FOR PUBLICATION

In the Court of Appeals of the State of Alaska

Jason Rak, Petitioner, v. **State of Alaska,** Respondent.	Court of Appeals No. **A-13623** **Order** Petition for Review Date of Order: **June 30, 2020**

Trial Court Case No. **3SW-14-00188CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges

Jason Rak has been indicted on four charges — interference with official proceedings, first-degree witness tampering, coercion, and tampering with physical evidence[1] — related to an affidavit that Rak allegedly coerced a witness to sign. The subject matter of the affidavit related to a criminal case in which Rak and a co-defendant, Charles Littlefield, were charged with several counts of felony assault against another inmate.

The State became aware of the allegedly false affidavit because the witness, Jerome Capps, contacted prosecutors and provided a "detailed statement" about it. It is unclear whether Capps was ever given a copy of the affidavit, but it does not appear that the State is in possession of a copy.

However, it does appear that Rak's defense attorney is in possession of a copy of the affidavit. According to the State, Capps was approached by the defense's investigator as a possible defense witness in the assault case against Rak, and during that meeting, Capps

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[1] AS 11.56.510(a)(1)(A), AS 11.56.540(a)(1), AS 11.41.530(a)(1), and AS 11.56.610(a)(2), respectively.

was shown a copy of the affidavit he had previously signed. Shortly after this meeting, Capps contacted the prosecutor's office and informed them of the existence of the allegedly false affidavit. The interference with official proceedings, coercion, and tampering charges then ensued.

Following this indictment, the assigned prosecutor contacted Rak's defense attorney and requested that she provide a copy of the affidavit to the prosecutor under Alaska Criminal Rule 16(c)(6). Rak's defense attorney responded that she would not provide the document without a court order. The State then filed a motion to compel production of the affidavit, which the superior court granted. This petition followed.

Why we conclude that the State is entitled to a copy of the affidavit if the State can show that it has been unable to secure a copy through due diligence

Alaska Criminal Rule 16(c)(6) provides, in relevant part:

> *Physical Evidence*. If defense counsel or defense counsel's agent acquires *physical evidence of the offense*, defense counsel must immediately notify the prosecutor and must make arrangements to turn over the evidence to the prosecutor within a reasonable time. . . . Defense counsel must not test or substantively alter the evidence, unless defense counsel has first notified the prosecutor and given the prosecutor a reasonable opportunity to seek court action.[2]

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[2] Alaska R. Crim. P. 16(c)(6) (emphasis added). Rule 16(c)(6) also provides that "[d]efense counsel must reveal all information concerning the manner in which the evidence was obtained and handled unless that information is privileged. When physical evidence is disclosed by the defense, the prosecutor cannot reveal to the jury that the evidence was obtained from the defense." The rule further provides that any differences concerning

This rule is a codification of the Alaska Supreme Court's holding in *Morrell v. State.*[3] In *Morrell*, the Alaska Supreme Court adopted the general rule that a defense attorney must turn over to the prosecution real evidence of the crime that comes into the defense attorney's possession — whether through a client or a third party.[4] In reaching this conclusion, *Morrell* cited numerous cases from other jurisdictions recognizing that a defense attorney has a professional obligation, as an officer of the court, to turn over real evidence of the offense in his or her possession so as not to impede the State's investigation of the crime.[5] As Professor LaFave explains, a defense attorney is not permitted to turn counsel's office into "a sanctuary for evidence that the government could otherwise have obtained from its original location by seizure or subpoena."[6]

There are many situations in which the dictates of Criminal Rule 16(c)(6) are easy for a defense attorney to follow. The majority of cases addressing this rule or a similar

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whether the defense counsel turned over the evidence "within a reasonable time" shall be resolved by the court.

