SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE 1 THE CIRCLE, SUITE 2 GEORGETOWN, DE 19947 (302) 856-5257

February 12, 2013

Donald R. Bucklin, Esquire Department of Justice 114 E. Market Street Georgetown, DE 19947

Eric G. Mooney, Esquire 11 S. Race Street Georgetown, DE 19947

RE: State of Delaware v. John C. Glenstrup, Def. ID# 1010002272

DATE SUBMITTED: December 7, 2012

Dear Counsel:

The State of Delaware ("the State") has filed an appeal, pursuant to 10 *Del. C.* § 9902(b) and (c), of a decision of the Court of Common Pleas ("CCP") remedying the State's violation of CCP's discovery rules by suppressing essential evidence in this driving under the influence case. This is my decision on the appeal.

On October 5, 2010, defendant John C. Glenstrup ("defendant") was arrested on charges of driving under the influence of alcohol in violation of 21 *Del. C.* § 4177(a)(1); failing to remain within a single lane in violation of 21 *Del. C.* § 4122(1); failing to obey a traffic control device in

<sup>&</sup>lt;sup>1</sup>See 8-9, infra, for applicable portions of this statute.

violation of 21 *Del. C.* § 4122(3); failing to have insurance identification in his possession in violation of 21 *Del. C.* § 2118(p)(1); and failing to have registration card in his possession in violation of 21 *Del. C.* § 2108. The matter commenced in Justice of the Peace Court No. 14 ("JP Court"). Defense counsel entered his appearance on behalf of defendant in JP Court.

Defense counsel filed, in JP Court, a discovery request dated October 12, 2010.

On December 16, 2010, the State filed the following responses to this discovery request:

- \* The State would be calling the arresting officer as an expert in HGN.
- \* It provided to counsel the AIIR.
- \* The State provided to counsel the MVR.
- \* The State explained: "No 20 min. video available."
- \* Jencks<sup>2</sup> material, if any existed, would be available at trial.
- \* This was not a road block case.
- \* This was not a blood case.
- \* The State provided to defense counsel defendant's uncertified driving record and notified counsel it would be relying upon defendant's certified driving record at trial.

While the case was in JP Court, an issue arose concerning the existence of any videotape of the defendant while at Delaware State Police ("DSP") Troop 7. Due to conflicting information defense counsel received regarding the videotape,<sup>3</sup> he filed a motion to compel in JP Court and then, on January 17, 2011, transferred the case to CCP.

<sup>&</sup>lt;sup>2</sup>Jencks v. U.S., 353 U.S. 657 (1957).

<sup>&</sup>lt;sup>3</sup>The conflicting information was contained in an October 18, 2010 letter from DSP; the State's December 16, 2010 discovery response; and the State's January 6, 2011 letter to defense counsel.

The State filed its information on February 11, 2011. A different Deputy Attorney General now was prosecuting the case.

On February 14, 2011, defendant filed his request for discovery in CCP, which was identical to that filed in JP Court. He also filed a motion to suppress evidence.

On February 28, 2011, the State filed in CCP the following "response" to the discovery request:

My records indicate that discovery was provided to you when this matter was pending in the Justice of the Peace Court #14 on December 16, 2010, with a supplement on January 6, 2011. As a supplement to discovery, please find enclosed a copy of the Information regarding the above matter.

Please be advised that the State, pursuant to Rule 16(a)(1)(E), may present expert testimony by one or more officers as summarized in the discovery materials previously provided. The officer(s) will testify regarding NHTSA training and standards and the applications of those standards to the officers [sic] observations of the defendant in this case. Based on the observations and NHTSA training, the officer(s) will testify that in his/her opinion the defendant appeared to be under the influence at the time of driving. The identity of the officer(s) who will testify is reflected in the discovery materials previously provided. If applicable, this may include but is not limited to the officer indicated in the AIIR report as an expert in the administration and relevance of the HGN test.

If applicable, please be advised that Cynthia McCarthy will be called as an expert in Intoxilyzer cases, pursuant to Delaware Rules of Evidence 702.

Please be advised that you MUST contact me if this response does not satisfy your request. The State expects that if this response does not satisfy your request, you will provide notice prior to trial. If notice is not provided, the State will object to any issues raised on the day of trial.

Finally, if you have failed to do so previously, please, pursuant to Court of Common Pleas Criminal Rule 16(b), respond to the State's Reciprocal Discovery Request.

