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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Case Type: Criminal

State of Minnesota, | Court File No. 27-CR-20-12949

Plaintiff,

vs.

STATE'S RESPONSE TO DEFENDANT THAO'S MOTION FOR SANCTIONS AND HEARING REGARDING DISCOVERY VIOLATIONS BY STATE

Derek Michael Chauvin, | Court File No.: 27-CR-20-12646

J. Alexander Kueng, | Court File No.: 27-CR-20-12953

Thomas Kiernan Lane, | Court File No.: 27-CR-20-12951

Tou Thao, | Court File No.: 27-CR-20-12949

Defendants.

TO: The Honorable Peter A. Cahill, Judge of District Court, and counsel for Defendants, Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431; Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402; Earl Gray, 1st Bank Building, 332 Minnesota Street, Suite W1610, St. Paul, MN 55101; Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101.

INTRODUCTION

Thao's assertion in his motion that the State delayed disclosing evidence for months is simply wrong. At issue in Thao's motion are two documents held by the United States Attorney's Office: notes taken by an FBI agent of an interview of Dr. Baker and a letter from Dr. Baker, through his legal counsel, clarifying those notes. The State did not initially have possession or control of these documents, but diligently sought to obtain them. Once the State obtained them, the State promptly disclosed the documents to the defendants in a matter of days, not "months" as Thao asserts.

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Despite allegedly finding out about this purported discovery violation on October 28, Thao filed this motion on December 11, just four days before his December 15 deadline to make expert witness disclosures, a deadline this Court imposed in an order filed on October 8, 2020. His unfounded allegation of a discovery violation appears to be nothing more than cover for a request for more time to meet his disclosure obligation. This Court should deny Thao's motion.

ARGUMENT

Thao's motion is based on a false factual premise. The documents he refers to in his motion were provided to this office on October 19, 2020. This office then disclosed them to each defendant on October 28, 2020, 9 days later, not "months" as Thao claims in his motion. Motion, at 2. Thao made no attempt to ask this office when it received these documents prior to filing his motion.

The documents at issue initially were in the possession and control of a federal agency, not the state. Therefore the state did not have the ability and was not legally required to produce the documents. This principle of law was already established in this case with Thao's previous demand for production of records of a federal agency. On August 24, 2020, Thao filed a motion to compel discovery of several items, including the Armed Forces Medical Examiner (AFME) file. In its response, the state pointed out that the AFME is a federal agency, and so the State did not have the ability to force the AFME to turn over its file. In addition, the Minnesota Rules of Criminal Procedure do not require that the State produce the AFME file because it is not in the possession or control of this office, and because the AFME does not report to this office and is not part of the prosecution team. *See* State's Response To Defendants' Motions To Compel Disclosure, at 8. Accordingly, this Court did not grant Thao's motion to compel.

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The same reasoning applies to the documents held by the Office of the United States Attorney which are at issue in this motion. The U.S. Attorney's Office does not regularly report to this office, and so this office had no legal obligation to disclose documents in the possession of the U.S. Attorney's Office. But this office continued to request documentation of the interview with Dr. Baker. After repeated requests by this office, on October 19, 2020, the U.S. Attorney's Office provided the two documents at issue here: the notes taken by an FBI agent from that interview (commonly referred to as a "302") and the letter from Dr. Baker, through his legal counsel, to the U.S. Attorney's Office clarifying answers from that meeting.

Thao received the two documents at issue here on October 28, 2020. Yet, he did not file his motion alleging a discovery violation until about six weeks later, just four days before his deadline for expert disclosures. In his motion, he seeks a continuance of the trial and more time to make his expert witness disclosures.[1] His unfounded allegation of a discovery violation seems to be cover for seeking more time to prepare. Regardless, his motion should be denied because the premise of his allegation is factually wrong and he has not demonstrated how his preparation has been hampered.

