Commonwealth of Kentucky
Supreme Court

Case No. 2007-SC-493

COMMONWEALTH OF KENTUCKY — **APPELLANT**

v.

Appeal from McCracken Circuit Court
Hon. Craig Z. Clymer, Judge
02-CR-1608

DAVID NICHOLS — **APPELLEE**

BRIEF FOR COMMONWEALTH

Submitted by:

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a true and accurate copy of the Brief for the Commonwealth was mailed this 13th day of August, 2008 to:Craig Z. Clymer, Judge, McCracken Circuit Court, Courthouse, 301 South Sixth Street, Paducah, Ky. 42003; Hon. Emily Roark, Bryant and Kautz, 601 Washington Street, P. O. Box 1876, Paducah, Ky. 42002-1876; and delivered via electronic mail to: Timothy Kaltenbach, Commonwealth's Attorney, Courthouse, 301 S. 6th Street, Paducah, Ky. 42003.

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INTRODUCTION

This matter is before the Court on the Commonwealth's Motion for Discretionary Review. The question before the Court is: Whether a criminal defendant should be allowed to hide the name and address of his expert, and advise that expert not to prepare a written report, in order to frustrate the concept of reciprocal discovery and the language of RCr 7.24?

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth requests oral argument as this matter is before the Court upon the Commonwealth's Motion for Discretionary Review.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE FACTS

David Nichols, ("the Respondent") was initially convicted by the McCracken Circuit Court on one count of abuse second degree, and was sentenced to five years incarceration. TR Vol. I, 51. On March 11, 2005, in a "not-to-be published" opinion, the Court of Appeals vacated and remanded his conviction on the basis that the Respondent should have been allowed to present additional "AALTERP" testimony, and the action was remanded for trial. The previous opinion was entered in action 2004-CA-634. TR Vol. II, 15. The case was set for retrial in McCracken County, scheduled for September 6, 2006. TR Vol. II, 32.

In preparation for trial, an issue arose involving the trial court's reciprocal discovery order and the anticipated use of an expert by the defense. TR Vol. II, 39. A hearing was held on or about July 17, 2006, at which time the Commonwealth requested that a report or summary of the expert's investigation and analysis be provided under reciprocal discovery. At the same time, counsel for the Respondent objected to providing such a report, and further objected to even providing the identity and address of the expert witness. The McCracken Circuit Court entered a two page order on or about July 18, 2006, referring to RCr 7.24(3)(A)(I), and RCr 7.24(3)(B)(I). TR Vol. II, 46. In summary, the trial judge ruled that the Respondent was not required to have the witness generate a report to satisfy the rules of reciprocal discovery, but if such a report was prepared, that the Respondent would have to provide the Commonwealth with a copy. Id. The court went on to order that the Respondent must provide the full name and address of the expert to the Commonwealth. Id. Both sides objected to the contents of the order. The Commonwealth filed a Motion to Alter,

Amend, or Vacate on July 27, 2006. TR Vol. II, 49. The trial court denied that Motion in an Order entered August 8, 2006. TR Vol. II, 72.

An interlocutory appeal was filed on behalf of the Commonwealth and a cross appeal was filed on behalf of the Respondent, objecting to the contents of the McCracken Circuit Court order. TR Vol. II, 55 - 71. In a not-to-be published opinion rendered June 15, 2007, the Court of Appeals affirmed the part of the decision denying access to the Commonwealth of any report or statement concerning respondent's expert, and reversed the part of the decision requiring the respondent to divulge the name and address of the expert. In its opinion, the Court of Appeals discussed and analyzed numerous cases on the issue of pre-trial discovery, and then made the following comment:

> While the analysis performed by the Supreme Court in these cases is the proper one to resolve disputes regarding the application of RCr 7.24 to expert testimony, we are unable to conduct such an examination in this case because we do not know the subjects of Nichols' expert witness' anticipated testimony. Nichols claims that his expert has not generated any reports regarding his anticipated testimony and insists that, at trial, his expert will only express opinion based on the material previously provided by the Commonwealth. Given this, the facts of the present case are most like facts found in *Vires* [989 S.W.2d 946 (Ky. 1999)], rather than the facts found in *Barnett* [763 S.W.2d 119 (Ky. 1988)]. However, we cannot apply the holding in either case to the case *sub judice* due to the dearth of information regarding the anticipated testimony of Nichols' expert. Therefore, we are left with analyzing the trial court's decision purely for an abuse of discretion. (Appendix p. 15, Slip Opinion p. 15).

