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NO. 81449-0

CLERK OF SUPREME COURT
STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent/Cross-Petitioner,

v.

NEIL GRENNING,

Petitioner.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

REPLY TO STATE'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
A. ISSUES RAISED BY THE STATE'S ANSWER	1
B. STATEMENT OF THE RELEVANT FACTS	1
1. Discovery motions	1
2. State's briefing	7
C. ARGUMENT WHY REVIEW SHOULD BE DENIED ON THE ISSUE OF THE REVERSAL OF THE CONVICTIONS FOR POSSESSION OF DEPICTIONS OF MINORS.	8
1. TO REQUIRE A DEFENDANT TO SHOW PREJUDICE WHERE HE HAS BEEN DENIED DISCOVERY OF THE VERY EVIDENCE AGAINST HIM WOULD MAKE THE RIGHT TO THE DISCOVERY MEANINGLESS	8
2. THE DISCOVERY ISSUE WAS PRESERVED FOR REVIEW	11
3. THE PROTECTIVE ORDER WAS UNWORKABLE .	14
D. CONCLUSION	15

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Boyd,
160 Wn.2d 424, 158 P.3d 54 (2007) 1, 7-10, 14, 15

State v. Carlson,
61 Wn. App. 865, 812 P.2d 536 (1991),
review denied, 120 Wn.2d 1022 (1993) 13

State v. Riker,
123 Wn.2d 351, 869 P.2d 43 (1994) 13

RULES, STATUTES AND OTHERS

CrR 4.7(a)(1)(iv) 8, 9

A. ISSUES RAISED BY THE STATE'S ANSWER

1. If Mr. Grenning had a right, under the decision of this Court in State v. Boyd, 160 Wn.2d 424, 432-433, 158 P.3d 54 (2007), to a copy of the mirror-image hard drive of his computer without having "to establish that effective representation merits a copy of the very evidence supporting the crime charged," is he deprived of that right if he has to prove ineffective assistance of counsel to obtain a remedy for denial of that right at trial?

2. Did Mr. Grenning do everything necessary to preserve for appeal the issue of the defense's right to a copy of the mirror-image hard drives of his computer by: (a) moving to reconsider the denial of his pretrial motion to compel discovery of the hard drives, (b) signing a written order prepared and presented by the prosecutor memorializing the denial of the motion to reconsider, and (c) raising the issue again with the trial judge who refused to revisit the issue?

B. STATEMENT OF THE RELEVANT FACTS

1. Discovery motions

On July 25, 2003, defense counsel moved, pursuant to CrR 4.7(a)(5), to compel the discovery

of the mirror-image hard drive of the computer seized by the police from Mr. Grenning.¹ CP 101-113, 463-464; RP(7/25/03) 4-6. The request was made after consulting with defense experts Marcus and Ramona Lawson. RP(7/25/03) 5.

Defense counsel stated:

We have an obligation to look at the material that's been seized by the state to determine, number one, not only to look at the exhibits that they are referencing here, but to search that material and determine whether or not there's exculpatory material.

Again, this process has been on-going by the state for months, and they still aren't done. And we're going to have to undertake the same type of search. So our position is we cannot do that unless we have the requested material.

RP(7/25/03) 9-10. Counsel reiterated that "it's our position that we're going to look at everything that was done on that computer. It's not as simple as just looking at these pictures." RP(7/25/03) 19.

The prosecutor's argument was that "Mr. Kawamura can ask his client, did you do this, or didn't you do this?" and that to allow the defense

¹ CrR 4.7(a)(5) provides that it is the prosecutor's obligation to provide "Any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonging to the defendant."

to have copies would risk having the materials "get out into distribution." RP(7/25/03) 1516.

The court, the Honorable Lisa Worswick, ruled that the defense experts needed to come to a secure facility in Tacoma to view the hard drives and photographs. RP(7/25/03) 24.