A. There was no discovery violation.

The state is required to produce documents in its possession or control that relate to the case. Minn. R. Crim. P. 9.01, subd. 1. It is not obligated to produce documents from an agency that is not a member of the prosecution staff or does not regularly report to the prosecuting office. Minn. R. Crim. P. 9.01, subd. 1a(1). That latter situation describes the documents at issue here,

[1] Thao also asks for attorneys fees and costs, but cites no legal authority and provides no factual basis for any claim that the disclosure of these documents on October 28, 2020, led to fees and costs he would not have incurred in preparing his case if they had been disclosed nine days earlier. Appellate courts will not entertain claims not supported by argument or citation to legal authority. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002). Neither should this Court.

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which were initially in the possession of the U.S. Attorney's Office. The U.S. Attorney's Office is an agency of the federal government, independent of the state and county offices prosecuting this case. The State was therefore not under an obligation to obtain and produce the FBI agent's notes from the U.S. Attorney's Office's interview of Dr. Baker. *See State v. Roan*, 532 N.W.2d 563, 571 (Minn. 1995) (holding that Rule 9 did not require the state to disclose documents in the possession of the Bureau of Alcohol, Tobacco and Firearms because "as a federal agency, [it] does not 'report' to the Hennepin County prosecutor's office").

The same holds true for Dr. Baker's counsel's letter to the U.S. Attorney's Office clarifying his answers given at the meeting. The medical examiner is a completely autonomous office, independent of the prosecutor's office. *See State v. Beecroft*, 813 N.W.2d 814, 833 (Minn. 2012). In *Beecroft*, the Minnesota Supreme Court emphasized that medical examiners must be able to operate free from influence by law enforcement and prosecutors. *Id.* Yet, as a county officer, Minn. Stat. § 390.011, the medical examiner must be provided legal representation by the county attorney's office, Minn. Stat. § 388.051, subd. 1(2). If his office is to remain autonomous and independent from the prosecution staff, his legal representation must also remain independent of the prosecution staff. For this reason, the attorneys who provide legal representation to Dr. Baker do not report to, or work with, the prosecution staff. Dr. Baker's counsel is not a member of the prosecution staff. In addition, as independent counsel for Dr. Baker, she does not regularly report legal matters, such as communication with an outside office on behalf of Dr. Baker, to the prosecutors. To require otherwise would impinge on the independence of the medical examiner, something the supreme court in *Beecroft* found to be so important. *See Beecroft*, 813 N.W.2d at 834 ("[O]ur Legislature has explicitly rejected the proposition that medical examiners serve only the police and prosecutors."); *id.* at 835 ("[B]oth our laws and practical considerations support the

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mandate that medical examiners must at all times remain independent, autonomous, and neutral participants in our criminal justice system.")

Still, the State voluntarily continued to ask the U.S. Attorney's Office for any documents related to their interview of Dr. Baker. Finally, on October 19, the U.S. Attorney's Office forwarded the 302 and the letter received from counsel to the undersigned. Those documents were then disclosed to the defendants on October 28, 2020.

Thao also notes that the state did not disclose these documents within 24 hours of receipt as provided in this Court's order of June 30, 2020. This is a complex case. Investigation and preparation are ongoing, and the state has been doing its best to promptly disclose what it is required to disclose. The rules of criminal procedure require that discovery be disclosed promptly, and in time to afford counsel an opportunity to make beneficial use of it. Minn. R. Crim. P. 9.03, subds. 2(a), (b). Although the State certainly appreciates the Court's interest in prompt disclosures, expressed in the June 30 order, it can be practically difficult - if not impossible - to meet the 24-hour deadline.[2] The State takes its disclosure obligations seriously and continually endeavors to make disclosures as promptly as it can. The state disclosed these documents to Thao nine days after receiving them and more than six weeks ago. Thao has not explained how the eight-day period in late October between the time of the Court's 24-hour rule and the actual disclosure affected his ability to make "beneficial use of it." Minn. R. Crim. P. 9.03, subd. 2(a).

Finally, Thao's assertion that the state knew and failed to disclose that Dr. Baker had opined that the cause of death did not include "police restraint . . . on the ground" is likewise false.

[2] The Defendants have not disclosed matters within the Court's 24-hour rule. On November 16, 2020, counsel for Defendant Kueng disclosed memos from defense interviews of six witnesses; four interviews on October 27, one on October 29, and one on November 5. Counsel for Thao participated in the October 27 and 29 interviews.

