IN THE

Indiana Supreme Court

Supreme Court Case No. 22S-CR-285

Frank E. Minges, III,
Appellant (Defendant below),

–v–

State of Indiana,
Appellee (Plaintiff below).

Argued: May 18, 2022 | Decided: August 23, 2022

Appeal from the Dearborn Superior Court
No. 15D01-2010-CM-754
The Honorable Jonathan N. Cleary, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 21A-CR-216

Opinion by Justice David
Chief Justice Rush and Justices Massa, Slaughter, and Goff concur.

David, Justice.

Over thirty years ago, this Court decided *State ex rel. Keaton v. Cir. Ct. of Rush Cnty.*, 475 N.E.2d 1146 (Ind. 1985). Citing an undue burden on prosecuting attorneys and the potential for abuse by defense counsel, the Court concluded criminal trial courts do not have inherent authority to require the State to produce complete copies of police reports over the prosecuting attorney's timely work product objection. *Id.* at 1148. Decided in a time when lawyers redacted documents using Marks-a-Lot markers, the *Keaton* court was unlikely to fathom electronic filing or software programs readily accessible to legal professionals today.

But as technology developed after our *Keaton* decision, the rules governing criminal procedure, and custom, likewise changed over time. And today, the majority of prosecutors across the State of Indiana regularly produce police reports to defendants and their counsel, while prosecutor's offices in the minority of counties automatically assert the work product privilege over these documents as a matter of policy.

In the midst of this change, Minges challenges the trial court's denial of his motion to compel the State to produce a copy of the police report related to his misdemeanor charges. In doing so, Minges asks us to reconsider our decision in *Keaton*. Today, we accept his request, overrule *Keaton*, and remand to the trial court to determine whether the police report is privileged work product in a manner consistent with this opinion.

Facts and Procedural History

On October 13, 2020, a Dearborn County police officer observed a vehicle driven by Minges exceeding the speed limit and failing to stay in its traffic lane. The officer initiated a traffic stop, and a field sobriety test revealed Minges had a blood alcohol content of 0.099%.

The next day, the State charged Minges separately for operating his vehicle while intoxicated, a Class C misdemeanor under Indiana Code section 9-30-5-2(a), in a manner that endangered a person, a Class A

misdemeanor under Indiana Code section 9-30-5-2(b). That same day, defense counsel appeared on Minges' behalf. Simultaneously, Minges filed a motion for discovery, which requested twenty-three items, including, and noteworthy for our purposes, "[a]ny and all reports known to the State made in writing by any policeman or investigating officer which are relevant to the charge against Defendant," and "any such reports which the Prosecuting Attorney may acquire or learn of in the future at any time prior to trial." Appellant's App. Vol. II at 19.

On October 26, the State responded to Minges' discovery requests by producing copies of the probable cause affidavit and documents related to the search warrant. However, the State refused to produce a copy of the Dearborn County Sheriff's Department Case Report Narrative ("Police Report"), specifying the Police Report was "available to review upon appointment" with the Dearborn County Prosecutor's Office. *Id.* at 37, 58.

A contentious discovery battle ensued between the parties, and Minges moved to compel the State to produce the Police Report. In his motion, he recounted that his attorney requested a copy of the Police Report via e-mail, but the prosecutor denied his request and informed defense counsel that, pursuant to the policy of the prosecutor's office, he could review the report by making an appointment or signing a non-negotiable protective order. Because defense counsel questioned whether his ethical obligations to his client prevented him from signing the protective order,[1] he reviewed the Police Report at the prosecutor's office.

Over a month later, the parties appeared before the trial court regarding Minges' motion to compel. At that time, defense counsel clarified the State had "no objection" to providing the Police Report to Minges, but rather "[i]t's just the manner in which it gets provided to [Minges and his counsel]." Tr. at 5. Further, Minges argued in his motion

[1] While the terms of the protective order are unclear in the record, defense counsel testified the order prohibited counsel from making copies of the Police Report or providing a copy to anyone, including Minges, and required counsel to return the Police Report to the prosecutor's office after disposition of the criminal matter.

that "[t]he State's attempt to control when and where Defense Counsel can access evidence negatively impacts a Defendant's rights to the effective assistance of counsel and due process of law," and its policy was "impractical and problematic on its face, but especially in the midst of [the COVID-19] pandemic." Appellant's App. Vol. II at 59.

