House
Legislative
Analysis
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PROSECUTORIAL DISCOVERY

House Bill 4227 as enrolled
Public Act 113 of 1994
Second Analysis (1-12-95)

Sponsor: Rep. Leon Stille
House Committee: Judiciary
Senate Committee: Judiciary

THE APPARENT PROBLEM:

In criminal cases, the prosecution is required to disclose certain information, including police reports and witnesses' names, to the defendant before trial. However, statute makes similar "discovery" available to the prosecution only in a limited number of situations: when the defense plans to present an alibi, when insanity or diminished capacity is to be claimed, or when a defense of duress in a prison escape is to be presented. In other situations, the prosecutor cannot demand advance information about a planned defense, but rather often must wait until such things are revealed in the course of courtroom proceedings. Many believe that this is unfair to the prosecutor, who may be surprised by an unexpected defense or evidence that cannot be countered without advance preparation. To remedy this situation, statutory amendments have been proposed to require defendants to provide certain discovery to the prosecution.

THE CONTENT OF THE BILL:

The bill would amend the Revised Judicature Act to generally require a defendant to disclose the following to the prosecutor upon request:

-- the name and last known address of each witness other than the defendant whom the defense intended to call at trial provided the witness was not listed by the prosecutor;

-- the nature of any defense the defendant intended to establish at trial by expert testimony;

-- any report or statement by an expert concerning a mental or physical examination, or any other test, experiment, or comparison that the defendant intended to offer in evidence, or that was prepared by a person who the defendant intended to call as a witness, if the report or statement related to the testimony to be offered;

--a list of exhibits that the defense intended to offer in evidence or that related to the testimony of a planned defense witness.

The bill's disclosure requirements would have to be complied with at least ten days before trial or at any other time as directed by the court.

If a defendant failed to disclose evidence as required, that evidence could only be offered at trial if the court found good cause to do so and allowed the evidence. A motion to offer such evidence could be made before or during trial.

The bill would take effect October 1, 1994.

MCL 767.94a

BACKGROUND INFORMATION:

Legislative debate on House Bill 4277 occurred while a case involving prosecutorial discovery was working its way through the appellate process. In People v. Lemcool (200 Mich App 77), decided June 7, 1993, the court of appeals held that in the absence of specific authority granted by statute or court rule, a trial court may not permit discovery by the prosecution. The supreme court heard oral arguments on the case on January 11, 1994, about two weeks before the bill was reported from the House Judiciary committee. On June 24, 1994, about two months after the enrolled bill was presented to the governor, the supreme court issued its decision.

In People v. Lemcool (445 Mich 491), the supreme court said that "the question of discovery in a criminal case is committed to the discretion of the trial court," and ruled that the circuit court in the case in question had properly exercised its discretion in ordering the defense to disclose certain

things to the prosecution. In a footnote, the supreme court noted the enactment of Public Act 113 of 1994 (enrolled House Bill 4277), and said "we offer no opinion with regard to this measure."

FISCAL IMPLICATIONS:

The Senate Fiscal Agency said that the bill could result in administrative savings to local prosecuting attorneys. (3-16-94)

ARGUMENTS:

For:

Although criminal trials are adversarial proceedings, the interests of justice are not served when a prosecutor is unfairly surprised by an unexpected defense or unanticipated evidence. Through pretrial discovery, however, defense attorneys are able to familiarize themselves with the prosecutor's case and prepare to defend against it. The bill would balance this advantage for the defense with reasonably limited prosecutorial discovery. While some may claim that prosecutorial resources far outstrip the defense's, the fact is that most police departments and prosecutor's offices are heavily burdened and operating under severe fiscal constraints. In reality, the bill's discovery provisions would help to put prosecutors on an equal footing with the defense in preparing for trial. Prosecutorial discovery, combined with the defense discovery which already exists, would improve the administration of justice by minimizing the role of courtroom gamesmanship and facilitating the search for the truth.

Against:

The bill would not balance the advantages between the defense and the prosecution, but rather would tip the balance in favor of the prosecution, which already has the superior power and resources of the government behind it. Most defendants are indigent and are represented by public defenders that may be overextended or inexperienced. The investigatory capabilities of the defense simply do not compare with those of the prosecution. Moreover, indigent defendants often view court-appointed attorneys with suspicion, perceiving them to be part of the prosecutorial system; to require defense attorneys to turn over information to the prosecution would be to worsen the difficulties that many court-appointed attorneys have in gaining the trust of their clients. And, there is a sense in which the bill would put defense counsel to work for the prosecution, by giving the prosecution advance notice of defense witnesses and exhibits. Defenses often develop along unanticipated lines, but the bill would raise barriers to presenting witnesses or exhibits that were not on the list given to the prosecution, and leave the decision on admission to the uncertain exercise of broad judicial discretion. The bill would not favor the discovery of the truth, but rather would favor the prosecution.