

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

vs.

LISA JOHNSON

Defendant-Appellant.

CASE NO. **06-2353**

C.A. No. 2006 CA 21639

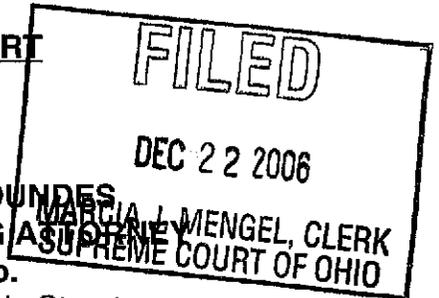
T.C. No. 05-CRB-2226

ON APPEAL FROM THE COURT OF APPEALS

FOR THE SECOND JUDICIAL APPELLATE DISTRICT OF OHIO

MONTGOMERY COUNTY, OHIO

APPELLANT'S MEMORANDUM IN SUPPORT
OF SUPREME COURT JURISDICTION



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CONTINUING OBLIGATION TO PROVIDE
THOSE DISCOVERY MATERIALS AND THE
OPPOSING PARTY HAS ABSOLUTELY NO
OBLIGATION TO MAKE FURTHER REQUESTS
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WHY THIS COURT SHOULD GRANT JURISDICTION

Appellant asks this Court to accept jurisdiction in this case so that it can clarify the State's and defense counsel's responsibilities with respect to discovery requests. Criminal Rule 16 states that once a request is made, both the State and the defense are required to provide discovery. That obligation continues as new materials are uncovered during the course of a case. (Crim R. 16(D).) The rules place absolutely no obligation on a party to continue to make discovery requests once the initial request has been made.

In this case the trial court ordered the case dismissed when the State failed to meet its obligation to provide discovery to the defense. The Court of Appeals reversed the order, holding that the trial court abused its discretion in dismissing the case when it could have opted for the less drastic remedy of a short continuance. Critical to the appellate opinion was the court's view that defense counsel could have requested the missing materials earlier than he did.

But that view places an obligation on defense counsel that is not provided for under the Criminal Rules. Appellant therefore asks this Court to accept jurisdiction so that it can explain what obligation, if any, counsel has to make repeated discovery requests.

STATEMENT OF THE CASE AND OF THE FACTS

The defendant was charged on October 19, 2006 with one count of tampering with records. (R.C. 2913.42(A).) Jury trial was set for March 30, 2006.

On March 29, 2006, defense counsel notified the prosecution that certain bank statements had not been supplied in discovery. On that same date the parties met with

the trial court and at that time defense counsel asked that the case be dismissed because of the discovery violation.

The trial court noted first that “this matter ha[d] been going on for some time” and that the case was “at the end of the line in terms of the Supreme Court Report.” (TR 2.) The court then asked defense counsel whether he could prepare for trial on the following day if he was given the missing materials at that time. Defense counsel replied that he could not. (TR 4-5.)

The trial court then noted that defense counsel filed a motion for discovery, and that he was not required to file another one in order to obtain further discovery. (TR 5.) The court then observed that since defense counsel could not proceed by the time of the scheduled trial date, it would then order the “undiscovered” evidence excluded from the trial. The court then stated that since without the missing evidence the state had no case, the matter would be dismissed with prejudice. (TR 5.)

From that decision the State appealed. On November 22, 2006, the Court of Appeals for Montgomery County, with one judge dissenting, reversed the decision and held that the trial court committed an abuse of discretion by dismissing the case. From that decision appellant files this memorandum and notice of appeal.

PROPOSITION OF LAW

ONCE A PARTY FILES A REQUEST FOR DISCOVERY, THE OPPOSING PARTY HAS A CONTINUING OBLIGATION TO PROVIDE THOSE DISCOVERY MATERIALS AND THE OPPOSING PARTY HAS ABSOLUTELY NO OBLIGATION TO MAKE FURTHER REQUESTS FOR DISCOVERABLE MATERIAL

The granting or denying of a continuance motion is left to the sound discretion of the trial judge. *State v. Unger* (1981) 67 Ohio St.2d 65, 423 N.E.2d 1078. In ruling on

that request, the trial court must balance the court's interest in controlling its docket and the public interest in efficient judicial administration against the possible harm to the defendant. *Sayre v. Hoelzle-Sayre* (1994) 100 Ohio App.3d 203, 653 N.E.2d 712.

