

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY SESSION, 1996

**FILED**

October 31, 1996

C.C.A. NO. 02C01-9503-CC-0095

Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )

Appellee, )

VS. )

JAMES CECIL SELLERS )

Appellant. )

C.C.A. NO. 02C01-9503-CC-0095

MADISON COUNTY

HON. JOHN FRANKLIN MURCHISON,  
JUDGE

(Agg. Assault, Esp. Agg. Kidnapping,  
Agg. Burglary, Poss. Deadly Weapon)

OPINION CONCURRING IN RESULTS

I concur fully with the results reached by the majority in this case. Indeed, I agree with most of the reasoning of the majority. However, I disagree with that portion of the Court's opinion holding that a verbatim recording of a 911 call made by the victim is not a "statement" within the meaning of Tennessee Rule of Criminal Procedure 26.2(g). Statements made by state witnesses are specifically excluded from pre-trial discovery in a criminal case. I would hold that such a tape recording is a "statement" within the meaning of the rule and that the State was under no obligation to produce this witness' statement until the witness testified. See Tenn. R. Crim. P. 26.2(a). Tenn. R. Crim. P. 16(a)(2). Thus, the failure of the State to make the tape available to the defense prior to trial was not a violation of Tennessee Rule of Criminal Procedure 16.

Although this precise issue has been infrequently addressed in other jurisdictions, case law from those jurisdictions supports the conclusion that tape recordings of 911 calls should be treated as witness statements producible after

the witness testifies. See e.g., Slye v. United States, 602 A.2d 135, 138 (D.C. App. 1992); State v. Cain, 596 A.2d 449, 454 (Conn. App. 1991); State v. Dedrick, 589 A.2d 1241, 1242 (Conn. App. 1991); State v. Williamson, 552 A.2d 815, 818 (Conn. App. 1988); Bartley v. United States, 530 A.2d 692, 697 n.10 (D.C. App. 1987). The majority asserts that State v. Cooper, 736 S.W.2d 125 (Tenn. Crim. App. 1987), supports its position that tape recordings of 911 calls should be treated not as “statements” under Tennessee Rule of Criminal Procedure 26.2, but rather as “tangible objects” discoverable pre-trial pursuant to Tennessee Rule of Criminal Procedure 16(a)(1)(C), if they are “material to the preparation of the defendant’s defense.” In Cooper, this Court treated tape recordings of conversations between the defendant and police informants as “tangible objects” within the meaning of Tennessee Rule of Criminal Procedure 16(a)(1)(C). However, Cooper is distinguishable from the case at bar.

Statements of defendants are discoverable in pre-trial discovery whether characterized as tangible objects or statements. Tenn. R. Crim. P. 16(a)(1)(A); Tenn. R. Crim. P. 16(a)(1)(C). Statements of state witnesses or prospective state witnesses found in the form of documents or tangible objects are excluded from pre-trial discovery. Tenn. R. Crim. P. 16(a)(2) and 26.2(a).

Thus, Cooper is, in my opinion, inapposite to the case of tape recordings containing victim 911 calls; calls which every other jurisdiction to consider the matter has determined to be witness statements producible after the witness testifies at trial.

In all other respects, I concur fully in the judgment of this Court.

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JERRY L. SMITH, JUDGE