UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2018 Robert O. Dawson Conference on Criminal Appeals

May 2, 2018 – May 4, 2018
Austin, TX

Morton Case Law Update

Patricia Cummings

Author Contact Information:
Patricia Cummings
The Law Offices of Patricia Cummings
405 Round Rock Avenue
Round Rock, TX 78664
cummingslaw@aol.com
(512) 671-9788

Table of Contents

Table of Authorities

CASES

STATUTES

Morton Case Law Update

In 2013, the Texas Legislature enacted the Michael Morton Act ("the Act") (Senate Bill 1611). The Act revised article 39.14 of the Code of Criminal Procedure and provided, "as soon as practicable after receiving a timely request from the defendant the State shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state. The state may provide to the defendant electronic duplicates of any documents or other information described by this article. The rights granted to the defendant under this article do not extend to written communications between the state and an agent, representative, or employee of the state. This article does not authorize the removal of the documents, items, or information from the possession of the state, and any inspection shall be in the presence of a representative of the state." Tex. Code Crim. Proc. Ann. art. 39.14.

1. Applicable to Offenses Committed After January 1, 2014

Appellate courts uniformly have held that the Act applies to all offenses committed after January 1, 2014. In *Garza v. State*, 453 S.W.3d 548, 554 (Tex. App.—San Antonio 2014, pet. ref'd), the San Antonio Court of Appeals held that the Act did not apply to an offense that took place on September 6, 2009, finding that "the historical notes specifically state the changes to article 39.14 apply 'to the prosecution of an offense committed on or after the effective date [January 1, 2014] of this Act.'" *Id.* (citing Tex. Code Crim. Proc. Ann. art. 39.14(h) historical note [Act of May 14, 2013, 83rd Leg., R.S., ch. 49, § 3, 2013 Tex. Sess. Law Serv. 106, 108]). Similarly, the San Antonio Court of Appeals, in an unpublished opinion, held that the Act did not apply to an offense occurring on July 7, 2011, even though the trial began February 18, 2014. *Gonzales v. State*, 04-14-00222-CR, 2015 WL 4273261 (Tex. App.—San Antonio 2015, no pet.) ("The Michael Morton Act applies to litigation of offenses that occurred *on or after* January 1, 2014.").

2. How to Obtain Discovery Under the Act

A. Article 39.14(a) Discovery is Request Driven

Generally, the discovery provisions in the Act are triggered by a request from the defendant. The Act's disclosure requirements are triggered only after receiving a timely request from the defendant. By its express language, the Act requires a defendant to invoke his right to discovery by request to avail himself of the Act's benefits. Absent a discovery request, the State's affirmative duty to disclose evidence extends only to exculpatory, impeaching and mitigating evidence. *Glover v. State,* 496 S.W.3d 812, 815 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (internal citations omitted). Failure to request discovery pursuant to the statute will prevent a defendant from later successfully complaining about the admission of "non-disclosed" evidence at trial. *Davy v. State*, 525 S.W.3d 745, 750 (Tex. App. - Amarillo 2017, pet. ref'd). *Garcia v. State*, 13-15-00527-CR, 2017 WL 3530926 (Tex. App.—Corpus Christi 2017, no pet.).

B. Expert Witnesses (Before and after 2015 Legislative Amendment to 39.14(b))

In *Byrd v. State*, the defendant sought to exclude an expert's testimony because he was disclosed as an expert witness nineteen days before trial, rather than the twenty days contemplated by the Act. *Byrd v. State*, 02-15-00288-CR, 2017 WL 817147 (Tex. App.—Fort Worth 2017, no pet.). The Court of Appeals for Fort Worth, however noted that the defendant filed a motion to disclose expert witnesses but never obtained a ruling on that motion. "[U]nder its plain language, the disclosure provision of article 39.14(b) is triggered only by a defendant's motion requesting disclosure of the State's testifying experts *and a trial court order*." *Id.* (citing *In re Tibbe*, No. 03–13–00741–CV, 2013 WL 6921525 (Tex. App.—Austin 2013, orig. proceeding)(mem. op.) (emphasis added)." The Court therefore found that "[b]ecause the trial court never ruled on [defendant]'s motion, he was not entitled to the twenty-day notice contemplated by article 39.14." *Id.* Moreover, the Court repeatedly pointed out that the defendant refused to seek a continuance and found that he waived his complaint regarding the testimony.

Both *Byrd* and *Blanco v. State*, 08-15-00082-CR, 2017 WL 604050 (Tex. App.—El Paso 2017, no pet.), rely upon article 39.14(b) in its original form. Prior to September 1, 2015, the State's duty was "triggered only by a defendant's motion requesting disclosure of the State's testifying experts *and a trial court order*." *In re Tibbe*, No. 03–13–00741–CV, 2013 WL 6921525 (Tex. App.—Austin 2013, orig. proceeding)(mem. op.) (emphasis added). However, the Legislature amended that section of the Act in 2015 in order to make it consistent with article 39.14(a). Now a simple request is sufficient to invoke discovery obligations regarding expert witnesses. Article 39.14(b) no longer requires a trial court order; the defendant's request alone trigger's the State's duty to disclose. *See* Act of May 21, 1999, 76th Leg., R.S., ch. 578, § 1, 1999 Tex. Gen. Laws 3118, 3118 (amended 2015) (current version at Tex. Code Crim. Proc. Ann. art. 39.14(b)). As a result, *Byrd* and *Blanco* are no longer good law because, as a general rule, neither the defense or the State need a court order to force the other party to disclose its expert witness list pursuant to the Act. The exception to this general rule is that a court order is required in the event that a party seeks disclosure earlier than the 20-day timeframe set out in the statute.

If a timely request for notice of expert witnesses is made and if notice is not timely provided, exclusion of the expert witness testimony is not mandatory. *Sekula v. State*, 04-16-00614-CR, 2018 WL 1402066 (Tex. App.—San Antonio 2018). In S*ekula,* the defense argued that by filing his article 39.14(b) request, the State was required to disclose, no less than twenty days before the start of trial, the name and address of any expert witness the State planned to call. The defense also argued the State's failure to timely disclose the names of any expert witnesses led him to believe the State would not be relying on expert testimony and so any undisclosed expert should not be allowed to testify. The trial court disagreed with the defense and specifically said that merely filing a motion [to exclude] is not enough … "I know you think it is, but it's not." *Id.*

The San Antonio Court of Appeals agreed with the trial court and held:

> "[b]ecause defense counsel's request was sufficient to trigger the State's duty to disclose, we conclude the State failed to timely designate Officer Henning and Debra Stephens in accordance with article 39.14(b). Our analysis, however, does not end here. Because the record does not support the late designation was based on action taken in bad faith on the part of the prosecutor, and the record supports that Sekula could have reasonably anticipated that Officer Henning would testify regarding the nystagmus test and Stephens would testify regarding the breath-alcohol test, we

Title search: Morton Case Law Update

First appeared as part of the conference materials for the
2018 Robert O. Dawson Conference on Criminal Appeals session
"Morton Case Law Update"