If you are no longer in possession of the materials supplied in November [sic], please let me know and I will send copies over to you upon your request. [Emphasis added.]

The State sought a continuance of the trial date because the arresting officer was out of town. CCP granted the continuance over defense counsel's objection.

On May 3, 2011, at close to noon on the day of trial, defense counsel moved to dismiss the case because the State had not complied with the defense's outstanding discovery requests. Defense counsel's support for that motion, set forth below, was multi-faceted.

- \* Although he had moved the case to CCP to obtain discovery to clear up the confusion regarding the videotape and its existence, he never had received information from the State clarifying the issue.
- \* The form discovery responses the State files in CCP differ from those filed in JP Court.

  Thus, even though he had the responses and information filed in JP Court, he could not be certain that those responses accurately represented the State's evidence and/or witnesses for the trial in CCP.
- \* The State's February 28, 2011 letter requires him to determine what is missing from the State's discovery responses. The defense should not have the burden of ferreting out what is missing from the State's discovery responses.
- \* There is no requirement that he file a motion to compel or tell the State before the time of trial that it has not complied with discovery. The State should be aware of whether it has complied with discovery without him informing it before trial. His obligation is to his client and he is prohibited from tipping his hand to the State in order to best represent his client.<sup>1</sup>
  - \* Very important to his argument that the case should be dismissed was the fact that it

<sup>&</sup>lt;sup>1</sup>He explained how a past client had filed a complaint against him because, after he told the State about an omission, the State fixed the problem and his client was prohibited from profiting from the omission.

had been a long-standing rule, which recently was enforced against him at the State's request, that the parties must file discovery in CCP as if nothing had been filed in JP Court and failure to do so results in sanctions against the offending party. He urged the court to consistently enforce the rules against both sides.

The State's response was to ask for a continuance. The State's arguments are set forth below.

- \* The State had been talking with defense counsel about the case all morning, and defense counsel had sprung this motion on it.
  - \* Defendant had not filed a motion to compel in CCP.
- \* A factual dispute existed as to whether information regarding the videotape is conflicting.
- \* The Court's ruling that everything must be filed *de novo* in CCP after a transfer from JP Court came after the State had submitted its February 28, 2011 "response" to discovery requests filed in CCP.
- \* In the February 28, 2011, discovery "response", the State did not say it was not responding; instead, it said that it already had provided the information and if defendant needed more, to please notify the State.
- \* Most importantly, the State had given defense counsel everything, with the exception of the in-Troop videotape, that it would have given him in response to the discovery requests filed in CCP; i.e., defense counsel has had, since the case was in JP Court, the AIIR, the MVR, the before and after sheets, and the intoxilyzer printout form.
  - \*The State's policy not to duplicate discovery responses in a case transferred to CCP is

based upon its caseload.

CCP, in dealing with the motion, made the following rulings.

\* Most importantly, the *de novo* aspect of the case requires the whole process to start anew and requires the parties to comply with the CCP rules as if they never have taken any steps in the court below. The Court stated:

I want to make clear, this is not – I do not see this as an individual ruling by this judge, this is just the process, the rules of criminal procedure that when ... [defense counsel] files a new discovery request as a part of the Court of Common Pleas' process, the State has to respond to it. They just can't say, oh, well, we did that in J.P. Court, we don't have to respond to it.<sup>2</sup>

\* It is extremely difficult to determine if a party has complied with discovery filed in JP Court and not in CCP. It is "very difficult for the Court to wade through something that was filed as a form response or a mass response in another court to pick and choose and say, well, does this piece of information from the State match this request or not."

\* There was no obligation to file a motion to compel in advance of the day of trial.<sup>4</sup> In fact, it was irrelevant that the motion to compel was not filed in CCP. Instead, the issue was whether the State had adequately and properly responded to the discovery requests filed in CCP.

\* The State's caseload is insignificant compared to what it used to be and the Court did not see "caseload" as a reason for the State not responding anew to discovery requests filed in

<sup>&</sup>lt;sup>2</sup>Transcript of May 3, 2011 Proceedings at 8.

 $<sup>^{3}</sup>Id$ . at 29.

<sup>&</sup>lt;sup>4</sup>In Court of Common Pleas Criminal Rule 16(d)(3)( C), it is provided:

Motion to compel. If a party fails to comply with a request the opposing party **may** move for an order compelling compliance with the request..... [Emphasis added.]

