Journal of Criminal Law and Criminology

Volume 65 | Issue 1 Article 5

1974

Recent Trends in the Criminal Law

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 65, No. 1

Printed in U.S.A.

RECENT TRENDS IN THE CRIMINAL LAW

DISCOVERY

Federal and state courts continue to define and clarify the scope of discovery in criminal cases. The District Court for the Northern District of Georgia refined its previous decision[1] on pre-trial discovery and the District of Columbia court of appeals would not extend discovery to allow the government to obtain the defense investigator's report. Two state courts, Florida and New York, dealt with the discovery of police records. A third state court, Michigan, ruled on a request for discovery of the prosecution's dossier on prospective jurors.

In *United Statesv. Quinn*, 364 F. Supp. 432 (N.D. Ga. 1973), the court modified the procedures it previously had outlined for pretrial discovery. The court held that the test of whether disclosure is required is whether the information "is materially favorable to the defendant," not whether the information "might be considered helpful." In *United States v. Eley*,[2] this court had required the government to search its files for any information that "might be helpful" to the defense and to turn over to the court for in camera determination any of the material it contended was not "materially favorable." Many defendants were unclear as to the standard and felt they were entitled to court-ordered discovery of anything that "might be helpful." The court, in *Quinn*, explained that the "might be helpful" test was a threshold test only and not the final standard to be applied in determining whether the defendant had a right to the information requested. In clarifying the test, the court stated that the standard for court-ordered discovery in compliance with *Brady v. Maryland*,[3] has always been whether the government had information "materially favorable" to the defense.[4]

The "might be helpful" standard had only served the purpose of requiring the government to bring to the attention of the defendant the existence of material which the court might ultimately determine to be materially favorable.

The court restated the test and eliminated the "might be helpful" standard. The government must now respond to an informal request for discovery by stating whether it possesses the information and whether the information is "arguably favorable" to the defendant. If the government does not possess the information, the inquiry ends. If the government possesses the information and finds it materially favorable, it will disclose it to the defendant. However, if the government possesses the information but has real doubt as to whether it is materially favorable, it may deny the request but must provide a general description of the information in question. At this point, the defendant may formally request the court to examine in camera the arguably favorable information. The court then determines whether the information is materially favorable.[5]

In this court, then, the government may not refuse disclosure of arguably favorable information without giving the defendant the opportunity to have the information reviewed by the court for final determination.

On the precedent of the Fifth Circuit's decision in *United States v. Gonzales*,[6] which held that the government has no constitutional duty to assist the defendant in locating witnesses who have knowledge of the case, the court here denied the defendant's request for names and addresses of all persons known to the government who had knowledge of the facts of the case. While admitting that the names of such persons might be helpful to the defendant, the court was unwilling to extend the scope of discovery in violation of *Gonzales*. In response to the defendant's request to copy reports prepared by the government, the court required the government to reply to the defendant as to whether or not it possessed information "arguably favorable" to the defendant's defense of entrapment.

In *United States v. Wright*, __ F.2d __ (D.C. Cir.

[1] United States v. Eley, 335 F. Supp. 353 (N.D. Ga. 1972).

[2] *Id.*

[3] 373 U.S. 83 (1963). The Supreme Court held that requirements of due process prohibit the prosecution from withholding favorable evidence from an accused which would tend to exculpate him or reduce punishment.

[4] In Williams v. Dutton, 400 F.2d 797, 800 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969), the Court of Appeals for the Fifth Circuit held, "It is now clear that *Brady* imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence which is materially favorable to the accused either as direct or impeaching evidence."

[5] 364 F. Supp. at 442.

[6] 466 F.2d 1286 (5th Cir. 1972).

1973), the District of Columbia court of appeals refused to adopt a common-law rule of discovery which would require the defense, after its witness has testified on direct examination, to turn over to the prosecution prior statements of that witness in its possession so that those statements could be used by the government to cross examine the witness. Such an action, pointed out Judge Wright, would make fundamental changes in procedures that have been treated in detail by statute or rule.

The case arose when the prosecution, at trial, requested the report of the defense investigator to the defense counsel and later called the investigator as a government rebuttal witness. The court found it an error to permit the prosecutor to question the investigator about his interview with a defense witness because anything the investigator said at the trial would be hearsay. As to the government's claim that the defense should turn over the investigator's report to the prosecution, Judge Wright pointed out that this would modify the Jencks Act,[7] making applicable to the defense what was applicable to the prosecution, a result not intended by Congress. He also stated that Rule 16(c) of the Federal Rules of Criminal Procedure[8] dealt with the right of discovery by the government but applied only where the defense had taken advantage of the right of discovery and entitled the government only to discover documents which the defendant intended to produce at trial. Because the statute and rules were intended to immunize defense material from discovery, Judge Wright did not feel that the court should impose a major change.

