91211-4

Fri 1/9/2015
4:59 PM

NO. 44761-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

---

STATE OF WASHINGTON,

Respondent,

vs.

DARIN RICHARD VANCE,

Petitioner.

---

# PETITION FOR REVIEW

---

David T. McDonald and
Steven W. Thayer, Of
Attorneys for Appellee

510 SW Third Avenue #400
Portland, Oregon 97204

112 West 11th Avenue
Vancouver, Washington 98660

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### *State Cases*



### ***Constitutional Provisions***



### ***Court Rules***

A. *IDENTITY OF PETITIONER*

Darin Vance asks this court to accept review of the decision designated in Part B of this motion.

B. *DECISION*

Petitioner seeks review of each and every part of the decision of the Court of Appeals reversing the Clark County Superior Court's order striking information from the affidavit filed in support of the state's search warrant, and dismissing the charges with prejudice, based upon the state's failure to comply with discovery rules. A copy of the Court of Appeals decision is attached.

C. *ISSUES PRESENTED FOR REVIEW*

**I. ARE THE STATE'S LAW ENFORCEMENT WITNESSES WHO ARE PART OF A INTERAGENCY TASK FORCE, AND PARTICIPATE IN THE INVESTIGATION AND PROSECUTION OF A STATE DEFENDANT, IN THE "POSSESSION AND CONTROL" OF THE STATE SUCH THAT THE STATE HAD TO PRODUCE THEM FOR INTERVIEWS WITH THE DEFENSE OR BE SUBJECT TO A COURT IMPOSED SANCTION?**

**II. DID THE COURT OF APPEALS ERR BY HOLDING THAT THE DOCTRINE OF SOVEREIGN IMMUNITY RESTRICTED THE TRIAL COURT'S AUTHORITY WHEN THE STATE DID NOT RELY ON THE THEORY OF SOVEREIGN IMMUNITY IN THEIR BRIEF AND, EVEN IF THE COURT DID NOT ERR BY RELYING ON AN UNPRESERVED ARGUMENT, DID THE COURT ERR BY FAILING TO SHIFTING THE BURDEN TO THE DEFENDANT TO COMPEL THE TESTIMONY OF THE WITNESSES?**

## D. *STATEMENT OF THE CASE*

As a result of a joint federal and state task force investigation, law enforcement executed a search warrant at the home of Mr. Vance and subsequently the state charged Mr. Vance with multiple counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct and Distribution of Depictions of Minors Engaged in Sexually Explicit Conduct. The state knew that Agents Peay (Homeland Security Investigations) and Burney (FBI) were part of the investigation, obtained key information regarding Mr. Vance and supplied that information to the affiant who included it within his affidavit. Absent the information supplied by the two agents, the affidavit failed to support probable cause for the warrant. 13 RP at 354-355. Absent the testimony of Agent Burney, the state would not be able to prove the Distribution counts. 5 RP 100.

In June 2012, the defense filed a Motion for Depositions under CrR 4.6, asserting that Agents Burney and Peay were material and necessary to the preparation of the defense and had refused to reply to requests for interviews. CP at 57. On August 8, 2013, the trial court conditionally granted the motion but gave the state a week to determine if they wished to object. The state did not object and the court entered the Order on August 16, 2012[1]. *See* CrR 4.6(a)(2).

The defense then issued notices of deposition and subpoenas

[1] CP 106

*duces tecum* to Agents Burney and Peay pursuant to the unopposed court Order. CP at 517-527. The witnesses failed to appear for the noticed depositions. Instead, Assistant United States Attorneys sent letters to the defense that stated that the agents would not attend or comply with the state court orders. CP at 529-536. No United States Attorney ever made a formal appearance in the state trial court, filed a motion to quash the subpoenas or filed a challenge to the court's valid order nor did they send any letters to the court.

The defense filed a motion to dismiss (CP at 499-500), and attached the letters from the AUSAs (CP at 529-536). On November 8, 2012, the trial court again held that the defense had a right to take the depositions. 3 RP 26-58. The state did not contest that ruling. 3 RP 43-44. The court required that the defense prepare new orders for depositions for Agents Peay and Burney, and again set specific dates and times for those depositions. 3 RP 42-44; 3 RP 53. On November 16, 2012, the Court signed and entered the Orders. CP 539.

The defense received another letter from an AUSA on November 28, 2012 on behalf of Agent Burney, which asserted that the subpoenas to take testimony and produce documents were "without force and effect" and that "there will be no response to this subpoena on

November 29, 2012, or any other date".[2]

On December 11, 2012, the state conceded that without Agent Burney, they would not be able prove the Distribution charges. 5 RP 100. The trial court ruled that he would allow the testimony of the state's witnesses unless the defense submitted a scope and relevance letter to the agents and the court entered that Order on December 21, 2012. CP at 597.

The defense then submitted a scope and relevance letter on January 4, 2013 (CP 606-608) and reported that to the court on January 18, 2013. 8 RP at 179. The court found the letter to be sufficient and the state did not object, or take exception to, that finding. 8 RP 183-184 and 9 RP at 237. The parties then agreed to a continance of the February trial date until March 11, 2013 to allow the state to set up interviews.

At the February 6, 2013, the state reported that, in regards to gettting the witnesses to participate in an interview, he could "make this happen" and asked the court to grant him additional time. 9 RP 234. DPA St. Clair also stated that when he had previoulsy used federal agents as witnesses, he would personally do the scope and relevancy letter. *See* 9 RP at 234-235[3] DPA St. Clair also admitted the agents were state's witnesses for the purpose of probable cause. 9 RP 259.