The State, on the other hand, conceded there was no harm in providing the Police Report to Minges and his counsel, but refused to do so because police reports are the work product of the prosecuting attorney. And, consistent with this Court's earlier decision in *Keaton*, 475 N.E.2d 1146, a trial court "in a criminal proceeding does not have any inherent power to order production of verbatim copies of police reports over a work product objection," unless the reports contain statements from witnesses. Tr. at 6–7.

The trial court acknowledged "this is an issue that's been litigated a lot in [the] courtroom in the past [twelve] years," but in the absence of case law overturning *Keaton*, concluded it had "no discretion" to compel the State to produce the Police Report. *Id.* at 7–8. Accordingly, the trial court denied Minges' motion.

Minges moved to certify the trial court's order denying his motion to compel for interlocutory appeal. The trial court granted his motion, and the Court of Appeals accepted jurisdiction over the matter. The Court of Appeals affirmed the trial court's order, writing that "[d]espite [the court's] concerns about the continued viability of *Keaton*," but understanding it was bound by the Supreme Court's precedent, the trial court did not abuse its discretion by denying Minges' request. Slip op. at 16–17. Nevertheless, the Court of Appeals "agree[d] with Minges that reconsideration of [*Keaton*] is warranted." *Id.* at 17.

We accept these requests for us to reconsider our precedent. Ind. Appellate Rule 57(H)(5). Accordingly, we grant Minges' petition for transfer and vacate the opinion of the Court of Appeals. App. R. 58(A).

Standard of Review

Because trial courts have broad discretion on issues of discovery, we review discovery rulings—such as rulings on motions to compel—for an abuse of that discretion. *State v. Jones*, 169 N.E.3d 397, 402 (Ind. 2021). But we review questions of law, including whether this Court's precedent conflicts with Indiana's Trial Rules, de novo. *Tippecanoe Cnty. v. Ind. Mfrs. Ass'n*, 784 N.E.2d 463, 465 (Ind. 2003).

Discussion and Decision

The primary issue on appeal is whether *State ex rel. Keaton v. Cir. Ct. of Rush Cnty.*, 475 N.E.2d 1146 (Ind. 1985), deprives trial courts of their broad discretion in matters of discovery to order the State to produce complete copies of police reports despite a timely objection that the report is privileged work product of the prosecuting attorney.

Before we proceed to our analysis, we recall the facts and circumstances of *Keaton*. In 1983, the State charged David Kidd with murder, and he filed several discovery motions requesting copies of all relevant police reports. *Id.* The State refused to provide verbatim copies of the reports, arguing they were the work product of its prosecuting attorney. *Id.* at 1147. Instead, the prosecutor allowed defense counsel to examine the reports for exculpatory information. *Id.* After a hearing on the matter, the trial court ordered the prosecutor to produce "verbatim copies" of the police reports. *Id.* Disagreeing with the trial court, and citing an undue burden on prosecuting attorneys and the potential for abuse by defense counsel, this Court concluded "Where, as in the instant case, a timely work product objection has been made, a trial court's authority to control discovery does not extend to compelling production of verbatim copies of police reports." *Id.* at 1148. Therefore, the police reports were not discoverable. *Id.*

Minges requests that we overrule *Keaton* because its holding is "incongruous with the rules of this Court and the principles of fairness and justice." Pet. to Trans. at 14. We accept his request. For purposes of continuity and predictability in our jurisprudence, "we should be

'reluctant to disturb long-standing precedent[.]'" *Layman v. State*, 42 N.E.3d 972, 977 (Ind. 2015) (quoting *Marsillett v. State*, 495 N.E.2d 699, 704 (Ind. 1986)). But even though "stare decisis often compels a court to follow its prior decisions, the doctrine is not a straitjacket and we may overrule or modify precedent if there are 'urgent reasons' or… a 'clear manifestation of error.'" *Ladra v. State*, 177 N.E.3d 412, 421 (Ind. 2021).

