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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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NO. _____

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
1/7/2019
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS,
Appellant

v.

DWAYNE ROBERT HEATH,
Appellee

From the Tenth Court of Appeals
Cause No. 10-18-00187-CR

APPELLEE'S PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT REQUESTED

Identity of Judge, Parties and Counsel

Appellant, pursuant to Rule of Appellate Procedure 68.4(a), provides the following list of the trial court judge, all parties to the trial court's judgment, and the names and addresses of all trial and appellate counsel.

THE TRIAL COURT:

Matt Johnson — Trial Court Judge
54th District Court, McLennan County
501 Washington Ave., Ste. 305
Waco, Texas 76701

THE DEFENSE:

Dwayne Robert Heath — Appellee

Luke Giesecke — Trial Counsel for Appellee
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THE STATE:

Hilary LaBorde — Trial Counsel
Jennifer Jenkins — for Appellant
Assistant Criminal District Attorneys

Sterling Alan Harmon — Appellate Counsel
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Former Criminal District Attorney

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Statement Regarding Oral Argument

Oral argument will aid the decisional process. By granting oral argument, counsel may address relevant questions and concerns about the meaning of the Michael Morton Act in light of the legislative history of the Act, the circumstances leading to its enactment, and other relevant considerations. Further, counsel may answer questions posed by the judges about why the Waco Court erred by reversing the trial court's discovery sanction order for the reason it did. For these reasons and to address any other issues, Appellee respectfully requests the opportunity to appear and present oral argument.

Statement of the Case

The trial court granted Appellee's motion to exclude a 9-1-1 recording because of the State's failure to produce the recording until 424 days after Appellee requested discovery and less than a week before trial. (CR58, 86-90), (RR14) The State pursued an interlocutory appeal. (CR61-64) The court of appeals reversed, holding that Appellee's discovery request was inadequate to invoke the requirements of the Michael Morton Act.

Statement of Procedural History

The Tenth Court of Appeals reversed the trial court's order in a unanimous opinion authored by Chief Justice Gray that was handed down October 31, 2018. The court of appeals denied Appellee's timely-filed motion for rehearing on December 5, 2018.

Grounds for Review

1. Did the court of appeals err by reversing the trial court's discovery sanction order under a theory not raised by the State?

2. Was Appellee's discovery request sufficient under the Michael Morton Act?

3. Is the State estopped to challenge the sufficiency of Appellee's discovery request because it produced discovery in response to the request?

Summary of the Argument

The Waco Court of Appeals issued a series of decisions in July 2018 purporting to construe the Michael Morton Act. *E.g. Watkins v. State*, 554 S.W.3d 819 (Tex. App.—Waco 2018, pet. granted); *Carrera v. State*, 554 S.W.3d 800 (Tex. App.—Waco 2018, no pet.); *Hinojosa v. State*, 554 S.W.3d 795 (Tex. App.—Waco 2018, no pet.). This Court has granted review in *Watkins* to evaluate the lower court's decision about what constitute "material" (*i.e.*, discoverable) items under the Act.

The Waco Court's decision in the present case (a State's appeal) flows from its prior decisions and purports to decide what constitutes a sufficient "request" for discovery under the Act.

The Waco Court's decision is incorrect because: (1) the court ruled on a theory not preserved in the trial court or assigned as error in the State's brief; (2) the court's interpretation is contrary to the language and intent of the Act; and (3) the State is estopped to deny the propriety of Appellee's request because it furnished discovery in response to the request.

Appellee urges the Court to grant review and correct the Waco Court's erroneous decision because the decision literally impacts discovery in nearly every pending criminal case throughout the state.

Argument

1. Did the court of appeals err by reversing the trial court's discovery sanction order under a theory not raised by the State?

An appellate court commits error by reversing a trial court order on a basis not raised in the trial court or on appeal. Here, the Waco Court reversed the trial court's discovery sanction order on the theory that Appellee's discovery request was inadequate to invoke the requirements of the Michael Morton Act. But the State did not challenge the adequacy of the request at trial or on appeal. The Waco Court thus erred.