On August 1, 2003, defense counsel informed the court that he had contacted the Lawsons whose company is in Spokane, Washington, to determine whether they could comply with the conditions of the protective order, and was waiting while they determined if they could stay on the case given the protective order. RP(8/1/03) 4-5. The court indicated that it would look at further information from the Lawsons if it was put in writing. RP(8/1/03) 5.

On September 2, 2003, defense counsel indicated that the Lawsons were not willing to work on the case, given the protective order, and so the computer discovery had not been reviewed. RP(9/2/03) 4.

On December 15, 2003, defense counsel further informed the court, now the Honorable Vicki Hogan, of his need to have a computer expert to assist in

preparing the case and of his efforts to find such an expert.² RP(12/15/03) 13-14. On March 5, 2004, the court and parties met on the defense motion to reconsider Judge Worswick's ruling, but the hearing was continued because the new potential expert Robert Apgood was not present. RP(3/5/04) 32-35.

On March 26, 2004, defense counsel asked Judge Hogan to reconsider Judge Worswick's order denying the defense mirror-image copies of the hard drives. RP(3/26/04) 47-48. Defense counsel noted that retained experts, the Lawson Company of Spokane, had declined to work on the case given the restrictions of the discovery order. RP(3/26/04) 48. Counsel outlined the considerable time he had spent attempting to contact and retain another expert; eventually he was referred to Robert Apgood. RP(3/26/04) 49. Counsel made extensive argument that CrR 4.7 was mandatory and cited authority supporting the right to discovery of the drives and of the impossibility of working within the protective order. RP(3/26/04) 58-63. Counsel

² One of the difficulties in this case was the number of judges making pretrial rulings in this case: Judge Worswick, Judge Hogan, Judge Fleming, and Judge Orlando.

emphasized his need for professional expertise in examining virtually the sole evidence at trial. RP(3/26/04) 52-53.

Expert Robert Apgood explained in his declaration filed with the court that he had specialized equipment in his laboratory in Seattle which he would need to use and that the searches of the hard drives were time-consuming and could take place when he was engaged in other work. CP 601-609. If the work took place in the secure facility he would not be able to engage in other work and would have to transport his equipment to the secure facility. CP 601-609. He attested that if forced to work with state equipment he would have to divulge defense theory or strategy. CP 601-609.

The court denied the motion to reconsider, ruling that the defense had made no effort to comply with the order. RP(3/26/04) 84-85. The court indicated it did not think that the order was unworkable but needed to know if it was. RP(3/26/04) at 85.

On May 7, 2004, the prosecutor provided two orders to the court, including an order signed by Judge Hogan earlier in the day "which denied the

defendant's request for reconsideration on pretrial ruling regarding the discovery of the images that were the basis of these counts. This matter was originally heard by Judge Worswick, she entered the order. Cause was then reassigned to Judge Hogan. Defense sought to revise that order and Judge Hogan denied that, I believe, back in late March. I drafted the order and had her -- Mr. Kawamura signed it and I had her sign it today." RP 1.

On May 26, 2004, defense counsel indicated that the only potential witness for the defense would be Robert Appgood. RP 20. Counsel made it clear, however, that he might be required to call Mr. Appgood only on matters pertaining to statements provided by Detective Voce. RP 21-22.

On June 8, 2004, defense counsel summarized for the trial court, the Honorable James Orlando:

We have been before the court twice before for discovery issues and the court's made rulings. It doesn't change our position.

We, from the outset of when I was appointed in this case, had made specific requests for copies of the hard drives and there has been repeated attempts by the State to define our discovery request as simply looking at images. That's not accurate. There's basically a couple hundred photographs here that the State's going to introduce; there has been testimony from the detective that there's

8700 pages worth of material on those hard drives. Those were the materials that we have been requesting. So our position hasn't changed.

RP 267-268. In response, Judge Orlando stated, "Well, I am not going to revisit any of the other motions." RP 268. At the state's request, Judge Orlando granted a motion in limine precluding the defense from commenting in voir dire or opening statement about not having had access to the hard drives. RP 268.

