

IN THE CIRCUIT COURT OF APPEAL OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

CASE NO. 04 CT 14406 SC

CAROLE BJORKLAND, et al.¹,
Respondents.



PETITION FOR WRIT OF CERTIORARI

COMES NOW, State of Florida, Petitioner, by and through the undersigned State Attorney, files this instant Petition for Writ of Common Law Certiorari pursuant to Rule 9.100, Florida Rules of Appellate Procedure, seeking relief by way of a departure from the essential requirements of law, and as grounds for granting the writ states as follows:

Summary

On November 2, 2005, the trial court issued an Order compelling the State to produce an EPROM source code belonging to a third party. The Order was based on the Respondents' October 21, 2005 hearing where Respondents were allowed to present testimony and evidence to establish materiality and reasonable necessity in their EPROM request. Respondents solicited expert testimony from Dr. Harley Myler, and presented other new evidence. However, the trial court denied the State its opportunity to be heard.

Prior to the October 21 hearing, the trial court made clear that the purpose for the October 21 hearing was for the Respondents to establish materiality and reasonable necessity in their request for the EPROM source code; and only after establishing that standard would the Petitioner be asked to respond.

The Petitioner was never asked to respond.

¹ For a complete list of Respondents, see Exhibit A, filed separately with this document.

FILED FOR RECORD
2005 DEC -2 PM 4: 04
KIM M. RUSHING
CLERK OF CIRCUIT COURT
SARASOTA COUNTY, FL

In fact, Petitioner's request to be heard was denied by the trial court. Nonetheless, without hearing from the Petitioner, the trial court issued its November 2 Order finding that the Respondents had met their first burden, and in the same order, the trial court granted the second issue: Respondents' request for supplemental discovery. Therefore, by granting the Respondents' request for supplemental discovery without hearing from the Petitioner, the Petitioner has been materially and unfairly prejudiced in violation of fundamental procedural due process and fundamental fairness.

Jurisdictional Basis

This Court has jurisdiction pursuant to the Florida Constitution and the Florida Rules of Appellate Procedure. See Art. V § 5(b), Florida Constitution; Fla. R. App. P. 9.030 (b)(3). The State seeks common law certiorari review of an order from the trial court granting Respondent's Motion for Supplemental Discovery.

Procedural History and Facts

1. On April 22, 2005, Respondents' first Motion in Limine seeking suppression of the breath test was effectively denied without prejudice, and Respondents were given an opportunity to re-file. See, Exhibit B.

2. On June 3, 2005, the parties began discourse in front of the trial court regarding the Respondents' request for the EPROM (erasable programmable read-only memory) source code for Intoxilyzer 5000 breath test instrument. The trial court stated that the Respondents have the first burden of showing the materiality of their request, and only after establishing this first burden would be required to present evidence and testimony on the second issue: Respondents' request for supplemental discovery.

3. On June 8, 2005, Respondents' Motion in Limine seeking suppression of the breath test was heard for a second time. For a second time, Respondents' Motion was effectively denied without prejudice, and Respondents were given another opportunity to re-file. See, Exhibit C.

4. On June 13, 2005, Respondents filed a similar motion seeking supplemental discovery of the Intoxilyzer 5000 EPROM source code. Exhibit D. After a hearing on July 11, 2005, the trial court issued an order denying the Respondents' request for supplemental discovery without prejudice, providing the Respondents' another opportunity to re-file. Exhibit E.

5. On July 5, 2005, Respondents' filed yet another attempt to achieve suppression of the breath test, this time in a form of a Request to Take Judicial Notice of various documents. The trial court denied this attempt to achieve suppression without prejudice, providing the Respondents' yet another opportunity to re-file. Exhibit F.

6. On July 28, 2005, the trial court entertained discussion on the record of the EPROM source code again, and the Petitioner moved for a bifurcated hearing. This Court repeatedly expressed that it wanted expert testimony on the EPROM issue, discussed the bifurcation issue, and then finished the hearing by ruling that the bifurcation issue "wasn't argued." Exhibit G. The court appearance record from July 28 indicates that the Petitioner's Motion to Bifurcate did not reach a resolution, and the trial court provided Respondents still yet another opportunity to re-file.

7. On August 8, 2005 Respondents again re-filed their Motion for Supplemental Discovery, seeking production of the EPROM source code. Exhibit H.

