STATE OF NORTH CAROLINA COUNTY OF MONTGOMERY		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA	)	
	)	
v.	)	File No. 08CRS50156 *et al.*
	)	
SEAN A. LITTLE,	)	
	)	
Defendant.	)	

ORDER

This matter comes before this Court on Defendant's Motion to Dismiss and/or Motion for Sanctions pursuant to N.C. Gen. Stat. § 15A-910. The Court held a hearing on these matters during the March 16, 2009, session of Montgomery County Criminal Superior Court. Defendant was present for this hearing and was represented by Duane Bryant, Esq. The State was represented by Alan Greene, Assistant District Attorney. The Court has reviewed and considered the record proper, including the arguments of both sides and the testimony presented as to the issues presented in this case.

The Court notes for the purposes of this Order that the Court declared a mistrial in this case based on an unrelated matter that came to the attention of counsel for both sides and the Court during the trial of this case. The Court retained the case for further proceedings after declaring the mistrial, and took Defendant's Motion to Dismiss and/or Motion for Sanctions under advisement with the consent of both sides as noted on the record at the hearing of these matters.

Based on its consideration of the record proper, the Court makes the following FINDINGS OF FACT by at least a preponderance of the evidence, and CONCLUSIONS OF LAW as to the matters at issue in Defendant's Motion to Dismiss and/or Motion for Sanctions.

FINDINGS OF FACT

1. Defendant was charged in this case by bills of indictment with the crimes of Attempted Murder, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, First Degree Burglary, Robbery with a Dangerous Weapon, and Felony Larceny (two counts) with a date of offense of on or about January 22, 2008. The alleged victim of these offenses is Ronald Kevin Hoover.

2. Defendant's cases came on for trial before the undersigned judge on March 17, 2009. Prior to March 17, 2009, Defendant made a formal written request for Voluntary Discovery from the State.

3. Among the witnesses the State called at trial are: (1) Officer Todd Lowder of the Mount Gilead Police Department; and (2) Captain Daniel Tharrington of the Mount Gilead Police Department.

4. Lowder testified that he is a part-time officer with Mount Gilead and that he also works as a magistrate judge in Stanly County. Lowder estimated that 85% of his work as a Stanly County magistrate involves criminal matters. Lowder began serving as a law enforcement officer in North Carolina prior to 2004.

5. Lowder was the first responder to the residence of the alleged victim Mr. Hoover. Lowder's responsibility was to secure the scene. Lowder was present when EMS transported Hoover to the hospital, and he stayed at the scene until other officers from Mount Gilead arrived to begin the crime scene work.

6. When the other officers arrived to begin the crime scene work, Lowder returned to the police department, where he typed up his handwritten field notes about his role in the investigation. Lowder testified that he typed up all of his handwritten field notes and that he did not leave anything contained in his handwritten field notes out of his typewritten report.

7. Once he finished typing up his handwritten field notes, Lowder threw his handwritten field notes away. When asked why he threw his handwritten field notes away, he responded that "that's what we do with our handwritten notes" and that it was the "practice of the police department" to destroy handwritten field notes in all cases as far as he knew. Lowder testified further that it has been his normal practice to throw away notes "ever since [he's] been in law enforcement."

8. Lowder testified that he was not aware that the law required him to save his handwritten field notes and to provide them to the District Attorney's Office to be turned over as part of criminal discovery. Lowder explained that he was aware that there were statutes governing criminal discovery, but that he had not read them and did not know that they contained provisions applicable to notes.

9. Lowder testified that he had attended trainings both as a law enforcement officer and as a magistrate, but that to his knowledge he had never been informed of changes to the law requiring law enforcement officers to turn over their notes as part of the case file.

10. Captain Daniel Tharrington is a full-time officer with the Mount Gilead Police Department. Captain Tharrington began serving as a law enforcement officer prior to 2004.

11. Captain Tharrington testified that he arrived on the scene at Hoover's house shortly after Lowder got there. Tharrington was the law enforcement officer in charge of the investigation at the scene. While present, Tharrington took photographs of the crime scene, collected shell casings and other evidence, and took notes on these matters as well as his other observations.

12. Tharrington also went to the hospital to interview the alleged victim. While at the hospital, Tharrington spoke with Dr. Pribble, the alleged victim's treating emergency physician, and took a bullet (the bullet that was lodged into the alleged victim's scrotum and removed in the presence of Dr. Pribble) into evidence.

13. Several days later, Tharrington typed up his handwritten field notes about his role in the investigation. Tharrington testified that he typed up all of his handwritten field

notes and that he did not leave anything contained in his handwritten field notes out of his typewritten report.

