

FILED

01/08/2018

Clerk of the
Appellate Courts

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE AMENDMENTS TO THE TENNESSEE
RULES OF CRIMINAL PROCEDURE

No. ADM2017-01892

ORDER

The Court adopts the attached amendments effective July 1, 2018, subject to approval by resolutions of the General Assembly. The rules amended are as follows:

RULE 5 INITIAL APPEARANCE BEFORE
 MAGISTRATE;
RULE 16 DISCOVERY AND INSPECTION;
RULE 41 SEARCH AND SEIZURE; and
RULE 49.2 ELECTRONIC FILING, SIGNING, OR
 VERIFICATION

The text of each amendment is set out in the attached Appendix.

IT IS SO ORDERED.

FOR THE COURT:



JEFFREY S. BIVINS
CHIEF JUSTICE

APPENDIX

***AMENDMENTS TO THE
RULES OF CRIMINAL PROCEDURE***

**[Deleted text is indicated by overstriking,
and new text is indicated by underlining.]**

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 5

INITIAL APPEARANCE BEFORE MAGISTRATE.

[Modify the text of the rule to include the underlined text and eliminate the strike-through text; renumber subsections (e) and (f); and add new Advisory Commission Comment (2018 Amendment).]

* * * *

(c) *Other Misdemeanors.*

* * * *

(1) *Upon Plea of Guilty.*

* * * *

(B) *Set Preliminary Hearing Unless Not Required.* The magistrate shall schedule a preliminary hearing to be held within ~~ten~~ fourteen days if the defendant remains in custody and within thirty days if released from custody, (and the fourteen days or thirty days shall be computed from the date of the defendant's appearance before the magistrate), unless:

- (i) the defendant expressly waives the right to a jury trial and to a prosecution based only on an indictment or presentment; or
- (ii) a preliminary hearing is not required under Rule 5(e) below.

(2) *Upon Plea of Not Guilty.*

(A) *Set Preliminary Hearing.* Unless the defendant expressly waives the right to a preliminary hearing, when the defendant pleads not guilty the magistrate shall schedule a preliminary hearing to be held within ~~ten~~ fourteen days if the

defendant remains in custody and within thirty days if released, (and the fourteen days or thirty days shall be computed from the date of the defendant's appearance before the magistrate).

* * * *

(d) *Felonies.*

* * * *

(3) *Schedule Preliminary Hearing.* When the defendant does not waive preliminary hearing and when a preliminary hearing is not rendered unnecessary under Rule 5(e), the magistrate shall schedule a preliminary hearing within ~~ten~~ fourteen days if the defendant remains in custody and within thirty days if released, (and the fourteen days or thirty days shall be computed from the date of the defendant's appearance before the magistrate).

(e) *Extending the Time.* With the defendant's consent and upon a showing of good cause, a magistrate may extend the time limits in Rule 5(c) and (d) one or more times. If the defendant does not consent, the magistrate may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.

(~~e~~) (f) *Indictment Before Preliminary Hearing; Exceptions.*

(1) *Entitlement to Preliminary Hearing.* Any defendant arrested or served with a criminal summons prior to indictment or presentment for a misdemeanor or felony, except small offenses, is entitled to a preliminary hearing. A preliminary hearing may be waived as set forth by subsection (2) or as otherwise provided in this rule.

(2) *Waiver of Preliminary Hearing by Failure to Appear.* A defendant waives the right to a preliminary hearing by failing to appear for a scheduled preliminary hearing, unless the defendant presents before the general sessions court, and the court finds within fourteen days after the scheduled preliminary hearing, clear and convincing evidence that the failure to appear was beyond the defendant's control. Unless the general sessions court finds by clear and convincing evidence that the defendant's absence was beyond the defendant's control and resets the preliminary hearing, the grand jury may return an indictment or presentment on the charges.

(3) *Expeditious Hearings.* While a defendant should have a reasonable opportunity to assert any legal right, preliminary hearings shall be conducted as expeditiously as possible considering the inconvenience to victims and witnesses, the parties, and the court by unnecessary delays.

(4) *Remedy for Failure to Afford Preliminary Hearing.* If an indictment or presentment is returned against a defendant who has not waived his or her right to a preliminary hearing, the circuit or criminal court shall dismiss the indictment or presentment on motion of the defendant filed not more than thirty days from the arraignment on the indictment or presentment. The dismissal shall be without prejudice to a subsequent indictment or presentment and the case shall be remanded to the general sessions court for a preliminary hearing.

~~(f)~~ (g) *Defendant's Presence.* The defendant's presence at the initial appearance is governed by Rule 43.

