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Discovery in Criminal Proceedings

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DISCOVERY IN CRIMINAL PROCEEDINGS

Not many years ago an attorney in a civil case would have been shocked and angered if ordered by the court to stipulate to undisputed facts, or to allow discovery of evidence in his possession. Today discovery and pretrial conferences are generally accepted in litigation between parties. The result is a less spectacular but more efficient system of justice. On the criminal side of the docket, however, discovery is generally frowned upon if not openly discouraged. This often results in expensive trials, many of which could have been avoided by the simple expedient of an exchange of evidence.

This note explores the general area of discovery as allowed in the Florida criminal courts. Discovery in civil cases and the many and varied problems raised in the federal criminal courts by recent Supreme Court decisions are not discussed. As is readily apparent from a cursory reading of the cases, the law is vague in some areas.

COMMON LAW

It is generally conceded that the accused has no common law right of pretrial inspection of evidence in the possession of the prosecution.[1] The principle that the defendant may not be forced to incriminate himself usually prevents discovery by the state.[2] Some courts will allow inspection of a statement when the motion shows that the statement might be material.[3] In relation to written statements a distinction should be made between the right to pretrial discovery and the right of inspection at the trial itself.[4] Assuming that the right to discovery exists in a particular jurisdiction, its allowance is usually within the discretion of the court.[5]

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[1]Shores v. United States, 174 F.2d 838 (8th Cir. 1949); Walker v. People, 126 Colo. 135, 248 P.2d 287 (1952); Dell v. Commonwealth, 173 Va. 458, 2 S.E.2d 293 (1939); The King v. Holland, 4 D. & E. 691, 100 Eng. Rep. 1248 (1792).

[2]State v. Tune, 13 N.J. 203, 98 A.2d 881 (1952); State v. Rhoads, 81 Ohio St. 397, 91 N.E. 186 (1910).

[3]See Annot., 52 A.L.R. 212 (1928).

[4]See United States v. Krulewitch, 145 F.2d 76 (2d Cir. 1944); United States v. Rosenfeld, 57 F.2d 74 (2d Cir. 1932).

[5]See Silliman v. People, 114 Colo. 130, 162 P.2d 793 (1945); Padgett v. State, 64 Fla. 389, 59 So. 946 (1912); People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 30, 156 N.E. 84, 85 (1927) (dictum).

IN FLORIDA

By express constitutional[6] and statutory[7] provision the accused in Florida has the right to compulsory process for the attendance of witnesses in his favor. When applied to a *subpoena duces tecum*,[8] these provisions appear to give a defendant an unqualified right to discovery. But the actual picture as reflected in the court opinions is to the contrary. As early as 1912, the Florida Supreme Court in *Padgett v. State*[9] held that the granting of discovery to the accused is within the discretion of the trial court, "and this discretion will be reviewed only for the purpose of ascertaining if the defendant was in fact surprised."[10] Except when modified by statute,[11] the present Florida law appears to follow the discretionary rationale adopted in the *Padgett* decision.[12]

Authorized by Statute

Section 909.18 of Florida Statutes 1959 provides:

> "When . . . the evidence of the state shall relate to ballistics, fingerprints, blood, semen, or other stains, or documents, papers, books, accounts, letters, photographs, objects, or other tangible things, upon motion showing good cause therefor, and upon notice to the prosecuting attorney, the court . . . may order the state to produce and permit the inspection and copying or photographing . . . of any designated papers, books, accounts, letters, photographs, objects, or other tangible things."

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[6]FLA. CONST. Decl. of Rights §11.

[7]FLA. STAT. §§932.02,.25 (1959).

[8]A person other than a clerk or custodian of public records may be required to produce designated books and papers by a writ commonly called a *subpoena duces tecum*. This writ may be used only to produce writings that are to be introduced into evidence; it is not available to force production of writings that are to be used merely to refresh a witness's memory. Pelton Motors v. Superior Court, 120 Cal. App. 2d 565, 261 P.2d 275 (1953); State v. Cooper, 2 N.J. 540, 67 A.2d 298 (1949); State v. Yee Guck, 99 Ore. 231, 195 Pac. 363 (1921); see WHARTON, CRIMINAL EVIDENCE §706 (12th ed. 1955).