A. The appealing party must preserve most appellate complaints.

Aside from the rare category of fundamental error, an appealing party must preserve complaints for appellate review. This requires the party to make a timely objection and obtain an adverse ruling. *See* TEX. R. APP. P. 33.1(a). If the party fails to preserve a complaint, it may not be raised on appeal.

B. An appellate court may only consider preserved complaints.

Generally, an appealing party must "assign error" by specifying issues or points in the appellant's brief it wants the appellate court to consider. *See id.* 38.1(f). However, an appellate court may nevertheless consider

"unassigned error," **but only if it was preserved in the trial court.** *Sanchez v. State*, 209 S.W.3d 117, 120-21 (Tex. Crim. App. 2006).

C. An appellate court may not reverse based on unpreserved theories.

Consistent with the above principles, "[I]t is improper for an appellate court to reverse a case on a theory not raised at trial or on appeal." *State v. Bailey*, 201 S.W.3d 739, 743 (Tex. Crim. App. 2006). Stated differently, an appellate court may not "reach out and reverse the trial court on an issue that was not raised." *Id.* at 744.

D. The Waco Court reversed on an unpreserved theory.

Here, the Waco Court reversed the trial court's discovery sanction order under the theory that Appellee's discovery request was inadequate to invoke the requirements of the Michael Morton Act. *State v. Heath*, No. 10-18-00187-CR, 2018 WL 5660945, at *2 (Tex. App.—Waco Oct. 31, 2018, pet. filed). But the State did not challenge the adequacy of the request at trial or on appeal. Because the State did not object at trial to the form of Appellee's discovery request, the issue was not preserved, and the Waco Court erred by reversing on this basis. *Bailey*, 201 S.W.3d at 743-44.

E. The Court should grant review.

The Court should grant review on this issue for several reasons. *See* TEX. R. APP. P. 66.3.

The court below issued a decision that conflicts with the applicable decisions of this Court, namely *Sanchez* and *Bailey*, which prohibit reversing a trial court's decision on the basis of an unassigned and unpreserved theory. *Id.* 66.3(c).

The court below misconstrued Rule 33.1(a) which requires preservation of appellate complaints. *Id.* 66.3(d).

By reversing on an unassigned and unpreserved basis, the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. *Id.* 66.3(f).

2. Was Appellee's discovery request sufficient under the Michael Morton Act?

Appellee's discovery request included Appellee's name and his trial court cause number and requested "discovery." This sufficed to invoke the requirements of the Michael Morton Act (MMA). The Waco Court erred by holding otherwise.

A. The MMA does not require a statutory reference.

The MMA requires the State "as soon as practicable after receiving a timely request from the defendant" to produce the discovery materials identified in the statute. TEX. CODE CRIM. PROC. art. 39.14(a).

The Waco Court first faulted Appellee for not referring to the statute in his discovery request. *See Heath*, 2018 WL 5660945, at *2. Yet no general right to discovery exists in criminal cases aside from the MMA. *See Quinones v. State*, 592 S.W.2d 933, 940 (Tex. Crim. App. 1980). Appellee's request for "discovery" was necessarily a request for discovery under the statute.

B. The MMA does not require designation of discovery sought.

The Waco Court next faulted Appellee for not designating the items sought to be produced. But this is directly contrary to the intent of the MMA which established a uniform, statewide system of open-file discovery.

The MMA does use the term "designated" in two places and intersperses the term amid several series of items subject to discovery, which renders the statute ambiguous.[1] Further, the Waco Court's designation requirement leads to the absurd result of defense counsel having to request a laundry list of every conceivable item that may exist in case (as here) an item exits that defense counsel is unaware of.[2]

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[1] The MMA requires disclosure of:

> any offense reports, any **designated** documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any **designated** books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state.

TEX. CODE CRIM. PROC. art. 39.14(a) (emphases added).

