3) a list of all witnesses the State plans to call during the trial. N.C. Gen. Stat. § 15A-903(a)(1-3). More specifically, the State must provide the defendant with "the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant." N.C. Gen. Stat. § 15A-903(a)(1). These files include any handwritten or typed statements, tests and any handwritten notes taken while completing examinations, calculations, or tests. *Id*; *Smith v. Cain*, 565 U.S. 73, 75 (2012). The defendant has the right to copy these files and to perform independent tests for authenticity under appropriate safeguards. N.C. Gen. Stat. § 15A-903(a)(1)(D).

The defendant is further entitled, within a reasonable time prior to trial, to the names, reports, testimonial opinions, and curriculum vitae of any expert witness the State plans to call. N.C. Gen. Stat. § 15A-903(a)(2). An expert witness is any witness who is providing an opinion based on information to which the finder of fact would lack access. *State v. Davis*, 368 N.C. 794, 785 S.E.2d 312 (2016). On appellate review of the trial court's ruling on the admission of an expert witness, the court applies an abuse of discretion

standard. *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 539-40 (2012). The State must also turn over a written list of all witnesses to the defendant at the beginning of jury selection. N.C. Gen. Stat. § 15A-903(a)(3). The court, in its discretion, may allow a witness to testify even if she is absent from the written list if the court finds that the State acted in good faith. This statute serves "to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990).

Finally, it should be noted that "when a defendant's misdemeanor charge is within the original jurisdiction of the district court, the defendant is not entitled to statutory discovery but is, nonetheless, constitutionally entitled to discovery of Brady material." *State v. Marino*, 229 N.C. App. 130, 140, 747 S.E.2d 633, 640 (2013).

In some cases, a failure to meet the standards required by §§ 15A-901 to 910 may create constitutional challenges if the evidence in question is withheld by the prosecution and is "material to guilt or punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). It has been noted that "evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449 (2009). Reasonable probability does not require that the defendant would have more likely than not received a different verdict with the evidence; instead it refers to the likelihood of a differing result which is great enough to "undermine confidence in the trial." *Kyles v. Whitley* , 514 U.S. 419 , 434 (1995). In other words, "the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense." *State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983).

This question was most recently examined by the North Carolina Court of Appeals in *State v. Sandy*, 788 S.E.2d 200, 2016 N.C. App. LEXIS 660 (2016). In this case, the defense attempted to argue that the victim was a drug dealer with whom the defendants were meeting; the State maintained that he was a "club promoter" who had no ties to the sale of illegal substances. Evidence produced after the close of trial illustrated that the assistant district attorney, by way of a private e-mail account, requested the halt of a

Raleigh Police Department investigation into the victim's trafficking of marijuana until after the jury returned their verdict. The North Carolina Court of Appeals ruled the defendant's constitutional rights had been violated under *Brady* (by not being provided with material evidence) and under *Napue v. Illinois*, 360 U.S. 264, 272, (1959) (by the ADA's promotion of facts which she knew to be false).

C. Defense's burden to disclose.

Similar to the State's burden discussed above, the Defense is required to produce any and all documents, files, and other tangible objects that it possesses and plans to introduce at trial. N.C. Gen. Stat. § 15A-905(a). The State is likewise entitled to examine and copy the results and notes of any tests, examinations, and experiments compiled by the Defense; the State may perform its own tests for corroboration and authenticity under appropriate safeguards. The Defense is further required to alert the State within twenty business days of trial if it plans to raise an affirmative defense of "alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication." N.C. Gen. Stat. § 15A-905(c)(1). Finally, the defense is required to provide a list of expert witnesses with accompanying files and documents, and a written list of general witnesses that it plans to call. N.C. Gen. Stat. § 15A-905(c)(2-3). The court may, in its discretion, permit an unlisted witness to testify.

D. Restrictions and continued disclosure.

Neither the State nor the defense is required to disclose work product of the attorneys or defendant. N.C. Gen. Stat. § 15A-904(a); N.C. Gen. Stat. § 15A-906; *State v. Dunn*, 154 N.C. App. 1, 9, 571 S.E.2d 650, 656 (2002); *State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 840 (1977). Work product includes any product created by the attorneys for their own personal use at trial. N.C. Gen. Stat. § 15A-904(a). Parties are also not entitled to the proprietary source code and unrelated inner workings of testing technology without first showing cause. *State v. Marino*, 229 N.C. App. 130, 747 S.E.2d 633 (2013). However,

the attorneys are free to provide more information than statutorily required. N.C. Gen. Stat. § 15A-904(a). Both parties are required to promptly notify opposing counsel of any new, undisclosed evidence which is discovered before or during trial and which is subject to discovery or inspection. N.C. Gen. Stat. § 15A-907; *State v. Ginn*, 59 N.C. App. 363, 296 S.E.2d 825 (1982).