Neither Mr. Appgood nor any other expert testified at trial for the defense.

2. State's briefing

The state in its initial Brief of Respondent never argued that the issue of the discovery violation was waived or that Mr. Grenning failed to seek a final ruling. BOR at 5-6, 45-49. In its supplemental Brief of Respondent submitted in response to the decision in State v. Boyd, 160 Wn.2d 424, 158 P.3d 54 (2007), the state never argued that the issue was waived. 1-7.

For the first time, more than two years after oral argument and after supplemental briefing, in its Motion for Reconsideration the state first asserted that "any objection to the court's

protective order was waived by the defendant's failure to seek a final ruling." Motion to Reconsider at 2. The state argued this was grounds for reconsidering the reversal of 20 convictions for possession of depictions of minors in sexually explicit conduct.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED ON THE ISSUE OF THE REVERSAL OF THE CONVICTIONS FOR POSSESSION OF DEPICTIONS OF MINORS.

1. TO REQUIRE A DEFENDANT TO SHOW PREJUDICE WHERE HE HAS BEEN DENIED DISCOVERY OF THE VERY EVIDENCE AGAINST HIM WOULD MAKE THE RIGHT TO THE DISCOVERY MEANINGLESS.

This Court, in Boyd, held that the prosecutor was obligated to provide a defendant with an actual copy of the hard drive 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." Boyd, 160 Wn.2d at 432-433. For that reason, this Court held that a defendant is entitled to the copy of the mirror-image hard drive under CrR 4.7(a) and did *"not have to establish that effective representation merits a copy of the very evidence supporting the crime charged."* Boyd, at 433. (emphasis added). In so holding, the court noted further that "[d]isclosure is required in

large part because the prosecutor intends to use the evidence 'in the hearing or trial.' CrR 4.7(a)(1)(iv). It is this purpose that explains the materiality of the defendant's requests." Boyd, at 436.

The state's argument for review is that if a defendant is denied such essential discovery and does not successfully seek interlocutory review of the denial, he must then "establish [on appeal] that effective representation merit[ed] a copy of" the evidence, contrary to the holding in Boyd.

This argument conflicts with Boyd and robs it of any real force. This argument is analogous to saying that a defendant who has been denied counsel under Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963), should have to prove prejudice on appeal from the denial of representation. In fact, the prosecutor's argument at trial against permitting the discovery of the evidence against Mr. Grenning was essentially that trial counsel could simply ask Mr. Grenning, "[D]id you do this, or didn't you do this?" RP(7/25/03) 1516.

The state's argument also overlooks the constitutional underpinnings of Boyd, which holds that the discovery is essential to protect the constitutional right to counsel and to meaningful access to the evidence against him. Boyd, at 432-433. The argument asserts that a non-constitutional harmless error analysis is not precluded by Boyd (Answer at 6), but no citation to Boyd is provided.

Although the state asserts that Mr. Grenning was not denied discovery, only discovery away from the secure facility. Answer at 6. As set out above and discussed below, this assertion is not supported by the record and is in conflict with Boyd. The record amply demonstrates that the protective order effectively denied Mr. Grenning access to the mirror-image hard drive. The state's experts spent hundreds and hundreds of hours investigating these hard drives and used special equipment to do so. Mr. Grenning was entitled to access as well.

Moreover, although Boyd discusses protective orders, it is clear that these orders are meant to apply once the mirror-image drives have been provided to defense counsel; they include making defense counsel personally and professionally

responsible for any unauthorized access to the information, prompt return of the evidence at the end of the criminal proceeding and firewalls and other means of securing the evidence. Boyd, at 438.

Review should not be granted on the state's challenge to the reversal by the Court of Appeals of Mr. Grenning's convictions for possession of depictions of minors.

