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Tammy R. Johnson

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**Johnson v. State:****Upon the Defendant's Request, the State Must Furnish a Defendant's Recorded Statement, Even if the State Only Intends to Use the Content of the Recording at Trial**

By Tammy R. Johnson

The Court of Appeals of Maryland held that pursuant to Maryland Rule 4-263, upon a defendant's request, the State must furnish a defendant with his prior recorded statement made to a State agent and may not introduce the substance of that statement through the testimony of a State agent at trial. *Johnson v. State*, 360 Md. 250, 757 A.2d 796 (2000). The court found that recorded statements made to a State agent should be made available to a defendant so that he might effectively prepare his case for trial.

On August 2, 1996, police interrogated Larry Marcus Johnson ("Johnson") for his suspected involvement in several household burglaries. Johnson was interrogated again on August 14, 1996, and this interrogation was apparently videotaped. After the interrogation, the police obtained a warrant to search Johnson's home and workplace, which resulted in the seizure of hundreds of stolen items. Johnson was ultimately charged with first-degree burglary and fourteen counts of theft over \$300.

In a pre-trial hearing, Johnson requested a copy of the State's recording of his statement, reasoning that the recording was vital for possible suppression purposes, and to prepare cross-

examination of the interrogating officer. The Circuit Court of Anne Arundel County, however, held that discovery rules required only that the defense receive the substance of any oral statements, and allowed the substance of Johnson's statements to be introduced via the testimony of the interrogating officer. The trial judge then found Johnson guilty of the charges. The court of special appeals affirmed, reasoning that the trial court did not err because the substance of the content of Johnson's recorded statement had been provided through the testimony of the interrogating officer.

The primary issue on appeal was whether, pursuant to Rule 4-263(b)(2), the State was required to provide to the defense a recorded statement where, instead of introducing the recording at trial, it presented the substance of the statement through the testimony of the interrogating officer. *Johnson*, at 253, 757 A.2d at 798. The court began its analysis by considering the discovery requirements of Rule 4-263. *Id.* at 264, 757 A.2d at 803. Upon the defendant's request, the State's attorney shall:

... [a]s to all statements made by the defendant to a State agent that the State intends to use at a hearing or

trial, furnish to the defendant, ... (A) a copy of each written or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each statement. . .

*Id.* at 264, 757 A.2d at 804 (quoting Md. Rule 4-263(b)(2)).

The court reasoned that the scope of pretrial disclosure required by Rule 4-263 is a product of its dual purposes. *Id.* at 265, 757 A.2d at 804. First, in terms of fundamental fairness, broad discovery rules aid defendants in preparing their defenses and protect them from surprise at trial. *Id.* Second, Rule 4-263 is designed "to force the defendant to file certain motions before trial, including a motion to suppress any unlawfully obtained statement." *Id.* (quoting *White v. State*, 300 Md. 719, 734, 481 A.2d 201, 208 (1984)). Moreover, "[t]he defendant cannot be expected to file such motions prior to trial unless he can obtain the necessary information to prepare for the suppression or exclusion hearing." *Id.* (quoting *Warrick v. State*, 302 Md. 162, 169, 486 A.2d 189, 193 (1985)).

In analyzing Rule 4-263, the court considered the plain text of the rule. *Id.* at 265, 757 A.2d at 804. Under a plain meaning analysis, the

court had no doubt that Johnson's counsel made pretrial requests to receive a copy of his client's recorded statement. *Id.* at 266, 757 A.2d at 805. Despite his requests, however, the statement was not forthcoming. *Id.* Instead, the State introduced the substance of Johnson's statement through the interrogating officer, rationalizing its position by arguing that it did not intend to use or play the actual recording itself at trial. *Id.* The court held, however, that the intended use by the State of the prior recorded statement was not merely the intended use of the actual recording at trial, but also included an intent to use a derivative version of the defendant's statement during the State's case-in-chief. *Id.* at 267, 757 A.2d at 805. The court reasoned that the State was not allowed to circumvent the pretrial disclosure requirement of Rule 4-263 by using a derivative version of Johnson's statement through the interrogating officer. *Id.*

Moreover, the court held, upon the defendant's request, the State must furnish a defendant's apparently available recorded statement made to a State agent. *Id.* This is true even if the State intends only to use the content of the recorded statement at trial and does not intend to use the physical recording itself. *Id.* The court reasoned that to hold otherwise would render Rule 4-263(b)(2)(A) "a nullity." *Id.*

The court had previously issued a word of caution regarding the potential consequences of failing to disclose a defendant's statement. *Id.* at 268-69, 757 A.2d at 806. If a statement was discoverable, yet not

provided, the trial court may within its discretion, impose a sanction under Rule 4-263(i). *Id.* at 269, 757 A.2d at 806. These sanctions include discovery of the previously undisclosed item, striking the testimony related to the undisclosed matter, granting a continuance, prohibiting the introduction of evidence related to the matter not disclosed, granting a mistrial, or entering any other appropriate order. *Id.* This warning is even more applicable when a recorded statement is given to a State agent and appears to be available. *Id.*

Disclosure requirements, the court reasoned, are designed to prevent the State from having largely unchecked discretion to summarize, edit, or characterize the content of a defendant's recorded statement in any form it chooses. *Id.* at 268, 757 A.2d at 806. When a recorded statement is available, an oral delivery by a State's witness may not substitute or describe the nuances, qualities, or manner in which the interrogation was conducted. *Id.* Mere production of the substance of a defendant's prior recorded statement risks thwarting defense counsel's ability to determine the lawfulness of the interrogation or the evidence stemming from it. *Id.*

In light of the court's holding that a derivative version of Johnson's statement was not a substitute for the apparently available recorded statement, the court next addressed whether the non-disclosure of the recording by the State was harmless error. *Id.* at 269, 757 A.2d at 806.

An error is not harmless, and a reversal is mandated when the reviewing court, upon its own independent review of the record, is able to declare beyond a reasonable doubt that the error in no way influenced the verdict. *Id.* The court then held that the error was not harmless and Johnson was prejudiced, reasoning that "[c]ommon sense and judicial experience teach that a defendant's prior statement in the possession of the government may be the single most crucial factor in the defendant's preparation for trial." *Id.* at 269-70, 757 A.2d at 806-07 (citing *United States v. Percevault*, 490 F.2d 126, 129-30 (2d Cir. 1974)). The court also reasoned that, "[e]very experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory." *Id.* at 270, 757 A.2d at 807 (citing *Carr v. State*, 284 Md. 455, 460-61, 397 A.2d 606, 608-09 (1979)). Therefore, the judgment of the court of special appeals was reversed, and the case was remanded to that court with directions to reverse the trial court's decision and to remand the case to that court for a new trial. *Id.* at 271-72, 757 A.2d 808.

The *Johnson* decision stands for the proposition that where a defendant has made an apparently available recorded statement, the in court testimony of the interrogating officer is no substitute for the recording. The court's decision makes clear that prosecutors will not be allowed to

encapsulate a defendant's recorded statement through the testimony of a State's witness. By so holding, the court has persevered a defendant's right to obtain discoverable State evidence. Thus, the court sends the message that where discovery requirements are clear from their plain meaning, the requirements of the rules will not be diminished by State wishes.