---

[2] DPA Smith made the November 28, 2012 letter from the AUSA a part of the record on November 30, 2012. CP 540-541.

[3] "But having worked in the drug unit and gang cases, I personally have never had a problem getting a federal agent, and I -- but they make me do the scope and relevancy letter. So even if it's my witness, like let's say we got to point of trial, and, say, Your Honor

On February 25, 2013, DPA St. Clair reported he made direct contact with a specific AUSA and he again emphasized that the agents were state's witnesses and it was his "burden" to produce them for interviews and acknowledged that he did not even know if the witnesses would be available for the trial scheduled to begin on March 11: "***So, I know that is not Defense counsel's fault, it's the burden in this case—you know, it's on me to work this out. They're our witnesses***". 10 RP 266, ll 1-4. He again requested additional time to set up the interviews and the court allowed the state an additional five days and set a hearing for March 1, 2013. 10 RP 262 and 266, ll 1-4 (emphasis supplied).

On March 1, 2013, DPA St. Clair reported he had received no response from the federal government regarding the availability of the agents to submit to defense interviews. 11 RP 278-279. There is nothing in the record that shows he made any attempt to file his own scope and relevancy letter with the AUSA and/or the agents, a procedure with which he admitted that he was familiar with and, which he had utilized in the past to obtain federal agents for state court proceedings.

Based upon the statements by DPA St. Clair that he had been unable to set up interviews, the court imposed an intermediate sanction but

---

hypothetically, you know, we were allowed to proceed with all of our witnesses. Before they would even agree to come down and testify at trial, I would have to do a scope and relevancy letter to get them to testify. Now, when I've done them, I've been -- I've drafted them myself, and I have gotten -- and I call them and I -- you know, there's a particular paralegal I work with up there, and, you know, maybe it's because I'm also a special assistant U.S. attorney, I'm able to get that going."

did not dismiss the case:

> I am going to—it's not a dismissal of the case. The State may make a decision that with the ruling I make they don't have enough to proceed. That's going to independent.
>
> But at this point we have two agents who have not adequately participated in the state court process under the state rules. Why (sic) I've still required Mr. Thayer to comply with the federal regulation about the scope and relevancy process.
>
> I'm going to exclude their information in the warrant.
>
> 11 RP 282, ll 3-15.

The trial court then set a date for entry of that Order and on March 15, 2013 and entered the Order Granting Defendant's Motion to Strike. CP at 663. Based upon the court's Order, the state moved to dismiss and the defense filed a motion that the dismissal be with prejudice. The Court granted the defense motion and issued an Order Of Dismissal with Prejudice. CP at 720. The State filed a timely appeal of "the trial court's order redacting affidavit for search warrant and Order of Dismissal with Prejudice entered on April 15, 2013" and attached copies of those two Orders).

The state made multiple arguments on appeal including that the witnesses were not material and necessary but the state's brief never raised the issue of sovereign immunity. The Court of Appeals ruled that the law enforcement agents who provided critical information to the probable cause determination were not "in the possession and control" of the state

and, therefore, the state could not compel them to be present for interviews.[4]

The Court of Appeals also ruled that, because Vance did not comply with the applicable federal statutes and agency regulations required to obtain testimony and information from federal agents, the federal government did not permit them to testify and, thus, by redacting the agent's information from the search warrant affidavit the trial court abused its discretion.

## E. *ARGUMENT WHY REVIEW SHOULD BE ACCEPTED*

The case at bar presents two issues for the court's review. First, the Court of Appeals opinion is contrary to the constitutional foundation of the state's discovery rules by holding that the state cannot compel a witness to speak to defense counsel and that the state's witnesses were not in the possession and control of the state such that they had to produce them for interviews. Second, the state did not raise the issue of sovereign immunity in their briefs in the Court of Appeals and, thus, the Court of Appeals erroneously relied on an unpreserved legal theory in reversing the trial court. Third, this case presents an issue of importance in that, if let stand, state prosecutor's can utilize federal agents in state prosecutions, knowing that the federal agents do not have to comply with state discovery rules and are not subject to the requirements of CrR 4.6 and 4.7, thus thwarting the

[4] However, the court's opinon cited to the Court of Appeals case of *State v. Wilson*, 108 Wn. App. 774, 779, 31 P.3d 43 (2001) not the Supreme Court's opinion in the case found at 149 Wn.2d 1, 65 P.3d 657 (2003).

defense's ability to obtain pre-trial discovery.

**I. ARE THE STATE'S LAW ENFORCEMENT WITNESSES WHO ARE PART OF A INTERAGENCY TASK FORCE, AND PARTICIPATE IN THE INVESTIGATION AND PROSECUTION OF A STATE DEFENDANT, IN THE "POSSESSION AND CONTROL" OF THE STATE SUCH THAT THE STATE HAD TO PRODUCE THEM FOR INTERVIEWS WITH THE DEFENSE OR BE SUBJECT TO A COURT IMPOSED SANCTION?**

The court found the state's witnesses to be material and necessary without objection by the state and the state's prosecutors admitted that the witnesses' information was critical to their prosecution. Moreover, the witnesses were in the state's "possession and control" as the state admittedly conceded it had previously filed scope and relevance letters in order to bring federal witnesses into state prosecutions and one agent turned over her file to the state, which was then provided to the defense.