[2] Consistent with its decision in *Watkins* (No. PD-1015-18) for which this Court has also granted review, the Waco Court apparently chose to exercise some form of judicial restraint in construing the MMA by relying *sub silentio* on pre-MMA decisions. This Court did impose a "designation requirement" for discovery motions under the former version of article 39.14. *E.g.*, *Feehery v. State*, 480 S.W.2d 649, 651 (Tex. Crim. App. 1972); *Sonderup v. State*, 418 S.W.3d 807, 808 (Tex. Crim. App. 1967). And the Legislature retained much of the language from the former statute in subdivision (a). But the Waco Court's approach failed to give effect to the substantial amendments not only to article 39.14(a) but also to the remainder of the statute (such as the addition of 12 entirely new subdivisions) that collectively indicate that the Legislature intended a substantial change in criminal discovery practice in Texas.

If a statute is ambiguous,[3] or the plain meaning would lead to absurd results, the Court may consider: (1) the object sought to be attained; (2) the circumstances under which the statute was enacted; (3) legislative history; and (4) the consequences of a particular construction. *Baumgart v. State*, 512 S.W.3d 335, 339 (Tex. Crim. App. 2017) (citing TEX. GOV'T CODE § 311.023) (other citation omitted). Though not a preferred practice, the Court may also consider such matters even if the statute is unambiguous. TEX. GOV'T CODE § 311.023.

Various bill analyses prepared in conjunction with the enactment of the MMA confirm that it was intended to create a uniform, statewide system of open-file discovery in criminal cases. Open-file discovery, by definition, requires disclosure of everything (not otherwise privileged) in the State's file (without the need to submit an itemized request). For example,

> Interested parties observe that a U.S. Supreme Court ruling requires prosecutors to turn over to the defense any evidence that is relevant to the defendant's case, but express concern that the ruling is vague and open to interpretation, resulting in different levels of discovery across different counties in Texas. The parties contend that such inconsistency demonstrates a need

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[3] "Ambiguity exists when reasonably well-informed persons may understand the statutory language in two or more different senses." *Long v. State*, 535 S.W.3d 511, 521 (Tex. Crim. App. 2017).

> to change the state's criminal discovery laws **to ensure uniformity throughout Texas**.
>
> Concerned parties cite several reasons why a **uniform open file discovery process** is important. The parties contend that it promotes efficiency in the criminal justice system and lessens the likelihood of discovery disputes, costly appeals, and wrongful convictions.

House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, at 1, Tex. S.B. 1611, 83d Leg. (2013) (emphases added).

Various commentators and practitioners agreed.

- "[The Act] creates an open file policy, obviating the need for the defense team to continue requesting discovery." Cynthia E. Hujar Orr and Robert G. Rodery, *The Michael Morton Act: Minimizing Prosecutorial Misconduct*, 46 ST. MARY'S L.J. 407, 414 (2015)

- "This new law has changed criminal discovery dramatically by codifying open-file policies." Randall Sims and R. Marc Ranc, *Two Views of Morton: When the Michael Morton Act Took Effect in January 2014, It Changed the Way Criminal Cases Are Handled in Texas—and How Prosecutors and Defense Attorneys Work*, 77 Tex. B.J. 964, 964 (2014) (prosecutor's perspective)

- "What has the Morton Act brought the criminal defense bar? Throughout Texas, all prosecuting attorneys must now have mandatory open-file discovery." *Id.* at 966 (defense attorney's persective)

The 83rd Legislature achieved its objective by enactment of the MMA.

The Waco Court's "designation requirement" places a burden on defense counsel to speculate and guess what evidence the State may possess and then request it. Ultimately, the Court's decision requires defense counsel in every case to submit a request to the prosecutor listing all conceivable items that might be discoverable. This is precisely the opposite of what the Legislature intended when it enacted a uniform, statewide open-file discovery policy through the MMA.

C. The Waco Court erred by requiring a statutory reference or designation of discovery sought.

The Waco Court erred by holding that Appellee's discovery request was inadequate for not including a statutory reference because no general right to discovery exists in criminal cases aside from the MMA. His request thus necessarily requested discovery under the statute.

