

FILED
FIRST JUDICIAL
DISTRICT COURT

2018 NOV -1 PM 2: 04

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

STATE OF NEW MEXICO,

Plaintiff,

vs.

No. D-0101-CR-2017-00250

MANSOOR KARIMI,

Defendant.

**MOTION TO COMPEL PRODUCTION AND EXAMINATION OF CELLULAR
TELEPHONES OR IN THE ALTERNATIVE, MOTION TO DISMISS**

COMES NOW, the Defendant, Karimi Mansoor, by and through his attorney, Thomas M. Clark, and moves this honorable Court to order the State to produce and/or examine the cellular telephones of the two decedents or in the alternative to dismiss this pending indictment because of the State's failure to preserve and/or the destruction of exculpatory evidence, violating Defendant's due process rights and rendering a criminal trial for Defendant fundamentally unfair.

This motion is based on the defendant's rights under Article II, Sections 14 and 18 of the New Mexico State Constitution, and the 5th, 6th and 14th Amendments to the United States Constitution. This motion is also based on the Statement of Facts, the Memorandum of Applicable Law, the records and files of this case, and any further evidence which may be presented at a hearing on this motion.

I. STATEMENT OF FACTS

As grounds for relief requested in this motion, Defendant through counsel states:

1. On March 24, 2017, Defendant, Karimi Mansoor, was charged with the offense(s) of Homicide by Vehicle (2 counts) and Duty to Give Information and Render Aid;

2. This case originates from a motor vehicle accident, whereby the Defendant is alleged to have been speeding and to have run a stop sign, striking the vehicle driven by Christopher Bryant. There is no allegation of drug or alcohol use by the Defendant. Ian Sweat was a passenger in Mr. Bryant's vehicle. Both Mr. Sweat and Mr. Bryant died as a result of the crash;
3. Upon information and belief, there was at least one (1) cell phone in the vehicle driven by Mr. Bryant;
4. Mr. Bryant was the driver of the vehicle. When his body was recovered from the vehicle, a damaged cell phone was located on the driver's seat where his body had been seated (See attached Exhibits 1-5);
5. Photographs of the interior of the vehicle taken after the crash, show no cell phone in the front driver's seat (See attached Exhibit 6);
6. The cell phone does not appear in a photograph of items recovered from Mr. Bryant's person at the hospital (See attached Exhibit 7);
7. Upon information and belief, there exists no record as to the whereabouts of this cell phone, nor are the phones discussed in any police report;
8. Upon information and belief, no cell phones were taken into evidence and/or examined by the police;
9. In his statement to the police, the Defendant indicated he never saw Mr. Bryant's vehicle prior to the crash. Mr. Bryant tested positive for both alcohol and marijuana following his death;

10. Whether Mr. Bryant was either texting, talking, or otherwise using his telephone at the time of the accident is extremely relevant to this case. If Mr. Bryant was using his telephone immediately prior to, or at the time of the crash, this would be exculpatory evidence for the Defendant;
11. The location of the phone on the driver's seat, which was located under Mr. Bryant's body, certainly begs the question of whether the phone was in use at the time of the crash;
12. If the phones were taken into evidence, they should have been searched by the police for relevant evidence. If the phones were not taken into evidence or have been lost or destroyed, the Defendant cannot conduct a forensic examination of the phones and present potentially exculpatory evidence. There is no substitute in this case for the forensic evidence from the phones.

II. APPLICABLE LAW AND ARGUMENT

1. "Central to the protections of due process is the right to be accorded 'a meaningful opportunity to present a complete defense.'" California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413, 419 (1984).
2. The destruction or loss of evidence in this case violates the defendant's right to due process of law, his fundamental right to a fair trial, his right to confront the witnesses against him, and his right to present evidence on his own behalf, under Article II, Sections 14 and 18 of the new Mexico State Constitution, and the 5th, 6th, and 14th Amendments to the United States Constitution. The proper remedy is to dismiss the Indictment against the Defendant with prejudice.

3. NMRA Rule 5-501(A) mandates disclosure of the following:

(3) any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant; NMRA Rule 5-501 (A)(3) (emphasis added).

4. The Discovery rules of District Court also mandate that items in evidence and items taken from the Defendant be made available for examination:

Examination by defendant. The defendant may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule. NMRA Rule 5-501(B).

5. In addition to discovery rules, evidence is also discoverable pursuant to United States Supreme Court decisions delineating Constitutional Due Process rights. The prosecution must provide favorable information to defense that tends to negate guilt, reduce punishment, or goes to the credibility of witnesses. Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963); Giglio v. United States, 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972).
6. In State v. Trimble, 75 NM 183; 402 P.2d 162 (1965), the New Mexico Supreme Court adopted the rule pertaining to destroyed evidence established in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Trimble noted that in Brady v. Maryland, the United States Supreme Court held, “that the suppression by the prosecution of evidence material either to guilt or punishment and favorable to the accused violates due process irrespective of the good faith or bad faith of the prosecution. Trimble at 75 NM 186, 402 P.2d 165.