2. THE DISCOVERY ISSUE WAS PRESERVED FOR REVIEW.

Judge Worswick entered the protective order and Judge Hogan denied reconsideration of that order; and, at the request of the prosecutor, Judge Hogan signed a written order memorializing that denial.³ RP(3/26/04) 83-85; RP 1. The trial judge, Judge Orlando, expressly denied reconsideration of the order as well. RP 267-268.

Thus, what the record shows is that defense counsel properly moved to compel discovery, moved to reconsider the denial of the right to a copy of the

³ Although the prosecutor stated on the record that such an order was signed, and provided the order to the trial judge, Judge Orlando, it does not appear to have been filed in the superior court file.

mirror-image drives and was denied the right to further reconsideration by the trial court.

Moreover, the expert Robert Apgood expressly set out in his affidavit the reasons why the discovery order was too restrictive and unworkable: he had specialized equipment in his laboratory in Seattle; it would be burdensome to transport his special equipment to Tacoma; if he used the state's equipment, he would be forced to reveal defense theory or strategy; and he would not be able to perform any other work while searches were going on unattended. CP 601-609. The clear implication of his affidavit was that he would not be willing to undertake the intensive examination of the hard drives, which had taken the police months to conduct, at the police facility in Tacoma.

Both the prosecutor and the trial judge were well aware of the fact that Mr. Apgood did not undertake the investigation defense counsel sought; defense counsel indicated at the start of trial to Judge Orlando that the defense request for discovery of the hard drives was on-going and that it had not changed position on the issue.

The state cites to the case of State v. Riker, 123 Wn.2d 351, 369, 869 P.2d 43 (1994), and State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991), review denied, 120 Wn.2d 1022 (1993), as authority for its claim that the discovery issue was waived. Motion at 2. Riker holds only that where a ruling is tentative (in Riker, a ruling excluding testimony about an overheard conversation), a party needs to seek a final ruling on a motion in limine. In Carlson, the court held that where a ruling on the right to introduce evidence of a witness's drug use was deferred and not renewed after the witness testified and denied using drugs, the issue of the exclusion of the evidence was waived on appeal. Neither Riker nor Carlson held that one must seek further rulings after a motion to reconsider a final order has been signed, or that having a further motion to reconsider denied by the trial court is insufficient to preserve the order.

Defense counsel filed a written motion to compel discovery which was subject to a final written protective order. Counsel moved to reconsider this order in front of a new judge who temporarily was in charge of the case. That judge

denied reconsideration and ultimately signed a written order denying reconsideration. Counsel broached the issue with the trial court and the court unambiguously ruled that it would not revisit the issue.

The issue was preserved.

3. THE PROTECTIVE ORDER WAS UNWORKABLE.

The record below established that the defense experts, the Lawson Company, were unwilling or unable to work under the protective order. RP(9/2/03) 4. After the Lawsons declined to continue working on the case, defense counsel spent a great deal of time and effort trying to find an expert who would work within the strictures of the protective order. RP(3/26/04) 46, 49. This led counsel to Robert Apgood. RP(3/26/04) 49. Mr. Apgood, however, filed a declaration setting forth why the protective order was unworkable. CP 601-609. If Mr. Apgood's affidavit left any doubt about his willingness to work at the police facility, defense counsel's report on the record to the trial judge that the defense position was unchanged since its motion to compel and motion to reconsider

establishes that Mr. Apgood was not willing to conduct his expert investigation there.

In any event, there is no authority supporting the rule of law urged by the state -- that defense counsel had to demonstrate that the protective order was unduly burdensome to preserve objection to it. Requiring such a demonstration was likely impossible where the defense was unable to find any expert to try working within the confines of the order.

D. CONCLUSION

Petitioner respectfully submits that review should be denied on the issue challenging the reversal by the Court of Appeals of his convictions for possession of depictions of minors.

DATED this 20th day of May, 2008

Respectfully submitted,



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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the ^{20th} day of May, 2008, I caused a true and correct copy of Petitioner's Reply to the State's Answer to his Petition for Review to be served on the following via prepaid first class mail:

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