

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

vs.

HENRY WAKNINE,

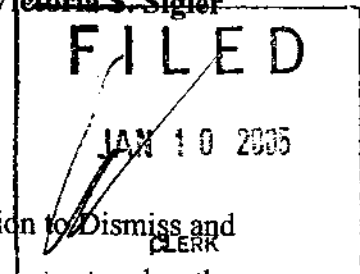
Defendant.

CRIMINAL DIVISION

Case No.:F01-20839

Section 02

Judge Victoria S. Sigler



ORDER

THIS CAUSE came on to be heard on the Defendant's Motion to Dismiss and after reviewing the court file, the motion and the State's Response the court makes the following findings:

The defendant was charged with allegedly making false and fraudulent insurance claims between May 1999 and March 2001 and Grand Theft in the Second Degree. The alleged victim of these acts, was the defendant's disability insurer, UNUM Provident Corporation, (UPC) with Jerry Bell as the named representative. A plea of not guilty was entered on July 9, 2001 and the case was first set for trial.

- On September 13, 2001, the defendant sent his first letter to the assistant state attorney indicating the failure of the state to send any discovery response. This was accompanied by a motion for a continuance caused by the failure to provide any discovery from July 9, 2001 to September 24, 2001.
- The court charged a continuance and reset the trial date because of the state's failure to provide any discovery in the first 90 days of the case.
- The defendant sent a letter on September 13, 2001 specifically asking the state for *Brady* material.
- The defendant filed a Motion for a Statement of Particulars on October 2, 2001 asking the state to describe with particularity what false or incomplete statement

the defendant made and to whom, as well as a description of what types of physical behaviors the defendant exhibited which led the state to the conclusion that the defendant misrepresented his physical status to the insurer, giving rise to the charges of fraud and theft.

- The court granted the Motion for Statement of Particulars on October 19, 2001 giving the state 15 days to file a response. To this date, the State of Florida has filed no response to the Court's Order to file a Statement of Particulars.
- On October 5, 2001, the defendant sent his second letter regarding the failure to receive any discovery response.
- On October 10, 2001, the defendant sent his next letter regarding the failure of the state to send the discovery to the defendant.
- On October 15, the defendant sent another letter concerning request for documents pursuant to discovery demands.
- In October of 2001, the state provided the defendant with copies of hundreds of documents, but no actual list of witnesses or formal discovery response. Eventually in November of 2001, the state provided its initial discovery response.
- In March of 2002, the defendant filed a Motion to Produce or Authorize a Subpoena Duces Tecum so that the defendant could begin to discover the result of the investigation conducted by UPC which formed the basis for filing charges by the State of Florida. Among the investigators for UPC were Jerry Bell and Jim Shannon. The court granted a Subpoena Duces Tecum so that the defendant could begin to discover what actions and documents were taken by UPC in investigating the defendant. The court granted this order in April of 2002.
- The defendant then attempted to issue subpoena duces tecum and take depositions of Bell and Shannon, who were initially listed in care of UPC in Chattanooga Tennessee. UPC acknowledged receipt of this Court's Order and the subpoena but took the position that this Court had no jurisdiction over UPC and refused to comply. UPC's legal counsel filed a Motion for Protective Order in Chattanooga Tennessee.
- The defendant then retained Tennessee counsel to assist in enforcing this Court's Order to go forward with discovery of documents and depositions of witnesses of

UPC in Tennessee. The Honorable Jacqueline Schulten of Hamilton County Circuit Court in Chattanooga Tennessee eventually ordered that the documents be turned over in discovery in this case.

