

Carolyn A. Koegler

From: Hon. William Delker
Sent: Tuesday, April 16, 2019 8:29 AM
To: Justice Patrick E. Donovan; Carolyn A. Koegler
Subject: Expert Disclosure Deadlines
Attachments: State v Kelly Bryant (order on motion to continue).docx; Proposed Changes to Rule 12 (regarding expert disclosure).docx

Justice Donovan-

I have dealt with the issue addressed in the attached order twice now regarding the conflict between Rule 12(b)(1) and Rule 12(b)(4) as it relates to expert witness disclosure deadlines. The same problem applies to both the State and the defendant's expert witness disclosures.

I would like to submit a proposal to the Rules Committee to clarify this. I have attached some proposed language. Judge Nadeau is OK with this proposal.

Will

**The State of New Hampshire
Superior Court**

Rockingham

STATE OF NEW HAMPSHIRE

V.

KELLY BRYANT

No. 218-2018-CR-1396

AND

STATE OF NEW HAMPSHIRE

V.

JONATHAN BRYANT

NO. 218-2018-CR-1397

SCHEDULING ORDER

The defendants in the above-captioned matters are husband and wife. Both are charged with Possession of a Controlled Drug and Reckless Conduct with a Deadly Weapon. The cases are scheduled separately for trial but the Court held a joint hearing on motions to suppress and motions to dismiss because there was factual and legal overlap between the motions in both cases. The Court started the evidentiary hearing on the pretrial motions on March 18, 2019, but was unable to complete the hearing in the allotted time. Kelly Bryant's case is currently scheduled for jury selection on April 8, 2019, with the final pretrial conference on March 29, 2019. The State filed a motion to continue trial, to which the defense objected. The Court held a telephonic chambers conference with counsel today. Attorney LaFlamme again objected to the continuance

of trial. He argued that his client would be prejudiced by a delay because her children remain in state custody pending the outcome of this criminal case. He also argued that the State should not be allowed a continuance because it provided late notice of expert witnesses.

Kelly Bryant was arrested on the charges on or about September 16, 2018. She has not been incarcerated pretrial. The defendant's right to a speedy trial is not implicated until July 2019. See State v. Brooks, 162 N.H. 570, 581 (2011) (a delay of over nine months from arrest is presumptively prejudicial). With respect to the defendant's argument regarding expert witness disclosure deadlines, the Court is not convinced the State is in violation of court rules.

New Hampshire Rule of Criminal Procedure 12(b)(1)(B) requires the State to disclose within 10 calendar days of arraignment "[c]opies of all . . . scientific tests and experiments, or any other reports or statements of experts, as well as a summary of each expert's qualifications, with the exception of drug testing results from the New Hampshire State Forensic Laboratory, which shall be provided within ten court days from the date of indictment." On the other hand, Rule 12(b)(4) provides that 20 days before the final pretrial conference the State is required to disclose the names of all witnesses, including expert witnesses. The rule further states:

For each expert witness included on the list of witnesses, the State shall provide a brief summary of the expert's education and relevant experience, state the subject matter on which the expert is expected to testify, state a summary of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and provide a copy of any expert report relating to such expert.

N.H. R. Crim. P. 12(b)(4).

This latter rule would be superfluous if the State was already required to disclose all expert reports ten days after arraignment pursuant to Rule 12(b)(1). Thus, it appears that the former rule governs expert reports in the State's possession at the time of arraignment, whereas the latter rule relates to witnesses the State actually intends to call at trial. For this reason, the Court finds that the State is not in violation of the expert disclosure deadlines.

Ordinarily in a complex felony case both sides are expected to disclose whether they intend to engage expert witnesses so that the Court can set reasonable deadlines for the exchange of expert reports and to make sure that depositions of completed before trial. That did not occur in this case. After discussing the matter with counsel during the telephonic conference today, it is clear that the parties will not be able to complete expert depositions before the pending trial. Moreover, the defense may intend to call its own rebuttal experts. Accordingly, a continuance of the trial is necessary.

Parties for both of the above-captioned matters shall appear on March 29, 2019, at 8:30 a.m. to schedule a continuation of the motions hearing, schedule a new trial date for Kelly Bryant, and address any other discovery or pending motions.

SO ORDERED.

DATE

N. William Delker
Presiding Justice

(b) *Superior Court.* The following discovery and scheduling provisions shall apply to all criminal cases in the superior court unless otherwise ordered by the presiding justice.

(1) *Pretrial Disclosure by the State.* If a case is initiated in superior court, the State shall provide the materials specified in RSA 592-B:6. In addition, within forty-five calendar days after the entry of a not guilty plea by the defendant, the State shall provide the defendant with the materials specified below. If a case is originated in circuit court-district division, within ten calendar days after the entry of a not-guilty plea by the defendant, the State shall provide the defendant with the materials specified below.

