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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0503-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONALD F. BURKE, SR.,

Defendant-Appellant.

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Argued May 15, 2023 – Decided July 19, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law  
Division, Ocean County, Municipal Appeal No.  
M-21-03.

Donald F. Burke, Jr., argued the cause for appellant.

Elizabeth J. Leahey argued the cause for respondent.

**PER CURIAM**

This appeal arises from a quasi-criminal municipal court matter initiated on October 1, 2020 by a civilian complainant. Defendant Donald F. Burke, Sr.

appeals from the Law Division's August 22, 2022 oral decision, which denied a forensic examination of the entire contents of complainant's cellphone, and the Law Division's August 29, 2022 order, which denied defendant's motion to compel discovery of the complainant's employment and disciplinary records with the New Jersey State Police ("NJSP"), as well as related criminal records. We reverse and remand to the municipal court for further proceedings consistent with this opinion.

On September 5, 2010, a verbal altercation ensued between complainant and a friend, who were on bicycles, and defendant, who was in his vehicle. The details of that encounter are vigorously disputed. However, a police officer summoned to the scene by complainant and his friend took statements from all individuals involved, the substance of which almost exclusively referred to an ongoing property dispute between the parties and various family members. At that time, complainant did not make mention of any traffic violations engaged in by defendant and the reporting officer ultimately concluded that there was no further action needed, deeming the matter to be a "civil issue."

Apparently dissatisfied with that result, on October 1, 2020—nearly a month later—Weingroff swore out a complaint against defendant for alleged traffic violations that occurred during the subject dispute. Specifically, the

complaint charged defendant with four motor vehicle and traffic violations under Title 39: (1) improper turn, contrary to N.J.S.A. 39:4-123; (2) failure to maintain travel on a marked land, contrary to N.J.S.A. 39:4-88; (3) improper use of cellphone while driving, contrary to N.J.S.A. 39-4.97.3; and (4) careless driving, contrary to N.J.S.A. 39:4-97.

On October 6, 2020, defendant pled not guilty and requested discovery, including complainant's employment and disciplinary records with the NJSP, as well as related criminal records. On November 19, 2020, the prosecutor contacted complainant and requested he provide discovery related to the alleged violations, as requested by defendant. In response, complainant only provided printed images of the alleged traffic violations, which he had taken on his cellphone on the date in question.

On November 20, 2020, the State received a follow-up letter from defendant reiterating his requests for discovery regarding complainant's records with the NJSP. Specifically, defendant requested disciplinary records regarding complainant's "removal for cause" on December 13, 2018.<sup>1</sup>

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<sup>1</sup> Pursuant to N.J.S.A. 53:5A-28, complainant was terminated from his employment with the NJSP for charges of misconduct, including tampering with public records pursuant to 2C:28-7A(2) (use or file with a purpose to defraud) and 2C:21-4A (destruction/removal of a file). Ultimately, complainant was criminally charged

On January 18, 2021, the State emailed defendant the following items of discovery: the police report of the verbal altercation between complainant and defendant, which made no reference to the alleged traffic violations; PDFs of the images produced by complainant; and a letter denying the remaining requests for records. In denying defendant's discovery request, the State indicated that it is only required to provide evidence deemed relevant by the prosecutor. Here, the prosecutor determined that the requested records were not relevant or exculpatory, so the State did not disclose them. Further, the State asserted that relevance to credibility was not a ground for disclosure of complainant's employment, disciplinary, and criminal records because his credibility was not material to, or an element of, the motor vehicle infractions being charged, nor would complainant's credibility mitigate or negate defendant's alleged guilt.

As a result of the State's denial, defendant requested an adjournment of the January 21, 2021 municipal court appearance date, reasoning that he "did not believe that [] [c]omplainant had turned over all discovery." Defendant's adjournment request was ultimately granted.

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with one count of fourth degree falsifying or tampering with records, in violation of N.J.S.A. 2C:21-4. On December 13, 2018, complainant consented to the entry of an order of forfeiture of employment as a condition to avoid ordinary prosecution through his entry into the pretrial intervention program, pursuant to N.J.S.A. 2C:43-12.