The Waco Court also erred by holding that Appellee's discovery request was inadequate because it did not designate the discovery sought. The MMA established open-file discovery. No designation is required.

D. The Court should grant review.

The Court should grant review on this issue for at least two reasons. *See* TEX. R. APP. P. 66.3.

The court below decided an important question of state law, namely, the proper form for a discovery request under the MMA. This issue has not been, but must be, settled by this Court as it literally impacts every criminal case pending in the State for offenses committed on or after January 1, 2014. *Id.* 66.3(b).

The court below appears to have misconstrued article 39.14 of the Code of Criminal Procedure. *Id.* 66.3(d).

3. Is the State estopped to challenge the sufficiency of Appellee's discovery request because it produced discovery in response to the request?

A party may be estopped from asserting a claim on appeal that is inconsistent with the party's conduct at trial. Here, the State (belatedly) produced the disputed 9-1-1 recording in response to Appellee's discovery request without asserting any objection to the form of the request. The State is thus estopped to challenge the propriety of that discovery request. The Waco Court erred by failing to address Appellee's estoppel claim and by reversing on a theory the State is estopped to assert.

A. A party may be estopped on appeal by its conduct at trial.

"[A] party may be estopped from asserting a claim that is inconsistent with that party's prior conduct." *Arroyo v. State*, 117 S.W.3d 795, 798 (Tex. Crim. App. 2003).

In *Arroyo*, this Court held that the State was estopped from challenging the admissibility of certified copies of a complainant's prior criminal judgments and similar documents that were obtained and offered based on a rap sheet provided to the defense by the prosecutor. *Id.*

B. The State is estopped because it did not object to the request.

Here, the State furnished a copy of the 9-1-1 recording to Appellee because of his discovery request. The State did not furnish this copy "subject to" any objections, and the State did not otherwise object to the propriety of Appellee's discovery request. Therefore, the State is estopped to challenge the adequacy of the request. *Id.* The Waco Court erred by granting relief to the State on an issue that the State is estopped to raise.

C. The Waco Court erred by failing to address the estoppel issue.

Appellee raised this estoppel issue in his brief (and in his motion for rehearing), yet the Waco Court failed to address it.

Rule of Appellate Procedure 47.1 requires an appellate court to address "every issue raised and necessary to final disposition of the appeal." TEX. R. APP. P. 47.1; *see Keehn v. State*, 233 S.W.3d 348, 349 (Tex. Crim. App. 2007) (per curiam).

Appellee specifically argued in footnote 3 of his brief that the State was estopped to contend that the recording was not subject to disclosure because the State furnished a copy of the recording pursuant to his discovery request. This argument likewise forecloses the State's ability to challenge the adequacy of the discovery request.

The Waco Court erred by not addressing this estoppel argument. *Id.*

D. The Court should grant review.

The Court should grant review on this issue for several reasons. *See* TEX. R. APP. P. 66.3.

The court below issued a decision that conflicts with the applicable decisions of this Court, namely *Arroyo*, which provides that the State may be estopped on appeal by its conduct at trial, and *Keehn*, which requires the court of appeals to address every issue raised and necessary to the disposition of an appeal. *Id.* 66.3(c).

The court below appears to have misconstrued Rule of Appellate Procedure 47.1. *Id.* 66.3(d).

By failing to address the estoppel issue, the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. *Id.* 66.3(f).

Prayer

WHEREFORE, PREMISES CONSIDERED, Appellee Dwayne Robert Heath asks the Court to: (1) grant review on the issues presented in this petition for discretionary review; and (2) grant such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

/s/ Alan Bennett
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Certificate of Compliance

The undersigned hereby certifies, pursuant to Rule of Appellate Procedure 9.4(i)(3), that this computer-generated document contains 3,685 words in its entirety.