(A) A copy of all statements, written or oral, signed or unsigned, made by the defendant to any law enforcement officer or the officer's agent which are intended for use by the State as evidence at trial or at a pretrial evidentiary hearing.

(B) Copies of all police reports; statements of witnesses; **and to the extent the State is in possession of such materials,** results or reports of physical or mental examinations, scientific tests or experiments, or any other reports or statements of experts, as well as a summary of each expert's qualifications, with the exception of drug testing results from the New Hampshire State Forensic Laboratory, which shall be provided within ten court days from the date of indictment, **or such other date as may be authorized in the dispositional conference order.**

(C) The defendant's prior criminal record.

(D) Copies of or access to all books, papers, documents, photographs, tangible objects, buildings or places that are intended for use by the State as evidence at trial or at a pretrial evidentiary hearing.

(E) All exculpatory materials required to be disclosed pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *State v. Laurie*, 139 N.H. 325 (1995).

(F) Notification of the State's intention to offer at trial pursuant to Rule of Evidence 404(b) evidence of other crimes, wrongs, or acts committed by the defendant, as well as copies of or access to all statements, reports or other materials that the State will rely on to prove the commission of such other crimes, wrongs or acts.

(2) *Pretrial Disclosure by the Defendant*

Not less than sixty calendar days prior to jury selection if the case originated in Superior Court or not less than thirty calendar days prior to jury selection if the case originated in Circuit Court-District Division or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the defendant shall provide the State with copies of or access to ~~(i) all books, papers, documents, photographs, tangible objects, buildings or places which are intended for use by the defendant as evidence at the trial or hearing and (ii) all results or reports of physical or mental examinations, scientific tests or experiments or other reports or statements prepared or conducted by experts whom the defendant anticipates calling as a witness at the trial or hearing, as well as a summary of each such expert's qualifications.~~

(3) *Dispositional Conferences.* The purpose of the dispositional conference is to facilitate meaningful discussion and early resolution of cases.

(A) Unless the State does not intend to make a plea offer, in which case it shall so advise the defendant within the time limits specified herein, the State shall provide a written offer for a negotiated plea, in compliance with the Victim's Rights statute, RSA 21-M:8-k, to the defense, no less than fourteen (14) days prior to the dispositional conference. The defense shall respond to the State's offer no later than ten (10) days after receipt.

(B) The judge shall have broad discretion in the conduct of the dispositional conference.

(C) The State, defendant, and defendant's counsel, if any, shall appear at the dispositional conference. The State and the defendant shall be represented at the dispositional conference by an attorney who has full knowledge of the facts and the ability to negotiate a resolution of the case. Counsel shall be prepared to discuss the impact of known charges being brought against the defendant in other jurisdictions, if any.

(D) If a plea agreement is not reached at the dispositional conference, the matter shall be set for trial. The court may also schedule hearings on any motions discussed during the dispositional conference. Counsel shall be prepared to discuss their availability for trial or hearing as scheduled by the court.

(E) Evidence of conduct or statements made during the dispositional conference about the facts and/or merits of the case is not admissible as evidence at a hearing or trial.

(F) If the case may involve expert testimony from either party, both sides shall be prepared to address disclosure deadlines for: all results or reports of physical or mental examinations, scientific tests or experiments or other reports or statements prepared or conducted by the expert witness; a summary of each such expert's qualifications; rebuttal expert reports and qualifications; and expert depositions. Except for good cause shown, the failure of either party to set expert witness disclosure deadlines at the dispositional conference shall be grounds to exclude the expert from testifying at trial.

(4) *Exchange of Information Concerning Trial Witnesses*

(A) Not less than twenty calendar days prior to the final pretrial conference or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the State shall provide the defendant with a list of the names of the witnesses it anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list and to the extent not already provided pursuant to paragraph (b)(1) of this rule, the State shall provide the defendant with all statements of witnesses the State anticipates calling at the trial or hearing. At this same time, the State also shall furnish the defendant with the results of New Hampshire criminal record checks for all of the State's trial or hearing witnesses other than those witnesses who are experts or law enforcement officers.

~~For each expert witness included on the list of witnesses, the State shall provide a brief summary of the expert's education and relevant experience, state the subject matter on which the expert is expected to testify,~~

~~state a summary of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and provide a copy of any expert report relating to such expert.~~

(B) Not later than ten calendar days before the final pretrial conference or, in the case of a pretrial evidentiary hearing, not less than two calendar days prior to such hearing, the defendant shall provide the State with a list of the names of the witnesses the defendant anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list, the defendant shall provide the State with all statements of witnesses the defendant anticipates calling at the trial or hearing. Notwithstanding the preceding sentence, this rule does not require the defendant to provide the State with copies of or access to statements of the defendant.

~~For each expert witness included on the list of witnesses, the defendant shall provide a brief summary of the expert's education and relevant experience, state the subject matter on which the expert is expected to testify, state a summary of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and provide a copy of any expert report relating to such expert.~~