Here, we find several reasons to support our decision. First, we analyze the extent to which *Keaton* conflicts with Indiana's Trial Rules. In doing so, we conclude Trial Rule 26(B)(3) supersedes the Court's decision in *Keaton*. Next, we examine whether the reasons justifying the Court's decision are proper considerations while analyzing whether a police report is protected by the work product privilege set forth in Trial Rule 26(B)(3). Concluding they are not and finding Trial Rule 26(B)(3) supersedes *Keaton*, we overrule *Keaton* and remand to the trial court to consider the State's claim that the Police Report constitutes the prosecutor's work product in a manner consistent with this opinion.

A. The Court's decision in *Keaton* conflicts with Indiana's liberal discovery rules, including Trial Rule 26(B)(3).

Indiana's discovery rules are designed to permit "liberal discovery" in order to provide the maximum amount of information possible to both parties as they prepare their cases and reduce the possibility of surprise at trial. *See State ex rel. Keller v. Crim. Ct. of Marion Cnty., Div. IV*, 317 N.E.2d 433, 437 (Ind. 1974); *see also Beville v. State*, 71 N.E.3d 13, 18 (Ind. 2017). The Trial Rules govern discovery and, as incorporated by Indiana's Criminal Rules, "apply to all criminal proceedings so far as they are not in conflict with any specific rule adopted by this [C]ourt for the conduct of criminal proceedings." *See* Ind. Crim. Rule 21.

Trial Rule 34 allows parties in litigation to request information or material directly from each other and non-parties. Ind. Trial Rule 34. And Trial Rule 26 sets forth the scope of discovery, providing a party may obtain discovery about "any matter, *not privileged*, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of

any other party[.]" T.R. 26(B)(1) (emphasis added). As part of discovery, a party may request the opposing party produce and permit the requesting party, or someone on their behalf, to inspect and make copies of documents. T.R. 34(A)(1).

But "the Trial Rules also impose certain limits," and certain material is protected from disclosure. *See Beville*, 71 N.E.3d at 18. For example, Trial Rule 26(B)(3) codifies the common law work product doctrine originally articulated in *Hickman v. Taylor*, 329 U.S. 495, 509–10 (1947), which provides an attorney's work product, or that of their agent, is privileged and protected from disclosure. T.R. 26(B)(3). Further, absent extenuating circumstances, an attorney's work product is not discoverable in criminal litigation. *See U.S. v. Nobles*, 422 U.S. 225, 236 (1975); *Goolsby v. State*, 517 N.E.2d 54, 60 (Ind. 1987); *State, ex rel. Meyers v. Tippecanoe Super. Ct.*, 438 N.E.2d 989, 991 (Ind. 1982).

To qualify as work product, the material must satisfy a two-pronged definition—the material must have been (1) prepared in anticipation of litigation or trial (2) "by or for another party or . . . that other party's representative" or agent. T.R. 26(B)(3). However, the requesting party may obtain another's work product if there is a substantial need for the material and obtaining the information another way would create "undue hardship." *Id.* Even so, the requesting party is never entitled to an attorney's or their agent's mental impressions, conclusions, opinions, or legal theories. *Id.*

Courts apply a factual, case-by-case analysis to determine whether an item is an attorney's work product, and thus protected from disclosure. *See Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165, 169 (Ind. 1996); *Nat'l Eng'g & Contracting Co. v. C & P Eng'g & Mfg. Co.*, 676 N.E.2d 372, 377 (Ind. Ct. App. 1997); *Burr v. United Farm Bureau Mut. Ins. Co.*, 560 N.E.2d 1250, 1254–55 (Ind. Ct. App. 1990), *trans. denied*. In this respect, the party asserting the work product privilege "must establish that the materials sought to be protected from disclosure were prepared in anticipation of litigation rather than in the normal course of business." *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985, 995 (Ind. 2014); *see also* T.R. 26(B)(3). And the party asserting the privilege must "describe the nature of the documents,

communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." T.R. 26(B)(5)(a). Plainly, the party seeking to avoid disclosure bears the burden of demonstrating the privilege applies to the specific item.

