

HE SAID WHAT?

**All oral statements
should be provided
to prosecution**

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Officers often are the recipients of oral statements made by suspects who may or may not be in custody at the time. In training, officers are drilled that exculpatory evidence, including oral statements, must be disclosed through the prosecutor to the defense.

But what about inculpatory oral statements, those that actually incriminate the subject, which are never reduced to writing? The results of several court cases show that all statements should always be provided to the prosecution.

Courts (both state and federal) make a tremendous effort to follow the “doctrine of stare decisis,” also known as the rule of precedent. The rule comes from the phrase “stare decisis et non quieta movere” which translates as “stand by that which is decided.”

In other words, the courts try to follow precedent set by earlier courts. This rule is intended to “ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.” (*Vasquez v. Hillery*)

For law enforcement officers and lawyers alike, this rule provides a framework on which to base decisions, and consistency is highly valued.

However, on occasion, a court finds itself in the position of reversing a decision of an earlier court. In 2008, in *Chestnut v. Commonwealth*, a de-

fective repeated an incriminating statement (an admission) made by the defendant while on the stand. That statement had never been reduced to writing, however, and thus was never disclosed to the defense in discovery. The highly incriminating statement effectively gutted Chestnut’s planned defense strategy.

The Court concluded that earlier decisions concerning the application of Kentucky Rule of Criminal Procedure (RCr) 7.24 were incorrect, in that the earlier courts had held that only statements that had been reduced to writing were required to be disclosed. In those prior decisions, the court had held that the rule, which requires disclosure prior to 48 hours in advance of trial, only applied to written or otherwise recorded oral statements, not to statements that are never made part of any official statement.

In *Chestnut*, however, the court did not think it was obligated to “unquestioningly follow prior decisions” when change is warranted. The court concluded that the plain reading of the rule indicated that it “was intended to apply to both oral and written statements, which were incriminating at the time they were made.” Further, the court found that the “commonwealth’s ability to withhold an incriminating oral statement through oversight, or otherwise, should not permit a surprise attack on an unsuspecting defense counsel’s entire defense strategy.”

As such, the court stated that the “nondisclosure of a defendant’s incriminating oral statement by the commonwealth during discovery” is a violation of RCr 7.24(1), provided it was “plainly incriminating at the time it was made.”

Further, in *Chestnut*, although the statement was disclosed during rebuttal, rather than the case in chief, the court ruled that it was still inadmissible. The result was that Chestnut’s conviction was reversed and the case remanded for a new trial. >>

Kentucky Rules of Criminal Procedure

RCr 7.24 Discovery and inspection

(1) Upon written request by the defense, the attorney for the commonwealth shall disclose the substance of any oral incriminating statement known by the attorney for the commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the commonwealth to be in the possession, custody, or control of the commonwealth, and (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the commonwealth to be in the possession, custody or control of the commonwealth.

RCr 7.26 Demands for production of statement and reports

(1) Except for good cause shown, not later than 48 hours prior to trial, the attorney for the commonwealth shall produce all statements of any witness in the form of a document or recording in its possession, which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

Federal Rules of Criminal Procedure

FR 16 Government's Disclosure

(1) Information Subject to Disclosure.

(A) Defendant's Oral Statement. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) Defendant's Written or Recorded Statement. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

- (i) any relevant written or recorded statement by the defendant if:
 - the statement is within the government's possession, custody, or control; and
 - the attorney for the government knows – or through due diligence could know – that the statement exists;
- (ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and
- (iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

>> Following the decision in Chestnut, the issue arose in another Kentucky case. In the unpublished case of Lynn v. Com., an incriminating statement made by Lynn to his wife, in earshot of an officer, was then repeated by that officer at trial. The Commonwealth argued that since the statement was not exculpatory, it had no duty to disclose it under Brady v. Maryland. The Court agreed, but noted that the “Commonwealth has a duty to disclose all inculpatory statements that it plans to use against the defendant.”

Further, a review of the record indicated “that the statement was only provided to the defense on the day of trial just minutes before the testimony of the police officer who told the jury about the statement.” The prosecutor had argued that since he did not interview the officer until the day of trial, he did not know about the statement. The Court, however, stated that the “Commonwealth cannot choose to wait until the day of trial to interview a witness and then disclose previously unknown evidence.” As a result, Lynn's conviction was reversed and the case remanded.

‘Attempted to blindsides’

In another recent unpublished Kentucky case, Johnson v. Com., the prosecutor was aware of statements made by a witness that strongly incriminated Johnson in a vehicular homicide. When the suspect denied the statements, the prosecutor informed the court that she intended to call the witness to rebut Johnson's testimony. Johnson argued that the statements had not been disclosed, although the individual had been disclosed as a possible witness in voir dire.

The trial court permitted the impeachment testimony, but the Kentucky Supreme Court ruled that the prosecutor clearly violated RCr 7.24(1). The Court noted that this was

“not a situation where the existence of [the] incriminating statements spontaneously came out at trial for the first time.”

Instead, the Court found that it appeared that “the prosecutor attempted to blindsides” Johnson with testimony disguised as rebuttal. Johnson's conviction and sentence were reversed and the case remanded back to Wolfe County for further proceedings.

A comparable issue, relating to a companion Federal Rule of Criminal Procedure, has arisen in the federal courts, but with a different result. Federal Rule 16 is slightly different from the Kentucky rule, although it covers the same issue. Under the federal rule, disclosures of oral statements need only be made if the statement was given as a result of interrogation – it does not apply to spontaneous statements or those given in questioning that is not legally interrogation, such as during booking. Written or otherwise recorded statements must be disclosed upon request, however, pursuant to Smith v. U.S.

In conclusion, officers should ensure that all oral statements, whether incriminatory or exculpatory, are captured or recorded in some way and provided to the prosecution. This includes casual comments that might have been overheard by officers at the scene, even those that are not the investigators. (For example, a transporting officer or an officer assisting in the execution of a search warrant might have overheard such statements and might repeat them in court, but may have never shared those statements with anyone before appearing to testify.)

During trial preparation, it is essential that any and all officers who had even the most minor of contact with the defendant be questioned to ensure that such statements aren't revealed for the first time on the stand. The failure to do so might very well jeopardize the successful resolution of the case.