

07CA2380 Peo v. Rouse 08-26-2010

COLORADO COURT OF APPEALS

Court of Appeals No. 07CA2380
Arapahoe County District Court No. 06CR2021
Honorable J. Mark Hannen, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Brent Stafford Rouse,

Defendant-Appellant.

JUDGMENTS REVERSED, SENTENCES VACATED,
AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE NIETO*
Webb and Gabriel, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced August 26, 2010

John W. Suthers, Attorney General, Majid Yazdi, Assistant Attorney General,
Denver, Colorado, for Plaintiff-Appellee

Thomas K. Carberry, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2009.

Defendant, Brent Stafford Rouse, was charged in connection with three fires that occurred in three homes located in close proximity to each other and to defendant's residence. Defendant was charged with three counts of first degree arson, three counts of fourth degree arson, three counts of criminal mischief, and three habitual offender counts. Defendant was convicted of all charges and found to be a habitual offender. He now appeals the convictions and sentences. Because of a serious discovery violation, we reverse the judgments of conviction and vacate the sentences imposed.

I.

Sheriff Investigator S. investigated the first fire. He wrote a report stating that the cause of the fire was undetermined. He testified that his investigation did not establish that this was an arson fire.

Investigator S. did not investigate the second or third fires. These investigations were conducted by Sheriff Investigator D., who developed defendant as a suspect. Investigator S. discussed the second fire investigation with Investigator D., and then wrote a second report stating that he did not think, based on the

investigation of the second fire, that defendant had started fire number one. Investigator D. proceeded to present the investigations to the District Attorney, who filed the charges in this case.

The two reports of Investigator S. were provided to defendant in discovery. Relying on these reports, defense counsel, in opening statement, told the jury that Investigator S. would testify that the first fire was not an arson fire and that he disagreed with Investigator D.

The prosecution called Investigator S. as a witness and began asking questions about the third fire. Defense counsel objected because the two reports she had did not mention the third fire. Then, for the first time, the prosecution revealed that Investigator S. had changed his opinion and would testify that the first fire was caused by arson and that this new opinion was based on information he had received from Investigator D. about the second and third fires.

At a bench conference, defense counsel strongly objected to this testimony because she had not been informed about the changed opinion and had relied on the two reports of Investigator S.

that had been provided to her. She asserted that this was a discovery violation that had impacted her evaluation of the strength of the prosecution's case and her plea negotiations, and caused her to make statements in her opening statement that were not accurate.

The court then heard an offer of proof as to what Investigator S. would say if permitted to testify about his changed opinion. The prosecutor did not tell the court when he learned of the new opinion. He argued that no discovery violation occurred because Investigator S. had not prepared a new written report, defense counsel could have interviewed the witness and learned of the new opinion, and the evidence would not be exculpatory.

The trial court observed that lawyers can not predict "to a certainty, what a witness will testify to." It further stated that defense counsel could cross-examine the witness on his opinions and explain in closing argument that she had only learned of his changed opinion when he testified. The court found no discovery violation and ruled that Investigator S. could testify about his changed opinion. The court recessed one hour early to give defense counsel more time to prepare for this unexpected evidence.

The next morning, Investigator S. was qualified as an expert in fire investigation and opined that, based on similarities between fires one and three, fire one was an arson fire. He further testified that defendant was identified as a suspect in fires two and three.

Resolution of discovery issues is committed to the discretion of the trial court, and will not be disturbed absent on abuse of discretion or violation of the defendant's constitutional rights.

People v. Denton, 91 P.3d 388, 391 (Colo. App. 2003).

Crim. P. 16, as relevant here, provides:

Part I

- (a)(1) The prosecuting attorney shall make available to the defense the following material and information which is within the possession or control of the prosecuting attorney . . . :
 - (I) Police, arrest and crime or offense reports, including statements of all witnesses;
.....
 - (III) Any reports or statements of experts made in connection with the particular case
.....
- (b)(3) The prosecuting attorney shall perform all . . . obligations under [Part I, (a)(1)(I) and (III)] as soon as practicable but not later than thirty days before trial.

Part III

- (b) If . . . a party discovers additional material or information which is subject to disclosure . . .

he or she shall promptly notify the other party . . . of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

Part V

- (a) The furnishing of the items discoverable, referred to in Part I (a), (b) and (c) . . . is mandatory

The prosecutor's duty to disclose information concerning the pending case extends not only to exculpatory evidence, but to any evidence that may be of material importance to the defense. *People v. Gallegos*, 644 P.2d 920, 925 (Colo. 1982).

A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense – regardless of whether it relates to testimony which the State has caused to be given at trial – the State is obliged to bring it to the attention of the court and the defense.

People v. Smith, 185 Colo. 369, 376, 524 P.2d 607, 611 (1974) (quoting *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793 (1967)).

A discovery violation is not reversible error unless it causes prejudice to the defendant. *Salazar v. People*, 870 P.2d 1215, 1220 (Colo. 1994).

Here, we conclude that the prosecution's failure to disclose this critical information was a violation of its continuing duty to disclose discoverable information under Crim. P. 16(III)(b). *State v. Perez*, 52 P.3d 451, 457-58 (Utah Ct. App. 2002) (when prosecutor discloses information, it has a duty to do so "fully and forthrightly" and has a continuing duty to disclose new information "so as to avoid misleading the defense").

Investigator S. was testifying as an expert, and the prosecution was obligated to disclose his reports. *See* Crim. P. 16(I)(a)(1)(III). We are aware that Investigator S. did not write a report memorializing his changed opinion and that the prosecutor is not required to reduce all oral interviews to writing and disclose them to the defense. *People v. Denton*, 91 P.3d 388, 391 (Colo. App. 2003). However, the prosecution cannot avoid its discovery obligations by deliberately failing to take notes or deliberately failing to reduce statements to writing. *People v. Anderson*, 837 P.2d 293, 299 (Colo. App. 1992).