The Court then stated that the language of RCr 7.24 (3) (A) (I) does not require a criminal defendant to generate a report of an expert's testimony merely to satisfy reciprocal discovery.

The Court then concluded with the following comments:

> However, we also agree with the trial court that if Nichols' expert generates a report prior to trial, then Nichols is required to provide that report to the Commonwealth. Furthermore, we hasten to add that this opinion does not limit the Commonwealth's right to object to the testimony of Nichols' expert if his expert expresses an opinion based on a premise not found in the materials previously produced by the Commonwealth. (Appendix p.16 , Slip Opinion p. 16).

The Court then also found that the Respondent had no obligation to provide the name and address of his expert.

ARGUMENT

This matter is properly before the Court on the Commonwealth's Motion for Discretionary Review. Before the trial court the Commonwealth requested that a report or summary of the expert's investigation and analysis be provided under reciprocal discovery. At the same time, counsel for the Respondent objected to providing such a report, and further objected to even providing the identity and address of the expert witness. The McCracken Circuit Court entered a two page order on or about July 18, 2006, referring to RCr 7.24(3)(A)(I), and RCr 7.24(3)(B)(I). TR Vol. II, 46.

This matter stems from the language of RCr 7.24(3)(A)(I), concerning the defendant's obligations when the Commonwealth requests "reciprocal discovery" under that rule. Specifically, the Commonwealth requests that this Court determine whether it is permissible for a defendant's trial counsel to purposely create an ambush through its failure to disclose the nature of their expert testimony, by advising their expert not to make any

written report. Under these circumstances counsel for the Commonwealth is left to speculate as to the nature of an expert's testimony, will not to have any time to check the given expert's credentials or qualifications to speak on the subject he or she is addressing, nor to adequately prepare cross-examination to question or counter the expert's statements. Such a tactic is contrary to the rule of reciprocal discovery, which requires that the subject of expert testimony be revealed prior to trial in order to avoid such trial tactics.

I. The Language of the Rule Requires Disclosure

The language of RCr 7.24(3)(A)(I) reads as follows:

> (3)(A)(I) If the defendant requests disclosure under Rule 7.24(1), upon compliance to such request by the Commonwealth, and upon written request of the Commonwealth, the defendant, subject to objection for cause, shall permit the Commonwealth to inspect, copy, or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody, or control of the defendant, which the defendant intends to introduce as evidence or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to the witness's testimony.

By the terms of this language the criminal defendant must disclose any "results or reports" produced by an expert witness when the defendant has requested such information from the Commonwealth. In the case herein, the Commonwealth disclosed the information concerning its experts in compliance with the rule, but the Respondent asserts that he will not reveal any information concerning his own expert (despite the fact that the expert is expected to testify at trial) because that expert did not conduct any experiment, produce any report, and arrived at whatever conclusion he or she will describe during testimony solely

through a review of documentation. Such a position is a violation of the rule as the conclusion of an expert is a result that must be produced through reciprocal discovery.

There is little case law addressing the meaning of the term "result" in the context of RCr 7.24. In Debruler v. Commonwealth, 231 S.W.3d 752 (Ky. 2007) the Court stated that the training certificates of scent tracking canines were not considered results or conclusions properly produced through discovery, in much the same way that an expert is not required to produce his diplomas prior to testimony. The Court has also stated that the rule only includes "studies...made in connection with the present case" while stating that there was no obligation to provide copies of publications and journals that an expert may rely upon in forming a conclusion. Collins v. Commonwealth, 951 S.W.2d 569, 574 (Ky. 1997). Otherwise, the Court has been silent on the meaning of the term "result."

When interpreting the language of a rule or statute the common terms employed in the language must be given their common meaning. "It is a well established rule of statutory interpretation that words which have acquired a technical legal meaning should be accorded that meaning, while words which have not should be given their common meaning." City of Worthington Hills v. Worthington Fire Protection Dist., 140 S.W.3d 584, 591 (Ky. App. 2004) citing Commonwealth v. Wombles, 346 S.W.2d 299 (Ky. 1961). Here, the issue concerns the meaning of the word "result". The expert's testimony constitutes a "result" as contemplated by the rule set out above. Although counsel for the Respondent states that the anonymous expert is merely going to review existing reports and documents, it is highly likely that the witness will be called upon to testify as to their observations, conclusions, or analysis of the given data. Such a review is considered a study in its own

right and would be coupled with a conclusion. Indeed, it would be highly unusual for a defendant to present expert testimony that was merely a recitation of reports reviewed by that expert. The Commonwealth would expect that the Respondent would be extremely disappointed and would not put on testimony that failed to support his or her case. Thus, the expert is being asked to review and digest certain information in order to reach a specific opinion or conclusion. This opinion or conclusion is a "result" as contemplated by the discovery rules, and as such, should be divulged.