[3] *Morrell v. State*, 575 P.2d 1200 (Alaska 1978); *see also* Alaska Supreme Court Order No. 1191 (effective July 15, 1995) (codifying the *Morrell* rule in Criminal Rule 16(c)(6)); Memorandum from Christine E. Johnson, Court Rules Attorney, to Members of the Alaska Supreme Court, Rule File for Alaska Supreme Court Order 1444 (Mar. 31, 2000) (noting that Criminal Rule 16(c)(6) was intended to reflect the decision in *Morrell*).

[4] *Morrell*, 575 P.2d at 1210.

[5] *See id.* at 1207-11 & n.11 (citing *In re Ryder*, 236 F. Supp. 360 (E.D. Pa. 1967), *aff'd* 381 F.2d 713 (4th Cir. 1967); *Dyas v. State*, 539 S.W.2d 251 (Ark. 1976); *Anderson v. State*, 397 So. 2d 871 (Fla. Dist. Ct. App. 1974); *People v. Lee*, 83 Cal. Rptr. 715 (Cal. Ct. App. 1970); *State v. Olwell*, 394 P.2d 681 (Wash. 1964)).

[6] 5 Wayne R. LaFave et al., *Criminal Procedure* § 20.4(f), at 558 (4th ed. 2015).

rule in another jurisdiction involve unique tangible items with inherent evidentiary value to the State's investigation. *See,e.g.*, *In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967) (stolen money and sawed-off shotgun); *People v. Nash*, 341 N.W.2d 439 (Mich. 1983) (murder weapon); *Gipson v. State*, 609 P.2d 1038 (Alaska 1980) (gun used in shooting); *Morrell v. State*, 575 P.2d 1200 (Alaska 1978) (handwritten kidnapping plan); *Anderson v. State*, 297 So. 2d 871 (Fla. Dist. App. 1974) (stolen property); *People v. Lee*, 83 Cal. Rptr. 715 (Cal. App. 1970) (blood-stained shoes used to kick victim); *State v. Olwell*, 394 P.2d 681 (Wash. 1964) (knife used in killing).

But there are other situations, such as here, where defense attorneys may reasonably question whether the rule requires production of certain items in their possession. In those situations, it is not inappropriate for the defense attorney to request that the State move to compel the item and directly support its claim for why the item qualifies as "physical evidence of the offense" that must be produced under Criminal Rule 16(c)(6). As commentators and courts have recognized, rules like 16(c)(6) present a difficult dilemma for defense attorneys tasked with the constitutional role of representing a client under the Sixth Amendment and zealously defending their client's rights under the Fifth Amendment.[7]

Part of the difficulty is the lack of guidance regarding what constitutes

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[7] *See, e.g.*, *Commonwealth v. Stenhach*, 514 A.2d 114, 125 (Pa. Super. Ct. 1986) (noting that "[a]ttorneys face a distressing paucity of dispositive precedent to guide them in balancing their duty of zealous representation against their duty as officers of the court"); Jane M. Graffeo, *Ethics, Law, and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 STAN. L. REV. 977, 985 (1980) (explaining that the "constitutional backdrop" to the attorney-client privilege, which protects the trust between the attorney and the accused, would be implicated if criminal defense attorneys were obligated to sacrifice the duty of loyalty by turning over incriminating evidence in the absence of legal process).

"physical evidence of the offense" for purposes of the rule. In the trial court proceedings, the State argued that the term should be interpreted broadly to include anything that would qualify as "physical evidence" under AS 11.56.900(4). Alaska Statute 11.56.900(4) defines "physical evidence" to include "an article, object, document, record, or other thing of physical substance."

