IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JONATHAN QUISANO,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

No. 66816

REPLY TO SUPPLEMENTAL FAST TRACK RESPONSE

Additional Statement of facts.

The Clark County District Attorney's Office has long held the position of maintaining an "Open File" policy. The Office has on and off the record repeatedly expressed the office policy is to encourage defense counsel to review the prosecution's files for any discoverable information prior to trial or sentencing. The same is true in the case before this Honorable Court. Not only did the prosecution admit to such a policy in open court and its pleadings, but defense counsel availed themselves of the opportunity to review the State's file on more than one occasion.

At sentencing, Ms. Rodrigues, who testified at the preliminary hearing and had been noticed as a witness in the government's case-in-chief, gave a victim impact statement. (ROA 1514-42; 1170-78). In that statement, she asked the court for leniency in sentencing Mr. Quisano, a man with no criminal history (other than a DUI conviction). Over defense objection, the

15-900824

prosecutor questioned her using an affidavit of a Department of Family Services official. (ROA 1174-75). In that undisclosed affidavit, the DFS official quoted Ms. Rodriguez as expressing a desire that Mr. Quisano go to prison. (ROA 1174-75). The prosecutor argued that prior disclosure of the DFS Affidavit was not required as "It's not part of discovery. This is a victim-impact statement." (ROA 1176). The Court overruled the defense objection, and allowed the prosecutor to examine Ms. Rodrigues about the contents of the affidavit. (ROA 1176-80). Also over defense objection, the prosecutor elicited testimony from Mrs. Quisano that was outside the scope of the statutory authority. (ROA 1514-42; 1170-78). Thereafter, the court sentenced Mr. Quisano to the maximum allowed pursuant to the prosecutor's recommendation. (ROA 1166-7).

Notably, prior to Mr. Quisano's entry of his guilty plea, the defense filed a Motion to Compel Discovery. (ROA 792-816). In that Motion, the defense requested production of any/all statements of all witnesses the government intended to call at trial, as well as impeachment information for those individuals. (ROA 807-812). Since Ms. Rodrigues was one of the individuals noticed on the government's witness list (ROA 617), she was one of the individuals for whom the defense sought the prior statement and impeachment information. (ROA 807, 811). The prosecution responded by,

inter alia, citing the Clark County District Attorney's open file policy. (ROA 828-835). The trial court granted the defense discovery requests, ordering the disclosure of witness statements and impeachment information. (ROA 1250-1253).

I. THE STATE MAINTAINS AN "OPEN FILE" POICY IN EVERY CASE THEY PROSECUTE, INCLUDING THIS CASE.

The Clark County District Attorney's Office has long held the position of maintaining an "Open File" policy. The Office has on and off the record repeatedly expressed the office policy is to encourage defense counsel to review the prosecution's files for any discoverable information prior to trial or sentencing. The same is true in the case before this Honorable Court. Not only did the prosecution admit to such a policy in open court and its pleadings, but defense counsel availed themselves of the opportunity to review the State's file on more than one occasion.

The existence of the "Open File" policy is clearly found in the record on appeal. For example, in their Opposition to the Defendant's Motion for Discovery, the Clark County District Attorney's Office, retorts,

"the State invites defense counsel to review the State's case information to insure that they have all written or recorded statements, as well as all other discovery available at the present time." AA at 828.

Again, defense counsel took advantage of this opportunity and reviewed the file pursuant to the "Open File" policy. It will not come to much surprise to this Honorable court that the Clark County District Attorney assigned to prosecute this case repeats the invitation to review the file MORE THAN 10 TIMES. AA at 828-35. Thus, the State's untenable position on appeal that the prosecution did not maintain an "Open File" policy in this case is patently false.

The trial court erred by allowing the prosecutor to question Ms. Rodriguez at sentencing using a document not previously provided to the defense. **NRS 174.234**, which governs discovery production in criminal cases, obligates prosecutors to notify the defense, not less than 5 judicial days prior to trial, of any witness he intends to call in his case in chief. Similarly, **NRS 174.235(1)(a)** requires the government to provide: "Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the state..." **NRS 174.235(1)(c)** further obligates the government to disclose to the defense "books, papers, documents, tangible objects, or copies thereof, which the prosecuting attorney intends to introduce in the case in chief of the state." **NRS 174.305** provides that, when a party fails to comply with the provisions of **NRS 174.235**, the trial court may

"permit inspection of the materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances."