/s/ Alan Bennett
E. Alan Bennett

Certificate of Service

The undersigned hereby certifies that a true and correct copy of this petition was served electronically on January 2, 2019 to: (1) counsel for the State, Sterling Harmon, sterling.harmon@co.mclennan.tx.us; and (2) the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Alan Bennett
E. Alan Bennett

Appendix

1. *State v. Heath*, No. 10-18-00187-CR, 2018 WL 5660945 (Tex. App.—Waco Oct. 31, 2018, pet. filed)

APPENDIX – TAB 1

IN THE
TENTH COURT OF APPEALS

No. 10-18-00187-CR

THE STATE OF TEXAS,

Appellant

v.

DWAYNE ROBERT HEATH,

Appellee

From the 54th District Court
McLennan County, Texas
Trial Court No. 2017-241-C2

OPINION

The State appeals from an order granting a motion to exclude evidence based on an alleged violation of article 39.14 of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14 (West Supp. 2018). Eleven days prior to the fourth jury trial setting in this proceeding, the prosecutor discovered the existence of a 9-1-1 call that had been made on the day of the alleged offense. The prosecutor received the recording four days later and produced the recording to Heath's attorney the next day, which was six

days before the scheduled jury trial date. Heath filed a "Writ for Habeas Corpus and Motion to Exclude Evidence" which was heard by the trial court on the day of the trial setting. The trial court excluded the recording based on the prosecutor's failure to produce the recording "as soon as practicable" pursuant to article 39.14(a) of the Code of Criminal Procedure and Heath's objection to a continuance. The State filed this interlocutory appeal pursuant to article 44.01(a)(5) of the Code of Criminal Procedure and *Medrano v. State*, 67 S.W.3d 892 (Tex. Crim. App. 2002). The State complains that the trial court abused its discretion by granting Heath's motion to exclude the 9-1-1 recording.

We review a trial court's order to exclude evidence withheld from a defendant in violation of a discovery order for an abuse of discretion. *Francis v. State*, 428 S.W.3d 850, 855 (Tex. Crim. App. 2014). While this is not a discovery "order" as contemplated by prior versions of article 39.14 which required an order by the trial court, we find that the same standard of review applies to requests made pursuant to the amended article 39.14(a).

Heath was indicted for the charged offense on February 15, 2017. Counsel for Heath was appointed thereafter, and on March 23, 2017, counsel for Heath emailed a request to the State that stated in its entirety: "Can I get discovery on this client? Cause #2017-241-C2". Heath asserts that this request was sufficient for the State to have been required to produce the recording pursuant to article 39.14 of the Code of Criminal Procedure. Heath also filed a motion for the trial court to order the State to produce CPS

records, which was granted, but otherwise, nothing in the record indicates that Heath requested any further discovery beyond his initial request.

Article 39.14(a) of the Code of Criminal Procedure states that:

> (a) Subject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this code, as soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state.

TEX. CODE CRIM. PROC. ANN. art. 39.14(a). In order to trigger the requirements of article 39.14(a), we have held that the defendant must timely request discovery and that the request must designate which items are requested to be produced before the State is required to produce them. *See Hinojosa v. State*, 2018 Tex. App. LEXIS 5744 at *2, 2018 WL 3580780 (Tex. App.—Waco July 25, 2018, no pet. h.); *see also Davy v. State*, 525 S.W.3d 745, 750 (Tex. App.—Amarillo 2017, pet. ref'd) (noting that "by its 2013 amendments, the Legislature retained in article 39.14(a) the concept that discovery applies to items 'designated.'"). The request in this proceeding did not even reference article 39.14 and did not designate any items sought to be produced. We do not find that this is sufficient to give the State notice of what is requested to be produced pursuant to article 39.14(a). Therefore, the prosecutor was not under a duty to produce the recording pursuant to

article 39.14(a). Because there was no duty to produce the recording pursuant to article 39.14(a), the trial court abused its discretion by excluding the recording on this basis. We sustain the State's issue.

CONCLUSION

Because the State was under no duty to produce discovery pursuant to article 39.14(a) of the Code of Criminal Procedure without a sufficient request, the trial court abused its discretion by excluding evidence based on a violation of that statute. We reverse the order granting the motion to exclude evidence and remand this case to the trial court for further proceedings.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Reversed and remanded
Opinion delivered and filed October 31, 2018
Publish
[CR25]