II. Existing Precedent Requires Disclosure

Further, the appellate courts of this state have continually recognized that reciprocal discovery requires the exchange of certain, basic, information concerning each parties' testifying experts. For example, Barnett v. Commonwealth, 763 S.W.2d 119 (Ky. 1988) stands for the proposition that expert witnesses should not testify outside of what was revealed during discovery prior to trial, even if that testimony was merely a conclusion that was based upon the physical findings. In Barnett, a Commonwealth expert was called to testify concerning a report that included a finding that there were faint traces of blood present. Barnett, 763 S.W.2d at 123. The expert's testimony then reached beyond the physical finding and the expert concluded that the trace of blood indicated that the defendant washed blood off of his hands. This conclusion was an opinion that was outside the scope and contents of the report that had been provided to the defendant in discovery. Id. This Court concluded that it was a violation of the rules of discovery for the expert to testify concerning this conclusion. Although Barnett applied to a Commonwealth witness, it stands for the proposition that opinions offered by expert witnesses constitute significant

information, which should be discoverable, even when the opinion is one based upon facts known to the opposing party.

In attempting to support his position the Respondent is likely to expend considerable effort in discussing Barnett and its progeny. Counsel for the Respondent has previously argued that the issue in Barnett is not one of whether or not a party has to create a report to turn over for the sole purpose of reciprocal discovery, but was one of how far outside the scope of a report an expert could in fact testify. However, this characterization is exactly the issue in this case. The Respondent does want to present expert testimony that is outside the scope of what has been presented in discovery because the Respondent's expert did not produce ***any*** report. Thus, it is apparent that the problem addressed in Barnett is the same problem present in this case, one of inadequate disclosure of expert testimony. In Barnett the expert had prepared a report stating certain items, but then attempted to testify to matters outside the scope of his report. Applying that analysis to the case at bar, the expert for the Respondent should not be allowed to testify at all. Since there is no report, ***everything*** to which the expert would testify would be outside the scope of his report.

In an unpublished case, George v. Commonwealth, this Court addressed the exact issue that is now before the Court, and determined that it was error to circumvent discovery by obtaining an expert's oral opinion and failing to reveal that information in reciprocal discovery[1]. The facts of George v. Commonwealth were as follows:

Prior to calling Dr. Greg Davis as a witness, the prosecutor

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[1] This unpublished decision is cited pursuant to CR 76.28(4)(c) as it directly addresses the issue herein and may be helpful to the Court.

> approached the bench. The prosecutor informed the trial court that Dr. Davis was a forensic pathologist and that she had spoken with Dr. Davis in September regarding D.C.'s bruises and had shown him pictures of those bruises. The purpose of this discussion was to learn more about the nature and extent of the physical injury that might be associated with the bruises displayed in the pictures. Dr. Davis reviewed the pictures for the prosecutor and gave her an oral report on his conclusions. No written report was filed and no notice was given to the defense regarding Dr. Davis's oral report or even that he would be testifying as a witness.
>
> Defense counsel objected to Dr. Davis taking the stand on grounds that the Commonwealth violated the trial court's reciprocal discovery order by failing to give notice that Dr. Davis would be called as an expert and failing to disclose the substance of his testimony. The trial court overruled the objection on grounds that, because no written report was filed, no notice or disclosure was required. On appeal, George argues that this was error. We agree.

George v. Commonwealth, 2003 WL 22227195, 6 No. 2001-SC-1067-MR (Ky. 2003).

In holding that the trial court erred in ruling that disclosure was not required, the Court stated:

> In cases where expert testimony is likely to be determinative of an important issue or of the case itself, the failure to disclose the substance of the testimony of experts expected to be called at trial produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand.

Fed.R.Civ.P. 26 advisory committee's notes.

> That the above comments relate to civil rules of discovery do not make them inapplicable here. On the contrary, these concerns are amplified in a criminal trial by a constitutional

> sounding board. That is, pre-trial disclosure of the substance of expert testimony in a criminal trial is a matter of fundamental fairness that goes to the very heart of the adversarial process.

Id. at 7.

