

ORIGINAL

IN THE
SUPREME COURT OF OHIO

IN RE D.M.,

A Minor Child-Appellant.

Case No. 2013-0579

Appeal No. C-1200794

Trial No. 12-9552Z

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS
HAMILTON COUNTY, OHIO

REPLY BRIEF OF APPELLANT D.M.

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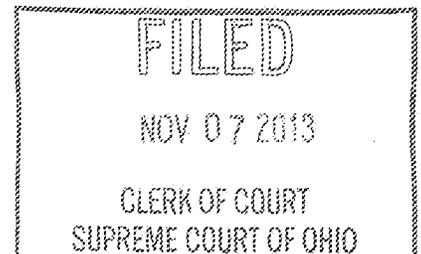
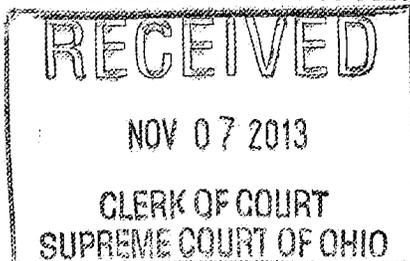


TABLE OF CONTENTS

	Page No.
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	4
PROPOSITION OF LAW NO. I	4
A juvenile is entitled to full discovery prior to a probable cause hearing held pursuant to R.C. 2152.12. Fourteenth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 16; Juv.R. 24.	
A. The discovery rules apply in full effect prior to a bindover probable cause hearing	4
1. <i>Scope of Juv.R. 24</i>	5
2. <i>Applicability of Crim.R. 16</i>	6
B. The state did not provide “substantial” discovery	7
C. The state is not the sole arbiter of what is <i>Brady</i> material or otherwise discoverable	8
D. The juvenile court acted well within the scope of its discretion to dismiss the case without prejudice	9
CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

	Page No.
Cases Cited:	
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).....	1, 4, 8, 9
<i>In re A.K.</i> , 2d Dist. Montgomery No. 21504, 2007-Ohio-2095	7
<i>In re D.M.</i> , 1st Dist. Hamilton No. C-120794, 2013-Ohio-668.....	3, 4, 10
<i>In re D.P.</i> , 6th Dist. Lucas No. L-10-1054, 2011-Ohio-0285.....	7
<i>In re D.S.</i> , 8th Dist. Cuyahoga No. 97757, 2012-Ohio-2213	7
<i>In re Johnson</i> , 61 Ohio App.3d 544, 573 N.E.2d 184 (8th Dist.1989).....	5
<i>In re K.H.</i> , 8th Dist. Cuyahoga No. 92618, 2009-Ohio-5237	10
<i>In re Swift</i> , 8th Dist. Cuyahoga No. 79610, 2002-Ohio-1276	7
<i>Lakewood v. Papadelis</i> , 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987)	9
<i>Pennsylvania v. Ritchie</i> , 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).....	8, 9
<i>State v. Cunningham</i> , 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504	6
<i>State v. Darmond</i> , 135 Ohio St.3d 343, 2013-Ohio-966.....	9
<i>State v. Jenkins</i> , 15 Ohio St.3d 164, 473 N.E.2d 264 (1984)	6
<i>State v. Patterson</i> , 28 Ohio St.2d 181, 277 N.E.2d 201 (1971)	9
<i>State v. Wiles</i> , 59 Ohio St.3d 71, 571 N.E.2d 97 (1991).....	10
<i>State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register</i> , 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913	6
Constitutional Provisions Cited:	
Fourteenth Amendment to the U.S. Constitution.....	4
Ohio Constitution, Article I, Section 16	4
Statutes Cited:	
R.C. 2152.12	4, 11
R.C. 2945.67	2

Rules Cited:

Crim.R. 1.....	7
Crim.R. 16.....	2, 6, 7
Crim.R. 29.....	7
Juv.R. 24.....	1, 4, 5, 6, 7

STATEMENT OF THE CASE AND FACTS

The state alleged that then 16-year-old D.M. was delinquent of aggravated robbery, and moved the juvenile court to relinquish jurisdiction in favor of criminal prosecution, i.e., bindover D.M. T.d. 1 and 4.