While the work product doctrine was central to *Keaton*'s holding, Trial Rule 26(B)(3) is absent from the Court's analysis, and the *Keaton* court did not examine whether the police reports met the two-pronged definition of "work product" under Trial Rule 26(B)(3). Moreover, a careful reading of the Court's decision does not provide additional insight as to whether the authoring law enforcement officers acted as agents of the prosecuting attorney in drafting the police reports or the reports contained the officers' or prosecutor's mental impressions, conclusions, opinions, or legal theories. *See* 475 N.E.2d at 1149 (DeBruler, J., dissenting) ("Absent here from the showing are the form, nature, and intended uses of 'police reports.'").

However, it appears to us the lack of reference to Trial Rule 26(B)(3) in the *Keaton* decision is merely a product of time, rather than an intentional omission. Specifically, amended Criminal Rule 21, effective March 1, 1997, provides the Trial Rules apply to all criminal "proceedings," whereas its original form referred only to criminal "*appeals*." *See In re WTHR-TV*, 693 N.E.2d 1, 5 n. 3 (Ind. 1998) (concluding to the extent the criminal cases cited in the footnote "or other cases suggest the Trial Rules are per se inapplicable to criminal proceedings, they are superseded by the recent amendment" to Criminal Rule 21) (emphasis added). Accordingly, it is not only possible, but probable, our Court would have decided *Keaton* differently under the amended Criminal Rule 21. Since we have the benefit of the amended Criminal Rule 21 as we resolve this appeal, we find Trial Rule 26, and specifically the work product doctrine codified as Trial Rule 26(B)(3), applies to criminal proceedings, including Minges' matter.

As additional support, we note *Keaton* seemingly broadens the scope of the work product doctrine in favor of the State by protecting police reports from disclosure upon the prosecutor's timely work product

objection. 475 N.E.2d at 1148. Whether rightly or wrongly, courts have interpreted *Keaton* as providing a blanket privilege to police reports, effectively depriving a trial court from exercising its discretion in compelling disclosure over the prosecuting attorney's timely work-product objection.[2] *See, e.g.*, *Beckham v. State*, 531 N.E.2d 475, 476 (Ind. 1988) ("[I]n general, police reports are not discoverable and are considered protected as 'work product' of the prosecutor."); *Goolsby*, 517 N.E.2d at 60 (citing *Keaton* for the rule that police reports constitute the work product of the prosecuting attorney, and thus the trial court did not commit error by ruling the officer's report was not discoverable).

Yet, Indiana generally disfavors bare assertions of privilege in the context of discovery. *Compare Hayworth*, 669 N.E.2d at 169 (noting "courts disfavor blanket claims of privilege…") (internal citations omitted), *with TP Orthodontics*, 15 N.E.3d at 994 (finding a company met its burden of asserting the privilege because it was a broad, but not blanket, claim of privilege). Further, interpreting *Keaton* in this manner effectively exempts the State from the "analytical rigor otherwise placed on a proponent under Trial 26," slip op. at 20 (Bailey, J., concurring), as soon as it (or its attorney) objects on the basis that the report is privileged work product. *See Hayworth*, 669 N.E.2d at 169 (reiterating that a party claiming the privilege bears "the burden to allege and prove the applicability of the privilege" for each document sought by the requesting party). We see no reason to perpetuate this reading of *Keaton* when Trial Rule 26(B)(3) and other discovery principles provide the appropriate framework for analyzing whether the work product doctrine protects a police report from disclosure.

