

ORIGINAL

NO. 12-0081

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 96373 & 96374

STATE OF OHIO

Plaintiff-Appellant

-vs-

DEMETRIUS DARMOND

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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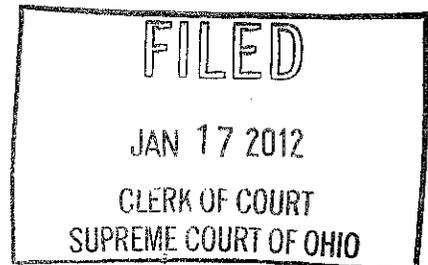


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Journal Entry & Opinion released and Journalized December 1, 2011, Cuyahoga County
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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR AN ISSUE OF GREAT PUBLIC
INTEREST**

This case provides this Court with an opportunity to address the proper standard for discovery violations after the 2010 amendments to Crim. R. 16. After the amendment, a critical question remains: must a trial court consider the least severe sanction consistent with the rules of discovery before imposing a sanction when the state fails to disclose discoverable evidence? In *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 5, 511 N.E.2d 1138, 1142, this Court held that “a trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery.” In the twenty five years since *Lakewood*, trial and appellate courts have routinely applied its holding. However, some courts have questioned whether or not *Lakewood* is applicable to violations by the prosecution. This case provides this Court the opportunity to address that question.

In *State v. Darmond*, 8th Dist. Nos. 96373 and 96374, 2011-Ohio-6160, the Eighth District Court of Appeals affirmed a trial court’s order dismissing a case with prejudice for a discovery violation. During a bench trial in a drug trafficking case, the prosecution and defense were both surprised to learn that law enforcement officers interdicted additional packages. The additional packages were not the subject of the trial. The trial court found that the packages could have been either “inculpatory or exculpatory” and were discoverable. Because the information was not provided to the defense, the trial court dismissed the case with prejudice. The Eighth District affirmed, finding *Lakewood* inapplicable to discovery violations by the prosecution. *Id.* at ¶18.

There is a vital need for this Court's review. The *Darmond* decision is in conflict with both the Third District Court of Appeals opinion in *State v. Engle*, 166 Ohio App.3d 262, 850 N.E.2d 123, 2006-Ohio-1884, and the First District Court of Appeals opinion in *State v. Siemer*, Hamilton App. No. C-060604, C-060605, 2007-Ohio-4600. Review is also needed in light of the recent amendments to Crim. R.16. Crim. R.16(A) states that the purpose of the rule is to "provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large." This goal can hardly be accomplished if trial courts are can arbitrarily impose the most severe sanction without consideration of readily available alternatives.

As such, the State of Ohio respectfully petitions this Honorable Court to accept jurisdiction over the Eighth District Court of Appeals opinion in *State v. Darmond*, 8th Dist. Nos. 96373 and 96374, 2011-Ohio-6160, and adopt the following proposition of law:

Proposition Of Law I: A Trial Court Is Required To Impose The Least Severe Sanction That Is Consistent With The Purpose Of The Rules Of Discovery After An Inquiry Into The Circumstances Producing An Alleged Violation Of Crim. R. 16.

STATEMENT OF THE CASE

On August 11, 2010 defendants-appellees, Demetrius Darmond and Iris Oliver, were indicted in CR540709 by the Cuyahoga County Grand Jury as follows: one count of Trafficking Drugs in violation of R.C. § 2925.03(A)(2) with a Juvenile Specification, R.C. § 2925.01(BB), a felony of the second degree, and one count of Possession of Drugs in violation of R.C § 2925.11(A) a felony of the third degree. Demetrius Darmond was

also indicted with one count of Possessing Criminal Tools in violation of R.C. § 2923.24(A), a felony of the fifth degree, and two counts of Endangering Children, R.C. § 2919.22(A), misdemeanors of the first degree.

On August 25, 2010 defendants-appellees were arraigned. The case proceeded to a bench trial on February 1, 2011. During trial the attorneys made an oral motion to dismiss the case with prejudice. The court granted the motion after the first witness testified.

The State appealed the dismissal. The Eighth District, relying on a case from the Seventh District Court of Appeals, refused to apply *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138, to discovery violations by the prosecution. *Darmond* at ¶18. The Eighth District affirmed in light of its flawed application of this Court's decision. *State v. Darmond*, 8th Dist. Nos. 96373 and 96374, 2011-Ohio-6160.