On October 17, 2012, D.M. filed a request for discovery, seeking discovery pursuant to Juv.R. 24, and materials pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and its progeny. T.d. 7. On October 22, 2012, the state partially responded to D.M.'s discovery request. T.d. 8. In its initial discovery response, the state listed two Cincinnati police officers, Officer Combs and Officer Longworth, as witnesses, as well as the alleged victim; however, the state asserted that there were no known written witness statements. *Id.* The state did provide copies of D.M.'s and his adult codefendants' recorded statements. *Id.*; T.p. 5, Oct. 25, 2012. However, the state did not provide copies of the statements of the other witnesses who were interviewed by police. T.p. 5 and 11, Oct. 25, 2012. No witness' or victim's statements were provided even though the police spoke to them. Although there were several weeks of investigation between the time of the alleged offense and D.M. being charged, the police report filed with the complaint simply states "arrested shot [victim] in the torso while robbing him," but refers to the 301 and 527(b) which contain the real facts of the case. T.d. 1. Similarly, the only relevant facts provided in the state's discovery response was the equally basic: "testimony is expected to include but is not limited to: Victim was robbed and shot in the abdomen by [D.M.]." (Sic.) T.d. 8. Contrary to the state's assertion in its brief, the state did not provide "the contents of [witnesses'] written and oral statements." State's Merit Brief 1 and 8.

Counsel for D.M. became aware that the Cincinnati police officers had prepared reports, forms 301 and 527(b), per their normal routine. However, the state did not provide defense

counsel with the 301 or 527(b) police reports. Both police reports are prepared in the ordinary course of police work.

On October 25, 2012, the date initially scheduled for a probable cause hearing, D.M. filed a motion to compel discovery. T.d. 9. The juvenile court heard arguments on the motion. The state indicated that it intended to have Officer Trabel, who had not been disclosed in discovery, testify rather than either of the two listed officers. T.p. 9, Oct. 25, 2012. The state argued that it had provided everything that it was required to provide in discovery, while defense counsel argued that D.M. was entitled to copies of the 301 and 527(b) because they contained witness statements and were necessary for D.M. to prepare his defense. *Id.* at 6-10. Defense counsel also argued that, after the recent amendments to Crim.R. 16, the police reports would clearly be discoverable under the Criminal Rules if D.M. were boundover. *Id.* at 6 and 16. The state took the position that it had provided everything that it was required to under the law. *Id.* at 19. The juvenile court continued the probable cause hearing and granted the state leave to file a written response to D.M.'s motion to compel. *Id.* at 25. The state did not file a written response to D.M.'s motion to compel.

On November 8, 2012, the juvenile court heard further arguments, after which, it held: "The State is ordered to turn over to defense counsel both 301 and 527b police reports." T.d. 15; *see also* T.p. 8-9, Nov. 8, 2012. The state did request "a couple days" continuance so that the prosecution's appellate division could review the discovery issue. T.p. 9, Nov. 8, 2012. The juvenile court did not specifically rule on this request. However, the juvenile court continued the matter for 11 days for a probable cause hearing on November 19, 2012. T.d. 15. The state never filed a motion for the juvenile court to reconsider its order. Nor did the state seek leave to appeal. *See* R.C. 2945.67(A).

Because the state had not complied with the juvenile court's order to provide the 301 and 527(b) police reports, on November, 16, 2012, D.M. filed a motion to show cause and a motion to dismiss. T.d. 17 and 18.