8. On September 15, 2005, the State moved to strike the Respondent's Motion for Supplemental Discovery, claiming it did not indicate what facts the Defense intended to prove, did not indicate what exhibits or documents it would be using, nor did it state with any particularity what legal grounds upon which facts would be placed. In fact, at the September 15 hearing, the Respondents argued that they would put the Petitioner on notice of those grounds and facts at the October 21 hearing. Exhibit I.

9. Further, the trial court stated that the hearing on October 21 was for the Respondents to establish their first burden of materiality and reasonable necessity when it said:

The [hearing on the] twenty-first is not to determine, uh, whether or not I'm gonna automatically order the State to produce the source code. It's whether or not [the Respondents] can meet **that first burden** of materiality; and to do that, that's why we're having the expert come in and testify. See, Exhibit I, page 27: lines 1-4.

I'm not ordering that the discovery be produced...at the twenty-first hearing; I'm ordering that we have a hearing so I can determine whether or not the State -- or [pause] the Defense can satisfy that burden such that I would later require [the State] to produce the discovery requested... Id. at 27:22-28:2.

It's the Defendant's burden to produce sufficient information to satisfy the Court that they have a material basis upon which their requesting this information. **I'm not requiring the State to do anything at this point...** I agree with you that the Defendant has the burden; I agree with you that they have to show materiality. That's why I gave them the opportunity to do so at the October 21 hearing... Id. at 28:14-19.

Just so we're clear. I'm not requiring the State to do anything at this point. **The only thing the State has to do on the twenty-first is show up.** Id. at 28:21-22.

Mr. Varn is right. What I stated was, is that it's the Defendants' burden to provide materiality through expert testimony based upon all the orders that were being submitted to me, and some of the Defense counsel that was at the last hearing was quoting from isolated transcripts of expert testimony, testifying at other hearings throughout the State. I said, "that's not gonna work." ... [The Defense has] the burden. That's what I've ruled. **The State is not required to provide with any expert witnesses unless they are required to under the rules of discovery. They're not, pursuant to my order of June 3rd.** Id. at 32:22-33:8.

10. On September 19, 2005, the trial court denied the Petitioner's Motion to Strike Defendant's Motion for Supplemental Discovery. Exhibit J. In that Order, the trial court ruled:

As previously indicated by this court, the purpose of the [October 21, 2005] hearing is to allow the Defendant(s) the opportunity to establish materiality in their request for supplemental discovery pursuant to Fla. Crim. P. 3.220(f).

Id.

11. On October 21, 2005 the trial court held a hearing to determine whether the Respondents could establish their first burden of materiality and reasonable necessity. At the close of examination of the Respondents' only witness, the trial court instructed the parties to proceed directly to argument. The trial court never even indicated that the Petitioner could or should present any evidence or testimony at the October 21 hearing.

12. On November 2, 2005, the trial court ruled that the Respondents carried their first burden of materiality and reasonable necessity. However, without hearing from the Petitioner, the trial court also granted the Respondents' request for supplemental discovery. Exhibit K.

13. On November 10, 2005, Petitioner requested a response hearing at which it would produce evidence and testimony contrary to Respondents' expert. Petitioner's request was summarily denied by the trial court in its November 17, 2005 Order. Exhibit L.

Relief Sought

Petitioner requests an order staying the trial court's November 2, 2005 Order granting Respondents' request for supplemental discovery until the Petitioner has been afforded proper procedural due process and, upon remand, the opportunity to present evidence and testimony in support of its position in this cause.

Argument

The State of Florida, Petitioner in this cause, has been deprived of fundamental procedural due process and fundamental fairness by the trial court when the trial court granted the Respondents' request for supplemental discovery without hearing from the Petitioner. On this issue, the trial court heard only from the Respondents, and did not discuss whether or not the Petitioner could or should present evidence or testimony in support of its position prior to granting Respondent's request. In fact, when the Petitioner requested an opportunity to be heard, the trial court summarily denied its request.

Such an order violates fundamental procedural due process. Scully v. State, 569 So.2d 1251, 1252 (Fla. 1990)("The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered."). See, Tibbetts v. Olsen, 91 Fla. 824, 108 So. 679 (1926); Rucker v. City of Ocala, 684 So.2d 836, 841 (Fla.App. 1st DCA 1997)("To qualify under procedural due process standards, opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive."); See, Fl. R. Cr. P 3.020 (The Florida Rules of Criminal Procedure are "construed to secure simplicity in procedure and fairness in administration.").

In previous statements and orders, the trial court ruled that the October 21, 2005 hearing was to allow the Respondents the opportunity to establish materiality and reasonable necessity in their EPROM source code request. The trial court stated that, only after it found that the Respondents had reached their first burden, the Petitioner would need to proceed.