The defense has the right to interview witnesses in a criminal case. *State v. Burri*, 87 Wn.2d 175, 550 P.2d 507 (1976). The right to interview witnesses is embedded in the right to compulsory process, which "includes the right to interview a witness in advance of trial". *Id.* at 181.

In *Burri,* the court held that a defendant is denied his right to counsel where his right to make a full investigation of the facts and law applicable to the case is denied. *Id.* at 180. The *Burri* ruling is in keeping with Washington's "long settled policy to construe the rules of criminal

discovery liberally in order to serve the purposes underlying CrR 4.7, which are to 'expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process.'" *State v. Norris*, 157 Wn. App. 50, 78-79, 236 P3d 225 (2010) *quoting State v. Dunivin,* 65 Wn. App. 728, 733, 829, P2d 799 (1992)(other citations omitted); *State v. Boyd*, 160 Wn. 2d 424, 158 P3d 54 (2007)(purpose of full discovery is warranted in order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process); *State v. Pawlyk*, 115 Wn.2d 457, 470-471, 800 P.2d 338 (1990)(CrR 4.7 grants the trial courts the right to liberally construe the rules. *Id.* at 471-472).[5]

In addition, to the liberal scope and purpose underlying CrR 4.7, CrR 1.2 emphasizes that the Superior Court Criminal Rules are to be "***construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay***." *Pawlyk, supra* at 471-472.

The state's failure to comply with the discovery rules can result in exclusion of the evidence or dismissal of the charges. *State v. Grenning*, 169 Wn.2d 47, 234 P3d 169 (2010); *Norris*, 157 Wn. App. 50,

[5] The defense notes that the state's brief quotes from the ***dissent*** in *Pawlyk*. State's brief at 14.

236 P3d 225 (2010). The holdings of these cases highlight the prosecutor's obligations under CrR 4.7 and emphasize constitutional provisions that are the foundation of the discovery rules, including a defendant's right to effective assistance of counsel and a fair trial. *Boyd, supra* at 434-435; *Grenning, supra* at 55; *Norris, supra* at 70 ("CrR 4.7(a) obliges the prosecutor to provide copies of the evidence as a necessary consequence of the right to effective representation and a fair trial"); *See Pawlyk, supra at* 471-472.

Moreover, there is a long recognition by courts that "***access to evidence***, including witnesses, are crucial elements of due process and the right to a fair trial" and that the "Sixth Amendment right to effective assistance of counsel advances the Fifth Amendment's right to a fair trial and the right to effective assistance includes a "reasonable investigation" by defense counsel." *Boyd, supra* at 434-435; *See State v. Burri*, 87 Wn.2d 175, 550 P.2d 507 (1976). These constitutional protections include access to state's witnesses and to evidence relevant to issues related to the search and seizure of evidence and the manner in which the state acquired its evidence. *See* CrR 4.7(c).

For example, the *Boyd* court rejected the state's claim that it was not obligated to produce a mirror image of a hard drive because such a disclosure would violate federal law. *Boyd, supra* at 437-438. The

provision of full and fair discovery in Washington includes the ability to interview material and relevant witnesses insure the effective assistance of counsel and to guarantee that person due process. *Burri, supra* at 181; *State v. Wilson,* 149 Wn.2d 1, 7, 65 P.3d 657 (2003); *State v. Sherman,* 59 Wn. App. 763, 801 P2d 274 (1990).

In this case, the Court of Appeals erroneously held that "A prosecutor cannot compel a witness to speak to defense counsel because a witness is under no obligation to talk to anyone outside the court." *Citing* to the Court of Appeals opinion in *State v. Wilson,* 108 Wn. App. 774, 779, 31 P3d 43 (2001) rather than relying on this Court's opinion which, while affirming the result from the Court of Appeals, recognized the necessity of interviewing all relevant witnesses. *Wilson*, 149 Wn.2d at 7. Certainly, the prosecutor can seek a material witness warrant or, in this case, provide a scope and relevance letter, in order to have the state's witnesses to comply with state court discovery rules.

The discovery rules "are designed to enhance the search for truth" and their application by the trial court should "insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage." *Boyd, supra* at 433, *quoting State v. Boehme,* 71 Wash.2d 621, 632–33, 430 P.2d 527 (1967). It is in direct contravention of that principle to allow the state to bring a prosecution involving federal

agents who are material and necessary to the prosecution but then fails produce them for interviews, thus placing the defendant at a disadvantage and unable to mount appropriate constitutional challenges to the state's case or provide effective representation in keeping with the foundational requirements of the Sixth Amendment and the right Due Process.

During the trial court proceedings, the state admitted that Agent Peay and Burney were state's witnesses and that they were material and necessary to the state in proving the charges and establishing probable cause. Twice the trial court issued orders for depositions without objection for the state under CrR 4.6 that requires a finding of materiality.

Over 7 months, and 12 hearings, the defense repeatedly followed the edicts of the state trial court and complied with all state rules. The trial court found the defense scope and relevance letter to be sufficient. The state admitted that it was their burden to obtain witness interviews but did not provide the witnesses for interviews despite the court giving them almost 45 days and several extensions of time.

In January 2013, the defense even agreed to reset the trial date from February to March in order to give the state additional time to produce their witnesses for interviews. However, with the 3.6 hearing less than a week out, the trial date scheduled to start 4 days later, and the state admitting that it could not produce their own witnesses for either hearing,

the court took the appropriate sanction of excising the information from the affidavit in support of the search warrant that had been provided by the two agents.

