2013 WL 6646696 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Eleventh Judicial Circuit
Miami-dade County

STATE OF FLORIDA, Plaintiff,
v.
Jason WAGNER, Defendant.

No. F11-6488.
August 20, 2013.

**Amended Order Granting Ore Tenus Motion to Compel Production of the State's Pre-File Conference Notes**

MIGUEL M. de la O, Judge.

***1 THIS CAUSE** came before the Court on Defendant, Jason Wagner's ("Wagner"), *ore tenus* Motion to Compel the State to Produce Pre-Trial Conference Notes ("Motion"), and the State's Motion for Rehearing. The Court granted the Motion on August 13, 2013, and ordered the State to produce the Pre-File Conferences notes ("PFC Notes") without redaction. After reviewing the State's Motion for Rehearing, conducting further research, and hearing further argument, the Court amends its prior Order. The Motion is Granted. The State is ordered to produce the PFC Notes to Wagner within ten (10) days (unless the State has sought appellate review of this Order). The State may redacted all *non-Brady* material from the PFC Notes prior to their production.

## I. BACKGROUND.

Wagner was arrested by Detectives Crespo and Zaragoza, who claim to have found a number of narcotics between his buttocks following a traffic stop. The State charged Wagner with trafficking in MDMA, and possession of cocaine and cannabis with intent to sell, manufacture or deliver. Wagner's trial commenced on August 12, 2013.

During the trial, Det. Crespo testified on behalf of the State. Subsequent to his direct examination, but prior to cross-examination by Wagner, the Court granted a mistrial for reasons related to statements contained in the PFC Notes which are the subject of this Order. The Court has placed a sealed copy of the PFC Notes in the court file.

During his direct testimony, Det. Crespo testified that he donned gloves and retrieved multiple packets of various narcotics from between Wagner's buttocks. Following Det. Crespo's direct testimony, the Court conducted an *in-camera* review of the PFC Notes due to an earlier evidentiary issue which Wagner had raised. During this review, the Court learned that the PFC Notes indicate that Det. Crespo informed the PFC Assistant State Attorney [1] that it was his partner, Det. Zaragoza, who donned the gloves and retrieved the narcotics. Wagner seeks a copy of the PFC Notes to, *inter alia*, impeach Det. Crespo.

Another potential source of impeachment in the PFC Notes concerns two allegedly different self-serving hearsay statements allegedly made by Wagner to Det. Crespo. It is these two statements which led the Court to review the PFC Notes *in-camera*. Wagner seeks a copy of the PFC Notes to impeach Det. Crespo as to these statements also.

The State objects to the production of the PFC Notes on the basis of the work product privilege. Furthermore, the State asks that if the Court orders production of the PFC Notes, it limit the disclosure to only the two statements which have already been orally disclosed to Wagner.

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**II. THE STATE MUST DISCLOSE THE PFC NOTES.**

**A. DETECTIVE CRESPO MADE THE STATEMENTS UNDER OATH.**

***2** The State and the Defense agree that the statements made by Det. Crespo to the Assistant State Attorney during the Pre-File Conference ("PFC") were made under oath. In fact, a PFC is an official proceeding which can subject a witness to perjury charges.

We conclude, therefore, that the pre-filing conference alleged to have occurred here is an official proceeding within the meaning of Section 837.011, that is, one "required to be heard, before [an] ... official authorized to take evidence under oath," and that Count One of the information charging the defendant with perjury under Section 837.02, Florida Statutes (1981), must be reinstated.

*State v. Witte*, 451 So. 2d 950, 953-54 (Fla. 3d DCA 1984). Although, as discussed, *infra*, the Court's ruling does not turn on whether the statements made by Det. Crespo at the PFC were sworn, it is relevant that the statements at issue were not some passing remark to a prosecutor. These were sworn statements made under Florida law to assist the State Attorney in discharging her duties in bringing criminal charges against defendants.

**B. THE PFC NOTES CONSTITUTE A WITNESS "STATEMENT" UNDER RULE 3.220.**

This Court's plain reading of Florida Rule of Criminal Procedure 3.220 is that the PFC Notes are discoverable as the statements of a witness. The Rule provides:

(B) the statement of any person whose name is furnished in compliance with the preceding subdivision. *The term "statement" as used herein* includes a written statement made by the person and signed or otherwise adopted or approved by the person and *also includes any statement of any kind or manner made by the person and* written or recorded or *summarized in any writing* or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are compiled;

Fla. R. Cr. P. 3.220(b)(1)(B) (2013) (emphasis added). By its plain language, the Rule requires the State to provide a Defendant with any statement "of any kind or manner" made by a witness which is "summarized in any writing." The PFC Notes constitute oral statements made by a witness which were summarized (if not reproduced verbatim) in the notes taken by an Assistant State Attorney. The State is, therefore, obligated pursuant to Rule 3.220(b)(1)(B) to produce the complete PFC Notes to Wagner unless their production is prohibited by another rule.