CCP.

\* It was not appropriate to put the burden on the defense to determine what was missing from what the State produced in JP Court. The Court stated:

If you want to try to rely on what you filed in J.P. Court I think you have to get - ask for an affirmative response saying that we gave you things in J.P. Court, is that satisfactory, yes or no, and if you don't get an answer you've to file it up here. You can't just say we're going to assume this is okay unless you tell us otherwise.

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I think the State has to assume that they have to comply with the new discovery request de novo unless they get some indication from the defense that they're satisfied with what they got below and they do not need you to do it again. It's just part of a process, I mean, our rules say that, you know, the discovery request is filed and the responding party has so many days to reply to it.<sup>5</sup>

\* A discovery violation existed.

With regards to an appropriate remedy, 6 the Court stated:

... I think your argument that well, in actuality the defense has a lot of this information from a prior proceeding goes to what the adequate remedy is in this case, in other words, when you decide a remedy you look at the "misconduct or bad faith of the State in how they handled their discovery response."

The Court ruled as follows regarding the sanction for the failure to comply with

discovery:

<sup>6</sup>In CCP Criminal Rule 16(d), it is provided in pertinent part:

(2) Failure to comply with a request. If at any time during the course of the proceedings it is brought to the attention of the Court that a party has failed to comply with this rule, the Court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

<sup>7</sup>*Id.* at 31.

<sup>&</sup>lt;sup>5</sup>*Id.* at 25-6.

The defendant through counsel in this case filed a request for discovery in this court. The only response filed by the State was a supplemental response to discovery provided in the Justice of the Peace Court. This Court has both previously and recently reiterated that when a matter is transferred or de novo to this court, the parties must file their motions and requests and responses under this court's rules and process.

The State should be well aware of their obligation to properly respond to discovery requests in this court and not to rely on whatever may have occurred in another court.

If the court merely continued this matter to give the State the opportunity to remedy it's [sic] violation there would be no effective sanction on the State, although the Court always prefers to see matters tried and resolved on their merits, it must sanction this violation.

However, the ultimate sanction, dismissal of the entire action the Court does not believe is warranted here as an appropriate remedy given the nature of the violation by the State. Accordingly, what the Court will do is the Court will suppress any evidence that should've been properly provided in response to discovery in this court regarding the DUI charge. And, that is the Court's ruling.

So, we can proceed to trial on the balance or the State can proceed to trial on the entire matter if they believe they can do so. [Emphasis added.]<sup>8</sup>

The next portion of the CCP proceedings is pertinent to the requirements of the appeal

statute, 10 Del. C. § 9902.9

- (a) The State shall have an absolute right to appeal to an appellate court a final order of a lower court where the order constitutes a dismissal of an indictment or information or any count thereof, or the granting of any motion vacating any verdict or judgment of conviction where the order of the lower court is based upon the invalidity or construction of the statute upon which the indictment or information is founded or the lack of jurisdiction of the lower court over the person or subject matter.
- (b) When any order is entered before trial in any court suppressing or excluding substantial and material evidence, the court, upon certification by the Attorney General that the evidence is essential to the prosecution of the case, shall dismiss the complaint, indictment or information or any count thereof to the proof of which the evidence suppressed or excluded is essential. Upon ordering the complaint, indictment or information or any count thereof dismissed pursuant to the Attorney General's certification, the reasons of the dismissal shall be set forth

<sup>&</sup>lt;sup>8</sup>*Id.* at 39.

<sup>&</sup>lt;sup>9</sup>Therein, it is provided in pertinent part as follows:

THE STATE: Your Honor, we didn't send the AIIR.

THE COURT: That's right.

The STATE: So, the Court's not going to dismiss the case but it's going to dismiss all of the evidence in the case. I guess –

THE COURT: Related to the DUI charge.

THE STATE: Okay. Pursuant to 9902(a), given the Court's ruling we can't go forward, we'd certify that we can't go forward given this ruling of the suppression of the evidence and I only certify under (b) and (c) so that we can decide because I know that right now it's very strict whether you've made the certification or not whether there could be any—

THE COURT: You should make your record properly.

THE STATE: And, in doing so, I guess, the Court at that point dismisses and because we have no – without the AIIR the officer can't even testify – I mean, his narrative starts at the beginning of that. And, so – and, his MVR starts at the beginning, so I'm assuming that that's what the Court's ruling was that anything not turned over in this court specifically or referenced as being turned over.