The trial court's ruling is consistent with the fundamental principle that state should not have the unfair and impermissible advantage of using evidence derived from a joint state and federal task force investigation without having a concomitant obligation to provide the defense with all relevant discovery from the agents who generated the information, including interviews of those critical state's witnesses, because it impedes a defendant's constitutional right to challenge the evidence. *See Burri, supra.*

By allowing the state such an advantage, the court allows the erosion of the constitutional underpinnings that are in place to insure the effective assistance of counsel and compliance with due process. In order to protect these precious rights, Washington has long recognized the trial court as the gatekeeper. The monitoring of the scope of discovery is squarely "within the sound discretion of the trial court and will not be disturbed absent manifest abuse of that discretion". In this case the trial court worked diligently and methodically to regulate the discovery process in this case and, after 7 months justifiably imposed an appropriate sanction.

II. **DID THE COURT OF APPEALS ERR BY HOLDING THAT THE DOCTRINE OF SOVEREIGN IMMUNITY RESTRICTED THE TRIAL COURT'S AUTHORITY AND PROHIBITED THE STATE FROM COMPELING THE TESTIMONY OF THE STATE'S WITNESSES WHEN THE STATE DID NOT RELY ON THE THEORY OF SOVEREIGN IMMUNITY IN THEIR BRIEF AND EVEN IF THE COURT DID NOT ERR BY RELYING ON AN UNPRESERVED ARGUMENT, DID THE COURT ERR BY FAILING TO ACCURATELY RECOUNT THE TRIAL COURT'S RULING AND IMPROPERLY SHIFTING THE BURDEN TO THE DEFENDANT?**

First, the Court of Appeals ruled that the trial court is without authority to order federal agents to submit to interviews in state court and, thus, abused its discretion by finding that the state violated its discovery obligations under CrR 4.7(c)(1). At the outset, the Petitioner asserts that the Court of Appeals improperly relied on the doctrine of sovereign immunity in concluding that the trial court abused its discretion as the state did not rely upon that argument in its briefing and thus the argument is unpreserved. *See Clark Cnty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wash. 2d 136, 144-45, 298 P.3d 704, 708 (2013)( scope of a given appeal is determined by the notice of appeal, the assignments of error, and the substantive argumentation of the parties); RAP 5.3(a).

Second, the Court's opinion incorrectly construes the record below. Although the trial court initially authorized the issuance of subpoenas *duces tecum* and notices of deposition on two occasions ***without***

***objection from the state***, the court ultimately ruled that the defense had to do a scope and relevancy letter.[6] CP at 597. However, once the scope and relevancy letter was completed, and the trial court found it to be sufficient, the court directed the state to make their material and necessary witnesses available and the state explicitly accepted that burden and duty.

Moreover, had the state raised the issue of sovereign immunity, the defense could have argued that dual compliance with state and federal law is possible in this case. As stated by the *Norris* court:

> we do not infer preemption here because dual compliance with state and federal law is possible in this case. Notwithstanding the differences in state and federal procedure, the State is under no legal obligation to prosecute Norris. *See Altria Group*, 129 S.Ct. at 543; *State v. Gamble,* 168 Wn. 2d 161, 173, 225 P.3d 973 (2010). State prosecutors enjoy wide discretion in charging decisions and "may consider a wide range of factors in addition to the strength of the State's case" *State v. Rowe*, Wn.2d 277, 287, 609 P.2d 1348 (1980).
>
> *Norris, supra* at 77-78.

Here, the record is replete with colloquys between the state and the

---

[6] The Court of Appeals' opinion stated that Mr. Vance should have sent a scope and relevancy letter to Agent Peay even though she appeared for her deposition in response to the subpoena *duces tecum* and, subsequently, the state provided additional materials and reports completed by Agent Peay. However, that argument was never raised below and neither the state, nor Agent Peay, ever requested that the defense file a subsequent scope and relevance letter to obtain a subsequent interview of her. The court did tell the state to make their witness available for a follow-up interview based upon the fact that materials were provided after the first interview. 9 RP 235.

trial court that if the state is not going to be able to have federal agents, who are also state's witness, comply with state discovery laws, then the federal government should prosecute the case under the applicable federal rules.

In addition, to the extent that the Court of Appeals placed the burden on Mr. Vance in the discovery process it erred as a matter of law. The *Norris* court also addressed the issue of shifting the burden to the defense in the discovery process and held that the "the trial court erred to the extent that it placed any burden on Norris to show a need for production and failed to place the burden on the State to show a need for a protective order or to draft an appropriate protective order". *Id* at 78.

Therefore, the state did not raise or brief the issue regarding sovereign immunity and, if they had, the defense could have responded similar to the response in *Norris* and there should be no shifting of burden to the defense on obtaining pre-trial interviews of state's witnesses once they have complied with all state discovery laws and, in this case, even the trial court found that the defense had complied with the federal regulation and the state did not object to that finding at the trial court level and, thus, it was not preserved for appeal.

## *CONCLUSION*

For the reasons set out in this motion, this court should accept review and reverse the decision of the Court of Appeals.

Dated this 9th day of January, 2015.

