

STATE OF NORTH CAROLINA  
COUNTY OF RANDOLPH

FILED IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
2011 AUG 22 PM 1:14 08 CRS 56156  
RANDOLPH COUNTY, C.S.C.

STATE OF NORTH CAROLINA )  
 )  
 ) MOTION FOR SANCTIONS FOR  
VS. ) BRADY VIOLATIONS  
 )  
 )  
TAMARA BEAN )  
Defendant. )  
 )  
 )

NOW COMES, the Defendant, by and through the undersigned counsel, pursuant to N.C.G.S. §15A-901, et al. and both Federal and North Carolina constitutions, moves this Court for sanctions against the State for material violations of discovery. As reasons for said motion, the Defendant alleges and says:

GENERAL BACKGROUND

1. On or about September 30, 2008 Randy Charles died of gunshot wounds and the Defendant was charged with First Degree Murder.
2. This matter is primarily a self-defense case with the State alleging that the Defendant staged the crime scene.
3. The undersigned counsel was appointed in early February 2010 after the Defendant's original attorney was released.
4. Upon information and belief this matter was first set for trial in September 2009; however, it was continued to February 2010 and with the replacement of counsel it was reset for July 2010. Current counsel for the Defendant filed a motion to continue the July 2010 trial date in April 2010 and it was granted in May 2010 with a new trial date of mid-October 2010. In mid-September 2010 it was determined that the Defendant had cancer and as a result the trial date was continued and finally reset in May 2011 for August 22, 2011.

5. Numerous items were sent by the State to the SBI for examination early on its investigation; among those items were a shotgun and five (5) shotgun shells lying on the floor by the deceased's body. A "Laboratory Report" was prepared (dated 6/17/2009) for the DNA work performed by the SBI.

DELAYS BY STATE IN PROVIDING DISCOVERY

6. Prior to September 15, 2010 the only SBI discovery provided by the State related to the DNA was the "Laboratory Report" (See Exhibit "A").
7. The SBI "Laboratory Report" dated June 17, 2009 stated that no conclusion could be rendered based upon a comparison of the partial profile of the Defendant nor the victim.
8. Commencing September 15, 2010 and continuing through May 2011 counsel for the Defendant repeatedly requested all the DNA bench notes and data no less than ten (10) times (See Exhibit "B").
9. Defense counsels requests frequently asked that the documents not be faxed since other documents previously faxed were often blurred or at best difficult to read.
10. Commencing on or about June 1, 2011 The State started faxing multiple times approximately forty-eight (48) pages related to the SBI DNA analysis.
11. On or about June 10, 2011 the four (4) sets were reviewed for legibility and the best was kept; said set was subsequently reviewed by counsel and found to be totally unacceptable in that most of said copy was not legible due to the original documents containing small and fine print.
12. Counsel for the Defendant requested clear copies and/or the documents to be downloaded on to a disk from the link between the SBI and prosecutors; however, this was unacceptable to the State.
13. On July 28, 2011 counsel for the Defendant met with the State and obtained a clear copy of the SBI DNA documents as well as other clear copies of SBI documents (see Exhibit "C").
14. Exhibit "C" states on the cover page titled "Forensic Advantage Discovery Packet" that it was requested on May 5, 2011; more than seven and a-half (7.5) months after counsel for the Defendant made the initial request.

