No. 31323-9-III

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Daniel L. Brown,
Appellant

Appeal from the Superior Court of Spokane County

BRIEF OF APPELLANT

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I. INTRODUCTION

The trial court's decision was obvious legal error and substantially limits Mr. Brown's constitutionally-guaranteed rights in a criminal case. As an initial matter, it misinterpreted the State's duties under CrR 4.7 to mean it merely had to disclose the existence of evidence but not provide copies of that evidence, free of charge, to defense counsel. Further, its decision on the meaning of "disclose" directly conflicts with the Washington State Supreme Court's decision in State v. Boyd, 164 Wn.2d 424 (2007). Finally, it imposed on Mr. Brown a burden to pay costs in his criminal case in advance of judgment and thus in violation of Article 1, § 22 of the Washington State Constitution, as well as statutory law.

II. ASSIGNMENTS OF ERROR and ISSUE STATEMENTS

1. The Superior Court erroneously held Daniel Brown, defendant in a pending criminal case, is financially responsible for and must independently acquire material evidence the State intends to use against him at trial.

III. STATEMENT OF THE CASE

Upon being charged with Felony Harassment in Spokane County Superior Court, Daniel Brown, through his attorney, filed a Request for Discovery on January 24, 2012. CP 1-4. Approximately eight months later the State notified defense counsel it possessed and intended to use at trial a 911 recording with statements from the alleged victim. CP 15. Defense counsel immediately

requested a copy of the recording and was advised he would need to submit an independent request – and pay a fee – to Spokane County to obtain a copy of the recording. CP 15. Defense counsel next offered to come to the State's office with digital media to obtain a copy but was advised that (1) the State lacked the resources to facilitate the copying on its computers and (2), in any event, such a process would violate "office policy." CP 15-6. Mr. Brown filed a motion seeking suppression of the recording at trial and/or dismissal of the case, arguing that the State's position violated its discovery obligations under State v. Boyd, 164 Wn.2d 424 (2007) and contravened the prohibition against forcing an accused to advance money or fees in order to secure rights under article I, section 22 of the state constitution. CP 32.

On November 8, 2012 the trial court denied Mr. Brown's motion. CP 36. The court examined CrR 4.7, noting it "speaks in terms of disclosure rather than providing...." and because "[t]he word 'disclosure' was not picked by accident," its meaning is "totally separate from one of 'providing' evidence." CP 50-51. Accordingly, once the State discloses the existence of something like an audio recording, "the defense has to provide the costs of copying, reproduction, whatever." CP 52. In regards to the constitutional issue about advancing money before judgment, the trial court appeared to hold that since Mr. Brown was not indigent, he was required to pay costs, just as he would to hire, for example, an

expert to testify on his behalf. CP 51-52. Mr. Brown successfully sought discretionary review of the trial court's decision in this Court.

IV. ARGUMENT

Issue 1: The trial court's interpretation of CrR 4.7 was mistaken.

CrR 4.7 imposes broad requirements for discovery when the State initiates criminal proceedings, and these requirements are grounded in the constitutional guarantees of a fair tr ial and effective assistance of counsel. Indeed, the Supreme Court has recognized "The evident purpose of the disclosure requirement is to protect the defendant's interests in getting meaningful access to evidence supporting the criminal charges *in order to effectively prepare for trial and provide adequate representation.*" State v. Boyd, 164 Wn.2d 424, 432 (2007) (emphasis added).

In Boyd, the State argued it "need not make copies" of digital evidence for the defense because the discovery rules do "not require prosecutors to duplicate every single item they intend to use at trial and *provide a copy* to the defense." Id. (emphasis added) The Supreme Court strongly disagreed, stating "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.'" Id. at 433 (quoting State v. Boehme, 71 Wn.2d 621, 632-33 (1967). Moreover, the Sixth Amendment right to counsel underpins this

policy: "Where the nature of the case is such that copies are necessary in order that defense counsel can fulfill this critical role [of effective representation], 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." Boyd, 164 Wn.2d at 435 (emphasis added).

Here, the trial court misapplied the holding in Boyd and determined the State's obligation was limited to mere disclosure, not provision of copies. Specifically, the trial court reasoned: "The word 'disclosure' was not picked by accident. It has a meaning that is totally separate from one of 'providing' evidence. I think that that is significant. I think that even the Boyd case supports that issue." But in Boyd the Supreme Court said the exact opposite: "CrR 4.7 does not define 'disclose.' But the general usage of 'disclose,' the policies underlying the rules, and the provisions of CrR 4.7 indicate that 'disclose' *includes making copies of certain kinds of evidence.* Boyd, 164 Wn.2d at 433 (emphasis added); see also State v. Grenning, 169 Wn.2d 47, 54 (2010) (the Boyd "court rejected the State's argument that it need not *provide* the defense with *actual copies* of the material, as opposed to simply 'acknowledging the existence of seized evidence.'") (emphasis added). In short, the trial court's decision directly conflicted with the holding in Boyd.