On November 19, 2012, the state was not prepared to go forward with the probable cause hearing and had not provided the 301 and 527(b) police reports. The assistant prosecutor asserted that the juvenile division prosecutors had been "in contact with" the appellate division that morning and noted that the state was considering filing a writ of prohibition in the First District. T.p. 3, Nov. 19, 2012. The juvenile court noted that the court had ordered the state to turn over the 301 and 527(b) police reports, both of which were prepared "in the ordinary course of police work." *Id.* at 6. After a lengthy hearing and after allowing the state to revisit its arguments concerning discoverability of the police reports, the juvenile court held that "the State errantly, and in violation of a direct Court order, refused to provide discoverable information in violation of Defendant's rights to due process." T.d. 19. The juvenile court noted hesitance to dismiss what it considered to be serious charges. T.p. 7, Nov. 19, 2012. However, because the state had "disregarded a direct order" of the court, the court felt compelled to dismiss D.M.'s matter. *Id.* The juvenile court therefore dismissed the matter without prejudice. T.d. 19. The state appealed. T.d. 23.

On appeal, the First District reversed the juvenile court's judgment dismissing the state's case and remanded this cause for further proceedings. *In re D.M.*, 1st Dist. Hamilton No. C-120794, 2013-Ohio-668, ¶ 18.

ARGUMENT

PROPOSITION OF LAW NO. I:

A juvenile is entitled to full discovery prior to a probable cause hearing held pursuant to R.C. 2152.12. Fourteenth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 16; Juv.R. 24.

A. The discovery rules apply in full effect prior to a bindover probable cause hearing.

In the court of appeals, the state argued primarily that the police reports at issue were not discoverable because they were protected by work-product privilege. *In re D.M.*, 1st Dist. Hamilton No. C-120794, 2013-Ohio-668, ¶ 3. The First District held that the question of whether the reports were “privileged” was moot. *Id.* at ¶ 14.

Instead, the First District carved out bindover proceedings as a place where neither the Juvenile Rules nor the Criminal Rules apply, at least as far as discovery is concerned. The First District reasoned that the “outcome of a bindover proceeding necessarily determines whether Juv.R. 24 or Crim.R. 16 will govern discovery in a given case.” *In re D.M.* at ¶ 9. Therefore, the First District held that “the state must provide to a juvenile upon request only (1) any *Brady* materials in its possession and (2) the evidence that the state intends to use at the probable-cause hearing.” *Id.*; *see also Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

In its merit brief before this Court, the state does not argue, as the First District held, that Juv.R. 24 does not apply prior to a bindover probable cause hearing. Rather, the state argues about “how expansively Juv.R. 24(A) is to be interpreted.” State’s Merit Brief at 2.

The state appears to concede D.M.’s primary argument – that the juvenile discovery rules, i.e., Juv.R. 24, *do* apply prior to a bindover probable cause hearing. The state instead

argues about the scope of Juv.R. 24, i.e., whether the rule actually requires the state to provide copies of police reports in discovery.

1. Scope of Juv.R. 24.

In pertinent part, the Juvenile Rules require the state to provide:

- (2) Copies of any written statements made by any party or witness;
- (3) Transcriptions, recordings, and summaries of any oral statements of any party or witness, except the work product of counsel; * * *
- (6) * * * In delinquency * * * proceedings, the prosecuting attorney shall disclose to respondent's counsel all evidence, known or that may become known to the prosecuting attorney, favorable to the respondent and material either to guilt or punishment. Juv.R. 24(A).

“Juv.R. 24(A) unequivocally entitles appellant to production of [the victim's] narrative to the police.” *In re Johnson*, 61 Ohio App.3d 544, 548, 573 N.E.2d 184 (8th Dist.1989). “There is nothing in Juv.R. 24 mandating the witness' signature on a narrative, nor does that rule specify that the statement must be taken verbatim.” *Id.* Since the police reports contain written recordings of statements made by the alleged victim and other witnesses, they are clearly discoverable as witness' statements.

Moreover, since the state intended to use the officers as witnesses, any information in the police reports not derived from the victim or other witnesses to the event would also be discoverable witness statements because the officers themselves are listed as witnesses. Even under the former criminal discovery rules, a defendant was entitled to “those portions of a testifying police officer's signed report concerning his observations and recollection of the

events.” *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶ 43, quoting *State v. Jenkins*, 15 Ohio St.3d 164, 225, 473 N.E.2d 264 (1984).