Prosecutors noticed Ms. Rodrigues as a case-in-chief witness. Accordingly, she was the subject of the defense request(s) for prior statements. The court granted the request and ordered prosecutors to turn over any written or recorded statement statements made by Ms. Rodrigues and the other noticed witnesses. The prosecutor failed to honor this directive, and instead withheld the DFS affidavit containing Ms. Rodrigues's statements. Accordingly, the prosecutor violated the trial court's discovery Order, as well as **NRS 174.235**.

Admittedly, the matter did not proceed to trial, and Ms. Rodrigues, as the mother of the deceased, provided a victim impact statement at sentencing. However, the term 'case in chief,' as set forth in **NRS 174.235**, includes each party's evidentiary presentation at a penalty hearing. **Floyd v. State**, 118 Nev. 156 (2002). Accordingly, the prosecutor violated the lower court's discovery Order as well as **NRS 174.235** by withholding the statement of a witness who exercised her statutorily conferred right to testify at the instant sentencing hearing.

Notably, even if prosecutors ultimately decided not to call Ms. Rodrigues at either the trial or sentencing phases of Mr. Quisano's proceeding(s), they nonetheless were obligated to disclose the affidavit at issue. Prosecutors may not lawfully withhold inculpatory material and information simply because they do not intend to present the material or information during the government's case in chief. **State v. Harrington**, 9 Nev. 91, 94 (1873); **People v. Carter**, 312 P.2d 665, 675 (Cal.1957); **People v. Bunyard**, 756 P.2d 795, 809 (Cal. 1988). Any holding to the contrary would allow prosecutors to engage in unfair surprise by withholding inculpatory material from the government's case in chief, only to surprise the defense by using it in rebuttal.

Additionally, the instant prosecutor's invocation of, and defense counsel's subsequent reliance upon, the Clark County District Attorney's Office 'open file policy,' compels the conclusion that use of the prosecutor's use of the document at issue here required prior disclosure. Historically, the Clark County District Attorney's Office has employed an 'open file' policy in which prosecutors allow defense counsel to review the discovery contained in the government's trial file. Once this open file policy is invoked, as was the case here, the defense may rely on that representation and assume that the prosecutor has provided all relevant discovery. See, e.g., **Strickler v. Green**,

527 U.S. 263, 283, n. 23 (1999) ("If a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose..." See also **Amando v. Gonzalez**, No. 11-56420 at 27 (9th Cir. 2013).

Indeed, this was the Nevada Supreme Court's holding in **McKee v. State**, 112 Nev. 642, 644 (1996). In **McKee**, the prosecution withheld an inculpatory photo of the defendant. After the defendant testified, the government disclosed the photo and sought to admit it through another witness. Id. The trial court allowed introduction of the photo. Id. The Nevada Supreme Court reversed, holding that, given the prosecutor's earlier assurance of an 'open file policy,' the defense was entitled to assume the government had provided all relevant inculpatory and exculpatory evidence in the case. Id. Accordingly, the prosecution's introduction of the undisclosed inculpatory photo at trial amounted to unfair surprise. Id.

This is precisely what happened here. Not only did both **NRS 174.234** and the lower court's discovery Order require disclosure of the instant affidavit, but the prosecutor's assurance of an 'open file policy' compelled the disclosure, as well. The prosecutor's invocation of an 'open file policy' misled the defense into believing that the government had provided all

relevant discovery. As such, the introduction of the undisclosed affidavit amounted to unfair surprise. And the surprise revolved around the critical issue of Mr. Quisano's sentence. As this Court is well-aware, a testifying victim-impact speaker can have large sway over a sentencing authority. But for the unfair surprise and resulting prejudice occasioned by the DFS affidavit, the sentencing result may have been very different. Thus, under **McKee**, the instant discovery violation requires reversal.[1]

II. THE STATE VIOLATED NRS 174.235 BY NOT PROVIDING THE AFFIDAVIT PRIOR TO SENTENCING.

The State is misreading the application of NRS 174.235(a) by attempting to convince this Honorable Court that the affidavit in question was not a written or recorded statement made by a prosecution witness. A clear reading of the statute rebuts this argument.