15. On August 2, 2011 counsel Defendant sent a letter to the State (included in Exhibit "A") informing the State that the documents provided did not contain the DNA breakdown for the Defendant, the victim, nor the breakdown for the partial profile; furthermore, there was absolutely no comparison date of the Defendant or victim with the partial profile obtained from SBI Item #6 (shotgun shell). Counsel for the Defendant requested said information and in specific detail set forth what was needed.
16. The State responded by stating that what I was provided was all they had and/or could obtain.
17. On August 15, 2011 the State, in open Court, reiterated that the information they had was all they had and counsel for the Defendant was free to talk with SBI Agent Winningham.
18. The State further stated in open Court that he had spoken with Agent Winningham and that she would be more than willing to speak with counsel for the Defendant.
19. Counsel for the Defendant spoke with Agent Winningham on August 17, 2011 around 3:15pm and after just a few minutes of discussion she indicated that counsel did not have her "notes" and agreed to email them; said documents (39 pages) were received around 4:00pm (See Exhibit "D"). [Note: A copy of the 39 pages were provided to the State the morning of August 18, 2011.]
20. During the initial conversation, counsel for the Defendant and Agent Winningham agreed to speak again around 3:00pm on August 19, 2011.
21. A review of the documents provided by Agent Winningham revealed that the partial profile only produced one (1) "marker" and that the allele (#14) for said "marker" matched that of the victim and that the allele for the Defendant at said marker were #13 & #15; therefore, she has a non-match and is excluded.
22. Pursuant to North Carolina statute the SBI is still an agent of the prosecutor and the defense must go through the prosecutor to obtain documentation and data (discovery); the State failed to comply with the production of said information that was clearly exculpatory under Brady v. Maryland and related constitutional and statutory rights of the Defendant.
23. The information provided by Agent Winningham is not the complete "raw data"; it is only the summary of the "raw data" generated during the testing.

24. As an example, additional "raw data" includes such items as set forth in counsel for the Defendant's letter to the State on August 2, 2011.
25. The State failed to provide any discovery related to DNA (other than the "Laboratory Report") until around June 1, 2011 - eight and one-half (8.5) months after the Defendant's first formal request in writing.
26. The DNA material is critical and material to the Defendant's claim of self-defense.
27. Pursuant to N.C.G.S. 15A-910 and due process violations under both the U.S. and North Carolina Constitutions on the part of the State sanctions are appropriate.

INCORRECT REPRESENTATIONS BY THE SBI

28. The original "Laboratory Report" produced by Agent Winningham in this matter stated June 17, 2009 was an incorrect opinion/conclusion.
29. When counsel for the Defendant spoke with Agent Winningham the afternoon of August 19, 2011 regarding the documents she emailed to counsel she acknowledged that the Defendant did not have the allele #14 for "marker" #1 and that the victim did.
30. Agent Winningham, when confronted with this information by counsel, acknowledged that the Defendant was excluded due to Defendant having alleles (#13 & #15) different from that found in the partial profile on the shotgun shell (SBI Item #6) and that the victim could not be excluded due to his having said allele (#14).
31. Agent Winningham further stated that at the time the testing was done the SBI policies and procedures were to "render no conclusion" due to the partial profile and that now the policies and procedures are geared to greater specificity and as such "today" the report would state that the Defendant would be a non-match and therefore, excluded.
32. The policies and procedures in effect at the time of Agent Winningham's report were in effect since December 2005 and said "Quality Assurance Manual" (See Exhibit "E") in fact clearly states that if a known sample has allele other than that of the profile then it is a non-match.

"2.5.4 It is scientificallaly acceptable for a match or non-match to be determined for a case when one or more loci yielded inconclusive results. A match will be based only on loci which yield conclusive results. An exclusion will be determined if only one locus probed produces exclusionary results."  
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33. Counsel does not have the full "Report of the Ombudsman" completed by Judge Vince Rozier, Jr. on the SBI; however, a "bulletin" (See Exhibit "F") on a criminal list serve clearly states in Paragraph #3 that he recommends that analysts review any modified standards to ensure that the reporting language is current.
34. Agent misrepresented to defense counsel the policies and procedures in effect at the time of the testing.
35. This matter has been set for trial several times with Agent Winningham having received subpoenas to appear; however, it appears that at no time did she make any effort to prepare a new "Laboratory Report" reflecting the non-match and exclusion of the Defendant as relates to the shotgun shell.
36. At some point and time the prosecutor and Agent Winningham spoke and around 5:30pm on August 19, 2011 the prosecutor faxed me his "handwritten" notes of the conversation wherein it clearly state that the marker is definitely allele #14, the victim has allele #14 and Defendant does not (See Exhibit "G"); said document is undated.
37. In conjunction with the faxed "handwritten" notes of the conversation with Agent Winningham, the prosecutor also emailed me a note (See Exhibit "H") stating that Agent Winningham was now going to render an opinion that "just because the partial profile excluded the Defendant, did not mean she did not handle the shotgun shell" (paraphrased).
38. Clearly, an agent of the State has failed to properly perform her duties, misrepresented results, misrepresented policies and procedures in effect at the time of testing, failed to take remedial measures to correct errors that were prejudicial to the Defendant and that said agent knew or should have known that the Defendant was excluded from the agents DNA analysis of the partial profile obtained and compared.
39. The Defendant contends the DNA material is critical and material to self-defense, is exculpatory, and the

failure to provide the full detrails violated the Defendant's due process rights under both the U.S. and North Carolina Constitutions.