14. Once he finished typing up his handwritten field notes, Tharrington threw his notes away. When asked why he threw his notes away, he responded that "it was a mistake." Tharrington explained that he was aware that he was supposed to retain his notes as part of the case file and that he was required to turn over his notes to the District Attorney's Office for criminal discovery purposes.

15. Tharrington testified further that he retained his handwritten field notes in many cases but that he also destroyed his handwritten field notes in many other cases. When asked why he had thrown his notes away in this case as opposed to other cases, Tharrington responded, "I don't know."

16. Neither Officer Lowder nor Captain Tharrington had any interaction with Defendant or any of the co-defendants in this case.

17. There is no evidence of record (nor did counsel for Defendant make any assertion) that the prosecutor assigned to this case (Assistant District Attorney Alan Greene) had any prior knowledge that Officer Lowder and/or Captain Tharrington failed to turn over handwritten field notes in this case, that they destroyed the handwritten field notes they took, or that there was any sort of "practice" of destroying handwritten field notes on the part of law enforcement officers with the Mount Gilead Police Department.

18. Defendant was present in the courtroom for the totality of the trial and the hearing on Defendant's Motions.

19. There were no jurors present in the courtroom during the hearing on Defendant's Motions or during the *voir dire* of Officer Lowder and Captain Tharrington held for the purposes of the hearing on Defendant's Motions.

DISCUSSION

The rules applying to criminal discovery in North Carolina changed on October 1, 2004. Senate Bill 52, enacted as North Carolina Session Law 2004-154, set forth several new provisions governing the discovery responsibilities applying to both the State and the Defendant. N.C. Gen. Stat. § 15A-903 now provides in relevant part as follows:

> (a) Upon motion of the defendant, the court must order the State to:
>
> > (1) Make available to the defendant the **complete files** of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, **investigating officers' notes**, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. The term "prosecutorial agency" includes any public or private entity that obtains information on behalf of a law enforcement agency or

> prosecutor in connection with the investigation of the crimes committed or the prosecution of the defendant. Oral statements shall be in written or recorded form, except that oral statements made by a witness to a prosecuting attorney outside the presence of a law enforcement officer or investigatorial assistant shall not be required to be in written or recorded form unless there is significantly new or different information in the oral statement from a prior statement made by the witness. The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein. . . .
>
> . . . .
>
> (c) Upon request by the State, **a law enforcement or prosecutorial agency shall make available to the State a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this section** and any disclosure under G.S. 15A-902(a).

N.C. Gen. Stat. § 15A-903(a), (c) (emphasis added). The General Assembly amended the statute governing the conduct of law enforcement officers in the criminal discovery context by providing that they "must make available to the State on a timely basis **all materials and information** acquired in the course of all felony investigations" upon arrest of a defendant and noting that "this responsibility is a continuing affirmative duty." N.C. Gen. Stat. § 15A-501(6). In addition to the explicit language contained in N.C. Gen. Stat. § 15A-903 about officers' notes, the Court of Appeals has assumed that an officer's field notes, even when later typed up as part of a report, are discoverable. *See State v. Rush*, 178 N.C. App. 235, 2006 N.C. App. Lexis 1324 (No. COA06-41) (June 20, 2006) (unpublished).

When a party fails to comply with these discovery provisions, a trial court may move forward with criminal contempt proceedings and/or sanction a party pursuant to N.C. Gen. Stat. § 15A-910. Among the sanctions available to a trial court are ordering the discovery to be made available to the other party, granting a continuance and/or recess, prohibiting the introduction of the evidence at issue, declaring a mistrial, dismissing the charges (with or without prejudice), and entering "other appropriate orders." N.C. Gen. Stat. § 15A-901(a). Among the "other appropriate" sanctions entered by trial judges pursuant to discovery violations in an exercise of judicial discretion are deducting peremptory challenges from the sanctioned party and allowing the defendant to give the final closing argument irrespective of whether the defendant put on evidence. *See, e.g.*, *State v. Banks*, 125 N.C. App. 681 (1997), *aff'd per curiam*, 347 N.C. 390 (1997), *cert. denied*, 523 U.S. 1128 (1998).