The State filed a motion to certify a conflict between *Darmond* and the Third District Court of Appeals opinion in *State v. Engle*, 166 Ohio App.3d 262, 850 N.E.2d 123, 2006-Ohio-1884, and the First District Court of Appeals opinion in *State v. Siemer*, Hamilton App. No. C-060604, C-060605, 2007-Ohio-4600. The motion is currently pending.

STATEMENT OF FACTS

Ohio Bureau of Criminal Identification and Investigations (BCI) Special Agent Patricia Stipek testified for the State of Ohio. Agent Stipek has been a narcotics agent for twenty one years. (Tr. 28, 41). On March 13, 2010 Agent Stipek was involved with a package interdiction at FedEx in Richfield, Ohio. (Tr. 28-29, 31). She was there based on a tip from the sheriff's department that a drug package was due to come in. (Tr. 29).

During her interdiction, she found three drug packages containing marijuana. (Tr. 29, 49)

The first package was addressed to a Cleveland location *other* than 16210 Huntmere, Cleveland, Ohio. (Tr. 42, 49, 55) The second drug package was the one delivered to defendants-appellees at 16210 Huntmere, Cleveland, Ohio and the subject of the indictment. (Tr. 29) The third package was addressed to a Lorain County address. (Tr. 59) All three packages had separate addresses on them. (Tr. 30) All three packages had similar packaging. (Tr. 58, 60)

The second package, the target package for this case, was addressed to Tasha Mack, 16210 Huntmere, Cleveland, Ohio. (Tr. 29, 49-50, 56) This second package was packed the same as the first and third ones found. (Tr. 29-30, 42). Agent Stipek obtained a search warrant to open the target package and took photographs on the contents. (Tr. 30, 32-33) The search warrant only referenced this one particular package. (Tr. 71). The packaging inside the delivery box contained birthday wrapping paper, a blue card that was opened and marijuana. (Tr. 31). Exhibits 3-7 show pictures of the box and its contents. (Tr. 32-33). Agent Stipek then delivered the package to the Cuyahoga County Sheriff's Department. (Tr. 32). Agent Stipek acted as backup during the Sheriff's controlled delivery to defendants-appellees at 16210 Huntmere, Cleveland, Ohio on March 16, 2010. (Tr. 33-35)

In researching the sender for the package, Agent Stipek, found the package was sent from a Kinko's in Tempe Arizona and not from the return address listed on the package. (Tr. 34-35).

On March 17, 2010, Agent Stipek was again doing package interdiction and the FedEx in Richfield, Ohio. (Tr. 36). Agent Stipek found four packages that were packed

similar to the original three. (Tr. 44-45, 61-62). These four additional packages, including the original three, were sent from Kinko's in either Tempe or Phoenix, Arizona. (Tr. 45) Out of these four, one was addressed to Sonya Byrd, 16210 Huntmere, Cleveland, Ohio; two were Lorain County addresses, and the fourth to another Cleveland address. (Tr. 37, 50, 62-63) At least three of the four had similar packaging to the March 13th packages. (Tr. 64-65).

Agent Stipek again obtained a search warrant for the March 17th Huntmere package, opened the package, took pictures (exhibits 8-13), saw that it was packaged exactly the same as the target package and then delivered it to the Cuyahoga County Sheriff's Office. (Tr. 36-37, 67) This package was originally sent from a Kinko's in Phoenix, Arizona. (Tr. 38) The handwriting on this box and the target package appeared to be the same. (Tr. 40)

Agent Stipek made separate reports for each package. (Tr. 46, 66) In those separate reports, she did not reference any of the other packages found, except to the Huntmere address because the two had the same address. (Tr. 70) Agent Stipek did not participate in any follow-up with those other five packages and does not know if prosecution resulted. (Tr. 47)

During Agent Stipek's testimony, there were several side bars in which defense counsel made a motion to dismiss. They renewed this motion after Agent Stipek's testimony. (Tr. 74). The basis for the motion was that the discovery during trial of five additional deliveries, similar to the ones in question at trial, was exculpatory information and that the only remedy was dismissal. (Tr. 76).