It is obvious that the police reports at issue in this case, as in virtually all cases, were derived from some combination of statements from witnesses and officers’ personal observations. Both categories of information are clearly discoverable under Juv.R. 24. Therefore, copies of the police reports themselves are discoverable.

The state cautions that “[p]olice officer reports can include many notations for purposes such as documentation, reminder, action prompt, later verification, investigative analysis, statistical record keeping, etc.” State’s Merit Brief at 4. However, there was no indication below that the police reports at issue in this case contained any of these notations. Moreover, the state did not seek permission to limit discovery of these reports or to redact these reports in anyway. *See* Juv.R. 24(B).

Trial “courts have broad discretion over discovery matters.” *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, ¶ 18.

In the case *sub judice*, the juvenile court concluded that the 301 and 527(b) police reports were discoverable and ordered that they be provided to the defense. T.d. 15. The state “completely disregarded” this order. T.d. 19.

2. Applicability of Crim.R. 16.

The state concedes that the police reports at issue in this case are discoverable under Crim.R. 16. State’s Merit Brief at 2-3. The juvenile court interpreted Juv.R. 24 in the context of Crim.R. 16. T.d. 19. The juvenile court noted that the 2010 revisions to the Criminal Rules greatly expanded the scope of discovery for adult defendants. T.d. 19. This expansion included

police reports. The juvenile court reasoned: “Given the objective to safeguard juveniles, it is unreasonable and contrary to law, that juveniles would be afforded fewer protections than adults, especially when the juvenile justice system is designed to be rehabilitative in nature and protective of a child’s welfare.” (Sic.) T.d. 19.

The plain language of Juv.R. 24 is enough to mandate the discovery of the 527(b) and 301 reports in this case. But the juvenile court was also correct to interpret discovery requirements in this case through the lens of Crim.R. 16.

The Criminal Rules apply to juvenile proceedings except “to the extent that specific procedure is provided by other rules of the Supreme Court or to the extent that they would by their nature be clearly inapplicable.” Crim.R. 1(C); *see, e.g., In re A.K.*, 2d Dist. Montgomery No. 21504, 2007-Ohio-2095 (applying a Crim.R. 29 motion for acquittal to a juvenile proceeding). Other courts have applied Crim.R. 16 to juvenile discovery or interpreted Juv.R. 24 in the context of Crim.R. 16. *E.g., In re D.P.*, 6th Dist. Lucas No. L-10-1054, 2011-Ohio-0285; *In re Swift*, 8th Dist. Cuyahoga No. 79610, 2002-Ohio-1276; *In re D.S.*, 8th Dist. Cuyahoga No. 97757, 2012-Ohio-2213.

Crim.R. 16(B)(6) makes police reports specifically discoverable by criminal defendants. There is simply no reason why a police report, discoverable by a criminal defendant, should not be discoverable by a child.

B. The state did not provide “substantial” discovery.

The state argues that it provided “substantial” discovery. State’s Merit Brief at 6. The state provided the names of two police officers and then attempted to have a different officer, who had not been disclosed in discovery, testify rather than either of the two listed officers. T.p. 9, Oct. 25, 2012. The state did provide the recorded statements of D.M. and his codefendants,

but the state did not provide any statements, in any form, from other fact-witnesses. The offense allegedly took place approximately three weeks before the complaint was filed. T.d. 1. However, the state provided no explanation of what occurred during this fairly lengthy investigation or even how police determined D.M. to be a suspect. The state did not provide surveillance video which may have shown the offense. T.p. 8, Nov. 8, 2012. The state did not provide telephone or text message records. *Id.* No evidence of a gun was provided. *Id.* Although the victim was allegedly shot, no medical records were provided. *Id.*; T.d. 8. Finally, the state refused to provide the 301 and 527(b) police reports when ordered to do so by the juvenile court.

The state did not substantially comply with discovery. There were numerous items that were clearly relevant to the probable cause hearing that the state simply did not provide. More germane to the case before this Court, the juvenile court ordered the state to provide specific documents, the 301 and 527(b) police reports, and the state refused to do so.