Judge Wright also argued that the government's proposed rule raised a substantial constitutional question as to its validity under the fifth amendment. The rule would require the defense to turn over evidence incriminating to the defendant and entail excessive judicial intrusion into the files of the defense. The due process clause imposes an affirmative duty on the government to reveal evidence helpful to the defense.[9] The defense, however, has no reciprocal duty, a principle long a part of our legal tradition.[10]

Judge Wright concluded his opinion by stating:

> The defendant has a right under the fifth amendment to compel the state to investigate its own case, find its own evidence, and prove its own facts. The defense has no duty to help the prosecution convict the defendant.[11]

Police records were the subject of *State v. Johnson*, 284 So. 2d. 198 (Fla. 1973). The Florida Supreme Court held that, under restricted circumstances, the defense can discover police reports and use them for cross examination and impeachment purposes. The evidence sought must (1) go to a critical and material fact in serious contention at the trial, (2) be reasonably exculpatory of the defendant, and (3) undergo an in camera review and deletion.[12] The defendant had been convicted of a breaking and entering charge. At trial the arresting officer testified that the defendant's coat on the night of the burglary had on it markings of white powder similar to a substance found near the forced entryway. The trial court refused to admit, for impeachment purposes, the initial police report that made no mention of powder on the coat. The court expressed a caution that the use of police reports should not become a "fishing expedition." In addition, police reports often contain information, such as leads to other cases, that must be protected. The court added one further limitation

[7] 18 U.S.C. § 3500. This act requires the government to turn over to the defense prior statements of government witnesses after the witness has testified on direct examination.

[8] 16 (c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a) (2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case or of statements made by the defendant, or by the government or defense witnesses, or by prospective government or defense witnesses to the defendant, his agents or attorneys.
FED. R. CRIM. P. 16.

[9] Brady v. Maryland, 373 U.S. 83 (1963).

[10] Lord Mansfield once observed:
[I]n civil causes, the Court will force parties to produce evidence which may prove against themselves; or leave the refusal to do it (after proper notice) as a strong presumption, to the jury.... But in a criminal or penal cause, the defendant is never forced to produce any evidence; Though he should hold it in his hands, in Court.
Roe dem. Haldane v. Harvey, 4 Burr. 2489, 98 Eng. Rep. 302 (K.B. 1769).

[11] __ F.2d at __.

[12] 284 So. 2d at 201.

—that the inquiry should be on a positive statement in a police report, not on an omission.

In *People v. Sumpter*, 75 Misc. 2d 55, 347 N.Y.S.2d 670 (1973), the New York County Supreme Court, Central Narcotics Division, held that defense attorneys are entitled, by means of subpoena if necessary, to examine material in the police department records which might affect the credibility of police officers scheduled to testify against their clients. The court reasoned that since regular police reports are discoverable when relevant, any property in the possession of the police department was subject to discovery, if not exempt. The defendant was entitled to know whether witnesses, and police officers were no exception, have been guilty of any acts which may affect their credibility. Furthermore, the defendant's life is thoroughly investigated and may be used to attack his credibility, and an equal opportunity should be available to him to obtain data on witnesses against him. The only factor which might prohibit disclosure would be the public interest privilege, under which the government may withhold information prejudicial to the public interest, such as the identity of informants. However, the court stated that it was in the public interest for the police department to investigate its police officers, maintain records and have records available to those who have a need to know the contents. The court attached the caveat that the records should be given to the trial judge for an in camera examination to determine their relevancy.

A different but related area in the field of discovery involves the prosecution's dossier on jurors. In *People v. Aldrich*, 47 Mich. App. 639, 209 N.W.2d 796 (1973), the Michigan court of appeals held that disclosure of the prosecution's dossier on prospective jurors must be made available to the defendant on request. The dossier in question was collected by police agencies and contained information both on whether jurors were prosecution-minded and on jurors' and their families' adverse contacts with the law.

While courts nation-wide are divided on the issue of whether information on jurors should be made available to the defendant, this was a case of first impression in Michigan. The court, in its decision, relied on the concept of fundamental fairness in the area of disclosure.[13] The court found no rational basis for denying disclosure, which would treat the defendant unfairly. Because of the importance of jurors to the criminal system, nondisclosure of information on which a defendant might exercise peremptory challenges would make justice mere "gamesmanship" in the opinion of the court. Disclosure of jury dossiers would fulfill an important function by providing information vital to the exercise of peremptory challenges and upon which challenges for cause could be made.[14] The court disavowed any intention to benefit the defendant. It also disposed of the argument that the dossiers fall within the "work product" doctrine by stating that this cannot be invoked to deny disclosure of an investigatory report.