Respectfully Submitted,

David T. McDonald, WSBA #18446
David T. McDonald, P.C.
510 SW 3rd Avenue, Suite 400
Portland, OR 97204-2543
(503) 226-0188
Of Attorneys for Darin R. Vance

Steven W. Thayer, WSBA #7449
Steven W. Thayer, P.S.
112 W. 11th Street, Suite 200
Vancouver, WA 98660
360-694-8290
Of Attorneys for Darin R. Vance

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Appellant,<br><br>v.<br><br>DARIN RICHARD VANCE,<br><br>Respondent. | No. 44761-4-II<br><br>PUBLISHED OPINION |

MELNICK, J. — The State appeals the trial court's order dismissing with prejudice charges against Darin Richard Vance based on the State's failure to produce federal agents for interviews. Based on a federal investigation, the State searched Vance's home and charged him with various child pornography-related offenses. The trial court authorized Vance to subpoena federal investigators for depositions and subsequently ordered the agents to submit to depositions. When the federal agents failed to comply, the trial court redacted the search warrant to remove all information obtained by the agents. The trial court then retested the search warrant for probable cause, suppressed all of the evidence obtained under the warrant, and dismissed the charges with prejudice.

The State argues that the trial court abused its discretion by finding that the State violated discovery rules, because the State had no obligation to produce federal agents not under State control, and by redacting the information from the warrant. We agree. We further hold that because Vance did not comply with applicable federal statutes and agency regulations required to obtain testimony and information from federal agents, the agents were not permitted to testify or provide information. Therefore, the trial court's remedy of redacting the agents' information from

the search warrant affidavit was an abuse of discretion. We reverse and remand to the trial court to reinstate the charges against Vance.

FACTS

In the course of an undercover online investigation, Federal Bureau of Investigation (FBI) Special Agent Alfred Burney discovered child pornography images being received and uploaded from an internet protocol (IP) address belonging to Vance and Vance's wife. Immigration and Customs Enforcement (ICE) Special Agent Julie Peay assisted in the investigation. FBI Special Agent Laura Laughlin provided the Vancouver Police Department with the information obtained through the investigation.

On the basis of the federal agents' information, state police officers obtained a search warrant for Vance's home. The police executed the warrant in January 2011, and the search of Vance's home revealed evidence of child pornography. In April 2011, Vance was arrested in Clark County. The State charged him with three counts of dealing in depictions of a minor engaged in sexually explicit conduct in the first degree[1] and seven counts of possession of depictions of a minor engaged in sexually explicit conduct in the first degree.[2]

In August 2011, Vance e-mailed the State and requested the opportunity to interview Agents Laughlin, Burney, and Peay. The State responded that it did not intend to call the agents as witnesses at trial and if Vance still wanted to interview them, he would have to arrange the interviews himself. Later in the month, Vance mailed letters to Agents Laughlin, Burney, and Peay requesting interviews. Responding on behalf of Agent Laughlin, the Department of Justice (DOJ) directed Vance to 28 C.F.R. §§ 16.21 and 16.22. These sections required Vance to submit

[1] RCW 9.68A.050.

[2] RCW 9.68A.070.

a scope and relevancy letter to obtain testimony or information from a DOJ employee.[3] Neither Agent Burney nor Agent Peay responded to the letters.

On June 4, 2012, Vance moved the court to suppress "any and all evidence seized and/or derived from the execution of a search warrant at his residence" and to dismiss the charges with prejudice. Clerk's Papers (CP) at 4. Two days later, Vance moved the trial court for an order to take the depositions of Agents Peay and Burney. On August 16, the trial court authorized Vance to subpoena Agents Burney and Peay for depositions. Vance served them with notices of deposition, court orders authorizing depositions, and subpoenas duces tecum.

The United States Attorney's Office (USAO) responded on Agent Burney's behalf, stating that the FBI is an agency within the United States DOJ and, thus, the production of documents and testimony of Agent Burney could not be compelled by a subpoena issued by the superior court. The USAO again directed Vance to 28 C.F.R. §§ 16.21 and 16.22. The USAO stated that once Vance provided the required information, it would review his request.

The Office of the Chief Counsel of the United States Department of Homeland Security (DHS) responded on Agent Peay's behalf. DHS informed Vance that ICE is a component of the United States Department of Homeland Security, and as a DHS employee, Agent Peay was prohibited from providing documents or testimony related to information she acquired while working for DHS. DHS directed Vance to 6 C.F.R. §§ 5.44 and 5.45, which require individuals

---

[3] If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney.

28 C.F.R. § 1622(c).

to submit a scope and relevancy letter regarding the information sought.[4] DHS also stated that Agent Peay did not have authority to accept service of subpoenas and that Vance should serve the subpoena on DHS to the attention of a senior attorney. DHS stated that it would review Vance's request after Vance had properly served DHS and submitted a scope and relevancy letter. Vance served the subpoena as requested, but did not submit a scope and relevancy letter despite being reminded by DHS.

On October 31, Vance moved the trial court to dismiss the charges against him under CrR 4.7 and CrR 8.3 because the State had failed to abide by the trial court's order to allow Vance to take the depositions of Agents Burney and Peay. In the alternative, Vance moved to excise statements and information obtained from Agents Burney and Peay from the affidavit in support of the application for the search warrant. Vance argued that "Agent Burney and Agent Peay are crucial to the defense mounting a non-facial challenge to the warrant." CP at 506.

On November 19, the trial court ordered Agents Burney and Peay to submit to depositions. After Vance served the subpoena on Agent Burney, the USAO again responded that sovereign immunity deprived the trial court of jurisdiction over the FBI and that the subpoena could not be legally enforced against the FBI or its employees. The USAO again directed Vance to the applicable C.F.R. provisions that required Vance to submit a scope and relevancy letter.

