

VIRGINIA:

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IN THE CIRCUIT COURT FOR FAIRFAX COUNTY MAY 11 PM 1:36

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

COMMONWEALTH OF VIRGINIA

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vs.

Criminal No. FE2014-1313
Trial Date: June 8, 2015

JESSE MATTHEW

NOTICE AND MOTION TO CONTINUE TRIAL DATE

PLEASE TAKE NOTICE that on a date and time to be set by the Honorable David S. Schell, Jesse Matthew, by counsel, Dawn M. Butorac and Robert Frank, will move this court to continue the trial, currently set for June 8, 2015.

Statement of Facts

Jesse Matthew was indicted by the September 2014 grand jury with attempted capital murder, object sexual penetration and abduction with the intent to defile, offenses which carry a possible punishment of life in prison. At a status hearing in November 2014, Mr. Matthew's trial was originally scheduled for March 9, 2015 and was then subsequently continued to the current date of June 8, 2015.

The Commonwealth provided approximately 4000 pages of discovery on January 23, 2015. The materials, in part, include notes and reports that detail the Fairfax City police investigation for the 9 years leading up to Mr. Matthew's arrest. Many of the items included relate to other possible suspects (approximately 40), some of which are extensive background investigations of the suspects. It has taken defense counsel countless hours to review these materials, discern their relevance to this case and decide what, if any, further investigation needs to be conducted.

On April 2, 2015, the Commonwealth provided additional discovery to the defendant. That additional discovery required defense counsel to request an additional subpoena duces tecum related to the new discovery. The subpoenaed materials are due to the court soon but have not been provided as of the filing of this motion.

On May 6, 2015, the Commonwealth gave notice pursuant to Virginia Code § 19.2-270.5 of an intent to use an additional seven certificates of analysis. The new notice includes certificates of analysis that span from April 2006 to June 2014.

On May 7, 2015, the defendant received supplemental discovery related to a defense request for color photos, previously provided in black and white, and a more legible copy of documents from the Department of Forensic Science.

On May 8, 2015 defense counsel received an e-mail from the Commonwealth related to two letters sent to the Commonwealth regarding various discovery issues. Attached to that e-mail was an additional police report concerning potentially exculpatory information.

Defense counsel sent letters to the Commonwealth on April 28, 2015 and May 6, 2015. One request in those letters was to see the physical evidence for this case. Two dates were provided as available dates for defense counsel. While the Commonwealth has indicated one of those dates will work, as of the filing of this motion, a date and time has not been set for the viewing of the physical evidence.

For approximately two months, defense counsel has repeatedly inquired of the Commonwealth as to the complainant's ability to identify anyone as the perpetrator of this alleged crime. The request was based in part on the need to file a motion related to any possible identification if the Commonwealth was seeking any in-court identification. Finally, on May 8, 2015, in an e-mail from the Commonwealth, defense counsel was advised "we are not going to

agree that the victim will not be asked to identify the Defendant in court.” The other basis for this request is that such information is both exculpatory and required to be provided pursuant to Brady v. Maryland and/or clearly material to the defense and required pursuant to the discovery order in this case.

Memorandum of Law

“Article I, Section 8, of the Constitution of Virginia provides that, in criminal prosecutions, the accused has the right ‘to call for evidence in his favor.’ This unqualified right includes ‘the right to prepare for trial which, in turn, includes the right to interview material witnesses and to ascertain the truth.” Cox v. Commonwealth, 227 Va. 324, 328 (1984), citing Bobo v. Commonwealth, 187 Va. 774, 779 (1948). This includes the ability to consult with scientific experts, subpoena material documents and find and speak with potential witnesses. See Gilchrist v. Commonwealth, 227 Va. 540 (1984) and Lomax v. Commonwealth, 228 Va. 168 (1984). A trial court “must exercise its discretion ‘with due regard to the provisions of the Bill of Rights, which secure to one accused of a crime a fair and impartial trial.’” Gilchrist v. Commonwealth, 227 Va. 540, 546 (1984), citing Cremeans’ Case, 104 Va. 860, 863 (1905).

Because the initial discovery response was voluminous, more time is needed to fully investigate the information already provided. The Commonwealth has also provided supplemental discovery and another notice of intent to use DNA evidence. The supplemental discovery will require additional investigation. Moreover, the certificates of analysis were in existence at the time of the Commonwealth’s initial notice of intent to use DNA evidence provided in November of 2014, yet they waited until a month before trial to give notice of seven additional certificates that they plan to introduce. This information will require additional consultation with the defense DNA expert. Moreover, the defense needs to be prepared

regarding the chain of custody of the materials in seven additional certificates of analysis and for the testimony of at least four additional forensic scientists. In addition, the new notice includes certificates of analysis that deal with familial DNA searches and Y-chromosome testing. None of those types of testing were included in the certificates of analysis from the initial notice in November.

A continuance is also required to protect Mr. Matthew's effective assistance of counsel rights. "[T]he right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686 (1984), citing McMann v. Richardson, 397 U.S. 759, 771 (1970). The United States Supreme Court has repeatedly held that the "right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." United States v. Cronin, 466 U.S. 648, 658 (1984). If defense counsel does not have enough time to thoroughly review all of the discovery materials, the supplemental discovery materials, to consult with the defense DNA expert regarding the additional certificates of analysis and new types of DNA tests conducted, and to file appropriate motions, he will be denied the effective assistance of counsel.