E. Timing of disclosure

The statutes are mostly silent as to the required timing of the disclosures. The exceptions include:

G.S. 15A-903(a)(2) (State must give notice of expert witness and furnish required expert materials within a reasonable time before trial).

G.S. 15A-903(a)(3) (State must give notice of other witnesses at beginning of jury selection).

G.S. 15A-905(c)(1)a. (if ordered by court on showing of good cause, State must give notice of rebuttal alibi witnesses no later than one week before trial unless parties and court agree to different time frames).

Although the statutes do not set a specific deadline for the State to produce its complete files, which is the bulk of discovery due the defendant, the judge who issues an order granting discovery must set a deadline for a party to provide discovery. G.S. 15A-909 (order granting discovery must specify time, place, and manner of making discovery).

II. Sanctions for discovery violations.

A. Standard of review.

Upon a party's failure to meet her obligations and requirements as outlined under N.C. Gen. Stat. §§ 15A-901 to 910, the superior court judge is provided with a list of possible sanctions. N.C. Gen. Stat. § 15A-910. The decision of which sanction to apply, if indeed any sanctions are applied, rests squarely within the discretion of the trial court. *State v. Carson*, 320 N.C. 328, 336, 357 S.E.2d 662, 667 (1987); *State v. Stevens*, 295 N.C. 21, 37, 243 S.E. 2d 771, 781 (1978). Such sanction decision may be reversed for abuse of

discretion only when the order is manifestly unsupported or upon a showing that "[the court's] ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285 372 S.E.2d 523, 527 (1988); *State v. Gladden*, 315 N.C. 398, 412, 340 S.E. 2d 673, 682 (1986); *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985).

The abuse of discretion standard is a lofty burden, requiring something more than mere inconvenience or difficulty for one party. *State v. McClintick*, 315 N.C. 649, 340 S.E.2d 41 (1986). In *McClintick*, the judge made note of his displeasure regarding the State's tactics and failure to comply with discovery, but refused to impose sanctions. On these grounds, the defendant argued that the lack of sanctions against the state was an abuse of the judge's discretion. The Supreme Court noted that while displeased, the judge made no notice or mention of undue hardships against the defendant and thusly upheld the part of the trial court's order referring to the lack of sanctions. Therefore the burden to prove an abuse of discretion must be something more than a simple discrepancy between the disposition of the judge and his sanctioning action.

It should be noted that the court is not permitted to sanction based upon the actions of non-parties. *State v. Gillespie*, 362 N.C. 150, 655 S.E.2d 355 (2008). In the *Gillespie* case, mental health experts for the defense failed to provide copies of their reports to the state until a few days before trial. In response, the trial judge precluded the experts from testifying on behalf of the defendant. The North Carolina Supreme Court found that N.C. Gen. Stat. § 15A-910 did not provide the judge with the authority to sanction parties based on the actions of their non-party witnesses, and correspondingly overturned that portion of the order. However, this ruling in no way interferes with the judge's ability to hold witnesses in contempt. Ordinarily, the trial judge enjoys a broad ability to act as she pleases in the passing of sanctions. *State v. Pigott*, 320 N.C. 96, 357 S.E.2d 631 (1987).

Absent abuse of discretion, a judge's sanction actions may be reversed if the resulting sanction raises a constitutional issue; this issue primarily occurs when the sanction in quo is the refusal of a continuance. *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001). However, even if a constitutional issue arises, the denial of a continuance is only grounds for a new trial when (1) the defendant proves that the ruling was erroneous and (2) the defendant shows that she suffered "prejudice as a result of the error." <u>*State v.*</u>

Branch, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). In *Taylor*, the defendant claimed that the Judge's failure to grant a continuance was a violation of his constitutional right to mount a defense. *Taylor*, 354 N.C. at 33, 550 S.E.2d at 146. However, the court disagreed, citing the particular facts of the case and noting that "whether defendant is denied due process must be determined under the circumstances of each case." *Id.; State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977). Though the *Taylor* case's continuance was a motion on behalf of the defendant rather than a decision made for purposes of sanction, the case serves as a reminder that, in cases of sanction review on constitutional grounds, the standard becomes the defendant's burden to prove error (based on abuse of discretion) and harm as a result of that error. *Taylor*, 354 N.C. at 33, 550 S.E.2d at 146.

However it bears repeating that, absent abuse of discretion, the trial court maintains the ability to impose (or not impose) sanctions for violations of criminal discovery. *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988).