On November 29, Agent Peay appeared for a deposition, but she did not bring any documents as demanded by the subpoena *duces tecum*. Vance subsequently advised the court that

---

[4] If official information is sought, through testimony or otherwise, by a request or demand, the party seeking such release or testimony must (except as otherwise required by federal law or authorized by the Office of the General Counsel) set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought.

6 C.F.R. § 5.45(a).

at the deposition Agent Peay had stated that she had instructions to not answer certain questions. In contrast, the State told the court that Agent Peay did not refuse to answer any questions. Subsequently, the State provided Vance with 28 pages of Agent Peay's reports.

On December 21, the trial court denied Vance's motion to dismiss and ordered Vance to submit the subpoena and a scope and relevancy letter[5] to the USAO summarizing the testimony and materials sought from Agent Burney. The trial court stated that it would determine the adequacy of the scope and relevancy letter. The trial court also ruled that Vance could renew his motion to dismiss if Agent Burney failed to make himself available for an interview and to provide the relevant discovery requested within a reasonable time.

On December 27, Vance e-mailed the State's prosecutor to request a follow-up deposition with Agent Peay. On January 4, 2013, Vance sent the USAO a scope and relevancy letter regarding an interview with Agent Burney. The USAO responded a couple of weeks later and advised Vance that he failed to comply with the requirements of 28 C.F.R. § 16.22(c) and (d). The USAO again directed Vance to submit a relevancy letter in accordance with the C.F.R. and stated that his request would be timely addressed.

A few days later, Vance renewed his motion to dismiss or, in the alternative, to excise information obtained from Agents Burney and Peay from the search warrant affidavit. A new prosecutor took over the case, and the trial court orally ordered the State to attempt to arrange interviews or depositions one last time.[6]

---

[5] The superior court stated that Vance need only submit a "broad scope and relevancy, and if they get too nitpicky on it, I am going to be limiting them and maybe gutting your case." V RP at 112.

[6] The trial court stated that "this whole scope and relevancy thing I find a little bit offensive." IX RP at 233. The court added that "I'd love to talk to [Agents Burney['s] and Peay's] supervisor and say, 'Don't come to state court unless you're going to participate like our other police agencies do.'" IX RP at 259.

On February 25, the State represented that it had communicated with an attorney from the USAO who would work with the State to schedule interviews with Agents Burney and Peay. The trial court gave the State until March 1 to schedule interview dates, stating that if none had been scheduled by then, the court would grant Vance's motion to strike from the search warrant affidavit all the information Agents Burney and Peay provided. The State was unable to arrange the interviews by the court's deadline, and the trial court granted Vance's motion to strike. The trial court stated that due to Agent Burney's and Peay's repeated failure to comply with the court's directives and the State's failure to make discovery available to the defense under CrR 4.7(c)(1), the appropriate remedy was to strike all information Agent Burney and Peay provided from the search warrant affidavit.

Pursuant to its order, the trial court ordered specified lines redacted from the search warrant affidavit. After redaction, probable cause no longer existed. The trial court then suppressed all the evidence seized and derived from the execution of the search warrant. The trial court ruled that Vance had "been substantially and materially prejudiced" by the State's failure to timely provide the requested discovery, which affected Vance's "constitutional right to fully challenge the legality of the manner in which the evidence was acquired." CP at 721. The trial court ordered that the case against Vance be dismissed with prejudice.[7] The State appeals.

## ANALYSIS

### I. STATE'S CrR 4.7 OBLIGATION IS FOR EVIDENCE IN ITS POSSESSION AND CONTROL

The State argues the trial court abused its discretion by striking portions of the affidavit and dismissing the charges against Vance with prejudice. Vance argues that the State failed to

[7] The trial court further commented that the "State ought to go to the feds and say, You created this problem by not participating, you want it prosecuted, you do it. And not even seek an appeal on this." XIII RP at 362.

preserve the issue, and even if it did, the trial court did not abuse its discretion by striking the agents' information in light of their noncompliance with court orders. We agree with the State and reverse the trial court.

Discovery decisions based on CrR 4.7 are within the trial court's sound discretion. *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). A trial court abuses its discretion when it makes decisions based on untenable grounds or for untenable reasons. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

Where a party fails to comply with an applicable discovery rule or a trial court order pursuant to an applicable discovery rule, the trial court "may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances." CrR 4.7(h)(7)(i). Exclusion or suppression of evidence or dismissal for a discovery violation is an extraordinary remedy and should be applied narrowly. *Hutchinson*, 135 Wn.2d at 882; *State v. Smith*, 67 Wn. App. 847, 852, 841 P.2d 65 (1992).

CrR 4.7(a)(1)(i) mandates that the State disclose "material and information within the prosecuting attorney's possession or control," including "the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses." Additionally, under CrR 4.7(c)(1), the State must "disclose any relevant material and information regarding: (1) Specified searches and seizures." "The prosecutor's general discovery obligation is limited . . . 'to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." *State v. Blackwell*, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993)

(quoting CrR 4.7(a)(4)). A prosecutor cannot compel a witness to speak to defense counsel because a witness is under no obligation to talk to anyone outside the court. *State v. Wilson*, 108 Wn. App. 774, 779, 31 P.3d 43 (2001).