This conclusion is strengthened by comparing the wording of the current Rule with its predecessor which required the State to provide a defendant only with

a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement....

*Breedlove v. State*, 413 So. 2d 1, 4 (Fla. 1982). The requirement of a "substantially verbatim recital" of the oral statement was removed in the 1989 amendments to Rule 3.220.

The State relies on the comments to the 1989 amendments to argue that the plain language of the Rule does not mean what it plainly states. It is axiomatic that courts rely on legislative intent only when an ambiguity exists in a statute.

***3** When construing a statute, we strive to effectuate the Legislature's intent. *See, e.g., Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006) ("We endeavor to construe statutes to effectuate the intent of the Legislature."). To determine that intent, we look first to the statute's plain language. *Id.* at 595. "[W]hen the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *Id.* (quoting *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005)).

*Kasischke v. State*, 991 So. 2d 803, 807 (Fla. 2008). Besides the fact the Rule is unambiguous, the comments to the Rule do not contradict this Court's interpretation of the Rule.

**C. THE PFC NOTES ARE WORK PRODUCT.**

The dictates of Rule 3.220(b)(1)(B) do not end this Court's analysis, however. The State argues that all notes taken by the State during witness interviews at a PFC are protected by the work product privilege, which is codified in Rule 3.220(g) and which prohibits the disclosure of an attorney's work product.

Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs.

Fla. R. Cr. P. 3.220(b)(1)(g) (2013). Although at first blush the PFC Notes at issue do not appear to contain the opinions, theories, or conclusions of the Assistant State Attorney, the case law regarding the work product privilege suggests otherwise.

The work product privilege was first recognized by the United States Supreme Court in *Hickman v. Taylor*.

In performing his various duties, ... it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly though roughly termed ... the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. 495, 510-11 (1947) (quoted with approval in *Northup v. Acken*, 865 So. 2d 1267, 1269 (Fla. 2004)).

The seminal Florida case on the work product privilege is *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108 (Fla. 1970). Relevant to our inquiry today, *Surf Drugs* observed:

What constitutes "work product" is incapable of concise definition adequate for all occasions. Generally, those documents, pictures, statements and diagrams which are to be presented as evidence are not work products anticipated by the rule for exemption from discovery. Personal views of the attorneys as to how and when to present evidence, his evaluation of its relative importance, his knowledge of which witness will give certain testimony, personal notes and records as to witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams and charts he may refer to at trial for his convenience, but not to be used as evidence, come within the general category of work product.

***4** *Id.* at 112. Relying on *Hickman* and *Surf Drugs*, the Florida Supreme court held in *Northup v Acken*:

[A]n attorney may not be compelled to disclose the mental impressions resulting from his or her investigations, labor, or legal analysis unless the product of such investigation itself is reasonably expected or intended to be presented to the court or before a jury at trial.

865 So. 2d 1267, 1272 (Fla. 2004).

There exists a distinction between fact work product and opinion work product. *See State v. Rabin*, 495 So. 2d 257, 262 (Fla. 3d DCA 1986) ("Work product can be divided into two categories: "fact" work product (*i.e*., factual information which pertains to the client's case and is prepared or gathered in connection therewith), and "opinion" work product (*i.e*., the attorney's mental impressions, conclusions, opinions, or theories concerning his client's case)."). In discussing this distinction, the Third DCA observed that attorney notes tend to disclose the attorney's opinion work product.

The difference between the degrees of protection given oral and written statements is based partially upon this distinction between fact and opinion work product. Compelling disclosure of the attorney's notes or memoranda of oral statements tends to reveal an attorney's opinion work product.

*Id*. (citations omitted). As a result, the Third DCA held in *Rabin* that the attorney's notes of a witness interview were protected work product.

As to any existing documents and notes, we conclude that the trial court did not depart from the essential requirements of the law in ordering that Rabin produce documents relating to his conversation with Diaz but that he need not produce his notes. Documents constitute fact work product. *See, e.g*., Fla. R. Civ. P. 1.280(b)(2). As stated above, Rabin can have no significant interest in this type of work product. To the extent Rabin may have indicated his impressions, conclusions, opinions, or theories on the documents, the trial court properly ordered an *in-camera* inspection of the documents to insure that Rabin's mental processes remain private. Rabin's notes may also contain factual information. However, because notes of a conversation with a witness "are so much a product of the lawyer's thinking and so little probative of the witness's actual words," *In re Grand Jury Investigation*, 412 F. Supp. 943, 949 (E.D. Pa. 1976), and because Rabin is available to answer questions, *see In re Grand Jury Investigation*, 599 F.2d at 1231, we think the trial court properly denied the state access to Rabin's notes.

*State v. Rabin*, 495 So. 2d 257, 264 (Fla. 3d DCA 1986).

This does not mean an attorney cannot be questioned about the information provided to him or her by a witness. To the contrary. The Fifth DCA recently addressed the scope of the work product privilege in a criminal case and allowed a civil lawyer to be deposed about the contents of an interview with a crucial State witness - with important limitations.