Advisory Commission Comment [2018 Amendment]

The amendment effective July 1, 2018 extends the time within which a preliminary hearing must occur to fourteen days from ten days when a defendant remains in custody and confirms that the time period within which the preliminary hearing must be held shall be computed from the date of the initial appearance before the magistrate. Experience has shown frequent difficulty in scheduling preliminary hearings within a 10-day period. First, unlike in federal courts, where hearsay is admissible in preliminary hearings and federal law enforcement often can provide all testimony required, Tennessee's rules require witnesses to testify in person, and the attendance of witnesses often must be obtained by subpoena. Second, in some rural counties, general sessions courts convene only 2-3 times a month; therefore, longer than ten days may routinely pass between court sessions. The 2018 amendment tracks the current version of the federal analogue to this rule with respect to the in-custody time period, and, after review of other states' practices and data from Tennessee courts, the Advisory Commission determined that fourteen days represents a correct balance for the time period within which the preliminary hearing must occur after an initial appearance and when a defendant remains in custody.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 16

DISCOVERY AND INSPECTION.

[Modify the text of the rule to insert the new underlined subsection (d)(3); and, add new Advisory Commission Comment (2018 Amendment).]

* * * *

(d) *Regulating Discovery.*

* * * *

(3) Procedure in Child Pornography Cases. In any criminal proceeding relating to the sexual exploitation of minors under title 39, chapter 17, part 10 that involves documents or objects discoverable pursuant to Rule 16(a)(1)(F), the court shall, on motion of the state:

(A) Deny any request by the defendant to copy or photograph any documents or objects depicting the sexual exploitation of minors under title 39, chapter 17, part 10, so long as the state shows that the documents or objects will be made reasonably available to the defendant throughout the proceeding.

(B) For the purposes of subdivision (d)(3)(A), documents or objects shall be deemed to be reasonably available to the defendant if the state provides ample opportunity for inspection, viewing, and examination at a state facility of the documents or objects by the defendant, the defendant's attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

The Court may, in its discretion, permit other individuals to have access to the documents or objects if necessary to protect the rights of the defendant.

(C) If the state fails to demonstrate that the documents or objects will be made reasonably available to the defendant throughout the proceeding, or fails to make the documents or objects reasonably available to the defendant at any time during the proceeding, the trial court may order the state to permit the defendant to copy or photograph any documents or objects subject to terms and conditions set by the court in an appropriate protective order.

* * * *

Advisory Commission Comment [2018 Amendment]

Title 39, chapter 17, part 10 of the Tennessee Code Annotated prohibits conduct that involves child pornography. *See Sentencing Commission Comment to Tenn. Code Ann. § 39-17-1001.* Consequently, evidence in those cases often will be material that constitutes child pornography. The amendment conforms Tennessee discovery practice to federal law concerning the reproduction of material constituting child pornography under 18 U.S.C. § 3509(m). Tennessee courts face this situation on a routine basis, and the absence of a clear procedural rule can lead to delay in a defendant's defense, time-consuming proceedings, and the expenditure of judicial resources. *See, e.g., State v. Re'Licka Dajuan Allen*, No. E2007-01018-CCA-R3-CD (Tenn. Crim. App., Feb. 12, 2009). The amendment provides the procedural means for trial courts to control the reproduction and dissemination of material constituting child pornography, while protecting a defendant's right to access the information for the purpose of a defense. A form for a protective order under section (d)(3)(C) is provided below as part of this comment.

State of Tennessee Circuit / Criminal Court <hr/> County	PROTECTIVE ORDER PURSUANT TO TENN. R. CRIM. P. 16(d)(3)	Case Number
STATE OF TENNESSEE vs. _____ <div style="text-align: right;">[Defendant's Name]</div>		

This matter is before the Court upon the motion of the State of Tennessee pursuant to Tenn. R. Crim. P. 16(d)(3) for a protective order governing the production in discovery of documents and objects relating to the sexual exploitation of minors under title 39, chapter 17, part 10. It is, therefore, ORDERED, that the following provisions of this Order shall control the disclosure, dissemination, and use of information in this action:

1. The state of Tennessee has failed to demonstrate that the documents or objects subject to discovery pursuant to Tenn. R. Crim. P. 16(a)(1)(F) will be made reasonably available to the defendant throughout the proceeding or has failed to make the property or material reasonably available to the defendant at any time during the proceeding. Therefore, the trial court orders the state to permit the defendant to copy or photograph any documents or objects that constitute “material” (hereinafter “Prima Facie Contraband”) as defined in Tenn. Code Ann. § 39-17-1002 and prohibited by Tenn. Code Ann. §§ 39-17-1003, -1004, and -1005, subject to the following conditions.
2. Defendant and Defendant’s counsel acknowledged that the material that is subject to this order is prima facie contraband the possession of which is otherwise prohibited. Defendant and Defendant’s counsel shall be authorized to possess the Prima Facie Contraband during the pendency of this proceeding as long as Defendant and Defendant’s counsel comply with the terms of this order.
3. Defendant and Defendant’s counsel may possess and use the Prima Facie Contraband only for purposes of this litigation and not for any personal, business, commercial, scientific, competitive, or any other purpose whatsoever.

4. Except as permitted by Paragraph 5, Defendant and Defendant's counsel shall not disclose the Prima Facie Contraband to any person. Any unauthorized disclosure shall be treated as contempt of this order and may result in criminal prosecution.