On February 2, 2021, defendant revised his discovery requests, specifically seeking the images produced by complainant in their "native format with metadata intact." Defendant also renewed his request for complainant's records, arguing that they were subject to disclosure pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). Finally, defendant requested a forensic examination of complainant's phone to determine whether the relevant images had been altered or edited and whether the phone contained any other exculpatory evidence.

On February 12, 2021, the State responded, once again denying defendant's request for complainant's records. In so doing, the State referenced Attorney General, Directive Establishing County Policies to Comply with Brady v. Maryland and Giglio v. United States (Dec. 4, 2019) (Directive 2019-06), which grants prosecutorial discretion in determining what discovery is covered by the referenced case law and, therefore, must be disclosed to a criminal defendant. The next day, the State mailed defendant printed copies of the subject images, downloaded from complainant's phone, which were time-stamped and dated.

On April 5, 2021, defendant filed a motion to dismiss and a motion to compel discovery of the subject records. Shortly thereafter, on April 19, 2021, the State filed for a protective order in the municipal court.

On June 17, 2021, the municipal judge heard oral argument on the parties' motions and ultimately rejected defendant's discovery requests, stating:

Defense counsel [argues] that his client is entitled to have these documents under . . . [D]irective 2019-6, as well as Brady . . . and Giglio[.] . . .

The [c]ourt finds that[,] pursuant to . . . [D]irective 2019-6, the State is required to gather potentially exculpatory evidence and provide same to [] defendant. This is within the discretion of the [p]rosecutor. The information sought in this matter . . . does not pertain to [] defendant, and thus would [not] be exculpatory. They[ are] employment records. The defense counsel argues that these are required to address the credibility of the witness.

The [p]rosecutor has advised that it has no records in her possession that would be exculpatory and will not seek to produce the requested discovery information nor use same in the prosecution of the motor vehicle charges.

Further, this information[,] the [c]ourt finds[,] is not relevant to the prosecution, [and] is not evidence in this case. Discovery is evidence that the [p]rosecutor will introduce in order to attempt to prove the charges against [] defendant beyond a reasonable doubt.

It[ is] clear that the State has the burden to do that. However, the [m]unicipal [p]rosecutor in this matter

does not possess the disciplinary records of the complainant from his former employer, nor any criminal charges.

Next[,] the defense cites Brady[] as authority [to obtain] [] complainant's employment disciplinary records . . . requested by the defense where the evidence is material to either guilt or to punishment, neither which elements are prese[n]t here in these Title 39 motor vehicle charges. . . . [D]efendant's constitutional right to due process is protected and the complainant in this matter is not on trial[.]

Defense also cited Giglio[] as authority to compel the discovery requested. The [c]ourt understands that the holding in Giglio is to require the [p]rosecutor to disclose all material evidence and information pertaining to deals that witnesses in a criminal case may have entered into with the Government.

In the case at bar, this is not a criminal case, nor are there any charges pending against the witness compl[ainant] for which a deal could be made.

The [c]ourt further finds that the information sought is not relevant to the evidence [and] not relevant evidence to the charges before the [c]ourt under [N.J.R.E.] 401.

Next, the judge rejected defendant's request for a forensic examination of the complainant's cellphone, including the original images with accompanying metadata, stating:

The [p]rosecutor has provided the best evidence available in the form of dated time stamped prints from the complainant's [cellphone]. The [p]rosecutor is not

in possession of the [cellphone] of [] complainant or any other images containing any metadata.

. . . .

[N]o party will be permitted to conduct a forensic examination of [] complainant's cell phone due to privacy and confidentiality considerations.

Following the hearing, the municipal judge entered a protective order on June 17, 2021, which ultimately barred discovery of: complainant's records and information regarding his employment with, and discharge from, the NJSP; the images, which were produced by complainant, in their original digital format with metadata intact; and a forensic examination of complainant's cellphone. In addition, the judge denied defendant's motion for dismissal. In July of 2022, defendant filed an interlocutory appeal of the municipal judge's decision with the Law Division of Ocean County.