THE COURT: That's right.

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THE COURT: All right. The Court will note for the record that the State has certified on the record that it cannot proceed as to the DUI charge with the evidence that has been suppressed.

This matter will stay intact so obviously there is a dismissal of the entire matter at this time.<sup>10</sup>

The State appealed to the Superior Court, arguing CCP abused its discretion in imposing

in the order entered upon the record.

<sup>(</sup>c) The State shall have an absolute right of appeal to an appellate court from an order entered pursuant to subsection (b) of this section and if the appellate court upon review of the order suppressing evidence shall reverse the dismissal, the defendant may be subjected to trial.

<sup>&</sup>lt;sup>10</sup>*Id.* at 40-43.

the discovery sanction. Defendant, in response, seeks dismissal of the appeal on procedural grounds. He argues that the appeal should be dismissed because the State cited to § 9902(a) and not (b) and (c) as a basis for the appeal. Defendant further argues for dismissal on that ground that the State failed to specify what evidence was essential to the prosecution of the case.

As the Superior Court explained in *State v. Rollo*, 2005 WL 2249757, \*1 (Del. Super. Aug. 4, 2005):

Section 9902 was designed to obtain the requisite measure of finality so that the State may pursue appeals of pretrial suppression orders. The Delaware Supreme Court has outlined the three-step procedure required for the State to perfect an appeal. First, the trial court enters an order adverse to the State suppressing or excluding substantial and material evidence. Second, the Attorney General certifies that the evidence is essential to the prosecution of the case. Third, the court "shall" enter an order dismissing the complaint. Before a court can rule on the merits of a section 9902 appeal, it must first determine if the procedural requirements have been met. If not, the reviewing court lacks jurisdiction to hear the appeal. [Footnotes and citations omitted.]

Although the conversation at the end of the May 3, 2011 hearing was a bit confusing, the State specified that the evidence excluded was the AIIR and the MVR and the State represented that it could not proceed to prosecute without this evidence. The fact that the State inadvertently referred, at one point, to subsection (a) of § 9902 is irrelevant. The State ultimately did reference the correct subsections.

I conclude that the State complied with 10 *Del. C.* § 9902(b), and thus, deny defendant's request to dismiss the appeal on procedural grounds.

I turn to the merits of the appeal: whether CCP abused its discretion in suppressing the documents not produced in discovery.

Once a Court determines a sanction for a discovery violation should be imposed, then the

Court weighs all the relevant factors.<sup>11</sup> It has broad discretion in determining the sanction.<sup>12</sup> As I explained in *Rothermel*, the Court tries "to provide justice under the facts and circumstances of each individual case. If the Court does so, the interest of the citizens of Delaware will be furthered regardless of the outcome of the case" and the appellate court examines "the issue from the shoes of the judge making the decision."<sup>13</sup>

CCP, in managing its docket, has long held that all discovery must be filed anew in a case which has been transferred from JP Court. The State was on notice of this policy; thus, it had no valid reason for not responding to the discovery anew in CCP. Even if the State had forgotten that was the long-standing policy, it certainly had remembered the policy when it invoked the policy against defense counsel. The policy is a reasonable one in that it precludes unnecessary discovery disputes and thereby prevents a waste of judicial resources and time. No rule required defense counsel to file a motion to compel in CCP. Because the policy was clear and because the State was on notice of it, the State has no basis for complaining when defense counsel sought sanctions and CCP imposed them on the day of trial. This case previously had been continued over the objection of the defendant. To have allowed another continuance when the State failed to follow an established discovery rule would have been unfair to the defendant and would not have constituted a sanction on the State.

Thus, I conclude that CCP did not abuse its discretion in suppressing the evidence which

<sup>&</sup>lt;sup>11</sup>Oliver v. State, 2013 WL 427236, \* 2 (Del. Feb. 4, 2013); Snowden v. State, 677 A.2d 33, 39 (Del. 1996); State v. Rothermel, 1995 WL 465276, \*2 (Del. Super. July 24, 1995).

<sup>&</sup>lt;sup>12</sup>Oliver v. State, supra; State v. Rothermel, supra.

<sup>&</sup>lt;sup>13</sup>State v. Rothermel, supra.

should have been produced during discovery. The court below's judgment in this matter is affirmed.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

cc: Prothonotary's Office Court of Common Pleas, Clerk's Office