IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA

CASE NO. 06-CF-010169

vs.

DIVISION A

MICHAEL LUGO and
OMARI ELIJAH TOLBERT,

Defendants.
_____/

ORDER DISMISSING INFORMATION
(DISCOVERY VIOLATIONS)

This Court, having reviewed Defendants motions and memorandum of law, discussed the pertinent issues with counsel for State and Defense in open court on July 23, 2008, having reviewed State of Florida's RESPONSE to both motions, and being fully advised of the premises, makes the following findings.

The Defendants allege a violation of Due Process and discovery violations based upon the State of Florida's failure to produce Brady and Giglio information which presently remains in the possession of the Federal Bureau of Investigation (FBI). Although not a novel theory upon which to base a dismissal motion, these issues are unique because the State of Florida and local law enforcement have produced all of the evidence within their possession and cannot obtain the withheld investigative materials from the FBI. This issue of withheld evidence first arose in October 2006 and has permeated this case to the point of malignancy. This Court has not found any definitive authority which addresses these unique issues. Therefore, this Court is guided by principles of fundamental fairness, due process, and evidence exclusion.

Although the FBI's position in this matter may be an anomaly, it has greatly hampered the State from fulfilling its obligations and the Defendants from engaging in full discovery and receiving a fair trial. This additional information is vital to all parties because the FBI spearheaded this investigation which was characterized as a joint taskforce gang investigation. The FBI allowed the Tampa Police Department (TPD) to join the investigation which spanned from September 2005 to August 2006. From the

beginning, the FBI controlled the actions of the CI, provided and monitored all electronic surveillance equipment including the cellular phone and digital recorder provided to the CI, and wired furnished and paid for the CI's apartment. Also, they have paid the CI cash payments of $2400 to $3500 a month since February 2006, and continue to do so.

The FBI determined the times for turning on and off the audio and video surveillance equipment within the CI's apartment. It controlled the monitoring of outgoing and incoming calls to and from the CI's cell phone. It designated itself the note takers, report preparers and exclusive provider of electronic surveillance. TPD was not given any access to the FBI investigative materials during the investigation. Detective Zalansky was provided information on a selective basis. When these Defendants were arrested in May 2006, the FBI provided some, but not all of their investigative materials to TPD. In fact, numerous police reports prepared by the TPD detectives indicate "see FBI reports for additional information." This Court is convinced that TPD does not have all of that information, and that it has not been provided to the Defense.

From March 3, 2006 to August 20, 2006 the FBI operated the audio and video surveillance equipment in the CI's apartment and recorded the meetings held therein. The CI testified that all meetings were recorded and that he was instructed to meet with the agents at a secret location after the meetings to review the tapes to identify certain defendants. Some, but not all of those tapes have been provided to the State and there is no reasonable explanation given for the withholding of such evidence. Given the enumerable revelations of vital Brady material during discovery, this Court believes this withheld evidence is vital. For example, two of the videotape recordings of meetings in August 2006 clearly depict the CI wearing some type of handgun on his ankle and/or in his waistband. However, the recording for this May 20, 2006 offense in the CI's apartment is of very poor sound and visual quality. It is not clear from the video who attended this event and the Defense's only recourse is to cross examine the CI and cooperating codefendants, all of whom are being paid by the FBI. Thus, the FBI's failure to produce all of the original video recordings and to provide an explanation for the poor quality of the May 20 tape has greatly prejudiced these Defendants.

The FBI failed to comply with this Court's Order compelling the production of its complete file on the CI which includes CI handling procedures, instructions and

summaries of his credibility and cooperation. Also, this file contains the reasons for the FBI's decision to terminate the CI agreement in March 2006 due to the CI's theft of motorcycles and his illegal threats to his ex-girlfriend. Moreover, it includes information confirming cash payments to the CI and verification of whether the CI will be paid a lump sum of $100,000 upon the conclusion of this case based upon the number of guilty pleas and guilty verdicts. This information would clearly fall under Brady and Giglio, which require the State to produce such information to the Defense.

The FBI has failed to comply with this Court's Order compelling the disclosure of its payments to cooperating codefendants, Christopher Ameiva and Joseph Perez. Both entered open guilty pleas to this Court with no promises or agreements with the State of Florida concerning their cooperation. However, the State learned through hearsay statements that the FBI has compensated both of them with a residence and moving expenses for Ameiva and payment of moving expenses for Perez. Fundamental fairness requires that the Defense be provided with this direct evidence and not be relegated to cross examination of the codefendants and other State witnesses whose knowledge of this compensation is based upon hearsay.