[9]64 Fla. 1389, 59 So. 946 (1912).

[10]*Id.* at 1396, 59 So. at 949.

[11]See discussions *infra* under headings "Authorized by Statute" and "Grand Jury Testimony."

[12]See discussion *infra* under heading "Non-Grand Jury Testimony."

The United States Supreme Court has held that similar statutory provisions do not give an unqualified right of discovery,[13] and has held that the granting of discovery under them is within the discretion of the court.[14] A similar interpretation of the Florida statute is indicated by the use in the statute of the words *may order* rather than *shall order*. Since the Florida Court had held, prior to the adoption of the statute, that the allowance of discovery was within the court's discretion, this interpretation would lead to the conclusion that the statute was superfluous. Therefore, it is concluded that the statute grants an absolute right to the discovery of objects contemplated and embraced within its coverage — assuming that the requirements of showing good cause have been met. No decision has been found on this point; the Florida Court has confined itself to determination of the scope of the statute.

In the first case interpreting the statute,[15] the Florida Court held that confessions were not contemplated by the provision and could not be discovered under its authority. This holding has been reinforced by later decisions.[16] Likewise, statements of accomplices may not be discovered.[17] Ballistic reports of F. B. I. agents, when they are nothing more than the outline of testimony the examiner could give at trial, are also outside the scope of the statute.[18] Furthermore, the statute places no affirmative duty upon the state to make further tests or to collect evidence for the defendant,[19] but it does require the defendant to take affirmative action in order not to waive any rights given him.[20] By analogy to confessions, the Attorney General of Florida has ruled that the statute does not give a drunken driver the right to have a copy of a drunkometer report.[21]

These cases indicate what evidence is not discoverable under the statute; the question remains as to what is discoverable. Some indi-

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[13]Goldman v. United States, 316 U.S. 129 (1942).

[14]Shores v. United States, 174 F.2d 838 (8th Cir. 1949), construing FED. R. CRIM. P. 16; State v. Hayes, 127 Conn. 543, 18 A.2d 895 (1941).

[15]Williams v. State, 143 Fla. 826, 197 So. 562 (1940).

[16]Ezzell v. State, 88 So.2d 280 (Fla. 1956); *cf.* Urga v. State, 104 So.2d 43 (2d D.C.A. Fla. 1958).

[17]Raulerson v. State, 102 So.2d 281 (Fla. 1958).

[18]Ezzell v. State, 88 So.2d 280 (Fla. 1956).

[19]*Ibid.* (fingerprints).

[20]Drozewski v. State, 84 So.2d 329 (Fla. 1955); Perez v. State, 81 So.2d 201 (Fla. 1955).

[21]OP. ATT'Y GEN. FLA. 057-78 (Mar. 22, 1957).

cation of this may be found in *Ezzell v. State*.[22] Any further attempt to describe the scope of the statute in detail would probably be useless at the present time. It is safe to say, however, that unless objects are specifically mentioned in the statute they are not discoverable under its authority.

Grand Jury Testimony

A traditional cloud of secrecy normally renders grand jury testimony non-discoverable. Section 905.27 of Florida Statutes 1959 provides that grand jury testimony need not be disclosed

> "except when required by a court to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining whether it is consistent with that of the witness given before the court, or to disclose the testimony given before the grand jury by any person upon a charge against such person for perjury in giving his testimony or upon trial therefor, or when permitted by the court in the furtherance of justice."

In interpreting this provision the Florida Court, in four important cases, has developed a well-defined procedure that must be followed. For the sake of completeness, these cases will be treated separately and chronologically.