- In March of 2003, the defendant again, filed a Motion to compel and or for Sanctions concerning the failure UPC through of the State of Florida to follow this Court's and the Tennessee Court's Order requiring the production of documents necessary for the defendant to take the deposition of the two main investigators, Bell and Shannon.
- In May of 2003, the defendant still was attempting to serve Bell and Shannon and to that end filed another Motion to Compel Better Address of the witnesses. In September 2003, the defendant filed a Motion for Continuance because the depositions of Bell and Shannon had still not been arranged nor taken. In December of 2003, the counsel for defendant again, sent letters to the assistant state attorney to arrange the depositions of Bell and Shannon.
- In February of 2004 the case was before the court in order to have the home addresses of Bell and Shannon so that they could be served for depositions. And another continuance was charged in order so that the depositions could be taken
- In April of 2004, the deposition of Bell and Shannon had been taken. During the taking of those depositions the defendant learned the name of a potential exculpatory witness, Pamela Olsen. She had been listed as a "B" witness but it was determined that she had material and relevant information about the case and the State of Florida stipulated that she should be an "A" witness. It was discovered that Ms. Olsen, as an agent of UPC had contact with the defendant at key times and who made key decisions concerning the handling of the defendant's claim. The business records purportedly discovered contained notes that might have been written by Ms. Olsen concerning statements by the defendant. The statements would appear to be exculpatory as to disclosures as to what the defendant said he was physically capable of doing.
- Again, UPC maintained the position that the witness needed to be deposed in Tennessee through the contact with the company and that a Commissioner again

needed to be appointed in Tennessee for such purpose and this was ordered by this Court on June 10, 2004.

- In August of 2004, UPC wrote a letter to the defendant's attorney indicating that Ms. Olsen could not be deposed now or at any time in the future in that she had developed a medical condition that would prevent her from ever testifying as a witness in this case.
- Through the assistant state attorney, this court was informed that the witness Olsen was too ill to give a deposition or come to court and testify in this matter.

The inability of the witness Olsen to testify or give a deposition in this case is quite problematic given, the early demand for *Brady* material, the non compliance with the Order to produce a Statement of Particulars and this court,' understanding that the witness may have relevant and exculpatory information concerning what the defendant told her about his physical capabilities.

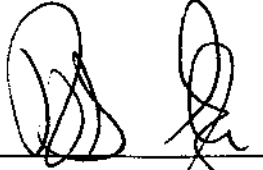
Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed 2d 215 (1963) held that suppression of evidence favorable to the accused upon request violates the due process where the evidence is material to either guilt or to punishment. Although in this case, the State of Florida may not have specifically had knowledge, knowledge is imputed to the government even if its agents knew or should have known of the existence of exculpatory material. *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 155 L. Ed 2d 490 (1995). In this case, UPC conducted its own internal investigation and reached conclusions about the defendant's activities and based on those conclusions went to the Office of the State Attorney and requested that charges be filed. Under these unique circumstances, an agency relationship can be imputed between the "victim" and the prosecuting agency.

The prosecution in this case has been dilatory throughout in responding to discovery requests and producing documents as well as following this court's orders. UPC's actions pass dilatory and border on obstructionism. Between the actions and inactions of the Office of the State Attorney and UPC, this case concerning acts that were

alleged to have occurred between 1999 and 2001 are still pending before the court. The witnesses Bell and Shannon were not able to be deposed until the summer of 2004. Their depositions gave fruit to the existence of an exculpatory witness, known to UPC since the onset of the case. A *Brady* demand had been filed. UPC maintains that the exculpatory witness cannot now nor can she ever be deposed or come to court to testify because of recent medical issues. This court cannot fashion a remedy for this situation after the passage of these many years.

It is uniformly held that dismissal is a drastic remedy which courts should employ only in extreme situations. Merger v. Raine, 443 So. 2d 944 (Fla. 1983). In a system in which the search for truth is the principal goal, the severe sanctions of evidence exclusions for failure to comply with the rules of procedure should be a last resort and reserved for extreme or aggravated circumstances. Davie v. State, 555 So.2d 447 (Fla. 4th DCA 1990). This court finds itself, for the first time in fourteen years of handling cases, ready to employ the most drastic of sanctions. As a result of the continuous, numerous discovery violations and failure to provide *Brady* material by UPC and the State of Florida this court hereby strikes all UPC witnesses and all paperwork generated by UPC in their preparation of this case.

DONE AND ORDERED in Miami-Dade County, Florida on this 10th day of January, 2005.



VICTORIA S. SIGLER
CIRCUIT COURT JUDGE

The state shall have thirty days to appeal this order.