On November 2, 2005, the trial court issued an order finding that the Respondent had reached their first burden. In that same Order, the trial court granted the Respondents' request compelling the Petitioner to provide the EPROM source code from a third party.

The trial court erred in that it deprived the Petitioner of procedural due process and fundamental fairness when it ruled that the Respondents had met its initial burden of materiality and reasonable necessity, and without hearing from the Petitioner, granted the Respondent's Motion for Supplemental Discovery. Instead, after finding that the first burden of materiality and reasonable necessity had been met, the trial court should have allowed the Petitioner the opportunity to be heard on the Respondents' Request for Supplemental Discovery.

A. The purpose of the October 21, 2005 hearing was to afford the Respondents the opportunity to establish the threshold standard of materiality and reasonable necessity.

In numerous statements and orders prior to October 21, the trial court ruled that the October 21 hearing was for the Respondents to establish their first burden of materiality and reasonable necessity in their supplemental discovery request, that the Petitioner would not be obligated to bring any evidence at that time, and only after the trial court had ruled that the Respondents had achieved their burden of materiality and reasonable necessity would the Petitioner be required to present evidence on the second question of the supplemental discovery request.

1. The June 3, 2005 hearing. At the June 3, 2005 hearing, the trial court stated the Respondents had the initial burden to establish the relevancy and necessity of the EPROM source code. The trial court said that after the Respondents establish the relevancy and necessity of their request, "then the [Petitioner] may want to produce an expert or a witness that would testify to the contrary." Further, the trial court elaborated, only after the Petitioner had its opportunity to be heard, "the [trial court] will be able to make an informed decision."

The trial court issued an order on June 3 denying the Respondents' request for EPROM source code "without prejudice for the [Respondents] to present testimony that the

disclosure of the EPROM source code is either relevant or is reasonably calculated to lead to discoverable evidence.”

2. **The June 8, 2005 hearing.** At the June 8, 2005 hearing, this Court entertained discussion on the record of the EPROM source code again. But no resolution was achieved.

3. **The July 28, 2005 hearing.** At the July 28, 2005 hearing, the trial court entertained discussion on the record of the EPROM source code again, and the issue of a bifurcated hearing. The trial court repeatedly expressed that it wanted expert testimony, discussed the bifurcation issue, and then finished the hearing by ruling that the bifurcation issue “wasn’t argued.”

The court appearance record from July 28 indicates that the Petitioner’s Motion to Bifurcate did not reach a resolution.

4. **The September 15, 2005 hearing.** At the September 15, 2005 hearing the Petitioner moved to strike the Respondents’ Motion for Supplemental Discovery claiming it did not indicate what facts the Respondents intended to prove, did not indicate what exhibits or documents they would be using, nor did it state with any particularity what legal grounds upon which facts would be placed. At the September 15 hearing, the Respondents argued that they would put the Petitioner on notice of those facts at the October 21 hearing itself.

The trial court agreed that the October 21 hearing was for the Respondents when it stated:

The [hearing on the] twenty-first is not to determine, uh, whether or not I’m gonna automatically order the [Petitioner] to produce the source code. It’s whether or not [the Respondents] can meet that first burden of materiality; and to do that, that’s why we’re having the expert come in and testify.

I'm not ordering that the discovery be produced...at the twenty-first hearing; I'm ordering that we have a hearing so I can determine whether or not the [Petitioner] -- or [pause] the [Respondent] can satisfy that burden such that I would later require [the Petitioner] to produce the discovery requested...

It's the [Respondents'] burden to produce sufficient information to satisfy the Court that they have a material basis upon which their requesting this information. I'm not requiring the [Petitioner] to do anything at this point...I agree with you that the [Respondents have] the burden; I agree with you that they have to show materiality. That's why I gave them the opportunity to do so at the October 21 hearing...

Just so we're clear. I'm not requiring the [Petitioner] to do anything at this point. The only thing the [Petitioner] has to do on the twenty-first is show up.

Mr. Varn is right. What I stated was, is that it's the [Respondents'] burden to provide materiality through expert testimony based upon all the orders that were being submitted to me, and some of the [Respondents'] counsel that was at the last hearing was quoting from isolated transcripts of expert testimony, testifying at other hearings throughout the state. I said, "that's not gonna work." ... [The Respondents' have] the burden. That's what I've ruled. The [Petitioner] is not required to provide with any expert witnesses unless they are required to under the rules of discovery. They're not, pursuant to my order of June 3rd.