Further, the Respondent cannot rely upon this Court's opinion in Gray v. Commonwealth, 203 S.W.3d 679, 686 (Ky. 2006). In that case the Court stated that a defendant was not obligated to disclose an audio taped interview as part of reciprocal discovery. That case, however, dealt with a witness that was not an expert and could not offer any expert opinion on the issues therein. In Gray the witness at issue was a resident of the neighborhood, not an expert. Gray, 203 S.W.3d at 684 -685. As discussed in § C herein, expert testimony presents an unique set of issues that require a minimal disclosure for practical considerations.

Similarly, the Respondent cannot rely on Vires v. Commonwealth, 989 S.W.2d 936 (Ky. 1999). In Vires, the expert was an accident reconstruction officer who testified to his observations of the photographs of the original scene. When asked if he had an opinion as to whether or not the physical evidence was consistent with one driver having attempted to avoid rather than initiate impact with the Vires' pick-up, the witness did not express an opinion on that matter. Vires, 989 S.W.2d at 948. In summarizing its position, this Court stated:

> There being no undisclosed premise against which the appellant claimed a need to defend himself, the trial court did not err in allowing Detective Hogg to testify as to his opinion based upon the results of his investigation. Midland v. Commonwealth, Ky., 788 S.W.2d 253, 256 (1990). *The appellant was not unfairly surprised by Detective Hogg's*

testimony. Vires, 989 S.W.2d at 948 (emphasis added).

Counsel for the Commonwealth can easily anticipate that the expert in the case at bar will have conducted a review and analysis of existing reports, and then express some opinion exonerating the Respondent. This will be contrary to the thrust of the Vires case, where the reconstructionist merely gave his impression of the evidence he viewed and did not express an opinion on a key issue. Again, the import of Vires is to avoid "unfair surprise" by an expert's testimony. Here the unfair surprise is not knowing the identity of the expert nor having access to a summary of the results of his or her analysis.

III. Fundamental Fairness and Practical Concerns Require Disclosure

It has been the general tendency of the defense bar to fail to disclose the nature of their expert testimony by advising their expert not to make any written report. In this manner, counsel for the prosecution is left to speculate as to the nature of an expert's testimony, not to have any time to check the given expert's credentials or qualifications to speak on the subject he or she is addressing, nor to adequately prepare cross-examination to question or counter the expert's statements. Moreover, as the trial court noted and the opinion of the Court of Appeals referenced, situations could even arise where some form of disclosure would be necessary in order for the Commonwealth to logically request a hearing under Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993) to determine if the nature of the expert's testimony was based on sound principles generally recognized by the

scientific community.[2]

The lack of some form of reasonable disclosure also presents a number of logistical problems for the trial court and appellate courts. At the trial level, situations could arise where the Commonwealth would be forced, in the middle of trial, to request a Daubert hearing as soon as the expert begins to testify, should the direction of the expert's testimony become questionable. Also, the Commonwealth could be put in a position to request a continuance at the conclusion of the expert's direct testimony, in order to have time to review the substance of the testimony, check its scientific soundness, to prepare adequate cross-examination and the calling of any experts in rebuttal to refute the theory propounded by the defendant's expert. Any of these contingencies could cause considerable disruption of the trial process. Lastly, as indicated in the Court of Appeals opinion, the courts will not be able to make meaningful review of interlocutory orders, since they would not know the nature and substance of the expert testimony, either. Thus, some workable option for fair and adequate discovery needs to be established, and the order in the case at bar needs to be reviewed and reversed in order to apprise the Commonwealth of the anticipated nature of respondent's expert testimony.

Under the Respondent's reading of RCr 7.24, it would be all too easy for defense counsel to skirt the intent and purpose behind RCr 7.24, by merely advising their

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[2] By way of an extreme example, based on the facts in the case at bar, it is hypothetically possible that the respondent could find an "expert" who would "testify" that, based upon his or her research, the expert has concluded that all child abuse injuries are caused by space aliens. This, of course, would not be a conclusion that would be recognized or accepted in the scientific community, but without some form of disclosure, the trial court nor the Commonwealth has any way to know *what* may be contained in the proffered testimony.

potential expert not to write anything down. The United States Supreme Court has held that the adversary system of trial "is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 46 (1970). This Court has also stated that it will not tolerate a "cat and mouse" game in the exchange of discovery. James v. Commonwealth, 482 S.W.2d 92, 94 (Ky. 1972). Here, the Respondent is engaging in just the kind of tactics that this Court has criticized.