On August 22, 2022, defendant's motion was heard by the Law Division judge, who ruled on each of the issues in turn. First, the judge agreed with the municipal judge's decision that, "[u]nder no set of circumstances would [] a forensic dump [] be reasonable under the circumstances," and, therefore, denied defendant's request for a forensic examination of complainant's cellphone. Second, the judge disagreed with the decision to disallow discovery of the



original images in complainant's possession, finding that the State should disclose those images in their original digital format with metadata intact.<sup>2</sup>

The judge then turned to defendant's request for complainant's employment and disciplinary records with the NJSP, as well as related criminal records. However, before he could do so, the State introduced new information, recently revealed by complainant, in the form of an expungement order entered on June 24, 2020; that order encompassed the disciplinary and criminal records requested by defendant. Specifically, the expungement order provided the following:

IT IS ORDERED . . . that the [relevant entities, including the NJSP,] remove from their records all information relating to [complainant's]:

[February 9, 2018] incident [and] [a]rrest [d]ate: [October 17, 2018.] . . .

The above-agencies shall also remove all records concerning the subsequent criminal [] proceedings regarding such charge(s), including any convictions(s), adjudication(s) of delinquency or disposition(s), if applicable[.] . . .

. . . .

[A]ny records, or the information therein, shall not be released except as provided under the provision of N.J.S.A. 2C:52-1[ to -32.] . . .

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<sup>2</sup> Defendant was ultimately provided the requested images on August 29, 2022.

In response to the new information, the Law Division judge declined to address the municipal judge's protective order and defendant's request for complainant's records. Instead, the judge opted to "set up a conference with the two [parties] sometime later [in the] week," and ordered the parties to submit supplemental briefs on the matter.

On August 29, 2022, the judge ultimately denied "[d]efendant's motion to compel discovery of [] [c]omplainant's criminal records and employment/disciplinary records from the [NJSP]." In so doing, the Law Division judge analyzed defendant's request under N.J.S.A. 2C:52-19, which permits the inspection of expunged records, and reasoned that defendant "satisfied neither element" of the statute, which provides the following:

Inspection of the files and records, or release of the information contained therein, which are the subject of an order of expungement . . . may be permitted . . . upon motion for good cause shown and compelling need based on specific facts. . . . Leave to inspect shall be granted by the court only in those instances where the subject matter of the records of arrest or conviction is the object of litigation or judicial proceedings.

Although the text of the order denied discovery of all of complainant's records, the judge's reasoning spoke only to complainant's expunged criminal and disciplinary records. The judge did not provide a reason for denying discovery of complainant's employment records, generally, or complainant's disciplinary

and criminal records, which were unrelated to the June 24, 2020 expungement order, if any such records existed.

On September 18, 2022, defendant filed motions for leave to appeal and for stay pending appeal in the appellate division. On October 14, 22, we granted defendant's motions and this appeal followed.

On appeal, defendant presents the following arguments:

#### POINT I

THIS COU[RT] SHOULD VACATE THE PROTECTIVE ORDER ENTERED IN FAVOR OF THE STATE.

1. Defendant is Entitled to Evidence that Could Lead to Relevant Information, including Evidence Bearing on the Credibility of the State's Complaining Witness.
2. Attorney General Law Enforcement Directive 2019-6 and Ocean County Prosecutor's Office Law Enforcement Directive 2020-8 Compel Production of Evidence Affecting the Credibility of the State's Complaining Witness.
3. Defendant's Discovery Request is Supported by Governing Case Law.
4. Expungement Does Not Bar Discovery Pertaining to Criminal Charges Where the State's Witness is the Complainant.

5. The Complaining Witness's State Police Disciplinary Records Are Not Subject to the Expungement Statute and Were Not Expunged.

## POINT II

THE EXPUNG[E]MENT STA[T]UTE WAS NOT INTENDED TO SHIELD THE STATE FROM PROVIDING EVIDENCE PERTAINING TO THE CREDIBILITY OF THE STATE'S WITNESSES.

## POINT III

THE STATE MUST PROVIDE DIGITAL EVIDENCE WITH METADATA INTACT.

We "will not ordinarily reverse a trial court's disposition of a discovery dispute 'absent an abuse of discretion or a judge's misunderstanding or misapplication of the law.'" Brugaletta v. Garcia, 234 N.J. 225, 240 (2018) (quoting Cap. Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017)). However, "[w]hen the question presented is a legal issue, . . . our review is de novo." Conn v. Rebutillo, 445 N.J. Super. 349, 353 (App. Div. 2016) (citing Kaye v. Rosefelde, 223 N.J. 218, 229 (2015)).