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Motion, at 3. In his motion, Thao claims that the state knew the "medical examiner opined that the police restraint of George Floyd on the ground did not cause his death." Motion, at 3-4. In support, he quotes from the *FBI agent's* notes. Motion, at 3. But this is a statement by the *FBI agent* who wrote the 302, not Dr. Baker. Furthermore, the FBI agent's statement is directly contrary to Dr. Baker's statement in the ensuing letter: "Dr. Baker included subdual, restraint, and neck compression in the cause of death, and the subdual, restraint, and neck compression included the time that Mr. Floyd was on the ground." Exhibit 2, p. 2. Even if it could be said that the State had possession of counsel's letter, the statement Thao claims is exculpatory is not contained in that letter. The State cannot be faulted for not disclosing the statement Thao notes as exculpatory because it was only in the 302 and was not even consistent with Dr. Baker's actual statements in the interview.

B. Thao has failed to demonstrate any harm from the alleged violation.

Nor has Thao established how any alleged delay has prejudiced him. The trial court is in the best position to determine whether any harm has resulted from an alleged discovery violation and to fashion a remedy. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). In exercising its discretion on these determinations, the court should consider: 1) the reason why disclosure was not made; 2) the extent of prejudice to the opposing party; 3) the feasibility of a continuance as a remedy, and 4) any other relevant factors. *Id.* Here, even if there were some technical violation, these factors do not warrant the relief Thao seeks.

First, the disclosures were made in the case. Indeed, the disclosures were made about six weeks before the deadline for initial expert disclosures and more than four months before trial. Prior to that, the state did not have possession or control of the documents and could not disclose

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them. Nonetheless, the state continued to make diligent efforts to obtain the documents and finally received them on October 19, 2020. The state disclosed them nine days later.

Second, Thao has not demonstrated any real prejudice as a result of an eight-day delay in disclosing the documents. Thao asserts that the alleged delay has affected his ability to prepare for trial, "specifically with regard to [his] expert witnesses." *See* Motion, at 4. That assertion is difficult to understand. The State disclosed Dr. Baker's complete autopsy report to the defense on June 25, 2020. It also disclosed the Medical Examiner's entire file to the Defendants by mail on August 26, 2020. Certainly, a defense attorney with the experience of Thao's counsel would understand that Dr. Baker would be a witness at trial. Thao's counsel had the right and ability to interview Dr. Baker himself at any time. *See Beecroft*, 813 N.W.2d at 834; Minn. R. Crim. P. 9.03, subd. 1.

Moreover, Thao does not provide any specifics on *how* any alleged delay has affected him with regard to his experts. After the State disclosed this information, Thao had 48 days to discuss it with his expert witness and prepare his expert witness disclosures. But rather than filing this motion immediately after the allegedly delayed disclosure, Thao waited until four days before his initial expert witness disclosures were due (a deadline he has known about since October 8). In addition, it is hard to see how the disclosure of something Thao thinks is advantageous to him has hindered his preparation. Regardless, he has not shown how this alleged delay has disadvantaged him. Without more specifics, this factor cannot weigh in favor of the remedies he seeks.

Third, although no remedy is necessary or warranted here, if the Court is inclined to grant one, there is a ready and simple potential remedy available. Because Thao ties the alleged delay to his experts, any harm can be remedied by a continuance of the expert disclosure deadline. Thao requests an extension of that deadline, though he does not suggest a length. The State therefore

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does not oppose a reasonable extension of the defense deadline for initial expert disclosures and suggests two weeks – six days longer than the claimed delay in disclosure - to December 29, 2020.[3] The State, however, objects to Thao's request for a continuance of the trial as a remedy for any alleged discovery violation.

CONCLUSION

Thao's motion for sanctions based on an alleged discovery violation should be denied in its entirety. However, if the Court is inclined to grant an extension of the deadline for initial expert disclosures by the defense, the State would not object to a two-week extension of that deadline.

Dated: December 18, 2020

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

[3] On December 17, before receiving the State's response to the discovery violation allegation, the Court issued an order extending the Defendants' deadline for initial expert disclosures for 31 days. The State objects to a 31-day extension, and continues to believe that a two-week extension would better balance the competing needs of the parties in light of the March 8 trial date.