Defense counsel needs additional time to further investigate those that appear to have been suspects or potential suspects of this alleged offense. While some of the materials related to other suspects include only a picture and name, others include extensive investigation into the suspect's job, family and life. "In Virginia, evidence that a crime was actually committed by someone other than the accused is admissible for the purpose of generating a reasonable doubt of the guilt of the accused." Evidence tending to show that someone other than the defendant committed the crime generally raises a factual question for the jury. A defendant is entitled to present his version of the facts along with that of the prosecution so the jury may decide where

the truth lies.” Tice v. Commonwealth, 38 Va. App. 332, 342 (2002), citing Oliva v. Commonwealth, 19 Va. App. 523, 526-527 (1995). As such, the defense would be severely prejudiced if not provided additional time to investigate the multitude of suspects of this alleged crime.

The defendant needs additional time to prepare, and possibly file a motion to compel, because the Commonwealth has yet to respond to the defense request for additional Brady material. The Commonwealth is not complying with the discovery order and its obligation under Brady v. Maryland by refusing to provide the defendant with information regarding the complainant’s ability, or lack thereof, to identify Mr. Matthew as the perpetrator of this alleged crime. It seems that the Commonwealth has not inquired of the complainant whether she can make any identification or if she has seen photos of Mr. Matthew since his arrest. A specific Brady request was made of the Commonwealth regarding her ability to make an in-court identification, whether she has seen any photos of Mr. Matthew, what previous identification attempts have been made and any conversations regarding identification that have occurred. The Commonwealth has not provided any information except the aforementioned quote in an e-mail from Mr. Ligan.

The defendant needs to have this information in enough time before trial so that motion to suppress any in-court identification can be made. Even if the defendant has time to file the motion at this juncture, it certainly could not be heard in sufficient time before trial so that Mr. Matthew could use that information effectively at trial. Mr. Matthew would be entitled to a transcript of those proceedings so that it could be used at trial.

The Virginia Supreme Court has stated that, “It is also settled that the refusal to provide an indigent defendant with a free transcript of the record constitutes a denial of fundamental

constitutional rights.” Cabaniss v. Cunningham, 206 Va. 330, 334 (1965). The Supreme Court of the United States has likewise upheld this principle, stating that, “While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal.” Britt v. North Carolina, 404 U.S. 226, 227 (1971).

In determining whether an indigent defendant is entitled to a transcript courts look to “(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.” Britt, 404 U.S. at 227; Anderson v. Commonwealth, 19 Va. App. 208, 211 (1994).

The Virginia Court of Appeals has held that Equal Protection requires an indigent defendant to be provided with the basic tools for his defense, including a transcript. The Court applied the following standard: “An indigent defendant does not have to show a particularized need tailored to the facts of the particular case. Nor does an indigent bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight.” Asfaw v. Commonwealth, 56 Va. App. 158, 164 (2010).

Based on these principles, the Commonwealth failing to timely advise the defendant of the information regarding identification is a constitutional violation. If forced to file a motion to suppress and still have trial on the current date, Mr. Matthew would be denied his right to due process, equal protection, effective assistance of counsel, the right to cross-examine the witnesses against him and the right to a fair and impartial jury trial.

Information regarding the complainant’s ability to identify Mr. Matthew is also material to the defense. If she claims to be able to identify Mr. Matthew, the defense would be seeking

expert funds on this issue. It would also dramatically affect the manner in which the defense prepares for trial and cross-examination of the witnesses.

Finally, the Commonwealth has had over nine years to investigate and prepare for this case; the defendant has had approximately six months to investigate and prepare for trial.

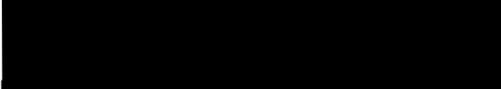
If Mr. Matthew's request for a continuance is not granted, he will be severely prejudiced in his ability to be adequately prepared for trial. See Lomax v. Commonwealth, 228 Va. 168 (1984) (holding that it was an abuse of discretion to deny a continuance because the defendant was entitled to explore and develop evidence provided in discovery.) The right to be prepared for trial is "the heart of a fair trial" and when abridged, a due process violation occurs. See Gilchrist v. Commonwealth, 227 Va. 540, 547 (1984).

WHEREFORE, Mr. Matthew respectfully requests that this Court grant his continuance request so that defense counsel can adequately prepare for trial and protect his Constitutional rights.

Respectfully submitted,

Jesse Matthew

By counsel

A large black rectangular redaction box covering the signature of Dawn M. Butorac.

Dawn M. Butorac

Deputy Public Defender

Certificate of Service

I, Dawn M. Butorac, hereby certify that on this 11th day of May, 2015 a true copy of the foregoing notice and motion was hand-delivered to the Office of the Commonwealth Attorney, 4110 Chain Bridge Road, Fairfax, VA 22030.

A large black rectangular redaction box covering the signature area.

Dawn M. Butorac