We rejected such a broad interpretation of Criminal Rule 16(c)(6) in a recent unpublished order. *See Kehl v. State*, File No. A-12894 (Order dated Dec. 5, 2017). As we explained in that order, tying "physical evidence of the offense" to the definition of "physical evidence" in AS 11.56.900(4) would effectively turn the rule into a provision for reciprocal discovery — a proposition explicitly rejected by the Alaska Supreme Court.[8]

In *Kehl*, we were addressing the question of whether copies of text messages in the defense attorney's possession constituted "physical evidence of the offense" for purposes of Criminal Rule 16(c)(6).[9] The evidentiary value of those text messages was not clear, in part because there was no record about when they were sent or what they

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[8] *See Kehl*, No. A-12894, at 5-6; *State v. Summerville*, 948 P.2d 469 (Alaska 1998) (striking down reciprocal discovery legislation enacted in SLA 1996, ch. 95 and reinstating prior version of Criminal Rule 16), *aff'g* 926 P.2d 465 (Alaska App. 1996); *see also* Memorandum from Judge Mary E. Greene to Criminal Rules Committee Members, Rule File for Criminal Rule 16(c)(6), Alaska Supreme Court Order 1191 (Nov. 20, 1994) (providing proposals — which were ultimately rejected — regarding disclosure of "physical evidence" in possession of defense attorney, but noting the possible constitutional issues in expanding the *Morrell* rule).

[9] *Kehl*, No. A-12894, at 3.

contained.[10]

Here, in contrast, the evidentiary value of the item being sought is clear. The State alleges that Rak coerced Capps into signing a false affidavit about whether the victim in the assault case had threatened Rak in the past. Unlike the text messages in *Kehl*, the allegedly false affidavit falls squarely within the "fruits and instrumentalities" of the crime covered by Criminal Rule 16(c)(6).[11] Importantly, the affidavit contains the statements of another person, not the statements of the defendant.

The difficulty posed by this case is that the affidavit is not inherently a unique item, the possession of which by the defense impedes the State's investigation of the crime. An affidavit can be copied and those copies can generally be used in the same way as the original under the rules of evidence.[12] Thus, if the State had a copy of the allegedly false affidavit in its possession, there would be no need for the defense attorney to separately produce the copy in her possession.

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[10] *Id.* at 7.

[11] *Morrell v. State*, 575 P.2d 1200, 1209 (Alaska 1978); *see also In re Ryder*, 381 F.2d 713, 714 (4th Cir. 1967), *aff'g* 236 F. Supp. 360 (E.D. Pa. 1967) ("It is an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime."); *People v. Lee,* 83 Cal. Rptr. 715 (Cal. App. 1970) ("A defendant in a criminal case may not permanently sequester physical evidence such as a weapon or other article used in the perpetration of a crime by delivering it to his attorney." (citing *In re Ryder*, 381 F.2d at 714)).

[12] *See* Alaska Evid. R. 1003 ("A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.").

However, in the current case, it appears that the State does not have a copy of the affidavit. It also appears that due diligence will not secure the State a copy. That is, it appears that Capps himself does not have a copy of the affidavit that he can give the State. If this is true, then the State can properly compel the defense attorney to turn over a copy of what is essentially the instrumentality used to commit various charged offenses for which the grand jury has already found probable cause.

Accordingly, IT IS ORDERED:

The petition for review is GRANTED, and this case is REMANDED to the superior court for further proceedings in accordance with the guidance provided here. If the State supports its claim to the relative "uniqueness" of the copy of the affidavit in the defense attorney's possession, the superior court shall grant the motion to compel and order the defense attorney to produce a copy of the affidavit to the prosecution. We note, however, that the State is required to take "extreme precautions" at trial to make certain "that the source of the evidence is not disclosed in the presence of the jury and prejudicial error is not committed."[13]

Entered at the direction of the Court.

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[13] *State v. Olwell*, 394 P.2d 681, 685 (Wash. 1964); *see also* Alaska R. Crim. P. 16(c)(6) ("When physical evidence is disclosed by the defense, the prosecutor cannot reveal to the jury that the evidence was obtained from the defense.").

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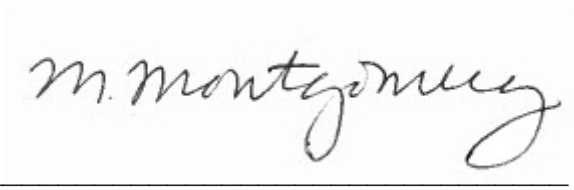

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