"The reason I ask for a dismissal is it is exculpatory information from this defense attorney's standpoint, and it provides us an opportunity to question other witnesses, to

question law enforcement professionals, to prepare a more adequate and vigorously defense for our clients, and certainly important to know. We're now at the beginning of trial and we - - it can't be made good now The only remedy would be to get this information, permit us time to follow up with it, and then prepare an adequate defense, and it just too late in the game to do that, just too late in the game." (Tr.76- 77).

The court granted this motion and barred the State from future prosecution. (Tr. 92) In so granting, the court held that the information about the other five packages should have been provided to the defense. (Tr. 89-92) The court though never considered any other remedy. (Id.)

Because the standard of review for criminal discovery violations has the potential to impact thousands of cases, and because there is a conflict among the lower courts, the State respectfully requests this Honorable Court grant jurisdiction over this critical issue.

LAW AND ARGUMENT

Proposition Of Law I: A Trial Court Is Required To Impose The Least Severe Sanction That Is Consistent With The Purpose Of The Rules Of Discovery After An Inquiry Into The Circumstances Producing An Alleged Violation Of Crim. R. 16.

I. Summary of Argument

“The Seventh District [Court of Appeals] further noted that a distinction exists in cases, unlike *Lakewood*, where the state fails to provide discovery, as opposed to cases where the defendant violated discovery rules as in *Lakewood*. *State v. Crespo*, 7th Dist. No. 03 MA 11, 2004-Ohio-1576.” *Darmond* at ¶18. (Emphasis Added).

Darmond highlights a conflict among reviewing courts about whether or not this Court's holding in *Lakewood* applies to discovery violations by the prosecution. The Eighth District joined the Seventh District in finding that *Lakewood* does not apply.

However, the Third District and the First District apply *Lakewood* to state violations. The proper standard for reviewing discovery violations is of vital importance, and this Court's review is made even more necessary by the recent amendments to Crim. R.16. Arbitrary imposition of the most severe sanction on either party is inconsistent with this Court's precedent and the policy behind the criminal rules.

II. There is a conflict among reviewing courts.

A conflict currently exists over the application of this Court's holding in *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 5, 511 N.E.2d 1138, 1142, to state discovery violations. In *Darmond*, the Eighth District has now joined the Seventh District in holding that *Lakewood* does not apply to state discovery violations. This position is in conflict with the Third and First District. The state has filed a motion to certify a conflict which is currently pending in the Eighth District.

In *State v. Siemer*, 1st Dist. No. C-060604, C-060605, 2007-Ohio-4600, the First District Court of Appeals reversed a trial court's order granting a defendant's motion to dismiss due to a discovery violation. In that case, like the instant case, both the defense and prosecution did not know about the additional evidence. The evidence at issue in *Engle* involved nearly 20 minutes of missing videotape from a police cruiser which was not provided to either the prosecution or the defendant. The violation was discovered during trial. The defendant moved to dismiss the case and the prosecution requested a continuance. The trial court heard arguments from both parties and granted the motion to dismiss. *Id.* at ¶4. The prosecution appealed.

In considering the State's appeal, the First District applied the Ohio Supreme Court's decision in *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138. In *Lakewood*, this Court created a balancing test to review discovery violations and held

that a trial court “must impose the least severe sanction that is consistent with the purpose of the rules of discovery.” *Id.* at 5. The First District recognized that the “*Lakewood* balancing test was created in the context of a discovery violation committed by the defendant” but found it was “***nonetheless relevant and equally applicable to cases involving discovery violations committed by the state.***” *Siemer* at ¶9. (Emphasis Added).

The First District found that multiple Ohio appellate courts have also applied *Lakewood* to state violations. *Id.* at fn.5 citing *State v. Jennings*, 1st Dist. No. C-030839, 2004-Ohio-3748; *State v. Palivoda*, 11th Dist. No.2006-A-0019, 2006-Ohio-6494; *State v. Shutes*, 8th Dist. No. 86485, 2006-Ohio-1940; *State v. Engle*, 166 Ohio App.3d 262, 2006-Ohio-1884, 850 N.E.2d 123; *State v. Thacker*, 2nd Dist. Nos.2004-CA-38 and 2004-CA-57, 2005-Ohio-2230; *State v. Wilson*, 6th Dist. No. L-02-1178, 2003-Ohio-2786; *State v. Savage*, 10th Dist. No. 02AP-202, 2002-Ohio-6837; *State v. Hoschar*, 5th Dist. No.2001CA00322, 2002-Ohio-4413; *State v. Pitts*, 4th Dist. No. 99 CA 2675, 2000-Ohio1986. Applying *Lakewood*, the First District agreed with the state and reversed the trial court’s dismissal. *Siemer* at ¶10.