The State argues *Keaton*'s holding "does not give [it] an advantage, but recognizes the reality of our criminal justice system: that a police officer acts as the agent of the prosecutor when authoring a report alleging criminal activity, and therefore that report is the work product of the

[2] For example, in this matter, the trial court stated it had "no discretion" to grant Minges' motion to compel production of the Police Report. Tr. at 8.

prosecuting attorney." Resp. to Trans. at 5. In certain circumstances, that might be true. Like our colleagues in the Court of Appeals, we have little doubt that police officers are agents of the State. However, we hesitate to treat police officers as *per se* agents of its prosecuting attorneys, especially "before the prosecutor is even involved in a case." Slip op. at 11. And as Justice DeBruler commented in his dissent, the work product "doctrine protects the machinations of lawyers and their legal staffs, not law enforcement officers engaged in their day to day filed[sic] work." *Keaton*, 475 N.E.2d at 1148 (DeBruler, J., dissenting). Rather than relying on a blanket privilege for police reports, Trial Rule 26(B)(3) provides an objective standard for determining whether a police report is work product.

Finally, the State argues it "has an interest in protecting information in a police report from being disseminated to the public," because police reports may identify a victim or contain other sensitive information, such as a confidential informant's identity, and the work product doctrine "acknowledges all these interests." Resp. to Trans. at 11. Today's decision should not be interpreted as compromising any of the protective devices available to safeguard this information; we merely conclude a blanket privilege for police reports based on the work product doctrine is inappropriate to accomplish this end. Instead, the State can redact sensitive information using readily available computer software, move for a protective order, *see* T.R. 26(C), invoke the confidential informer's privilege, *see Jones*, 169 N.E.3d at 400, and although a rare procedure in discovery disputes, even request the trial court to complete *in camera* inspection of any disputed materials. *See Richey v. Chappell*, 594 N.E.2d 443, 445 (Ind. 1992) (citing *Canfield v. Sandock*, 563 N.E.2d 526, 531 (Ind. 1990)). But if the State believes a police report is protected from disclosure as the prosecuting attorney's work product, Trial Rule 26(B)(3), as incorporated into criminal proceedings by amended Criminal Rule 21, sets forth the framework in making such an argument to the trial court.

Next, we examine the Court's reasons justifying its decision in *Keaton*, and ultimately find they are unsupported in our technological age and improper considerations in a work product analysis under Trial Rule 26(B)(3).

B. The reasons justifying the Court's decision in *Keaton* are improper considerations in a work product analysis and unsupported in our modern age.

The *Keaton* court concluded trial courts do not have an "inherent power" to compel prosecuting attorneys to produce police reports upon a work product objection for two independent reasons. 475 N.E.2d at 1148. First, according to the Court, it would constitute an undue burden to require prosecuting attorneys to produce verbatim copies of police reports, forcing them to "excise non-discoverable information from copies of reports it has been compelled to produce." *Id.* Second, abuse may arise if defense counsel were allowed to use verbatim copies of police reports at trial, because counsel "could subject the officers to misleading and unfair cross-examination." *Id.*

As a preliminary consideration, we note that neither basis for the Court's decision is a proper consideration in a work product analysis as described *supra*. Instead, Trial Rule 26(B)(3) sets forth a two-pronged definition of "work product," requiring that the document was prepared in anticipation of litigation by counsel or its agent at the direction of counsel. Any concerns of an "undue burden" on the producing party may be resolved by Trial Rule 26(B)(1), which permits trial courts to limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit[.]" T.R. 26(B)(1). And, as our colleagues in the Court of Appeals noted, under Evidence Rule 403, trial courts may exclude relevant evidence if its probative value is substantially outweighed by the danger of "misleading the jury." Ind. Evidence Rule 403.