We begin our analysis by recognizing that "[b]road discovery and liberal procedures for discovery . . . 'are essential to any modern judicial system in which the search for truth in aid of justice is paramount.'" Isetts v. Borough of Roseland, 364 N.J. Super. 247, 261 (App. Div. 2003) (quoting Lang v. Morgan's

Home Equip. Corp., 6 N.J. 333, 338 (1951)). Therefore, we "must start from the premise that [our] discovery rules 'are to be construed liberally in favor of broad pretrial discovery[.]'" Cap. Health Sys., Inc., 230 N.J. at 80 (quoting Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997)).

Nonetheless, "the scope of discovery is not infinite." K.S. v. ABC Prof'l Corp., 330 N.J. Super. 288, 291 (App. Div. 2000). Rather, it is limited to information, "not privileged, which is relevant to the subject matter involved in the pending action[.]" R. 4:10-2(a). "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Ibid.

Thus, as a threshold matter, we must first determine whether complainant's employment, disciplinary, and criminal records are relevant to the subject matter involved in the pending action. In so doing, we recognize that "[d]iscovery in a municipal court case, like in a criminal case, 'is appropriate if it will lead to relevant' information." State v. Stein, 225 N.J. 582, 596 (2016) (quoting State v. Hernandez, 225 N.J. 451, 461 (2016)). In that regard, we reject the prosecutor's position that impeachment evidence is not available to defendants in traffic court cases, a position that our Supreme Court has soundly

rejected. See Stein, 225 N.J. at 595 n.9 (acknowledging that "[n]othing in N.J.R.E. 401 suggests that the definition of relevance is different for quasi-criminal cases . . . than for actual criminal cases.").

Pursuant to N.J.R.E. 401, relevance is defined as any "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." "Relevance is measured in terms of the opportunity of the defendant to present a complete defense." State v. Desir, 245 N.J. 179, 193 (2021) (quoting Pressler & Verniero, Current N.J. Court Rules, cmt. 3.2 on R. 3:13-3 (2023)). In that regard, discovery is also appropriate for "material evidence affecting [the] credibility' of a state's witness whose testimony may be determinative of guilt or innocence." Hernandez, 225 N.J. at 462 (quoting State v. Carter, 69 N.J. 420, 433 (1976)).

Guided by these principles, we first conclude that the records sought by defendant are relevant as impeachment evidence. Here, complainant was akin to an arresting officer, as this matter would not have been prosecuted but for his issuance of the subject complaint. As the charging individual, and the sole witness for the State, his credibility and the credibility of his account of the incident, including the circumstances under which he took the subject photographs, are centrally and critically relevant to a finding of guilt or

innocence on the subject violations. Thus, evidence establishing complainant was terminated and criminally charged for falsifying police records is obviously highly relevant to this case where the sole evidence supporting defendant's guilt was created by complainant. See N.J.R.E. 607 ("For the purpose of attacking or supporting the credibility of a witness, any party . . . may examine the witness and introduce extrinsic evidence relevant to the issue of credibility[.]"). Therefore, we conclude that the municipal judge exercised mistaken discretion in deeming the requested records "not relevant."

Having found the requested records relevant, we must next determine whether the prosecutor had an obligation to gather and disclose the subject records to defendant. Rule 3:13-3(b)(1) codifies a criminal defendant's "right to automatic and broad discovery of the evidence the State has gathered in support of its charges." Desir, 245 N.J. at 193 (quoting Stein, 225 N.J. at 594). "[T]he rule creates a presumption of access to the file and to copies of the evidence, which results either in the complete turnover of the material or in restricted access when necessary[.]" State v. Scoles, 214 N.J. 236, 257 (2013).