40. The violations of N.C.G.S. 15A-910 and the Defendant's due process rights under both the U.S. and North Carolina Constitution are substantial and egregious justify sanctions against the State.

#### THE TOTALITY OF BRADY VIOLATIONS


41. The combination of the violations by the State are extremely egregious and justify severe sanctions.
42. The failure of the State to provide all of the discovery in a timely manner (at least 8 months) denied counsel for the Defendant sufficient time in which to obtain the services of an expert for trial.
43. The failure of the SBI agent to correctly report the conclusion, her failure to review and modify said conclusions and her misrepresenting the policies & procedures in effect at the time of the testing clearly calls into question her qualifications and her actions have denied the Defendant valuable time in preparing a defense.
44. The actions of both the State and the SBI have taken valuable trial preparation time away from the Defendant.
45. Serious sanctions are warranted based upon the totality and nature of the violations.
46. The totality of the circumstances surrounding the violation of the Defendant's due process rights under both the U.S. and North Carolina Constitutions warrant the most severe sanctions.
47. That N.C.G.S. 15A-910 permits a number of sanctions, inclusive of dismissal with prejudice of the charges against the Defendant, counsel for the Defendant contends that among other sanctions the Court should prohibit the State from pursuing any charge greater than Voluntary Manslaughter due to the case's focus is no self-defense.

WHEREFORE, the Defendant prays of this Court:

1. That the State be prohibited from pursuing any charge greater than Voluntary Manslaughter;

2. That Prosecutorial District 19B be prohibited from prosecuting this matter due to the obvious conflict created by the discovery violations;
3. That SBI Agent Winningham be required to prepare a new "Laboratory Report" that clearly states that the comparison of the partial profile from SBI Item #6 with the DNA of Ms. Bean finds a "non-match" and that her DNA is excluded. That the comparison of Mr. Charles' DNA to the of the partial profile found on SBI Item #6 does not rule Mr. Charles out since he does possess the allele found in the partial profile;
4. That furthermore, said new "Laboratory Report" shall be the sole and only evidence and/or testimony to be presented related to DNA;
5. That in the alternative, this matter be continued in order to permit the Defendant to obtain the services of a DNA expert and properly prepare for any and all new contingencies and/or opinions and due to the excessive time that has been spent in the past several days (and will be needed) that has detracted from other aspects of trial preparation;
6. For such other relief as the Court deems fit and proper.

This the 22 day of August, 2011.

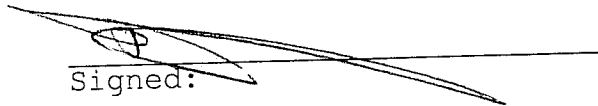
  
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NORTH CAROLINA  
FORSYTH COUNTY

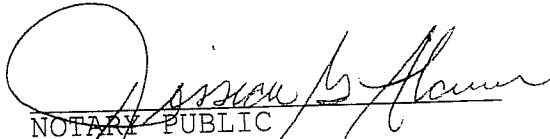
VERIFICATION

I, David B. Batchin, being first duly sworn, deposes and says:

That I am the attorney of record for the Defendant, Tamara Bean, who is charged with First Degree murder in Randolph County (08 CRS 56156) and that I have reviewed the motion for sanctions along with the supporting exhibits and confirms that the same are true and correct to the best of my knowledge, and as to those matters and things, he believes them to be true.

  
Signed:

Sworn to and subscribed before me  
this the 22<sup>nd</sup> day of August,  
2011.

  
NOTARY PUBLIC

My Commission Expires: 9-29-2015