Aside from contravening Boyd, the trial court's analysis of CrR 4.7 creates serious practical problems. For example, the discovery rule governs

dissemination of evidence in both directions. Thus, under the trial court's rationale, in a criminal case defense counsel would have an obligation to "disclose" the existence of a recording of a material witness statement that will be used at trial. But if disclosure does not entail provision, then a State attorney, in order to examine and copy the statement, would have to come to defense counsel's law office and pay "reasonable costs" to obtain a copy. This is perhaps feasible between the offices of a prosecutor and a public defender, with centralized locations in close proximity to each other, but becomes impossible when private law firms are involved with offices located throughout the State. Nonetheless, under the trial court's reading, once defense counsel discloses a witness statement and therefore fulfills the obligation under the court rule, a prosecuting attorney or an agent thereof from Spokane would have to physically travel, for example, to a law office in Bellingham to hear the statement and, in addition, pay that firm for any copies. Clearly this is not what the drafters of CrR 4.7 intended. Thus, the trial court's decision not only contravenes Boyd but also frustrates the purpose of the discovery rules: enhancing the search for truth in a particular case.

Issue 2: Mr. Brown is merely accused of a crime and thus is constitutionally and statutorily protected from advancing pre-judgment costs to obtain evidence that will be used against him at trial.

The Boyd decision settled the meaning of "disclose" under CrR 4.7, but it did not address the constitutional issue raised in this case: who should bear the costs of reproduction? While the opinion suggested a protective order may be placed on digital evidence requiring the defense to "pay the reasonable cost of duplication," Boyd, 164 Wn.2d at 438, a constitutional provision neither raised nor cited in Boyd, article 1, section 22, forbids the imposition of even a reasonable cost: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases...." Crucially, "*In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.*" (emphasis added)

Here, Mr. Brown relied on article 1, section 22 in arguing to the trial court that requiring him to pay costs, however "reasonable," in order to obtain

discovery to prepare for trial violated the state constitution. CP 17-18. While the trial court acknowledged the constitutional issue involved a "good question," it nonetheless determined "that, ordinarily, the defense has to provide the cost of copying, reproduction, whatever." CP 51-52. But it is impossible to square the trial court's conclusion with the plain language of article I, section22. Indeed, in spite of the constitutional guarantees afforded to him, Mr. Brown, just to obtain a copy of the evidence to be used against him at trial has to pay the State *before he is convicted of anything*.

In addition to the constitutional prohibition against pre-judgment advancement of costs, the Washington State Legislature has also enacted law forbidding the practice except in certain situations: "Costs may be imposed only upon a *convicted* defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear." RCW 10.01.160(1). Put more succinctly, costs "cannot include expenses inherent in providing a constitutionally guaranteed jury trial...." RCW 10.01.160(2). Surely an expense inherent in guaranteeing a jury trial would be the procurement of material evidence. Thus, the State's position not only violates the state constitution, but also the plain language of RCW 10.01.160.

V. CONCLUSION

Mr. Brown has not been convicted of anything. Accordingly, the discovery rules, state constitution, and state statute prohibit the State from imposing on him the burden and cost of obtaining evidence that will be used against him at trial. The decision of the trial court should be reversed.

Respectfully submitted this 28 day of March, 2013

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ORIGINAL

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent	)	Cause No. 31323-9-III
vs.	)	
DANIEL L. BROWN Appellant	)	DECLARATION OF SERVICE

I, Leah M. Hill, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a legal assistant in the office of Phelps & Associates, PS, served in the manner indicated below, an original of the Brief of Appellant on March 28, 2013.

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500 N. CEDAR
SPOKANE, WA 99201

X Legal Messenger
__ U.S. Regular Mail

I further declare that I served in the manner indicated below a true and correct copy of the Brief of Appellant, on March 28, 2013.

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1100 W. MALLON
SPOKANE, WA 99260

X Legal Messenger
__U.S. Regular Mail

DANIEL L. BROWN
8928 N. WOOD ROAD
REARDEN, WA 99029

__Legal Messenger
X U.S. Mail

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

Signed at Spokane, WA on this 28 day of March, 2013

Leah Hill

LEAH M. HILL