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[1] Notably, this Honorable Court asked the parties to discuss both **McKee**, supra, as well as **Furbay v. State**, 116 Nev. 481 (2000). In **Furbay**, the Nevada Supreme Court rejected the defense contention that prosecutors were required to disclose reports authored by a police officer who testified at Furbay's penalty hearing. However, **Furbay** is not dispositive of the issue currently before this Court. First, the **Furbay** prosecutor, unlike the instant prosecutor, did not offer assurances of an 'open file policy.' The **Furbay** Court distinguished **Furbay** from **McKee** on this basis. Second, unlike the case at bar, there is no evidence that Furbay sought and obtained a discovery order directing production of the very material withheld from the defense. Third, there is no evidence that the witness at issue in **Furbay**, unlike Ms. Rodrigues, had been noticed as a prosecution case-in-chief witness, such that the discovery obligations conferred by NRS 174 applied. Thus, unlike **McKee**, **Furbay** is not dispositive of the issue(s) at bar.

NRS 174.235(a) obligates the prosecution to provide any, "written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the state..." There can be no question that an affidavit is a written document. There can be no question that it is a statement of the witness. There also can be no question that the State "intended" to call her in their case in chief. This prosecution witness was the client's wife. She gave a recorded statement to the police, is a percipient witness, and was on the State's witness list from the inception of the case. There is no doubt should would have been called as a witness at trial by the prosecution. Thus, the plain reading of NRS 174.235(a) make disclosure required in this case.

III. THE STATE WAS REQUIRED TO PRODUCE THE AFFIDAVIT BASED ON THIS COURT'S HOLDINGS.

Both McKee v. State, 112 Nev. 642, 917 P.2d 940(1996), and Furbay v. State, 116 Nev. 481, 998 P.2d 553(2000), apply to this case and require disclosure. Certainly, that is why this Honorable Court ordered supplemental briefing. The facts and circumstances of each of these cases militate towards disclosure of this inculpatory material prior to trial/sentencing based on the prosecution's "Open File" policy.

In McKee, this Court held that providing inculpatory evidence is required when the prosecuting office maintains an "Open File" policy. That

has already been established based on the record. So, McKee requires disclosure. Inculpatory evidence, such as at issue here, must be disclosed.

In Furbay v. State, 116 Nev. 481, 998 P.2d 553(2000), this Court ruled that disclosure and discovery are different when there is an "open file" policy versus when such a policy is not in place. The State argues that, "the State refrained from making any explicit promise to produce all evidence in its possession." Supplemental Fast Track Response at p. 18. On the contrary, the State in their responsive pleading to the discovery motion admits to an "Open File" policy. They write as follows:

"the State invites defense counsel to review the State's case information to insure that they have all written or recorded statements, as well as all other discovery available at the present time." AA at 828. Maybe this is not a talismanic phrase like "Open File". But, that is exactly what this is—come look at our file and obtain appropriate discovery—discovery like which was not turned over in this case. Thus, the Furbay case supports the defense position that the affidavit in questioned should have been turned over to the defense long before sentencing.

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CONCLUSION

Based on the foregoing, Appellant, Quisano, respectfully requests that the case be reversed and remanded for a new sentencing hearing.

Respectfully submitted,

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VERIFICATION

1. I hereby certify that this supplemental fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This supplemental fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this supplemental fast track statement complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is either:

[XX] Proportionately spaced, has a typeface of 14 points or more, and contains 2,210 words.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 23rd day of July, 2015.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEF.

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NANCY LEMCKE, #5416
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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Supplemental Fast Track Reply to the attorney of record listed below on this 23rd day of July, 2015.

STEVEN B. WOLFSON
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BY _____
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