C. The state is not the sole arbiter of what is *Brady* material or otherwise discoverable.

The state argues that it is the prosecution alone, not the trial court or the juvenile, which decides what material is exculpatory and subject to discovery under *Brady*. State's Merit Brief at 7; *see also Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The state has cited *Ritchie* for the proposition that “[i]n the typical case where the defendant makes only a general request for exculpatory material under *Brady*, it is the state that decides which information must be disclosed.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 59, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). However, the very next sentence of *Ritchie*, quoted by the state, says, “*Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court’s attention, the prosecutor’s decision on disclosure is final.*” (Emphasis added.) *Id.* The Supreme Court held that the defendant is entitled to know whether the

government's file contains information that may be exculpatory. *Id.* at 61. In *Richie*, neither the trial court nor defense counsel had reviewed the records at issue. The Supreme Court held that an in camera review of records is necessary to determine whether records are *Brady* materials. *Id.* at 61.

This Court has likewise held that “[i]t [is] incumbent upon the trial court to determine if there [is] evidence favorable to the accused which [is] material to either guilt or punishment.” *State v. Patterson*, 28 Ohio St.2d 181, 182, 277 N.E.2d 201 (1971).

The juvenile court here did not reach the issue of whether the police reports were *Brady* material. Rather, the juvenile court ordered their production under the discovery rules. T.d. 15 and 19.

While due process may not grant defendants a right to rummage around in the state's files, it does give defendants a right to an examination of specific evidence that the defense has identified as potentially exculpatory. In *Ritchie*, the Supreme Court held that the defendant was entitled to at least an in camera review to determine if certain records must be turned over pursuant to *Brady*.

While the state has an initial duty to identify and disclose *Brady* materials, the state is not the final arbiter of what is exculpatory material.

D. The juvenile court acted well within the scope of its discretion to dismiss the case without prejudice.

The state characterizes the juvenile court's actions as “dismiss[ing] a charge for a non-existent discovery violation.” State's Merit Brief at 9. However, this case is not one where there was a mere failure to comply with a discovery request as was the case in *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987) and *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966.

On November 8, 2012, the juvenile court ordered the state to turn over the 301 and 527(b) police reports. The juvenile court heard the state's discovery arguments on three separate occasions over nearly a month, the last of which was heard even after the juvenile court had ordered discovery and D.M. had filed a motion to dismiss. The state never filed a response to D.M.'s motion to dismiss. The state was given 11 days from the time it was ordered to turn over the police reports before the court dismissed the case, on November 19, 2012, and, even then, the case was only dismissed due to the state's in-court refusal to turn over the police reports. The First District even found that "[t]he state refused" to comply with the discovery order. *In re D.M.*, 1st Dist. Hamilton No. C-120794, 2013-Ohio-668, ¶ 3. Faced with such a flat refusal to obey its order, the juvenile court had little choice but to dismiss the complaint.

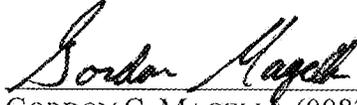
"The decision to dismiss a complaint is within the sound discretion of the trial court." *In re K.H.*, 8th Dist. Cuyahoga No. 92618, 2009-Ohio-5237, ¶ 7; *see also State v. Wiles*, 59 Ohio St.3d 71, 78, 571 N.E.2d 97 (1991). This Court noted that a case can be dismissed, even with prejudice, for a discovery violation. *Darmond* at ¶ 41. Here, there was not just a failure to comply with discovery, but an outright refusal to obey a court order. Dismissal without prejudice was more than warranted in this case.

Given the state's refusal to comply not just with a discovery request, but a court order, the juvenile court acted within its sound discretion to dismiss D.M.'s case without prejudice.

CONCLUSION

For the reasons discussed above, a juvenile is entitled to full discovery prior to a probable cause hearing held pursuant to R.C. 2152.12. Therefore, this Court should reverse the decision of the First District Court of Appeals.

Respectfully submitted,



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