Additionally, each basis is without support in today's modern age. First, as the Indiana Public Defender Council noted in its Amicus Brief, "[a]lthough redacting police reports may have been a burden in 1985 before the widespread use of computers, it is hardly true today," especially given that ninety-two counties in Indiana use electronic filing. IPDC Amicus Br. at 15. The increasing use of software to edit electronic documents in the profession renders "redaction . . . no more burdensome than the click and drag of a cursor on the screen." *Id.* More importantly, the "undue burden" placed on prosecutors to "excise non-discoverable

information" prior to production, *Keaton*, 475 N.E.2d at 1148, is a burden shared by all parties seeking to protect work product from disclosure. Instead, *Keaton* provides the State a sort of advantage not similarly provided to defense counsel and relieves the prosecutor of "the burden to allege and prove the applicability of the privilege as to each… document sought." *TP Orthodontics*, 15 N.E.3d at 994 (quoting *Hayworth*, 669 N.E.2d at 169); s*ee also* T.R. 26(B)(5).

Second, the *Keaton* court wrote the use of verbatim copies of police reports by the defense at trial presents an opportunity for abuse, because "[d]efense counsel cognizant of the theories and speculations of the investigating officers could subject the officers to misleading and unfair cross-examination." 475 N.E.2d at 1148. Such fear of abuse by fellow legal professionals not only appears unsubstantiated, but disregards the oath taken by every attorney in our State, defense counsel and prosecutors alike, to "abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness[.]" Ind. Admission and Discipline Rule 22. And more importantly, we can rely on trial judges to control the conduct and scope of cross-examination to minimize the risks of concern to the *Keaton* court.

Given that nearly every county in Indiana—apart from two which claim the work product privilege for every police report—has an open file policy allowing the defense to examine those police reports summarizing the State's investigation, *see, e.g.*, *Johnson v. State*, 446 N.E.2d 1307, 1310 (Ind. 1983); *Hinkle v. State*, 97 N.E.3d 654, 659 (Ind. Ct. App. 2018), it appears that disclosing such reports, and risking the potential for misuse, has been largely unproblematic.

We stress, though, that this Court's decision does not suggest that police reports may *never* qualify as work product. Even the parties concede the doctrine may otherwise protect police reports under certain circumstances. For example, to the extent that the police reports at issue in *Keaton* satisfied Trial Rule 26(B)(3), the Court correctly concluded the trial court abused its discretion by compelling the State to produce "verbatim copies" of the reports. We merely clarify that Trial Rule 26(B)(3) supersedes any reliance on *Keaton* as preventing trial courts from

exercising their discretion in determining whether the work product privilege protects a particular police report from disclosure.

We acknowledge that the Court's decision today stands in tension with other decisions of this Court which cited *Keaton* for the proposition that a trial court in a criminal proceeding does not have the inherent power to order production of verbatim copies of police reports over the timely work product objection of the prosecuting attorney. *See, e.g., Goolsby*, 517 N.E.2d at 60; *Beckham*, 531 N.E.2d at 476–77; *State ex rel. Crawford v. Super. Ct. of Lake Cnty., Crim. Div., Room II*, 549 N.E.2d 374, 376 (Ind. 1990); *Robinson v. State*, 693 N.E.2d 548 (Ind. 1998); *Gault v. State*, 878 N.E.2d 1260, 1266 (Ind. 2008); *Johnson v. State*, 584 N.E.2d 1092, 1103 (Ind. 1992). To the extent these cases conflict with today's holding, we disapprove of them.

Even though the work product doctrine is most often invoked in civil litigation, "its role in assuring the proper functioning of the criminal justice system is even more vital," for "[t]he interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." *Nobles*, 422 U.S. at 238. Nonetheless, the doctrine is not without its limits, and a trial court has discretion in matters of discovery "to guide and control the trial in the best interests of justice." *State ex rel. Keller*, 317 N.E.2d at 435. To do so, we believe Trial Rule 26(B)(3) provides adequate guidance for the trial court to determine—on a case-by-case basis—whether a police report is protectible work product. And because the trial court believed it was without discretion under *Keaton* to consider whether the Police Report was the prosecuting attorney's work product, we remand for the trial court to consider the State's claim in light of Trial Rule 26(B)(3).

Conclusion

Therefore, we overrule *Keaton* and remand to the trial court with instructions to reconsider whether the Police Report is protected by the work product privilege in a manner consistent with the Court's decision.

Rush, C.J., and Massa, Slaughter, and Goff, JJ., concur.

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