[13] Roviaro v. United States, 353 U.S. 53 (1957).

Search of Son's Room

The Illinois supreme court, in *People v. Nunn*, 55 Ill. 2d 344, 304 N.E.2d 81 (1973), held that evidence obtained in a warrantless search of a nineteen year old's room, carried out at his mother's request, must be suppressed. Relying on *Katz v. United States*,[15] the court said that the validity of this search was to be judged by the reasonable expectation of privacy. The defendant, prior to the search, had lived in his mother's home, and, while he did not pay rent, he did give money intermittently to his mother. The mother had access to the room. About two weeks before the search, the defendant moved out, locked the door, and told his mother not to let anyone into the room. His mother became concerned and asked the police to search his room. She gave her written consent and was present during the search. The police seized narcotics, hypodermic needles and syringes, and charged the defendant with the unlawful possession of them.

Prior Illinois law held that an equal or greater right to the use or occupancy of premises gives a co-occupant the right to consent to a search of the premises. Because *Katz* was not consistent with this holding, the court overruled earlier cases. The Illinois court rejected any consent to the search based solely on a landlord-tenant relationship or the property rights of the mother. The critical issue was whether the son had a reasonable expectation of privacy in the locked quarters. The court found that the defendant did have a reasonable expectation of privacy after he locked the door and upon the failure of his mother to object to his request that she not open the door. Under the *Katz* test, the court stated that the critical point was

[14] 209 N.W.2d at 802.
[15] 389 U.S. 347 (1967).

whether the son believed his mother would not enter the locked room or allow others to enter. The precautions he took indicated his belief that his room would not be entered. The court then inquired whether his expectation of privacy was a reasonable one, and found that it was on the basis of his mother's actions in setting aside the room for his use. The court could see no evidence on the record that the defendant had voluntarily waived his fourth amendment rights. Finally the court declared that the police knew that the son had not given his consent to the room being entered. Again referring to *Katz*,[16] the court concluded by saying that fourth amendment rights protect persons, not areas. Moreover, *Coolidge v. New Hampshire*[17] was distinguished. In that case the wife had voluntarily given her husband's guns and pants to the police, who had not searched the premises nor gone there for that purpose. On the other hand, the sole purpose of the police in *Nunn* was to search the room. Although the mother had requested the search, it was the police who entered the room. This was clearly government action.

Class Action

In *Wecht v. Marsteller*, 363 F. Supp. 1183 (W.D. Pa 1973), victims of unreasonable and brutal conduct on the part of a Pittsburgh police officer brought a successful class action suit for injunctive relief in the federal District Court for Western Pennsylvania. The citizens brought the action under the Civil Rights Act[18] on behalf of themselves and on behalf of all persons who now, have in the past, or will in the future, travel upon the public roads, sidewalks and highways of Pittsburgh to enjoin the police officer from continuing the alleged civil rights deprivations. The court found that this was a valid class action under provisions of Rule 23 (b)(2) and (3) of the Federal Rules of Civil Procedure.[19] The court commented that there was apparently no other existing remedy to protect the interest involved and that suits for damages were expensive and ineffective. The major part of the opinion is the court's finding of facts on the abuses. Some of the acts which the police officer engaged in were: arresting without cause a person waiting for a ride outside a baseball park and forcibly pushing him against the back of a police cruiser so that he was in danger of bruising his face on the vehicle, arresting a man after a verbal confrontation with him at a restaurant and then striking him with a billy club, and, on two occasions, striking drivers of cars which he had stopped. At no time did any of the victims offer any resistance or threaten any type of bodily injury to the police officer. On the basis of these facts, the court had no difficulty in deciding that the police officer had engaged in illegal and unconstitutional activity by using physical force and that injunctive relief was necessary to prevent any further acts on his part. The court also held that in civil rights matters state convictions do not constitute collateral estoppel preventing the plaintiff from attacking the constitutional question in federal courts.[20]

[16] *Id.* at 351.
[17] 403 U.S. 443 (1971).
[18] 42 U.S.C. § 1983.

[19] Fed. R. Civ. P. 23.
[20] 363 F. Supp. at 1190. The court cited Kaufman v. Moss, U.S. 846 (1970); Ney v. State of California, 439 F.2d 400 1285 (9th Cir. 1971); Mulligan v. Schlachter, 389 F.2d 231 (9th Cir. 1968); Moran v. Mitchell, 354 F. Supp. 86 (E.D.Va. 1973).