North Carolina Criminal Law

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Must Officers' Prior Misconduct Be Disclosed in Discovery?

May 8th, 2012

By Jeff Welty

I've had a whole bunch of phone calls lately raising the same basic issue: suppose that a prosecutor is aware that an officer has been dishonest or has engaged in other misconduct in the past. Must the prosecutor disclose the officer's dishonesty or misconduct to the defendant in a pending case in which the officer participated?

The answer to the question is, sometimes. The officer's prior dishonesty or misconduct is potential impeachment material in the pending case. If it reaches the level of *material* impeachment information, it must be disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Whether the officer's prior dishonesty or misconduct is material depends on a number of factors, including:

- How long ago the dishonesty or misconduct was. The more recent it was, the more likely that it is material.
- How serious the officer's dishonesty or misconduct was. The more serious it was, the more likely that it is material.
- How conclusively the officer's misconduct was established. The more certain it is that the officer engaged in misconduct, the more likely that the information is material. For example, a "substantiated" complaint that an officer planted evidence is more likely to be material than a complaint that could not be confirmed.
- Whether the officer's dishonesty or misconduct arose in a fact pattern that is also present in the instant case. For example, if the officer falsified a search warrant application in a prior case, and also obtained a search warrant in the instant case, the information is more likely to be material.
- Whether the defendant in the current case plans to present a defense based on the officer's misconduct or dishonesty. The more likely that the officer's credibility will be a focus of the defense, the more likely the officer's prior misconduct is to be material.
- Whether the officer's role in the current case is central or peripheral. The more critical his or her role, the more likely that impeachment evidence concerning his or her prior misconduct is material.
- Perhaps, whether evidence of the misconduct is contained in personnel records vs. in less-private sources. Personnel records are subject to privacy protections that other sources of information are not.

In some instances, balancing the officer's privacy interests against the defendant's due process rights may require a judge to conduct an in camera examination of records regarding an officer's prior misconduct.

Some relevant authorities from several jurisdictions are summarized below. Most of the cases concern the discovery issue, but some address the admissibility of evidence of an officer's prior misconduct because that may bear on the discovery question. If there are useful cases on point in North Carolina, I'm not aware of them. (Readers, let me know if you think I'm missing important authorities.) Generally, I would advise a prosecutor to err on the side of caution in this area.

- *Blumberg v. Garcia*, 687 F.Supp.2d 1074 (C.D. Cal. 2010)

  A gang member was convicted of attempted murder in connection with the shooting of a rival gang member. One of the state's rebuttal witnesses was an officer who testified about the defendant's involvement in a similar prior incident. At the time of the defendant's trial, the officer had a sustained internal affairs complaint for lying, and was under investigation for planting evidence and falsifying reports. (The officer was subsequently fired by his agency as a result of the investigation.) None of the foregoing

information was disclosed to the defendant prior to trial. Although the state courts found that the withheld information was not material, a federal court ruled in habeas proceedings that the evidence was "impeachment and/or exculpatory evidence which the prosecution had a duty to disclose."

- *United States v. Beltran-Garcia*, 2009 WL 2231667 (10th Cir. July 28, 2009) (unpublished)

The trial judge properly excluded evidence about an officer's prior misconduct – misrepresentations about the extent of the consent he received during a search – under Rule 403. The incident was four years old, the instant case did not involve a similar fact pattern, and a mini-trial about the officer's prior conduct would have been confusing. [Note: this case address the admissibility, rather than the discoverability, of misconduct evidence.]

- *Michigan Ass'n of Police v. City of Pontiac*, 2009 WL 794307 (Mich. Ct. App. March 26, 2009) (unpublished)

In a dispute over the firing of an officer for filing a false arrest report, the city argued that "retaining the grievant would be problematic because, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) . . . the prosecution would have to disclose the grievant's false report and dishonesty in all future cases in which he was involved." [Note: The court did not expressly agree or disagree with the city's interpretation of *Brady*.]

- *United States v. Hector*, 2008 WL 2025069 (C.D. Cal. May 8, 2008) (unpublished)

An officer had "a sustained complaint . . . for submitting an arrest report that he knew contained inaccurate information," apparently in a previous case. In the course of discussing the government's errors in handling the report, the court described it as "crucial impeachment information."