See Facts ¶9 and Exhibit I.

5. The October 21, 2005 hearing. At the October 21 hearing the trial court instructed the parties to proceed from the close of examination of the Respondents' sole witness directly to argument on the issue. The record is clear that the trial court never discussed whether or not the Petitioner should or could present any evidence or testimony.

Therefore, the trial court's language reflects its understanding that the October 21 hearing was for the Respondents; was to afford the Respondents the opportunity to meet their first burden of materiality and reasonable necessity. The Petitioner was not required to present its case at that time. Only after the trial court found that the Respondents had met this first burden would the Petitioner need to proceed.

Also, the Petitioner has a due process right for reasonable preparation of its expert. Scull at 1252. Placing the Petitioner on notice of the Respondents' factual and legal grounds at the hearing itself necessitates a second hearing. Such preparation cannot take place if the Petitioner is discovering the Respondents' facts and legal grounds supporting its Motion for the first time at the hearing on the Motion.

Additionally, by failing to entertain a discussion whether or not the Petitioner could or should to present any evidence or testimony, the trial court recognized that the Petitioner would have a second hearing to present responsive testimony.

B. Petitioner's request to be heard was summarily denied, in violation of procedural due process and fundamental fairness.

On November 11, 2005, Petitioner's request to respond was summarily denied by the trial court. Without hearing from the Petitioner on the issue of Respondents' Request for Supplemental Discovery, the trial court issued an order granting Respondents' request. The Florida Supreme Court in Scull v. State stated:

While we often have said that "due process" is capable of no precise definition, there nevertheless are certain well-defined rights clearly subsumed within the meaning of the term.

The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals.

Scull at 1252.

The Florida Supreme Court in Scull found an "appearance of irregularity" which so permeated the proceedings as to "justify [a] suspicion of unfairness." Id. Thus, the trial court in Scull violated due process and fundamental fairness. As a result, the Florida Supreme Court

remanded that case back to the trial court for another hearing in compliance with “the dictates of due process.” Id.

Similarly, in our case, the trial court clearly indicated that the Respondents’ first burden was the burden of materiality and reasonable necessity. Only after this first burden was met would the Petitioner be asked to respond to the request for supplemental discovery. For example, prior to October 21, the trial court stated:

The [hearing on the] twenty-first is not to determine, uh, whether or not I’m gonna automatically order the State to produce the source code;

I’m not ordering that the discovery be produced...at the twenty-first hearing;

I’m not requiring the State to do anything at this point;

Just so we’re clear. I’m not requiring the State to do anything at this point. The only thing the State has to do on the twenty-first is show up;

That’s what I’ve ruled. The State is not required to provide with any expert witnesses unless they are required to under the rules of discovery. They’re not, pursuant to my order of June 3rd.

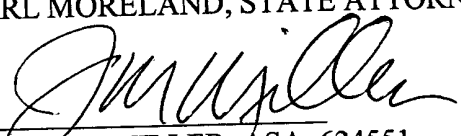
Contrary to these judicial statements, the trial court ruled on both the issues without allowing the Petitioner to respond to the Respondents’ Motion for Supplemental Discovery. Issuing an order without even allowing one party to be heard constitutes an appearance of irregularity which justifies a suspicion of unfairness. Similar to the Scull case, Petitioner asks this court, upon remand, for the opportunity to present evidence and testimony at a hearing within the dictates of due process.

Lastly, the court records also reflect that Respondents in this case have received no less than four attempts at suppression of the breath test(s). Each time, the trial court entertained Respondents’ requests, and denied them without prejudice for the Respondents to re-file in the future. By doing so, the trial court has given Respondent numerous chances to present its side of

the issue. Petitioner has yet to have a single reasonable opportunity to be heard. Such procedure violates the "fundamental conception of fairness" as illustrated by the Florida Supreme Court in Scull, departs from the fairness requirement of Fl. R. Cr. P. 3.020, and constitutes a departure from the essential requirements of law.

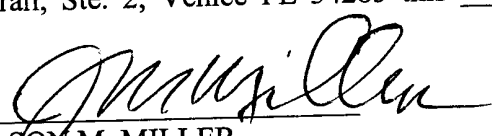
Respectfully submitted,
EARL MORELAND, STATE ATTORNEY

BY:


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I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand to:
Robert Harrison, Esquire, 825 S. Tamiami Trail, Ste. 2, Venice FL 34285 this 2 day of
Dec, 2005.

BY:


JASON M. MILLER