The first case — a landmark decision in the field of Florida criminal discovery — is *State ex rel. Brown v. Dewell*.[23] In this case the court reporter was present in the grand jury room and transcribed the testimony of witnesses. During the trial the defendant moved for the production of the transcribed testimony. The trial judge issued a *subpoena duces tecum* but later refused to enforce it. The defendant then instituted a mandamus proceeding to require enforcement. In granting mandamus, the Florida Supreme Court said:[24]

> "Nor is this an attempt . . . to coerce the respondent judge to order turned over to the defendant's counsel memoranda belonging to and *in the possession of the State's attorney or his representatives* . . . . In this case, the documents sought to be

[22] 88 So.2d 280 (Fla. 1956).
[23] 123 Fla. 785, 167 So. 687 (1936).
[24] *Id.* at 797, 167 So. at 691.

> inspected *are not in the possession of the prosecuting authorities, as such.* On the contrary, such transcription as exists, and such as is wanted to be inspected, is in the hands of the witness . . . ."

The next case to arise was *Trafficante v. State.*[25] The defendants were indicted by the grand jury on a charge of bribery. Prior to trial the defense counsel moved for a transcript of testimony of one of the state's witnesses given at the grand jury hearing. This motion was denied. After the witness had testified on direct examination, but before cross-examination had begun, defense counsel made a sworn application for a *subpoena duces tecum* directed to the official court reporter, alleging that the testimony given by the witness on direct examination was in conflict with that given by him before the grand jury. The defendant offered proof of this inconsistency. Both the motion and the offer of proof were denied by the trial court. On appeal the Florida Supreme Court affirmed the denial of the first motion but reversed the court's denial of the second. In remanding the case the Court adopted a procedure for handling future cases which had been established in another case.[26] Thus, when a motion for production of grand jury testimony is made the trial court should examine the grand jury testimony to determine its materiality or privilege. If the court decides that this testimony is relevant and material, it must allow its discovery under the authority of *State ex rel. Brown v. Dewell.*[27]

The next case to color the developing picture was *Gordon v. State.*[28] Two of the defendants were charged with perjury before the grand jury, and two were charged with subornation of perjury. The state had access to a transcript of voluminous grand jury testimony. The defendants moved for production of this testimony. The trial judge denied the motion except in so far as it related to the testimony of any witness who had testified before the grand jury and would be called to testify personally in behalf of the state at the trial. The Florida Supreme Court held that the ruling was correct except as it applied to the testimony of the defendants before the grand jury, and that the defendants were entitled to a transcript of their testimony

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[25]92 So.2d 811 (Fla. 1957).

[26]Vann v. State, 85 So.2d 133 (Fla. 1956).

[27]The Court in this case held that the defendant had the right to have brought into court any *material evidence.*

[28]104 So.2d 524 (Fla. 1958).

by "common justice, much less the specific language of the statute . . . ."[29] Further, the Court held that "subornation of the particular perjury is within the spirit, if not the letter, of the controlling statute."[30] Thus a defendant charged with subornation has the same right to discovery as one charged with actual perjury.

The last case in the series is *Minton v. State*.[31] Prior to trial the defendant moved for a written grand jury report. This was denied. While cross-examining a state's witness, the defendant moved for production of the witness's testimony before the grand jury "to determine whether he is testifying to the same thing at this time as he did then." This was also denied. Both denials were affirmed by the Second District Court of Appeal. On certiorari, the Florida Supreme Court affirmed. As to the first motion, the Court said:[32]

> "[E]xcept as to grand jury testimony upon which a charge of perjury or subornation of perjury is based — an accused in a criminal case has no right to inspect, in advance of trial, the grand jury testimony of the witnesses who will be called by the State to testify against him at the trial for the purpose of preparing his defense."

In affirming the denial of the second motion the Court settled an apparent conflict between the Court of Appeals' decision and its decision in the *Trafficante* case:[33]

> "Here, the motion . . . [was] based on pure surmise or speculation, if not on curiosity. . . . [I]n Trafficante there was a motion, sworn to upon information and belief . . . . This positive allegation of conflict is entirely different from the motion, based at most on surmise and speculation . . . ."