There is no direct evidence in the record that the prosecution's failure to make a written report was a deliberate attempt to avoid the discovery obligation. However, the clear mandate in Crim. P. 16

for disclosure of expert reports, the obvious critical importance of the changed expert opinion, the prosecutor's repeated reliance on the absence of a written report as part of his argument that no discovery violation occurred, and his failure to assert that the change of opinion was only recently revealed to him, are certainly indications that the failure to disclose may have been deliberate. Deliberate or not, this critical information was subject to mandatory disclosure under Crim. P. 16(I)(a)(1)(III) and (V)(a).

We also conclude that this discovery violation caused significant prejudice to defendant. The changed opinion was the only evidence that fire one was caused by arson. Without that evidence there was no proof of the corpus delicti for the charges relating to that fire. Prior to the changed opinion, Investigator S. was expected to testify that the cause of fire one was undetermined and that he did not conclude that it was caused by arson. Further, the prosecution relied on the similarities in the three fires as proof that defendant caused all three. Thus, the changed opinion added weight to the prosecution's proof as to all the fires. As defense counsel told the court, she relied on the disclosed reports in evaluating the state's case and conducting plea negotiations.

Additionally, by telling the jury in opening statement about Investigator S.'s opinions as set out in his two reports, it was clear that reliance on his opinion was part of her trial strategy. When she was undercut by the new opinion, her trial strategy was severely damaged and her credibility with the jury may have been diminished. That a trial lawyer's credibility with the jury is of critical importance to his or her client's case is beyond question.

Thus, we conclude the discovery violation prejudiced defendant, and his convictions must be reversed and his sentences vacated. *See United States v. Chastain*, 198 F.3d 1338, 1348 (11th Cir. 1999) (where defense strategy may have been determined by a failure to disclose evidence, there should be a new trial).

II.

Because they may arise on retrial, we will address defendant's contentions that the trial court erred in refusing to suppress his statement to the police and that he was entitled to the benefit of amendments to the criminal mischief statute.

A. Motion to Suppress

Defendant contends that the trial court erred in denying his motion to suppress his statements to police. We disagree.

During the investigation of the second fire, defendant was contacted by police to obtain a witness statement. He complied and also stated he would be willing to help further if needed. However, his attorney later contacted the investigator in charge to inform him that defendant would not be available for any further statements in relation to the second fire.

After the third fire, defendant was arrested on a bond violation related to a separate offense. When he was arrested, he repeatedly asked the investigator, "What is this all about?" The investigator explained that he was under arrest for a bond violation and was being transported to jail. Defendant continued to question the investigator, who then asked him, "Are you saying you want to talk to me?" Defendant responded affirmatively and an interview took place at the jail.

Defendant moved to suppress the oral and written confession. He argued he had invoked his right to counsel prior to this interview and the investigators violated his rights. After a hearing, the trial court denied the motion, finding that defendant had reinitiated contact with investigators and the invocation of counsel only applied to fire two. The trial court also found that he had

voluntarily waived his *Miranda* rights.

On appeal, defendant contends that he had exercised his Fifth Amendment right to an attorney when his attorney told the investigators that he was not to be questioned further. He also argues that the statements were not voluntary.

When reviewing a motion to suppress, we defer to the trial court's factual findings and review the conclusions of law de novo. *People v. Pacheco*, 182 P.3d 1180 (Colo. 2008).

The Fifth Amendment privilege against self-incrimination is a personal right to be invoked by the defendant himself. *People v. Vasquez*, 155 P. 3d 588, 591 (Colo. App. 2006). The Fifth Amendment right to counsel during interrogation must also be invoked by the defendant himself. *People v. Rosales*, 911 P.2d 644, 651 (Colo. App. 1995).

Here, defendant does not claim that he invoked his right to counsel, but rather relies on his attorney's statements to the police after the second fire. Therefore, we conclude defendant failed to invoke his Fifth Amendment right to counsel, and the trial court did not err by denying his motion to suppress.

Defendant also contends that there is no reliable record to

determine whether his statements were voluntary because the interview was not recorded.

However, defendant signed the *Miranda* advisement acknowledging his rights and still agreed to talk with the investigators. There is nothing in the record to indicate he was acting involuntary.

To the extent that defendant contends that his due process rights were violated by the failure to videotape the interview, we disagree. As a division of this court held in *People v. Raibon*, 843 P.2d 46 (Colo. App. 1992), failure to videotape or audiotape a defendant's interrogation does not violate due process.

B. Statutory Amendments

Defendant also contends the jury was incorrectly instructed on the criminal mischief charges because the statutory language changed prior to trial. We do not agree.

Defendant argues that under the doctrine of amendatory legislation, the amendment to section 18-4-501 on July 1, 2007 should apply retroactively. The amendment to the statute changed from \$15,000 to \$20,000 the amount of damage necessary to constitute class 4 felony criminal mischief. He contends that the

amendment did not explicitly state that it only applied to crimes committed on or after the effective date.

We reject this argument. The statutory amendment clearly contains an effective date of July 1, 2007 and provides that the amendment only applies to crimes committed on or after that date. Ch. 384, sec. 19, 2007 Colo. Sess. Laws 168; *see also People v. Shipley*, 22 P.3d 564 (Colo. App. 2001), *rev'd on other grounds*, 45 P.3d 1277 (Colo. 2002).

Because the convictions must be reversed and the sentences vacated, we do not consider defendant's other contentions.

The judgments of conviction are reversed, the sentences are vacated, and the case is remanded for a new trial.

JUDGE WEBB and JUDGE GABRIEL concur.