In the instant case, the Eighth District refused to apply the *Lakewood* “least severe sanction” standard because the prosecution committed the violation rather than the defendant. *State v. Darmond*, Cuyahoga App. Nos. 96373 & 96374, 2011-Ohio-6160, ¶18. The facts in *Darmond* and *Siemer* are similar in that neither case involved a willful violation by the prosecution; it is also clear that both courts took opposite positions on the applicability of *Lakewood v. Papadelis*. The Eighth District’s decision is in conflict not only with *Siemer* but with the other districts throughout this State as noted in the *Siemer* decision. The trial court in this case did not consider any remedy other than

dismissal with prejudice. (Tr. 89-92). Applying *Lakewood*, such an act constitutes an abuse of discretion. While dismissal may be appropriate in some instances, such a drastic action must be taken with the utmost caution and after compliance with the analysis set forth in *Lakewood*.

Darmond is also in conflict with *State v. Engle*, 166 Ohio App.3d 262, 2006-Ohio-1884, 850 N.E.2d 123. In *Engle*, the Third District Court of Appeals reversed a trial court's order granting a defendant's motion to dismiss based upon a discovery violation by the prosecution. In *Engle*, the prosecution failed to provide the defendant with a copy of the audio recording of a drug transaction. *Id.* at ¶4. The defendant filed a motion to dismiss which the trial court granted without providing the prosecution the opportunity to respond. *Id.* at ¶5.

The State appealed. The Third District applied *Lakewood* and held that the trial court was required to inquire into the circumstances of the violation and to "impose the least severe sanction that is consistent with the purpose of the rules of discovery." *Id.* at ¶8 citing *Lakewood*, 32 Ohio St.3d 1. The Third District found that the trial court did not make an appropriate inquiry into the violation and that it did not "properly balance the need to impose a sanction with the purpose of the discovery rules, as required under [*Lakewood v.*] *Papadelis*." *Id.* at ¶10. The Third District reversed, holding that the trial court "erred in dismissing the charges against Engle due to the state's discovery violation; the sanction imposed was not the least severe sanction available that is consistent with the purposes of the discovery rules." *Id.* at ¶12.

The Third District-much like the First-has held that *Lakewood* applies to state violations. Therefore, the Eighth District's decision in *Darmond* is in conflict with *Engle*. Much like *Engle*, the trial court in this case did not consider any remedy other

than dismissal with prejudice. (Tr. 89-92). This failure constitutes an abuse of discretion.

III. Applying Lakewood to violations by both parties is consistent with the stated purpose of Crim. R.16 and is supported by this Court's precedent.

Precedent supports applying *Lakewood* to all parties. In *State v. Parson* (1983), 6 Ohio St.3d 442, 453 N.E.2d 689, this Court reviewed a state discovery violation. In *Parson*, the state inadvertently failed to provide defense with a statement made by a co-defendant. Applying an abuse of discretion standard, this Court noted that a trial court is "not bound to exclude [nondisclosed discoverable material] at trial although it may do so at its option. Alternatively, the court may order the noncomplying party to disclose the material, grant a continuance in the case or make such other order as it deems just under the circumstances." *Id.* at 445. This Court then considered whether the trial court abused its discretion. In doing so, this Court considered whether or not the violation was willful and if the defendant was prejudiced as a result of the nondisclosure. *Parson* was decided four years before *Lakewood* and applies a similar analysis to state discovery violations.

In *State v. Parker* (1990), 53 Ohio St.3d 82, 558 N.E.2d 1164, this Court applied *Lakewood* and *Parson* to a state discovery violation. The *Parker* court noted that a "sanction should not be imposed under Crim.R. 16 unless the prosecutor's noncompliance is of sufficient significance of result in a denial of defendant's right to a fair trial." *Id.* at 86. This Court went on to state that a "trial court must inquire into the circumstances producing the alleged violation of Crim.R. 16. The court is required to impose the least severe sanction that is consistent with the purpose of the rules of

discovery.” *Id.* citing *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 5, 511 N.E.2d 1138, 1141.