The Court also held that the trial judge will not be required in all cases to examine the testimony in order to determine its materiality, even when there is a sworn application. Leaving the final decision in the trial court's discretion, it noted:[34]

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[29]*Id.* at 537.
[30]*Ibid.*
[31]107 So.2d 143 (2d D.C.A. Fla. 1958), *aff'd*, 113 So.2d 361 (Fla. 1959).
[32]113 So.2d 361, 364 (Fla. 1959).
[33]*Id.* at 365.
[34]*Id.* at 367.

> " '[W]hen the subject matter is one as delicate as grand jury testimony, no fixed rule can be formulated. The Judge should not be compelled to inspect in all cases; neither should he indiscriminately refuse, but he should exercise his judgment according to the circumstances.' "

In summary, a defendant has no right to discover, prior to trial, grand jury testimony except that upon which a charge of perjury or subornation of perjury against him is based. During trial on any charge, when a motion for discovery is made the trial judge has the duty to examine the grand jury testimony to determine its materiality. The final decision on this point rests in the judge's discretion, but once he determines that the testimony is material he must allow discovery.

One final point should be mentioned. Section 905.27 of Florida Statutes 1959 states that discovery should be allowed "when permitted by the court in the furtherance of justice." In the light of the procedures established in the cases discussed above, it is unlikely that the phrase will have any importance in the further development of the law.

NON-GRAND JURY TESTIMONY

Following the Court's decision in *State ex rel. Brown v. Dewell*, much confusion arose as to the actual breadth of discovery allowable under its authority. A subsequent case added this proviso:[35]

> "It extends only to legal or public records that have been regularly made in due course of legal procedure and as to these the application must be seasonably made. . . . [I]t must be shown that the evidence sought is material and necessary to the defendant's cause. It in no sense reaches notes or evidence taken by the prosecuting officer at his expense and by his private stenographer."

In this case the Court denied discovery of a transcript of testimony taken at a preliminary hearing by the prosecutor's stenographer. If anything, this decision merely muddied the waters, for it is not clear whether the rationale of the denial was based on the type of testimony

[35]McIntosh v. State, 139 Fla. 863, 867, 192 So. 183, 185 (1939).

attempted to be discovered or the time when the motion was made. The case is often indexed as standing for the rule that a motion for discovery must be seasonably made.

When next presented with a similar motion the Court denied discovery but in so doing ignored its previous language. It stated:[36]

> "We are not familiar with any statute or rule of law making it the duty of a State attorney . . . to deliver to counsel for defendant a transcript of testimony of State witnesses taken or made at a conference . . . between the State attorney . . . and the State's witnesses . . . ."

This decision settled the point that the work product of the state could not be discovered. One important exception to this rule has developed, however. In *Whitaker v. Blackburn*[37] the Court held that the work product of the defense could not be discovered by the state even when used to impeach a state witness on cross-examination. Relying on the *Whitaker* decision, the trial court in *Smith v. State* denied to defense counsel access to the work product of the state which had been used to impeach a defense witness. The Florida Supreme Court reversed and allowed discovery,[38] holding that a state attorney is a constitutional officer vested with the power to compel attendance of witnesses for purposes of discovery. When the testimony thus acquired is used for impeachment by the state, it no longer retains the quality of a private paper or memorandum — the rationale of the *Whitaker* case — and thus becomes discoverable by the defense.