B. Sanctions.

N.C. Gen. Stat. § 15A-910 lists several sanctions available to a trial judge, in concert with her contempt powers, to compel compliance with criminal discovery requirements. N.C. Gen. Stat. § 15A-910(a). If a judge chooses to sanction a party, the statute enumerates various options. For purposes of this presentation, I have grouped them into six categories: (1) specifically order compliance with a party's request; (2) grant a continuance or recess; (3) prohibit use of undisclosed evidence; (4) declare a mistrial; (5) dismiss the charge (with or without prejudice); or (6) enter another "appropriate order." *Id.* If the Judge enters one of these sanctions, she is required to make specific findings regarding her consideration of the "materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply." N.C. Gen. Stat. § 15A-910(b)(d).

1. Order a party to permit inspection or discovery.

In the event that one party possesses new or undiscovered evidence, the court may require that party to make the evidence available to opposing

counsel. N.C. Gen. Stat. § 15A-910(a)(1); *State v. Moore*, 152 N.C. App. 156, 566 S.E.2d 713 (2002). In *Moore*, the defense raised objection when the state attempted to bring in lab reports and testimony from two agents with the State Bureau of Investigation, the contents of which were not shared with the defense. The judge provided a variety of options to the defense, including an order for the state to produce the evidence and the ability for the defense to examine and test the reports during a recess. However, when the defense requested suppression of the testimony and reports, the motions were denied. The Court of Appeals upheld this decision noting that, by allowing the defense to examine the statements and reports, the defense was no longer at an inherent disadvantage; therefore, the use of this sanction was successful to cure the injury.

2. Grant a continuance or recess.

In order to cure the injury to a party, the court may grant a continuance or recess. N.C. Gen. Stat. § 15A-910(a)(2). For example, in *State v. Remley,* 201 N.C. App. 146, 686 S.E.2d 160 (2009). the court allowed a recess for the defense when the state made use of the defendant's statement which they had failed to provide to defense counsel per N.C. Gen. Stat. § 15A-903. Since the recess allowed the defense to examine the evidence in preparation for the remainder of trial, and since the judge offered to entertain other requested sanctions (with the exception of disallowing the evidence and dismissing the charge), the injury to the party was made right. Further, the judge's decision based as it was on specific findings and containing within it a willingness to hear alternative options, allowed the Court of Appeals to uphold the sanction due to a lack of abuse of discretion.

If the judge feels that more time will allow the injured party to accurately prepare, then she may grant a continuance as was done in *State v. Mendoza*, 794 S.E.2d 828, 2016 N.C. App. LEXIS 1255 (2016). The defense in *Mendoza* was caught off guard by the state's intent to use newly discovered and undisclosed evidence which took the form of two expert witnesses; the judge responded by allowing the defense a continuance of approximately two months to adapt and

prepare. The defense's request to exclude the testimony of the witnesses was denied, and on appeal the Court found that the Judge exercised proper discretion in allowing the continuance.

3. Prohibit use of undisclosed evidence.

If the court so chooses, it may prevent the introduction of evidence as a discovery sanction. N.C. Gen. Stat. § 15A-910(a)(3). As a note of primacy, the exclusion of evidence which does not meet the statutory requirements is permissive, rather than mandatory; a Judge is not required to throw out evidence which does not conform to 15A-900. *State v. Conner*, 53 N.C. App. 87, 280 S.E.2d 14 (1981); *State v. Braxton*, 294 N.C. 446, 242 S.E.2d 769 (1978). However, the exclusion of evidence will be ruled unconstitutional if it "has infringed upon a weighty interest of the accused." *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

The Court of Appeals found such a violation of a defendant's constitutional rights in *State v. Cooper*, 229 N.C. App. 442, 747 S.E.2d 398, *cert. denied and appeal dismissed*, 367 N.C. 290, 753 S.E.2d 783 (2013). In *Cooper*, the State presented evidence that there was a Google Maps search on the defendant's computer history of the exact location where the victim's body was located. The defense attempted to introduce an expert to testify that the Google map search history files had been "planted on Defendant's computer." The court examined the proffered witness and found, as a matter of law, that the witness was not qualified as an expert. The defense then attempted to call a different witness who was, in fact, a computer forensics expert but who had not been disclosed in discovery.

As a sanction for the untimely disclosure, the court refused to allow the second witness to testify, regardless of his expert status. Citing *Scheffer*, the Court of Appeals ruled that the defendant's constitutional rights were violated by the lower court's sanctions, as well as its misapplication of the expert witness qualification rules, and ordered a new trial.