One such category of "[m]aterial that must be produced[,] in accordance with Brady v. Maryland, 373 U.S. 83 [] (1963), commonly referred to as Brady material, has been defined . . . as that which[,] if it had been disclosed to the

defense[,] would have led to a different result in the proceedings." State v. Williams, 403 N.J. Super. 39, 45-46 (App. Div. 2008) (citing United States v. Bagley, 473 U.S. 667, 682 (1985)). Our case law echoes this responsibility by establishing that "[a] prosecutor's obligation to 'turn over material, exculpatory evidence to the defendant' . . . extends as well to impeachment evidence within the prosecutor's possession." State v. Nash, 212 N.J. 518, 544 (2013) (quoting State v. Morton, 155 N.J. 383, 413 (1998)). Thus, we have held that "'the State's obligation to disclose is not limited to evidence that affirmatively tends to establish a defendant's innocence but would include any information material and favorable to a defendant's cause even where the evidence concerns only the credibility of a State's witness.'" Williams, 403 N.J. Super. at 46-47 (quoting State v. Carter, 91 N.J. 86, 111 (1982)).

In addition, we note that "[t]he discovery rules governing the municipal court and the Criminal Part of the Law Division are almost identical; both mandate the disclosure of the same categories of information." Stein, 225 N.J. at 593-94 (comparing R. 7:7-7, with R. 3:12-3(b)). In fact, "the municipal court discovery rules are patterned from the criminal discovery rules." Id. at 594 (citation omitted). This is because "[c]riminal cases and quasi-criminal cases, . . . which are tried in municipal court, share many of the same procedural



protections[.]" Ibid. "In light of the similarity between criminal and municipal court cases and their discovery rules, the liberal approach to discovery in criminal cases is applicable in municipal court cases." Ibid.

Moreover, Directive 2019-6 further establishes that not only is a prosecutor required to disclose evidence in their file that the State has gathered in support of its charges, but they also have an affirmative duty to gather and disclose any relevant Brady/Giglio material from the State's testifying witness(es), including that which is not in the prosecutor's file. Because knowledge of such material is "imputed to the prosecutor," Directive 2019-6 makes it "imperative that the prosecutor request that information of testifying State witnesses."

Guided by these principles, we conclude that the Law Division judge erred in denying defendant discovery of complainant's unexpunged records, which includes his employment and disciplinary records with the NJSP. See State v. Zemak, 304 N.J. Super. 381, 384 (App. Div. 1997) ("The [expungement] statute does not . . . call for the removal of personnel records from any employment files. . . . This limitation implies that records maintained outside the realm of the law enforcement function are exempt from the expungement statute.") (emphasis in original).

For the same reasons, we conclude the Law Division judge erred denying the requested discovery based on the June 24, 2020 expungement order. Pursuant to N.J.S.A. 2C:52-19, "[i]nspection of the files and records . . . which are the subject of an order of expungement . . . may be permitted . . . upon motion for good cause shown and compelling need based on specific facts"; and where "the subject matter of the records of arrest . . . is the object of litigation or judicial proceedings."

Here, we find that defendant demonstrated both good cause and a compelling need for the subject records. We note that the purpose of the expungement statute is "to prevent the evidence of an expunged record [from being] used against the person for whom the expungement is meant to benefit." Y.H. v. T.C., 475 N.J. Super. 107, 120 (App. Div. 2023). In that regard, our Supreme Court has recognized that there is "no value in permitting [a] plaintiff to use the expungement statute as a sword, rather than the shield it was intended to be." G.D. v. Kenny, 205 N.J. 275, 289 (2011) (quoting G.D. v. Kenny, 411 N.J. Super. 176, 193 (App. Div. 2009)). In fact, we have recognized that, "[e]xpunged records are not destroyed. Even after the entry of a judgment of expungement, these records remain available for certain limited purposes,

including to satisfy discovery obligations[.]” State v. J.R.S., 398 N.J. Super. 1, 6 (App. Div. 2008) (citations omitted).

Our determination that the requested discovery was improperly denied compels a conclusion that there was no basis for the municipal judge to enter the June 17, 2021 protective order, and we hereby vacate that order.<sup>3</sup>

Reversed and remanded to the municipal court for further proceedings consistent with this opinion.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION

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<sup>3</sup> Pursuant to our decision in this matter, and for the same reasons, we reverse the Law Division's August 22, 2022 decision denying defendant access to complainant's cellphone for purposes of conducting a forensic evaluation.