7. Furthermore, as noted by the United State's Supreme Court "regardless of good or bad faith, the State may lose or destroy material evidence which is 'so critical to the defense as to make a criminal trial fundamentally unfair' without it." Arizona v. Youngblood, 488 U.S. 51, 61, 109 S.Ct. 333, 339 (1988). Defendant contends that the lost or destroyed phone or phones in this case are critical to his defense and that the loss or destruction of the phones violates his fundamental right to a fair trial.
8. To establish a Brady violation there must be a showing that the destroyed or lost evidence would "creat[e] a reasonable doubt about the Appellant's guilt that would not otherwise exist." United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 2402, 49 L.Ed.2d 342, 355 (1976).
9. In People v. Moore, 193 Cal. Rptr. 404, 666 P.2d 419 (1983), the court concluded that lost or destroyed evidence is material when the evidence by its nature can reasonably be used to impeach the credibility of government witnesses. Defendant contends that the lost or destroyed phone or phones are critical to his defense that he was not at fault for this accident.
10. Had the phones been properly preserved, Defendant would have been able to definitively establish whether Mr. Bryant, was not only driving under the influence of alcohol and/or drugs, but that he was also using his cell phone at the time of the accident.
11. In reversing the conviction of Trimble, the New Mexico Supreme Court cited with approval an apt quote from People v. Reed, 81 P.2d 162:

"While peace officers and officials connected with detection and prosecution of crime should be diligent in ferreting out and prosecuting the guilty they should be fair with an accused. Evidence pointing to his innocence should not be suppressed. For a guilty man to escape punishment is a miscarriage of justice, but for an innocent man to be convicted is unthinkable."

Trimble at 191, 168.

12. More recently, in the cases of State v. Lovato, 94 NM 780, 617 P.2d 169 (Ct. App 1980), and State v. Chouinard, 96 NM 658, 634 P.2d 680 (1981), our New Mexico Supreme Court revisited the issue of destruction of evidence. In Lovato and Chouinard, the court adopted a three-part test for analyzing the government's destruction of evidence. If the test is met, the case or charge involved should be dismissed. The three parts of the test are as follows:

- 1) The State either breached some duty or intentionally deprived the defendant of evidence;
- 2) The improperly "suppressed" evidence must have been material; and
- 3) The destruction of this evidence prejudiced the defendant.

Lovato at 782, 617 P.2d at 171.

13. As noted in Chouinard, the purpose of the three-part test is to assure that the trial court will come to a determination that will serve the ends of justice. Determination of materiality and prejudice must be made on a case-by-case basis. The importance of the lost evidence may be affected by the weight of other evidence presented, by the opportunity to cross-examine, by the defendant's use of the loss in presenting the defense, and other considerations. The trial court is in the best position to evaluate these factors. The trial judge's decision will not be overturned unless there is a showing of abuse of discretion. Chouinard, *supra*.

Here, the three-part test of Lovato/Chouinard is met.

14. **TEST No. 1:** Mr. Karimi has been deprived of a substantial piece of exculpatory evidence. The evidence was either not secured or gathered by the government and not tested or examined for exculpatory evidence. The duty to secure and/or maintain exculpatory evidence was breached. Brady v. Maryland, supra.
15. Furthermore, the duty to maintain evidence for the examination by the defense required in NMRA Rule 5-501(A) and 5-501(B) was similarly breached. See rules supra.
16. **TEST No. 2:** The cell phones from Mr. Bryant and Mr. Sweat were extremely material to this case, and potentially contain exculpatory evidence.
17. **TEST No. 3:** The destruction, loss or failure to secure the phones prevents the defendant from finding the evidence and presenting evidence that the driver of the other vehicle was using his phone at the time of the crash.
18. Had the phones been preserved and analyzed, Mr. Karimi could have used the evidence from the phones in his defense.
19. The prejudice is so great here, Mr. Karimi is deprived his right to have a fair trial.

III. CONCLUSION

Based on the foregoing facts and law, Defendant respectfully requests this Court order the production and examination of the cellular telephones of Mr. Bryant and Mr. Sweat, or in the alternative, dismiss of the indictment because Defendant's criminal trial is rendered fundamentally unfair without the necessary evidence with which to assert Defendant's defense and because there are no other alternatives with which to provide the same type of exculpatory evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that this pleading was forwarded to the Office of the District Attorney, on this 31 day of October, 2018.



Thomas M. Clark