5. Defendant and Defendant's counsel may disclose the Prima Facie Contraband to the following Authorized Persons: (a) counsel of record for the parties; (b) the permanent or temporary attorneys, paralegals, clerical, and secretarial staff employed by or in practice with Defendants' counsel; (c) non-party experts or consultants (together with their associates, consultants and clerical and secretarial staff) retained to assist in the defense, settlement, or other disposition of this action; (d) court reporter(s) employed in this action; (e) court personnel; (f) a witness at any deposition or other proceeding in this action and counsel for that witness; and (g) third-party contractors engaged in one or more aspects of organizing, copying, imaging, filing, coding, converting, storing or retrieving data, documents, or other information, or designing programs for handling data connected with this litigation, including the performance of such duties in relation to a computerized litigation support system.

6. Before making any disclosure authorized by Paragraph 5, Defendant and Defendant's counsel shall deliver a copy of this Order to the Authorized Persons, shall explain its terms to the Authorized Persons, shall instruct the Authorized Persons to comply with this Order, and shall require the Authorized Persons to acknowledge receipt of a copy of this Order in writing.

7. Within 30 days of the final disposition of this action in the highest court to which an appeal is taken, or if no appeal is taken within 30 of entry of the judgment, Defendant, Defendant's counsel, and each Authorized Person shall return the Prima Facie Contraband to the state or certify under oath that the Prima Facie Contraband has been destroyed.

8. Defendant, Defendant's counsel, and each Authorized Person who receives Prima Facie Contraband shall maintain the Prima Facie Contraband in a safe and secure area consistent with the provisions of this Order to prevent unauthorized disclosure or dissemination.

9. This Order shall remain in effect after the final determination of this action, unless otherwise ordered by the Court.

10. Each person to whom any Prima Facie Contraband is disclosed agrees to be subject to the jurisdiction of this Court for the purpose of proceedings relating to compliance with or violation of this Order.

IT IS SO ORDERED.

JUDGE

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 41

SEARCH AND SEIZURE.

[Modify the text of the rule to include the underlined text and eliminate the strike-through text; add the new Advisory Commission Comment (2018 Amendment) set out below. The text of the existing Advisory Commission Comment is unchanged:]

* * * *

(g) *Motion for Return or Suppression of Property.* A person aggrieved by an unlawful or invalid search or seizure may move the court pursuant to Rule 12(b) to suppress any evidence obtained in the unlawful search or seizure. If property was unlawfully seized, the aggrieved person may move for the return of the property. ~~The motion shall be granted except as to the return of contraband if the evidence in support of the motion shows that:~~ The motion to suppress and/or the motion to return property unlawfully seized, may be granted, under applicable substantive law and except as to the return of contraband, if the evidence in support of the motion shows that:

* * * *

Advisory Commission Comment [2018 Amendment]

The 2018 amendment removes the word “shall” and inserts “may” in the section of the rule regarding the exclusion of evidence, and makes Rule 41 more consistent with recent statutory changes, *see* 2011 Tenn. Pub. Acts, ch. 252 *codified at* Tenn. Code Ann. § 40-6-108, and recent case law, *see State v. Reynolds*, 504 S.W.3d 283, 313 (Tenn. 2016) (recognizing a good-faith exception to the judicially created exclusionary rule, which permits the introduction of evidence obtained “when the law enforcement officers’ action is in objectively reasonable good faith

reliance on *binding appellate precedent that specifically authorizes a particular police practice*” [italics added]); *see also State v. Tuttle*, 515 S.W.3d 282, 308 (Tenn. 2017) (negligent mistakes in wording of search warrant insufficient to invalidate search warrant). In *Reynolds*, the Tennessee Supreme Court also clarified that Rule 41, a procedural rule, does not provide greater protection than applicable substantive law on the exclusionary rule and its exceptions. The amendment makes clear that this procedural rule does not take precedence over applicable substantive law related to the exclusionary rule and its exceptions.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 49.2

ELECTRONIC FILING, SIGNING, OR VERIFICATION.

[Add new rule 49.2; and add new Advisory Commission Comment (2018 Amendment):]

Any court governed by these rules may, by local rule, allow papers to be filed, signed, or verified by electronic means compliant with technological standards promulgated by the Supreme Court. Pleadings and other papers filed electronically under such local rules shall be considered the same as written papers.

Advisory Commission Comment [2018 Amendment].

Courts in certain counties have expressed a desire to implement an electronic filing system. This rule permits trial courts, by local rule, to adopt such systems. This rule provides the same authority for trial courts exercising criminal jurisdiction as currently exists under Rule 5B, Tennessee Rules of Civil Procedure, and Rule 106(h), Tennessee Rules of Juvenile Procedure.

Electronic filing systems have also been implemented in all of the federal district courts (with the sole exception of the United States District Court for the Northern Mariana Islands) and in a number of states. Electronic filing offers numerous advantages over traditional “paper filing,” including vastly increased public access to court documents and reduction of the time and expense incurred by litigants and court personnel in filing, storing, and retrieving documents.

The Commission envisions that, in the not too distant future, all of Tennessee’s courts will adopt electronic case filing systems. In order to achieve statewide uniformity, the systems utilized throughout the state must comply with technological standards promulgated by the

Supreme Court. Without such uniformity, the desired ease of access to data and cost efficiencies could not be achieved.