Obviously, the problems in this area are not all solved. For example, assuming that the defendant does not have an absolute right to discovery, does the trial court have the authority to order discovery? It is submitted that it does. Although *Padgett v. State*,[39] which placed the right to discovery in the court's discretion, was decided many years ago, language in more recent cases indicates a reaffirmance of this view. For example, in *Urga v. State* the Second District Court of Appeal said: "These cases establish the general rule . . . that a defendant is not *as a matter of right* entitled to [discovery] . . . ."[40] Since the state can not appeal from an order granting discovery, and

[36]McAden v. State, 155 Fla. 523, 527, 21 So.2d 33, 35 (1945).
[37]74 So.2d 794 (Fla. 1954).
[38]Smith v. State, 95 So.2d 525 (Fla. 1957).
[39]64 Fla. 1389, 59 So. 946 (1912).
[40]104 So.2d 43, 44 (2d D.C.A. Fla. 1958). (Emphasis added.)

since discovery in any case is seldom granted, it is doubtful that this question will ever be clarified.

New problems are constantly being created by the ingenuity of counsel. For example, in *Bedami v. State*[41] counsel contended that the county solicitor in conducting hearings to determine whether to prosecute was in effect acting as a one-man jury. He argued that the testimony taken at the hearing could be discovered under the authority of section 905.27 of Florida Statutes 1959 and the cases decided thereunder.[42] Although the court refused to accept the argument and denied discovery on the work product theory of *McAden v. State*,[43] the technique used by the defendant is probably indicative of the future attempts that will be made to circumvent the present doctrines as to discovery.

CONCLUSION

There should be no need for an argument such as that made in the *Bedami* case; the defendant should be allowed to discover and examine all the evidence in the possession of the state. Likewise, the state should be allowed to discover, within the constitutional limitation of self-incrimination, all the evidence in the possession of the defendant. This almost exclusive denial of discovery to the state is probably one of the major reasons for the Florida courts' denial of discovery to defendants. This is illustrated by Judge Learned Hand's famous comment:[44]

> "Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and

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[41]112 So.2d 284 (2d D.C.A. Fla. 1959), *cert. denied*, 117 So.2d 496 (Fla.), 80 Sup. Ct. 153 (1960).

[42]Trafficante v. State, 113 So.2d 361 (Fla. 1959); Gordon v. State, 104 So.2d 524 (Fla. 1958); State *ex rel.* Brown v. Dewell, 123 Fla. 785, 167 So. 687 (1936); Minton v. State, 107 So.2d 143 (2d D.C.A. Fla. 1958).

[43]155 Fla. 523, 21 So.2d 33 (1945).

[44]United States v. Grayson, 291 Fed. 646, 649 (S.D.N.Y. 1923).

make his defense, fairly or foully, I have never been able to see."

Section 909.18 of Florida Statutes 1959 is a good example of this attitude at work. The statute authorizes discovery for the defendant only and does so in great detail. As is obvious from the previous discussion, the Florida courts have made short work of it, limiting discovery to a very narrow area.

An attempt at similar legislation in this field would probably meet with the same narrow interpretation. Therefore, it would seem that the best method is to begin a search for some new answers to the problems.

One possible solution is the establishment of a pretrial practice in criminal cases similar to that used in the civil docket. At this conference, the state and the defense could be required to stipulate to undisputed facts. Thus the court could allow a free exchange of evidence while expediting the course of the trial. Questions as to the admissibility of evidence, privileges and immunities claimed by the parties, and other matters of similar import could be handled at this preliminary stage rather than at the trial itself.

The advantages of this system have been proved in the civil courts. Trials could be appreciably shortened in many cases and rendered entirely unnecessary in others. Courts with a smaller trial docket would have more time to spend on each case, thereby increasing the possibility of reaching a just conclusion.

There are, of course, difficulties to be overcome before the system can function effectively. Undoubtedly the greatest of these is the prevailing adverse philosophy underlying the practice of criminal law. To a certain extent, this attitude is necessary to protect the conflicting interests of the state and the individual. When pretrial practice first came on the scene in civil cases, it was also vigorously denounced as *contra* the adversary philosophy of the American practice of law and hence impracticable and unworkable. Experience has proved just how well it works. It can and should work in the criminal field also. In any event, as one writer has put it, "The day has long since passed when a case is to be tried from ambush."[45]

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[45]Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in Federal Courts*, 57 COLUM. L. REV. 1113, 1119 (1957).