Furthermore, "[a] trial court has broad discretion when imposing discovery sanctions." *Nakoff v. Fairview General Hospital* (1996) 75 Ohio St.3d 254, 662 N.E.2d 1 syllabus.

Whether a court errs in denying a request for continuance is evaluated under an abuse of discretion standard. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. An abuse of discretion standard is a difficult one to meet. The term "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Ibid.* Among the factors to be considered in determining whether there has been an abuse of discretion are the following: the length of continuance requested, whether there were prior continuances, whether the requested continuance will cause inconvenience, the reasons for the request, whether the party asking for continuance contributed to the delay, whether the requested delay is for "legitimate" reasons, and any other relevant factors. *State v. Grant* (1993) 67 Ohio St.3d 465, 479, 620 N.E.2d 465.

"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar v. Sarafite* (1964) 376 U.S. 575, 589, 84 S.Ct 841, 11 L.Ed.2d 921; *State v. Denson* (1990) 66 Ohio App.3d 833, 586 N.E.2d 1125.

Based on the standards above and on the trial court's wide discretion in these matters, Appellant believes that the State has failed to demonstrate that the trial court

committed an abuse of discretion when it ordered this case dismissed. The case had dragged on for a very long time. As the trial court noted, a continuance would have meant that the case would not be disposed of within the suggested guidelines issued by this Court. In addition, any continuance would have caused inconvenience to the defense. Defense counsel needed time to evaluate the “undiscovered” materials, thus causing another delay in an already long-delayed trial. Moreover, the court was inconvenienced at having to, at the eleventh hour, postpone a scheduled jury trial on the following day. Further, the reasons for the continuance request were unavailing. True, the request could be considered legitimate in the sense that the delay in providing discovery would give the defense a chance to “digest” the material. But in the broader picture the reasons given are suspect. The fact is that the prosecution has a continuing duty to provide discovery. And for whatever reason, it failed to do its job in that respect. Another factor supporting the trial court’s decision is that the prosecution was the sole cause for the delay. Again, it failed to provide vital discovery until the day before trial.

Where the defense seeks disclosure of evidence held by the state, the state must afford access to that evidence when it is reasonably probable that the evidence would undermine confidence in the outcome of the trial. *United States v. Bagley* (1985) 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481. This standard applies irrespective of the prosecutor’s good faith or bad faith in failing to disclose the evidence. *Brady v. Maryland* (1963) 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215. Here, the prosecution failed to provide crucial evidence until the eve of an already long-delayed trial.

In its opinion reversing the trial court’s dismissal order, the Court of Appeals placed great weight on the notion that defense counsel should have known, long before

he moved to have the case dismissed, that the records he needed had not been provided in discovery, and that he should therefore have asked for those records earlier. (See Court opinion, p. 3.) But this view overlooks the basic premise that once a party files a discovery motion, it is the State's obligation to provide that discovery without the need for a further request. Criminal Rule 16 makes very clear that once a discovery motion is filed, the State must provide information that is material to the defense or that will be used in the prosecution. (See, *State v. Karl* (2001) 142 Ohio App.3d 800, 808, 757 N.E.2d 30.) While the State is obliged under the rule to provide discovery throughout the trial as the State discovers it, there is no corresponding obligation for the defense to make continual requests for that discovery.

Thus, appellant contends that the Court of Appeals erred when it determined that the trial court abused its discretion when it granted the defense motion to dismiss.

CONCLUSION

For the reasons stated in the foregoing memorandum, appellant asks that this Court grant jurisdiction.

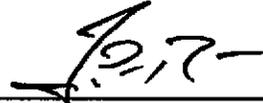
Respectfully submitted,



JON PAUL RION of
RION, RION & RION, L.P.A., INC.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the Appellant's foregoing Memorandum in Support of Jurisdiction has been forwarded to the Attorney for the Plaintiff-Appellee, Ray Dundes, 7 South Mechanic Street, Lebanon, OH 45036 on the same day as filing.



**JON PAUL RION of
RION, RION & RION, L.P.A., INC.**

APPENDIX

discovery and because "(w)e are out of time on this."

The State assigns error as follows:

"1. THE TRIAL COURT ERRED WHEN IT DENIED THE STATE'S REQUEST FOR A SHORT CONTINUANCE OF THE TRIAL IN THIS MATTER AND DISMISSED THE CASE."