In concluding that the trial court erred in denying Zimmerman an opportunity to depose Crump, we caution that any deposition of Crump is to be limited to inquiry of circumstances surrounding the interview of Witness 8 and the contents of such interview. Defense counsel may not inquire into Crump's mental impressions regarding Witness 8, nor may counsel inquire as to the reasons why Crump conducted the interview in the manner in which he did. Additionally, we believe the work product privilege precludes defense counsel from making inquiry as to the reason(s) Crump attempted to locate Witness 8 and the methods employed to do so.

***5** *Zimmerman v. State*, 114 So. 3d 446, 448 (Fla. 5th DCA 2013).

Likewise, in *Rabin*, the Third DCA allowed the State to question the defense attorney about statements made to him by a potential defense witness during an interview.

[T]he state should be permitted to question Rabin regarding Diaz's communications. Rabin need not respond to questions concerning his half of the conversation or to questions which would require him to reveal either his mental impressions of

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the conversation, or his conclusions, opinions, or theories drawn therefrom; he need only respond to questions concerning the content of Diaz's statements.

*Rabin*, at 264.

**D. THE PFC NOTES ARE *BRADY* MATERIAL.**

Regardless of the work product privilege, the State is obligated to produce relevant portions of the PFC Notes to Wagner pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The Florida Supreme Court has "expressly recognized that the State is obligated to disclose to a defendant all exculpatory evidence in its possession" pursuant to *Brady*. *Young v. State*, 739 So. 2d 553, 558 (Fla. 1999).[2] This requirement encompasses a prosecutor's notes.

In *Young*, the defendant argued post-conviction that the State was obligated to produce notes a prosecutor took which indicated that one of the witnesses had made a statement which might support the defendant's theory of defense. *Id*. at 556. The State argued it was not obligated to produce the notes because they were work product. The court flatly rejected this contention.[3]

The State argues that the notes fit the definition of attorney work product and thus were exempt from pretrial discovery under Florida Rule of Criminal Procedure 3.220(g)(1). We reject the State's argument. First, we again make plain that the obligation [under *Brady]exists* even if such a document is work product or exempt from the public records law. Second, we find that the trial court's decision that the state attorney notes of witness interviews were not *Brady* material was error.

*Young v. State*, 739 So. 2d 553, 559 (Fla. 1999) (citations omitted).

Likewise, in *Kyles v. Whitley*, the United States Supreme Court held that *Brady* documents which had to be disclosed to the defense included the state attorney's notes of his interview with a key person in the factual scenario of the case, and the prosecution's list of cars in a parking lot at mid-evening after the murder. 514 U.S. at 429-30.

***6** Even oral statements - not otherwise reduced to writing - must be provided to a defendant if they are *Brady* material.

Florida district courts have repeatedly held, consistent with *Evans*, that rule 3.220(b)(1)(B) does not require the State to disclose a witness's oral statement when that statement was not written or recorded. *See, e.g., Burkes*, 946 So. 2d at 37; *Olson*, 705 So. 2d at 691; *Johnson*, 545 So. 2d at 412. "To do otherwise would require the prosecutor to record and disclose virtually any case[-]related conversation...." *Burkes*, 946 So. 2d at 37. As the Fifth District has explained, when information from a witness is not a statement as defined by rule 3.220(b)(1)(B), "the State [i]s under no obligation to disclose" the information if that information is "not *Brady* material and [i]s not a material alteration to an existing written or recorded statement previously provided by the State to the defendant." *Id*. at 36-37.

*State v. McFadden*, 50 So. 3d 1131, 1134 (Fla. 2010).

Pursuant to this Court's *in-camera* review, only two statements in the PFC Notes are *Brady* material. The State may redact the remainder of the PFC Notes, if it wishes, because they are protected by the work product privilege.

***CONCLUSION***

For the foregoing reasons, the Court orders the State to produce a copy of the PFC Notes to Wagner. The State may redact, if it wishes, the *non-Brady* portions of the PFC Notes.

**DONE and ORDERED** in Miami-Dade County, Florida this 20th day of August, 2013.

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<<signature>>

Miguel M. de la O

Circuit Judge

Footnotes

1 The PFC Notes consist of one single-spaced typewritten sheet which is neither signed nor dated. There is no information on the document which identifies its author. Nevertheless, the State identified its purported author during argument before the Court. For purposes of this Order, the identity of the Assistant State Attorney is immaterial. Neither party questions the authenticity of the PFC Notes.

2 The U.S. Supreme Court has noted there is no distinction between impeachment and exculpatory evidence.
In the third prominent case on the way to current Brady law, *United States v. Bagley*, 473 U.S. 667 (1985), the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes.
*Kyles v. Whitley*, 514 U.S. 419, 433 (1995).

3 The court ultimately concluded that the defendant could not demonstrate the existence of a reasonable probability that the defendant would have received a different verdict if the State had disclosed the prosecutor's notes. However, the court did vacate Young's death sentence and remanded for a new sentencing hearing based on this nondisclosure. *Id*. at 560-61.

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