IV. Other Jurisdictions Require Disclosure

An excellent explanation of the reasoning behind reciprocal discovery can be found in the case of People v. Martinez, 970 P.2d 469, 472 (Colo. 1998):

> Only within the last four decades of our history has the concept of the defendant's duties of disclosure to the prosecution arisen. Such reciprocal discovery obligations have largely met with favor in the courts. For example, in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the United States Supreme Court upheld a statute requiring a defendant to provide advance notice of the alibi defense by reminding us that "[t]he adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Id.* At 82, 90 S.Ct. 1983. Similarly, in *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973), the Court concluded that reciprocal discovery "by increasing the evidence available to both parties, enhances the fairness of the adversary system." *Id.* At 473 – 74, 93 S.Ct. 2208.
>
> As to the defendant, the courts have reasoned that reciprocal discovery requirements merely accelerate the timing of disclosures that would otherwise be made by the defendant at trial. *See Williams*, 399 U.S. at 85, 90 S.Ct. 1983. In short, the broad question of whether it is constitutional to impose upon the defendant in a criminal proceeding certain disclosure

> obligations has been answered, and answered affirmatively. *See United States v. Nobles*, 422 U.S. 225, 233, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) (holding that the court can compel the defendant to disclose his investigator's report under certain circumstances when it would substantially enhance the search for the truth); *Williams*, 399 U.S. at 84 – 85, 90 S.Ct. 1983 (holding that a state may require defendants to provide the prosecution with advance notice of an alibi defense without violating the Fifth Amendment privilege against self-incrimination or the Fourteenth Amendment due process protections). In the context of an attack on the constitutionality of Crim. P. 16, our court addressed and upheld reciprocal discovery requirements in 1975/ *See People v. District Court*, 187 Colo. 333, 531 P.2d 626 (1975). We observed that the Rule survived constitutional scrutiny because it only accelerated the disclosure by the defendant of that which he would otherwise disclose at trial. Therefore, both the United States Supreme Court and this court have previously concluded that reciprocal discovery carries no inherent flaw. Martinez, 970 P.2d at 472.

In other words, the information should be provided through pre-trial discovery since it would only be information disclosed at trial in any event. Also, this fundamental approach ensures fairness of the adversary system, both for the defendant and for the state. Without the requested information, counsel for Commonwealth will be in the dark with respect to the scope and nature of the testimony that will be offered at trial, and will be precluded from effective cross-examination.

Similar holdings have been reached in other states as well: State v. Pawlyk, 115 Wash.2d 457, 800 P.2d 338 (1990) (reports discoverable so long as expert to be called as a witness); Commonwealth v. Faulkner, 528 PA. 57, 595 A.2d 28 (1991) (defendant's psychiatric reports discoverable in insanity defense situation even where defendant refused to be evaluated by prosecution expert); Commonwealth v. Paszko, 391 Mass. 164, 461

N.E.2d 222 (1984) (defense ballistic expert reports not "work product", so discoverable).

It has also been held that the states are free to impose preclusion of certain portions of a defendant's proof for failing to provide the information through reciprocal discovery. United States v. Nobles, 422 U.S. 225, 45 L.Ed.2d 141, 95 S.Ct. 2160 (1975). The more recent trend in the U.S. Supreme Court cases, however, favors placing notice requirements on the defendant rather than taking the extreme sanction of limiting the testimony that the defendant can place before the court on his own behalf. Taylor v. Illinois, 484 U.S. 100, 98 L.Ed.2d 798, 108 S.Ct. 646 (1987); Michigan v. Lucas, 500 U.S. 145, 114 L.Ed.2d 205, 111 S.Ct. 1743 (1991). It has been said that notice requirements are seen as "a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system." Michigan v. Lucas, citing, Wardius v. Oregon, 412 U.S. 470, 37 L.Ed.2d 82, 93 S.Ct. 2208 (1973). Thus, the Respondent cannot complain that disclosure of information concerning his expert implicates his constitutional rights. "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." U.S. v. Nobles, 422 U.S. 225, 241, 95 S.Ct. 2160, 2171 (U.S.Cal. 1975)

Lastly, a procedure as requested by counsel for movant has apparently worked well in the federal system. Under their reciprocal discovery orders, a defendant must give a written summary of testimony that the defendant intends to use as evidence, and the summary must describe the witness' opinions, the bases and reasons for those opinions, and the witness' qualifications. Federal Rule of Criminal Procedure 16 (b) (C). Such reciprocal

discovery does not place an undue burden on the defendant, and helps to insure the fair and expeditious handling of claims at trial.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court reverse the ruling of the Court of Appeals and remand this matter to the trial court for further proceedings in accordance with the Court's instruction.

Respectfully Submitted,

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