The complaint against Johnson, filed October 19, 2005, alleged in pertinent part:

"Lisa Johnson submitted a treasurer's report on November 5th, 2003 to the West Carrollton Recreation Association board meeting that deposits made for September and October were conflicting with Farmers and Merchants Bank statement."

On October 20, Johnson, by counsel, entered a not guilty plea, requested a pre-trial conference, and waived her speedy trial rights under R.C. 2945.71 et seq. On October 21, 2005, the trial court scheduled this matter for pre-trial conference on January 23, 2006. On that date, Johnson filed a jury demand, and a "pre-jury pre-trial" conference was scheduled for February 13, 2006. On that date, jury trial was scheduled for March 30, 2006.

Johnson's demand for discovery, filed October 24, 2005, contained seven specific requests, none of which is pertinent to this appeal, and an eighth, general request, for "All other matters discoverable pursuant to Criminal Rule 16."

On February 1, 2006, Johnson moved for a bill of particulars. The bill of particulars, filed March 20, contained virtually the same operative language as the complaint, as quoted above.

On March 29, Johnson moved to dismiss for the reason that bank statements had not been furnished in discovery. At the argument on March 29 on Johnson's motion to

dismiss, the prosecutor represented that Detective Bell of the West Carrollton Police Department had prepared the discovery packet which the prosecutor sent to defense counsel's office, "probably (in) February." The prosecutor also represented that he and Mr. Lennen, who was going to represent Johnson at trial, had "discussions several times about this case." The prosecutor represented that Mr. Lennen advised him that morning that he did not have the bank statements and that he told Mr. Lennen he didn't have the statements, either. He then called Detective Bell, who did have the statements. The prosecutor stated the documents were now available, and requested a short continuance to transmit the documents to Mr. Lennen so the case could be tried. Mr. Lennen did not refute any of the prosecutor's representations but, in response to the trial court's question, said he could not be ready for trial the following day. At the conclusion of argument, the trial court dismissed the case.

To the extent that the trial court relied on the Rules of Superintendence as justification for dismissal, we believe this was a weak reed upon which to lean. Although the Rules required this case to be tried within ninety days - Sup.R. 39(B)(1) - the first pretrial conference in this case was scheduled beyond the ninety-day deadline. When Johnson demanded a jury trial on the date scheduled for pretrial, a pre-jury pretrial conference was scheduled for three weeks later and, when that conference didn't result in an agreed disposition, jury trial was scheduled six weeks later on March 30. We realize that Johnson waived her speedy trial rights, but the trial court's scheduling on this case suggests that if indeed Sup.R. 39(B)(1) was a factor in its decision to dismiss, it was a convenient rather than a compelling factor.

We are also sympathetic to the State's suggestion that if Mr. Lennen hadn't received

the bank statements, he should have let the prosecutor know before the eve of trial. From the complaint, defense counsel must have known bank statements would be implicated in the case. The discovery packet had been sent to defense counsel in February. Mr. Lennen and the prosecutor had several discussions about the case prior to March 29. While Johnson undoubtedly was entitled to counsel who was prepared, we think the proper response would have been to grant the brief continuance requested by the prosecutor to allow Mr. Lennen to be prepared. This is especially so because Johnson had waived her speedy trial rights and it appears that the State's failure to provide the bank statements was inadvertent rather than intentional. The prosecutor had, perhaps unwisely, delegated preparation of the discovery packet to Detective Bell, who may not have appreciated the import of "all other matters discoverable pursuant to Criminal Rule 16." In any event, there is no suggestion on this record that either the prosecutor or Detective Bell were intentionally depriving Johnson of discovery.

Finally, the continuance requested by the prosecutor was the first request by either party for a continuance of either a pretrial or trial date.

On the basis of the foregoing discussion, we are constrained to conclude that the trial court acted unreasonably in overruling the State's motion for a brief continuance and in dismissing this case.

The assignment of error is sustained.

The judgment of dismissal will be reversed and the case will be remanded for further proceedings.

MILLIGAN, J., concurs.

DONOVAN, J., dissenting:

I disagree. "The grant or denial of a continuance is a matter that is entrusted to the broad, sound discretion of the trial judge." *State v. Unger*, 67 Ohio St.2d 65, syllabus, 423 N.E.2d 1078. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "The trial court balances the court's interest in controlling its docket and the public's interest in an efficient judicial system with the possibility of prejudice to the defendant." *Sayre v. Hoelzle-Sayre* (April 6, 1994), Seneca App. No. 13-93-2. "Factors to be considered can include the length of the continuance requested, any prior continuance, inconvenience, reasons for the delay, whether the defendant contributed to the delay, and other relevant factors." *State v. Grant* (1993), 67 Ohio St.3d 465, 479, 620 N.E. 2d 50. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841.