Here, Vance argues Agent Burney and Agent Peay were the State's witnesses and thus, the State had the obligation to produce them for interviews. We disagree. Vance wanted to interview Agents Burney and Peay to obtain information about their investigation and to determine if any suppression issues existed. The State has the burden to provide only "material and information" regarding "searches and seizures." CrR 4.7(c)(1). The State provided Vance with "material and information" about the search and seizure, including details about how the federal agents conducted their investigation and what they found. There is no evidence that the agents were under the State's possession and control or that the State could compel the agents to submit to interviews. Therefore, we hold that the trial court abused its discretion by finding the State violated CrR 4.7(c)(1) and by striking the agents' statements from the search warrant affidavit.

II. STATE TRIAL COURT IS WITHOUT AUTHORITY TO ORDER FEDERAL AGENTS TO SUBMIT TO INTERVIEWS IN STATE COURT

Federal agencies are authorized by 5 U.S.C. § 301 to create regulations governing the conditions and procedures under which their employees may testify concerning their work. *United States v. Soriano–Jarquin*, 492 F.3d 495, 504 (4th Cir. 2007) (citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468, 71 S. Ct. 416, 95 L. Ed. 417 (1951)). 5 U.S.C. § 301 provides:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Often called "*Touhy* regulations," procedures for subpoenaing employees of government agencies are contained in the Code of Federal Regulations (CFR). The *Touhy* regulations, and not a state court's order, control federal agents Agent Burney and Agent Peay.

A. DEPARTMENT OF JUSTICE EMPLOYEES

The applicable DOJ regulations are found in 28 C.F.R. §§ 16.21 and 16.22. Section 16.22(a) provides:

> In any federal or state case or matter in which the United States is not a party, no employee . . . of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official.

Under § 16.22, Vance was required to submit a "scope and relevancy" letter summarizing the information he sought and explaining its relevance to the proceeding.[8]

The United States Supreme Court has established that these regulatory requirements are valid in *Touhy*, 340 U.S. at 468, which upheld the validity of a predecessor to 28 C.F.R. § 16.22(a). *In re Boeh*, 25 F.3d 761 (9th Cir. 1994). Additionally, the DOJ regulations at issue are authorized by the plain language of 5 U.S.C § 301. *Boeh*, 25 F.3d at 763-64. Sections 16.21 and 16.22 prescribe the conduct of employees, the performance of the agency's business, and the use of its records. *Smith v. Cromer*, 159 F.3d 875, 878 (4th Cir. 1998).

[8] A defendant whose "scope and relevancy" letter is rejected has recourse under the federal Administrative Procedure Act. *United States v. Williams*, 170 F.3d 431, 434 (4th Cir.), *cert. denied*, 525 U.S. 854, 120 S. Ct. 135, 145 L. Ed. 2d 115 (1999); *Edwards v. U.S. Dep't of Justice*, 43 F.3d 312, 317 (7th Cir. 1994).

The regulations relied on by the DOJ and Agent Burney are "'validly promulgated and [have] the force of law.'" *Fed. Bureau of Investigation v. Superior Court*, 507 F. Supp. 2d 1082, 1093 (N.D. Cal. 2007) (quoting *Swett v. Schenk*, 792 F.2d 1447, 1451 (9th Cir. 1986)). Agent Burney is a subordinate DOJ employee who is bound by the DOJ's *Touhy* regulations. Without the prior approval of the proper DOJ official, Agent Burney was not permitted to submit to the state court process. 28 C.F.R. § 16.22(a). Because Vance did not comply with the applicable CFR, a valid regulation forbade Agent Burney from complying with Vance's discovery requests, and the state court had no authority to compel Agent Burney to do so. *Cromer*, 159 F.3d at 878.

B. DEPARTMENT OF HOMELAND SECURITY AGENTS

The applicable DHS regulations are found in 6 C.F.R. §§ 5.44 and 5.45. Section 5.45(a) provides:

> If official information is sought, through testimony or otherwise, by a request or demand, the party seeking such release or testimony must (except as otherwise required by federal law or authorized by the Office of the General Counsel) set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought.

Similar to the DOJ regulations, the DHS's regulations prescribe how to obtain the testimony of employees or their records. *Soriano-Jarquin*, 492 F.3d at 504. These regulations are valid under *Touhy*. *Soriano-Jarquin*, 492 F.3d at 504. Agent Peay is a subordinate DHS employee and is bound by the DHS *Touhy* regulations. Without prior approval of the proper DHS official, Agent Peay was not permitted to submit to the state court process. 6 C.F.R. § 5.45(a). A valid regulation prohibited Agent Peay from submitting to a deposition or providing information, and the state court had no authority to order her otherwise.

This case is distinguishable from the Ninth Circuit's 2-1 decision in *United States v. Bahamonde*, 445 F.3d 1225 (9th Cir. 2006). There, the defendant alleged a Fifth Amendment

violation despite his noncompliance with the regulations. He argued that the regulations created a discovery imbalance in favor of the government. *Bahamonde*, 445 F.3d at 1230-31. The Ninth Circuit agreed with the defendant. *Bahamonde*, 445 F.3d at 1230-31. However, there are material factual differences between *Bahamonde* and the present case. In *Bahamonde*, the defendant sought the testimony of an agent who "attended the entire trial, sat next to the prosecutor at the prosecutor's table, assisted him throughout, and was listed on the government's witness list." 445 F.3d at 1228. Here, Vance wanted to interview Agent Peay to ask about her investigation and determine if there were any suppression issues. But Agent Peay has not provided any information that the State did not also share with Vance, and accordingly the discovery imbalance that the *Bahamonde* court relied upon is absent here.