In determining whether sanctions are appropriate in the context of an alleged discovery violation, a trial court must consider both "the materiality of the subject matter" and "the totality of the circumstances surrounding an alleged failure to comply" with the discovery provisions. *See, e.g.*, N.C. Gen. Stat. § 15A-910; *State v. Jaaber*, 176 N.C. App. 752, 755 (2006). What sanctions, if any, that a trial court imposes for violation of the discovery provisions are within the discretion of the court. *See Jaaber*, 176 N.C. App. at 755-56. A trial court, however, is not required to impose a sanction where there

has been a discovery violation. *See id.* at 755. The Court of Appeals has ruled that there was not a discovery violation when a prosecutor failed to turn over an expert's "working notes" that the prosecutor did not know existed and that had not been shown to contain information different from that contained in the expert's written report (which had been made available to Defendant in discovery). *See State v. Toler*, ___ N.C. App. ___, 2008 N.C. App. Lexis 480 (No. COA07-337) (March 4, 2008) (unpublished).

CONCLUSIONS OF LAW

1. This Court has the requisite jurisdiction to address the matters set forth in Defendant's Motion to Dismiss and/or for Sanctions.

2. The relevant facts in this case are not in dispute.

3. By failing to make the handwritten field notes of Officer Lowder and Captain Tharrington available to Defendant after his formal request for discovery, the State did not comply with the mandates of N.C. Gen. Stat. § 15A-903. This failure is not attributable in any way to the actions of Assistant District Attorney Alan Greene, who did not know or have reason to know prior to the testimony of the officers that the officers had destroyed their handwritten field notes in this case.[*]

4. The subject matter at issue as it applies to Defendant's Motions – the officers' handwritten field notes about their investigation of the crime scene and the statements given by the alleged victim in this case - is material as it relates to this case. It is not, however, the most material subject matter when viewed in light of other evidence that was presented at trial or forecast by the parties.

5. There is no way to know whether the information contained in the officers' handwritten field notes was accurately or completely transcribed in the officers' compilation of their final reports. Based on the testimony of the officers and the nature of their roles in the investigation, however, there is no evidence of record that would lead this Court to conclude that evidence or other information that may have been beneficial to Defendant's case was destroyed.

6. The Court has fully considered all the available sanctions and concludes that the totality of the circumstances presented do not warrant dismissal of the case or the prohibition of introduction of evidence pursuant to N.C. Gen. Stat. § 15A-910. The other sanctions available under § 15A-910 (order permitting discovery, continuance/recess, mistrial) are not appropriate given the procedural posture of this case.

[*]The Court notes for the purposes of this Order that it is aware of the North Carolina Supreme Court's decision in *State v. Gillespie*, 362 N.C. 150 (2008), in which the Supreme Court ruled that N.C. Gen. Stat. § 15A-910 does not give a trial court the authority to sanction a party for its failure to comply with the criminal discovery rules based on the actions of non-parties. *See Gillespie*, 362 N.C. at 154-55. As it is not necessary to the disposition of the issues presented, the Court in this case does not intend in its ruling to address the issue whether Officer Lowder and Detective Tharrington constitute "the State" in its capacity as a "party" contemplated by N.C. Gen. Stat. § 15A-910, and the Court offers no opinion as to that issue.

Based on the Findings of Fact and Conclusions of Law set forth above, the Court concludes that the State should not be sanctioned for its failure to comply with the discovery statutes in this case. The Court further concludes, however, that the North Carolina discovery statutes do not provide a satisfactory mechanism for addressing the conduct of Officer Lowder and Captain Tharrington, and so elects to address this issue in an exercise of its inherent authority. As the relevant facts are not in dispute in this case and were the subject of substantial testimony at the hearing on Defendants' Motions, the Court further concludes that the record in this case is sufficiently well-developed, and that both sides had ample opportunity to be heard as to the nature of the conduct in this case, for the Court to exercise its inherent authority in the manner set forth below.

All courts are vested with the inherent authority "'to do all things reasonably necessary for the proper administration of justice.'" *State v. Buckner*, 351 N.C. 401, 411 (2000) (quoting In re *Alamance County Court Facilities*, 329 N.C. 84, 93 (1991)). This power belongs to a court "by virtue of being one of three separate, coordinate branches of government." In re *Alamance County Court Facilities*, 329 N.C. at 93. A court may use its inherent power "when constitutional provisions, statutes, or court rules fail to supply answers to problems . . . ." *Buckner*, 351 N.C. at 411 (citing Felix F. Stumpf, *Inherent Powers of the Courts* 37-38 (1994)). The inherent power of the court, however, is not a "broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function," and "must be exercised with restraint and discretion" due to its "potency[.]" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42-44, 115 L. Ed. 2d 27, 43-45 (1991) (quotations and citations omitted), *reh'g denied*, 502 U.S. 1269 (1991). A court may exercise its inherent authority when the interests of justice require it to do so. In re *Superior Court Order*, 315 N.C. 378, 380 (1986) (dealing with the court's ability to regulate criminal discovery). One aspect of the court's responsibility for protecting the "interests of justice" is ensuring the integrity of the judicial process. *See, e.g.*, *Swenson v. Thibaut*, 39 N.C. App. 77, 109 (1978) (describing court's inherent authority to "protect itself from . . . impropriety and to serve the ends of justice which are, fundamentally, the *raison d'etre* for the existence and operation of the courts") (citation omitted), *cert. denied and appeal dismissed*, 296 N.C. 740 (1979); In re *Northwestern Bonding Co.*, 16 N.C. App. 272, 275 (1972) (discussing court's inherent authority to discipline attorneys in effort to prevent conduct that would "bring contempt upon the administration of justice") (citation omitted), *appeal dismissed*, 282 N.C. 426 (1972).