The FBI failed to comply with this Court's Order compelling all of the recorded phone calls made by this CI since the FBI issued cell phone was turned on the first week of February 2006. It was the exclusive monitor for this phone and made all the recordings for the hundreds of calls made by the CI to various target defendants, including these Defendants and members of law enforcement, including FBI agents. For example, some recordings depict the CI discussing opportunities to commit crimes for personal gain with others while he was working for law enforcement. The CI makes several references to theft, counterfeiting, burglary and assault. Also, he tells one caller that he would prefer to discuss counterfeiting on his other cell phone, one presumably not issued and monitored by law enforcement. Therefore, the failure to produce all of the recorded calls is a violation of State discovery rules. To rely solely upon this CI's testimony about the recorded calls that have not been produced to the Defendants would be a miscarriage of justice.

This Court can exclude federal witnesses from testifying at trial and/or exclude evidence provided by the Federal government when it violates a Court's discovery

orders. State v Tascarella, 580 So.2d 154 (Fla. 1991). Although the facts of Tascarella are distinguishable, the legal analysis offers some guidance to this Court. If this Court can exclude federal witnesses/evidence when the federal authorities violate its orders, then there can be no prohibition to excluding the piecemeal evidence already provided by the Federal government when it continues to violate the order compelling the production of all of it. This has been a continuing violation since the Federal government refused to produce its FBI agents for deposition in April 2007. When this Court issued an Order to Show Cause for the failure to comply with the duly served deposition subpoena, the Federal government removed that Order to the Federal Court for the Middle District of Florida and got it quashed. It is inconceivable that the Federal government would go to the expense to intervene in this State criminal case if it did not have additional evidence in its possession.

On November 30, 2007, this Court ordered the State and Defense to issue a joint request for discovery information to the FBI pursuant to the Touhy case and the Code of Federal Regulations. (See Court Exhibit #1) To date, there has been no response from the Federal government. Therefore, it is apparent that the Defendants are prejudiced and they may never see this evidence. Further, the history of this protracted litigation demonstrates there is a reasonable probability that the outcome of these proceedings could be altered significantly with the production of this evidence.

This Court has not excluded any of the evidence already provided by the Federal government to the State of Florida. The State has used this evidence to prosecute these Defendants for serious offenses. Therefore, this Court must determine whether the State should benefit from what the FBI has provided, but not suffer any penalty for the additional evidence that is being withheld. In our constitutional framework, the State suffers the consequences of the failure of one of its key law enforcement agencies to comply with the law and the rules of discovery, regardless of whether the State has any control over that agency.

The withholding of this evidence has not only prejudiced the Defendants, it has prevented this State Attorney from fulfilling his statutory and constitutional duty to provide the Defense will all information in accordance with State rules of discovery as required by Brady and Giglio. The Federal government could have opted to prosecute

this entire case or could have agreed to cooperate fully with the State in compliance with State rules of criminal procedure.

The government, State and Federal, have the power and resources to prosecute and deprive an individual of life and liberty. That power is not without limitation or checks. The State of Florida has adopted rules for open discovery in criminal cases to ensure fairness. There can be no compromise of these rules when one powerful member of this joint taskforce refuses to comply with them. These rules apply equally to the first time offender and the most hardened criminal. Regardless of whom these Defendants may be, or what labels have been ascribed to them, the law entitles them to access of all relevant evidence and discovery material in the possession of every law enforcement agency who built this case against them.

These charges are serious and it has been alleged that these Defendants are violent individuals who are members of a dangerous gang. However, the principles of fundamental fairness, due process, and evidence exclusion are not to be subjectively applied. This Court wishes the Federal government had been more cooperative in this case and recognizes that the State of Florida's prosecutors have performed admirably in their efforts to produce all of the evidence to these Defendants. Unlike the State, this Court will not be hampered or hamstrung in its duty to follow the law. So it is with regret, but with strong adherence to the law and the principles of due process and fundamental fairness that this Court must grant Defendants motion to dismiss all charges against these Defendants.

This Court does accordingly

ORDER that all charges contained in the Information(s) that are the subject of Defendants' Motion to Dismiss are DISMISSED.

The State of Florida has fifteen (15) days to appeal.

DONE ORDERED in Chambers, at Tampa, Hillsborough County, Florida, this 22 day of July, 2008.

/s/ Daniel H. Sleet

Daniel H. Sleet
Circuit Court Judge

Lyann Goudie
Deeann Athann
Christine Brown