Vance argues that Agent Peay, by submitting to a deposition, waived the requirement to submit a scope and relevancy letter. But while Agent Peay submitted to an interview without the requisite scope and relevancy letter, she did not answer all of Vance's questions and did not initially provide all the records Vance requested. Agent Peay's action had no bearing on the applicability of DHS's *Touhy* regulations, and Vance was required to comply with 6 C.F.R. § 5.45(a) if he wanted a second interview with Agent Peay. *Soriano-Jarquin*, 492 F.3d at 504. Vance failed to do so, because he never submitted a scope and relevancy letter. Therefore, the trial court had no authority to compel Agent Peay to submit to a second interview.

### C. FEDERAL SOVEREIGN IMMUNITY DEPRIVES THE STATE COURT OF JURISDICTION TO ENFORCE THE SUBPOENAS AND COURT ORDERS ON FEDERAL AGENTS

An action seeking specific relief against a federal official, acting within the scope of his delegated authority, is an action against the United States, subject to the governmental privilege of sovereign immunity. *Boron Oil Co. v. Downie*, 873 F.2d 67, 69 (4th Cir. 1989). An action against the United States is defined broadly "as any action seeking a judgment that would . . . restrain the

Government from acting or compel it to act." *Fed. Bureau of Investigation*, 507 F. Supp. 2d at 1094 (internal quotation marks omitted). Where an agency has not waived its immunity to suit, the state court lacks jurisdiction to proceed against a federal employee acting pursuant to agency direction. *Cromer*, 159 F.3d at 879 (citing *Boron Oil*, 873 F.2d at 69). "Congress has not expressly waived sovereign immunity in cases in which state courts seek to compel government employees to submit to subpoenas or court orders." *Fed. Bureau of Investigation*, 507 F. Supp. 2d at 1094. Thus, a state court lacks jurisdiction to compel a federal employee to testify in a state court action to which the United States is not a party, concerning information acquired during the course of his or her official duties. *Cromer*, 159 F.3d at 879 (citing *Boron Oil*, 873 F.2d at 69-71); *see also State v. Youde*, 174 Wn. App. 873, 882, 301 P.3d 479 (2013) ("A state court cannot enforce a state subpoena issued to an agent of the Federal Bureau of Investigation.").

Here, the trial court attempted to compel Agent Burney and Agent Peay to submit to depositions and to provide Vance with information regarding their investigations. Under the doctrine of sovereign immunity, the state trial court lacked jurisdiction to subpoena the federal agents or to order them to submit to depositions and to provide information.

Other federal courts that have addressed this issue are in accord. *See, e.g., In re Elko County Grand Jury*, 109 F.3d 554 (9th Cir. 1997) (state court lacked jurisdiction to compel a forest service employee to appear and testify before grand jury in contravention of USDA regulations); *Houston Bus. Journal, Inc. v. Office of Comptroller of Currency*, 86 F.3d 1208 (D.C. Cir. 1996) (state court lacked jurisdiction to compel production of records from comptroller general when production was in violation of agency regulations); *Edwards v. United States Dep't of Justice*, 43 F.3d 312 (7th Cir. 1994) (state court had no authority to compel discovery of FBI surveillance tapes after Justice Department denied production pursuant to 28 C.F.R. § 16.26(b)(5)); *In re Boeh*,

25 F.3d 761 (FBI agent cannot be held in contempt for refusing to testify absent permission of the Justice Department, pursuant to 28 C.F.R. § 16.22(a)); *Louisiana v. Sparks*, 978 F.2d 226 (5th Cir. 1992) (state court subpoena issued to federal parole officer quashed on sovereign immunity grounds). Thus, we hold that the trial court lacked jurisdiction to issue subpoenas and court orders compelling federal Agents Peay and Burney to appear, provide testimony, and disclose records.

Based on the foregoing, the trial court abused its discretion by finding that the State violated its discovery obligations under CrR 4.7(c)(1), and by issuing subpoenas and orders to compel federal Agents Burney and Peay to appear and testify. Because the trial court abused its discretion, we reverse the dismissal and remand to the trial court with instructions to reinstate the charges against Vance.

Melnick, J.

Melnick, J.

We concur:

Johanson, C.J.

Johanson, C.J.

Bjorgen, J.

Bjorgen, J.

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

| | | |
|---|---|---|
| STATE OF WASHINGTON, | ) | |
| | ) | **Court of Appeals No. 44761-4-II** |
| Plaintiff/Respondent, | ) | |
| | ) | **Clark County No. 11-1-00704-9** |
| vs. | ) | |
| | ) | **DECLARATION OF SERVICE** |
| DARIN RICHARD VANCE, | ) | |
| | ) | |
| Defendant/Petitioner. | ) | |
| _____ | ) | |

I declare that on January 9, 2015, a true copy of Petitioner's Petition for Discretionary Review was served on the following persons in the manner indicated.

David Ponzoha, Clerk (via electronic mail)
Coa2filings@courts.wa.gov
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Rachael Probstfeld (via electronic mail)
Rachael.Probstfeld@clark.wa.gov
Deputy Prosecuting Attorney
P. O. Box 5000
Vancouver, WA 98666-5000

I declare under penalty of perjury of the laws of the State of Oregon that the foregoing is true and correct.

Signed at Portland, Oregon this 9th day of January, 2015.

Carol Duncan, Legal Assistant
carol@mcdonaldpc.com