- *United States v. Hayes*, 376 F.Supp.2d 736 (E.D. Mich. 2005)

Federal felon-in-possession case. Officer who claimed that he saw the defendant throw down a gun during foot chase was the "centerpiece of the prosecution, and a fair determination of his credibility is of paramount importance to the question of guilt or innocence." Thus, information regarding a previous federal prosecution of the officer for, inter alia, "falsify[ing] police reports" and covering up other officers' misconduct, must be disclosed to the defendant, even though the prior prosecution of the officer was dismissed.

- *United States v. Bravo*, 808 F. Supp. 311 (S.D.N.Y. 1992)

New trial because of government's failure to disclose any impeachment material about officers in a DEA unit that was under investigation "for allegedly beating up suspects, snorting cocaine, gambling, having sex with an informant and lying in court." At the time of the defendant's trial on drug charges, the unit either had been disbanded or was about to be so; the unit's leader was either assigned to a desk job or was about to be so; and a judge in another case had expressed severe doubt about the veracity of certain officers' testimony. Under those circumstances, a duty to disclose arose notwithstanding the lack of a formal finding of misconduct.

- Cal. Evid. Code § 1045

When a defendant seeks "records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations, concerning an event or transaction in which [a] peace officer . . . participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties," and makes a sufficient threshold showing, the court should conduct an in camera review of the records, and should withhold, inter alia, complaints that are more than five years old and records the disclosure of which offers "little or no practical benefit." (However, older records may be available if they are material under *Brady*, according to *City of Los Angeles v. Superior Court*, 52 P.3d 129 (Cal. 2002).)

Tags: brady, dishonesty, giglio, impeachment, misconduct

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3 Responses to "Must Officers' Prior Misconduct Be Disclosed in Discovery?"

1. *J.C. Towler* says:

May 8, 2012 at 12:28 PM

I don't know if you address follow up questions on your articles (new to the blog, sorry), but this piece brought a couple to mind:

1) Since fulfilling discovery requirements in case preparation now falls heavily on the police departments, if there is an internal matter that might fall under the "prior misconduct" category that the DA might be unaware of, does the investigating officer preparing the case file have a duty to notify them of a potential issue? For example, lets say Patrolman A. is part of an investigation and arrest of Nogood Jones. If a detective or another officer takes over that investigation and they know Patrolman A. has been reprimanded for falsifying a time sheet, is that something that they need to advise the DA of? And, as a follow-up, since personnel files are protected and their contents not usually known by your average line officers, if Patrolman A. has been written up and Detective Klew DOESN'T know about it, what then for the discovery file?

The last case, Cal. Evid. Code may hold the answer, but if it does, I'm not getting it.

2) Do the complaints have to be "official complaints" as in ones that have been investigated and resolved by the officer's agency (or some other entity)? The reason I ask this is that with social media and other outlets for people to spew and vent, we've seen a lot of lies, rumors and innuendo spread about officers. The problem is this information sometimes takes on a life of its own and while there no basis for accusing an officer of misconduct, some of that mud sticks and the defense community knows about it.

Thanks.

Reply

2. *Public Defender* says:

May 8, 2012 at 2:11 PM

Sadly, everything described above hinges on prosecutors actually knowing about officer misconduct. Seeing as how the relationship between some police departments and district attorneys is a little less than cozy, it should come as no surprise that often little or none of this information makes its way to the prosecutors. That is not the fault of the prosecutor whatsoever. Often, police departments have their own attorneys who take great pains to make sure that sensitive information contained in personnel files about police misconduct never sees the light of day.

Also, there is really no incentive for prosecutors to review for officer misconduct; after all, prosecutors only need turn over what information they know and most officers are considered reliable by default. Therefore it would be a waste of resources to vet each one before trial. In fact, it might even hamper how efficient they can be in the courtroom.

So while the approach above might be more cerebral, might I suggest doing things the old fashioned way. If through your investigation, you determine that there are signs of misconduct or corruption, file a Motion to Compel Disclosure of Personnel Files and a corresponding subpoena on the Police Dept. The law says that this cannot be a fishing expedition, so describe direct evidence such as incidents, dates, and types of conduct in your motion.

Reply

3. *Retired Prosector* says:

May 14, 2012 at 12:52 PM

In State v Raines, 362 NC 1, the Court reviewed sealed personnel records which the trial court had reviewed and not given to the defense. The trial judge did turn over the records of a different officer (which contained instances of misconduct which were clearly relevant), but neither side called him to testify.

Reply

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