STATE OF OHIO)
) SS: FILED
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS

CASE NO. CR-485971

2007 NOV -6 A 11: 11

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

STATE OF OHIO)
)
Plaintiff)
)
vs.) **JUDGMENT ENTRY**
)
WILSON SANTIAGO)
)
Defendant)

JANET R. BURNSIDE, JUDGE:

Although filed as a "memorandum of law in response to judgment entry of 10/22/07", the State of Ohio in this pleading filed October 24, 2007 states that it "requests that this Court revise its ruling of 10/22/07 in order to effectuate the agreement of the parties on the production of the requested materials. This Court should not require the State to provide all police reports and witness statements to defense counsel." By reason of this request inside the filed memorandum, the Court takes this filing to be a motion by the State for reconsideration of the October 22, 2007 order. The Defendant filed its brief on October 30, 2007 opposing any revision of the October 22, 2007 entry. Apparently there is no "agreement of the parties" to effectuate.

The Defendant previously sought by its March 7, 2007 motion a Court order compelling the production of all police reports and witness statements for the purpose of providing those experts with underlying facts upon which they could base their expert opinion. In its opposition brief filed March 26, 2007 the State flatly opposed that request for discovery

as being beyond that required or permitted by Crim. R. 16. Contrary to its current representation, the State did not agree at that time to produce police reports to Defendant's experts. Defense counsel countered that other judges in this Cuyahoga County Court of Common Pleas have ordered similar discovery in capital cases and the State has complied with the production ordered. On the record subsequently, the State of Ohio conceded as much. The State continued its objection to production of police reports to defense experts but indicated it would comply with such an order.

Numerous times on the record in discussing this proposal, this Court was reluctant to order disclosure of police reports because it provided information to the defense experts that was not necessarily going to be submitted as evidence at trial. As a result, defense expert opinion and testimony would conceivably be based on information not in evidence and hence inadmissible. That deficiency would perforce only become evident at trial and could result in the expert testimony being stricken or severely impeached and weakened in its presentation to the jury. The obvious result a court could expect from a defendant in a capital cases given such development would be either a motion for a mistrial or a motion for a delay in trial to permit the defendant to acquire new witnesses.

In the October 22, 2007 entry, the Court sought to avoid this difficulty of expert reliance on non-evidence by requiring that all experts give their expert opinion in answer to questions in the form of hypothetical questions. Under this technique experts would not be permitted to take the stand and simply describe generally that they have reviewed police reports in preparation for formulation of their opinions and giving testimony.

Defendant points out that experts for the State are given the police reports in preparation of their opinions and that exposure to extra information has made the State's experts appear

more credible and persuasive than defense experts. Provision of the police reports to the State expert witnesses also means they may be formulating opinion on facts not necessarily in evidence.

The State now expressly consents to production of the police reports to defense experts while continuing to object to their production to defense counsel. The Court notes that production of police reports to defense experts also contravenes the strict language of Crim. R. 16, but this particular violation of Crim. R. 16 seems not to trouble the State of Ohio. The State's willingness to ignore Crim. R. 16 and provide police reports to defense experts shows that it does not consider the rule to be sacrosanct.

The unstated premise of this arrangement is that experts hired by defense counsel may not divulge contents of the police reports to defense counsel. This places Defendant's counsel in an unenviable and awkward position of possessing less information than their agents, that is, their chosen witnesses. Obvious difficulties are seen with this arrangement. The fact the arrangement has allegedly been used in other capital cases does not enamor this Court of its use here. How is the Defendant protected from counsel being unwittingly ill advised and unprepared for facts of which experts have knowledge but counsel does not. Without such disclosure how are the defense counsel going to take advantage of facts brought out? How can counsel formulate direct examination of the witnesses? How does defense counsel protect against from unwittingly introducing expert testimony based on facts that are not in fact testified to and placed in evidence.

The Ohio Supreme Court in the recent decision appealed from the Cuyahoga County Court of Common Pleas, *State v. Brown* (2007), 2007-Ohio-4837, reversed a defendant's conviction in a capital case on the grounds, *inter alia*, of prosecutor misconduct in failing to

divulge to defense counsel significant and obvious exculpatory evidence contained in their police reports. Fortunately the prosecutor's file had been copied and retained for appellate view by order of the trial court. Had the trial court conducted an *in camera* inspection of the police reports, the exculpatory information contained therein would likely have been divulged. The obvious exculpatory nature of the non-disclosed information in the *Brown* case (police statements that others were taking credit for committing the murder) would cause one to agree that such inspection would protect the defendant's rights. Equally astonishing is the Cuyahoga County prosecutor's failure to recognize the exculpatory nature of the information and disclosure it to Brown.

The Court is not so confident that it could review police reports in this case and be able to discern what would be considered exculpatory to the Defendant. The Court does not know what theory or theories of liability the State is advancing. Indeed at this juncture, defense counsel may not yet know. The Court does not know the defenses that the Defendant believes he has to the indictment. The Court is in the worst position to conduct an *in camera* inspection if the objective is to ensure that disclosure of exculpatory information is to be made. The obvious means to protect a capital defendant in his trial is to provide copies of the police reports and witness statements to defense counsel so that they can be as prepared as their possible expert witnesses and they can discern for themselves what exculpatory information is contained in those police reports.

It is noted that notwithstanding Crim. R. 16, courts in some counties in this state routinely order police reports be turned over to defense counsel and in other counties prosecutors voluntarily turn over police reports to the defense. No ill effect from these procedures has been reported. By reason of the foregoing, this Court declines to revise its

ruling of October 22, 2007. Fundamental fairness compels the disclosure. The State is to provide all the police reports and witness statements no later than November 13, 2007 at 4:00 P.M.

IT IS SO ORDERED.

JANET R. BURNSIDE, JUDGE

November 5, 2007

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