North Carolina's appellate courts have recognized that a trial court has the power to censure even where there is no explicit statutory authority for it to do so. *See, e.g.*, *Couch v. Private Diagnostic Clinic* et al., 146 N.C. App. 658, 662-63 (2001) (discussing inherent authority of courts to censure attorneys for inappropriate conduct), *cert. denied and appeal dismissed*, 355 N.C. 348 (2002); In re *Key*, ___ N.C. App. ___, 721, 2007 N.C. App. Lexis 799 (2007) (same), *cert. denied*, 361 N.C. 428, 433 (2007); *Smith v. Bolden*, 95 N.C. App. 347, 353 (1989), *aff'd per curiam*, 328 N.C. 564 (1991) (recognizing court's power to censure attorney on court's own motion for improper closing argument); *State v. Young*, 291 N.C. 562, 573 (1977) (same). A censure is an "official reprimand or condemnation." *Black's Law Dictionary* (5th ed.) at 203.

The undisputed facts of this case as admitted by the law enforcement officers involved – one officer (Tharrington) who testified that he knew that his handwritten field notes were materials that should not have been destroyed, and one (Lowder) who

should have known based on his years of experience both as a law enforcement officer and as a judicial official in another county – show that Officer Lowder and Captain Tharrington did not follow the North Carolina criminal discovery provisions enacted more than three years prior to the events in this case. The Court notes further that the amendments to the North Carolina criminal discovery rules were well-publicized at the time of their enactment, and that the law applying to the discovery of handwritten field notes, in addition to being contained in Chapter 15A of the North Carolina General Statutes, is explicitly set out in the basic law enforcement training provided to all law enforcement officers:

> In all cases within the superior court's original jurisdiction, law enforcement file documents concerning offenses alleged to have been committed by a defendant must be made available to the District Attorney in compliance with disclosure requirements. ***The file documents include the investigating officers' notes.***

The North Carolina Justice Academy, *Basic Law Enforcement Training*, Chapter 15H (Criminal Investigation), at 26 (emphasis added).

The Court does not intend by this discussion to imply that Officer Lowder or Captain Tharrington destroyed their handwritten field notes in an effort to harm Defendant's case or otherwise subvert the causes of justice: The evidence in this case was clear that, at the time that the officers destroyed their notes, the Defendant in this case had not been charged and was not at that point even a person of interest in the ongoing investigation. The failure of the officers to comply with well-established law at the time of the investigation, however, is significant in the view of this Court. Due to the lack of a suitable alternative mechanism for addressing the conduct of the officers in this case, the Court concludes that the only appropriate course of action in this case is one "squeezed from the need to make the court function" in accordance with the Court's responsibilities to ensure the integrity of the judicial process and the proper administration of justice. As such, the Court concludes in an exercise of its inherent authority that the interests of justice require that the officers be censured for their failure to comply with North Carolina law in the course of their investigation into the shooting of Mr. Lowder.

Based on the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the Court concludes in an exercise of its informed discretion that the State should not be sanctioned for the conduct of the officers in this case. IT IS THEREFORE ORDERED in an exercise of the Court's informed discretion that Defendant's Motion to Dismiss pursuant to N.C. Gen. Stat. § 15A-910 is DENIED, and Defendant's Motion for Sanctions pursuant to N.C. Gen. Stat. § 15A-910 is DENIED.

Based on the foregoing, the Court concludes in an exercise of its informed discretion and in the exercise of its inherent authority that Officer Todd Lowder of the Mount Gilead Police Department should be and is CENSURED for conduct prejudicial to the administration of justice, and that Captain Daniel Tharrington should also be and is CENSURED for conduct prejudicial to the administration of justice.

This ORDER is entered out of session with the consent of both sides as noted at the hearing on this matter.

This, the 3d day of April, 2009.

Ripley E. Rand
Superior Court Judge