New Jersey Law Journal

Select '**Print**' in your browser menu to print this document.

Copyright 2011. ALM Media Properties, LLC. All rights reserved. New Jersey Law Journal
Page printed from: http://www.njlj.com

Back to Article

Wielding Evidentiary Bludgeon, Court Enjoins Police Destruction of Notes

Michael Booth
04-27-2011
The state Supreme Court on Wednesday put law enforcement on notice to stop destroying contemporaneous notes taken during an investigation, lest criminal juries be told they may draw negative conclusions from such an action.

Law enforcement officers "may not destroy contemporaneous notes of interviews and observations at the scene of a crime after producing their final reports," a divided Court held in *State v. W.B.*, A-80-09.

Because an officer's notes may be of aid to the defense, "the time has come to join other states that require the imposition of an 'appropriate sanction' whenever an officer's written notes are not preserved," Appellate Division Judge Edwin Stern wrote for the 4-3 majority.

The Court deferred the requirement for 30 days to give county prosecutors time to pass along the new rule and the Criminal Practice Committee to make any necessary rules modifications. After that, if notes are lost or destroyed before trial, a defendant may be entitled to an adverse-inference charge, Stern said.

But the Court nevertheless upheld the conviction of a Passaic County man for sexually abusing his14-year-old stepdaughter, saying that despite the destruction of a detective's notes, because the defense did not ask for the charge.

Passaic County Prosecutor's Office Detective Donna Gade, a sexual-assault investigator, testified that she destroyed her notes after W.B. made a videotaped confession and after she had written her final report.

Gade said she did so because her supervisors had taught her to destroy contemporaneous notes. The practice is common, despite a ruling in *State v. Branch* , 182 N.J. 338 (2005), that notes should not be destroyed.

Current discovery rules, specifically Rules 3:13(c)(6), (7) and (8), do not require that all witness statements be recorded. But Stern said the rules do require that all written statements, signed and unsigned, are discoverable, as are final reports prepared for county prosecutors' offices.

The Attorney General's office had contended that contemporaneous notes are not always accurate. But Stern said it is up to a jury to decide their credibility.

The Court also used its ruling to issue a restatement of guidelines regarding expert testimony on Child Sexual Abuse Accommodation Syndrome, which outlines frequently observed victim behaviors —such as secrecy, delayed disclosure and retraction — as a map to understanding the impact of the crime.

CSAAS testimony has been allowed in New Jersey since *State v. J.Q* ., 130 N.J. 534 (1993), but only to demonstrate how victims may delay reporting abuse and recant their allegations. The testimony may not be used to demonstrate that a sexual assault occurred.

In the case against W.B., prosecution psychiatrist and CSAAS expert Richard Coco testified about the syndrome in general and noted that he had not interviewed the victim. When questioned by both sides, he said only 5 percent or 10 percent of children lie about being sexually abused and some children underreport what happens to them.

But Stern said, "Statistical information quantifying the percentage of abuse victims who lie deprives the jury of its right and duty to decide the question of credibility of the victim based on evidence relating to the particular victim and the particular facts of the case."

He added, "Any CSAAS expert testimony beyond its permissible, limited scope cannot be tolerated."

But the defense opened the door to Coco's testimony and there was other ample evidence of W.B.'s guilt, said Stern, who was joined by Chief Justice Stuart Rabner and Justices Jaynee LaVecchia and Roberto Rivera-Soto.

Justices Barry Albin, Virginia Long and Helen Hoens dissented. Albin wrote that Coco's testimony, the violation of the fresh complaint rule and a confession playback required a new trial. He said the errors "were profound and undermined the fairness of the proceedings."

Though Rivera-Soto has vowed, on constitutional grounds, to abstain from any decision in which Stern's vote makes a difference, that was not the case here, since even without Stern's vote, a 3-3 deadlock would have resulted in upholding the Appellate Division's ruling.

Peter Aseltine, a spokesman for Attorney General Paula Dow, says the office will work with county prosecutors to implement the new notes policy.

Chief Assistant Passaic County Prosecutor Steven Braun, who represented the state, says he does not believe the notes requirement will present major problems. "It's been this way in the federal system for years. These people are professionals. They'll understand there's a new way of doing it," he says.

As for the CSAAS testimony, Braun says the Court merely restated the limits to which that testimony can be used.

William Buckman, president of the Association of Criminal Defense Lawyers of New Jersey, says the ruling on note retention "is a long overdue adjustment to what goes on at trial."

"The defense should get everything relative to the case and you should not have police officers picking and choosing what to turn over in discovery," adds Buckman, a Moorestown solo.

W.B.'s lawyer, Steven Kaflowitz of South Orange's Timothy Smith and Associates, says he agrees with Albin's dissent "in which he stated that this was a deeply flawed opinion and that the majority had to strain to rationalize 'a series of profound errors that undermine any confidence in the correctness of the jury's verdict.'"

But Kaflowitz says the ruling that an adverse inference charge may be given "finally puts some teeth into prior rulings that said such notes must be kept."