"A trial court has broad discretion when imposing discovery sanctions." *Nakoff v. Fairview General Hospital* (1996), 75 Ohio St.3d 254, syllabus, 662 N.E.2d 1.

At the hearing on Johnson's motion, the State appeared to suggest that counsel for Johnson bore some responsibility for the fact that Johnson did not have the bank statements: " * * * based on the Bill of Particulars the State suggests that if [defense

counsel] didn't know that he should have known that this was what the case was all about and although he has a formal request for discovery, and the State is obligated to continue to give that discovery, there was no additional request made, which I understand that is [sic] doesn't have to be, that being said, the matter came up this morning." The State conceded that "the Court is aware that this matter has been going on for some time. I believe we at [sic] the end of the line in terms of the Supreme Court Report. So it has been going on at least six months almost."

The State appears to refer to the Rules of Superintendence of the Ohio Supreme Court. "Section 5(A), Article IV of the Ohio Constitution authorizes the Ohio Supreme Court to establish Rules of Superintendence. * * * These Rules of Superintendence are designed (1) to expedite the disposition of both criminal and civil cases in the trial court of this state, while at the same time safeguarding the inalienable rights of litigants to the just processing of their causes; and (2) to serve that public interest which mandates the prompt disposition of all cases before the courts." *State v. Perry*, Ross App. No. 05CA2839, 2006-Ohio-220. "The very name and substance of these rules indicates that they were intended as an administrative directive from the Supreme Court to all the Court of Common Pleas [and Municipal Courts] of this state, and the individual judges thereof, succinctly setting forth procedures designed *more clearly to define judicial duties and responsibilities and to provide for more uniform and effective methods of general court administration. The Rules of Superintendence were not intended to function as rules of practice and procedure.*" *State v. Brown* (May 7, 1987), Cuyahoga App. No. 52098 (emphasis in original).

"In municipal and county court, all criminal cases shall be tried within the time provided in Chapter 2945 of the Revised Code." Sup.R. 39. "[A] person against whom a

charge of misdemeanor * * * is pending in a court of record, shall be brought to trial * * * within ninety days after the person's arrest or the service of the summons, if the offense charged is a misdemeanor of the first degree." R.C. 2945.71.

Although Johnson waived her right to trial within the time set forth in R.C. 2945.71, the trial court properly remained mindful of its obligation to expedite the disposition of Johnson's case. Had the court required the defense to proceed on schedule, however, the prejudice to Johnson, as her counsel indicated, would have been clear; to prepare for trial in one day was not Johnson's "burden to carry," especially when Johnson was "looking at jail time." Any suggestion that the defense should have made a specific request for the bank statements is without merit. The prosecuting attorney bore the ultimate responsibility to provide counsel for Ms. Johnson with the bank records necessary to prove their case. This responsibility should not be foisted upon the detective nor the defendant. The trial judge properly excluded the bank's records. Just as importantly, the trial court did not abuse its discretion in denying the State's request for a continuance as the court has an absolute right to manage its docket, penalize the city for a major discovery infraction and dismiss the case.

I would affirm.

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(Hon. John R. Milligan retired from the Fifth District Court of Appeals sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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Hon. Robert E. Messham, Jr.

Case: CR 21639
DATE: 11/22/06

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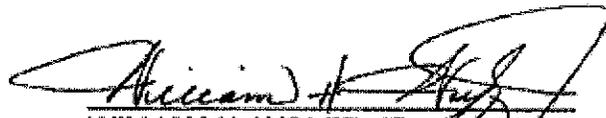
IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

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Plaintiff-Appellant	:	C.A. CASE NO. 21639
v.	:	T.C. NO. 2005 CRB 2226
LISA JOHNSON	:	FINAL ENTRY
Defendant-Appellee	:	

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Pursuant to the opinion of this court rendered on the 22nd day of November, 2006, the judgment is reversed and the matter is remanded for further proceedings consistent with this court's opinion.

Costs to be paid as stated in App.R. 24.


WILLIAM H. WOLFF, JR., Judge

MARY E. DOMOVAN, Judge


JOHN R. MILIGAN, Judge
(Sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

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