A similar case saw the Court of Appeals overturn another order to suppress for the court's failure to detail any harm suffered by the defendant by the non-

disclosure of evidence, as well as lack of information regarding how the order to suppress addressed the harm caused by the state's non-disclosure. *State v. Dorman*, 225 N.C. App. 599, 737 S.E.2d 452 (2013). Since the trial court failed to explain the harm suffered by the defendant resulting from the state's use of unlisted witnesses, as well as the way in which the suppression order correct that harm, the Court of Appeals found that there was an abuse of discretion and overturned the order.

4. Mistrial.

It is entirely within the court's discretion to order a mistrial based on a breach of discovery rules. N.C. Gen. Stat. § 15A-910(a) (3); *State v. Sowden*, 48 N.C. App. 570, 269 S.E.2d 274 (1980). Further, the refusal to grant a mistrial based on discovery misconduct does not, in itself, constitute an abuse of discretion. *State v. Hodge*, 118 N.C. App. 655, 456 S.E.2d 855 (1995). However, beware of declaring a mistrial unless the defendant asks for one. Double jeopardy is implicated unless the defendant requests the mistrial or "manifest necessity" exists. See, *State v. Odom*, 316 N.C. 306, 310, 341 S.E.2d 332, 334 (1986).

5. Dismissal.

In *State v. McEachern*, 114 N.C. App. 218, 441 S.E.2d 574 (1994), the court acted pursuant to N.C. Gen. Stat. § 15A-910(a)(3) when it dismissed the drug charges against the defendant as a sanction against the state for refusing to provide the name of their main (and arguably only) witness. On review, the Court of Appeals determined that this sanction was not an abuse of discretion, primarily because the trial court was able to show that the sanction was appropriate based on the tenuous nature of the state's case.

In *Dorman*, the court ruled that the trial court failed to specifically detail its reasons for dismissal. 225 N.C. App. at 601, 737 S.E.2d at 454. The court drew its legal basis from *State v. Allen*, 222 N.C. App. 707, 731 S.E.2d 510 (2012) which noted that "(g)iven that dismissal of charges is an 'extreme sanction' which should not be routinely imposed, orders dismissing charges for noncompliance with

discovery orders preferably should also contain findings which detail the perceived prejudice to the defendant which justifies the extreme sanction imposed." Id. at 733-34, 731 S.E.2d at 527-28. In *Allen*, it was determined that the state actively and willfully failed to turn over crucial and important evidence to the defense, including bloodwork and polygraph exams. As a result, the court dismissed the charge against the defendant, ruling that the violations of the state were sufficiently similar to those discussed by the Supreme Court in *Brady*. However, the Court of Appeals ruled that the trial court was incorrect in its interpretation of Brady, as well as its analysis on the necessity of the evidence in question, and overturned the sanction.

6. Other appropriate sanctions.

The statute includes an additional category for unlisted but appropriate sanctions. N.C. Gen. Stat. § 15A-910(a)(4). The most frequently utilized unlisted sanction is the preclusion of an affirmative defense.

In *State v. Foster*, 235 N.C. App. 365, 761 S.E.2d 208 (2014), the Court of Appeals ruled that the trial court erred in its decision to preclude the defendant's entrapment defense as a sanction. The trial court utilized the sanction as a response to the defendant's failure to adequately inform the state of his intent to argue entrapment pursuant to N.C. Gen. Stat. § 15A-905. However, the Court of Appeals, citing the lack of analysis or explanation within the record, overturned the sanction. and ordered a new trial.

By contrast, the *McDonald* court made proper use of the preclusion sanction when it suppressed two of the defendant's affirmative defenses in response to the defendant's failure to disclose pursuant to N.C. Gen. Stat. § 15A-05. *State v. McDonald*, 191 N.C. App. 782, 663 S.E.2d 462, *disc. review denied*, 362 N.C. 686, 671 S.E.2d 328 (2008). Without alerting the state, the defendant attempted to affirmatively argue accident, duress, voluntary intoxication, and diminished capacity. The court barred the defendant from arguing the latter two defenses because they would have been prejudicially unfair to the state. However, the defendant was permitted to argue accident and duress. The Court of Appeals noted

the differentiation and, based on the inherent logic within the formation of the distinction, supported the sanction as being based on proper discretion.

III. Conclusion.

N.C. Gen. Stat. § 15A-902 requires that parties request discovery from one another in writing before making a motion before a Superior Court Judge. If parties receive unsatisfactory responses, they may move for discovery in court, the terms of which are covered in N.C. Gen. Stat. § 15A-903-6; parties maintain a duty to inform one another of new discovery. In the event of a violation, the Judge has an enumerated (but not exclusive) list of sanctions which she may apply. These sanctions are in the Judge's discretion and are only appealable for abuse of discretion. However, a Judge's sanction choice may be overruled on constitutional grounds if the inability to present evidence infringes upon a weighty interest of the accused.