In 2008, this Court again applied the *Parson* factors to a state discovery violation in *State v. Hale* (2008), 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864. In *Hale*, the state failed to disclose an oral statement by a co-defendant. This Court stated that “*Parson* established guidelines for evaluating the trial court’s exercise of discretion in this area: ‘Where, in a criminal trial, the prosecution fails to comply with Crim.R. 16(B)(1)(a)(ii) by informing the accused of an oral statement made by a co-defendant to a law enforcement officer, and the record does not demonstrate (1) that the prosecution’s failure to disclose was a willful violation of Crim.R. 16, (2) that foreknowledge of the statement would have benefited the accused in the preparation of his defense, or (3) that the accused was prejudiced by admission of the statement, the trial court does not abuse its discretion under Crim.R. 16(E)(3) by permitting such evidence to be admitted.’ [citation omitted].” *Hale* at ¶115. This Court affirmed, finding that the *Parson* factors were not met.

The *Parson* factors are not present in the instant case. There was no willful violation and only mere speculation that foreknowledge would have had any benefit to *Darmond*. The State was unaware that law enforcement officers interdicted additional similar packages. *Darmond* was not on trial for the additional packages and, as noted by the court, there was an equal likelihood that the packages would have been inculpatory. Despite the minimal importance of the additional packages, the trial court imposed the most severe sanction possible on the state without consideration of readily available alternatives. The equitable application of *Lakewood* could have prevented the extreme result that occurred in this case.

The recent amendments to Crim. R. 16 also support applying *Lakewood* to all parties. Crim. R.16(A) states, in relevant part, that the purpose of this rule is to “provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large.” The rule is meant to create an equal playing field for all parties. This purpose is not met where the parties play the game with different rules. Adoption of the proposition of law presented in this case will ensure that each party is treated the same.

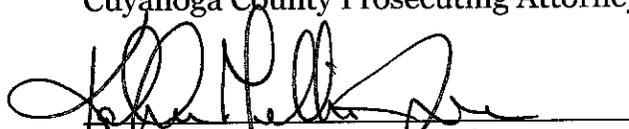
Lower courts are in need of this Court’s review and guidance on this issue; a conflict exists over *Lakewood’s* application to state discovery violations. This Court’s annunciation of a standard of review will provide necessary clarification and guidance to practitioners throughout the State of Ohio.

CONCLUSION

The State respectfully requests this Honorable Court grant jurisdiction over this matter of great public importance and is worthy of Supreme Court review as it affects thousands of litigants and provides clarity on an extremely important topic.

Respectfully submitted,

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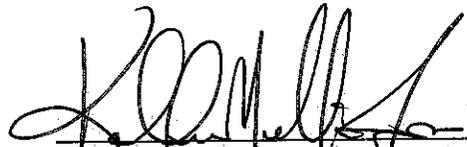
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[Cite as *State v. Darmond*, 2011-Ohio-6160.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 96373 and 96374

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

DEMETRIUS DARMOND

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-540709

BEFORE: Jones, J., Boyle, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 1, 2011

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LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals from the trial court's judgment dismissing the case with prejudice for a discovery violation. We affirm.

I. Procedural History and Facts

{¶ 2} Defendants-appellees, Demetrius Darmond and Iris Oliver, were jointly

indicted in August 2010. Both defendants were charged with drug trafficking and drug possession, and Darmond was additionally charged with possessing criminal tools and endangering children.¹ The charges stemmed from the controlled delivery of a FedEx package containing marijuana to 16210 Huntmere, Cleveland, Ohio.

{¶ 3} The defendants waived their right to a jury trial and the case proceeded to a bench trial. The state presented the testimony of Special Agent Patricia Stipek. On March 13, 2010, Stipek was involved with a package interdiction at a FedEx facility. She retrieved three packages at that time, including the one destined for 16210 Huntmere; it was addressed to “Tasha Mack.” The packages were all destined for different addresses. They all had similar packaging.

{¶ 4} Stipek obtained a search warrant for the package destined for Huntmere. Inside was a package wrapped in happy birthday paper and an envelope; marijuana was in the envelope.

{¶ 5} On March 17, 2010, Stipek did another package interdiction at the same FedEx facility and retrieved four packages, including the targeted one that was addressed to “Sonya Byrd” at 16210 Huntmere. Stipek testified that the four packages were similar to the packages she had retrieved on March 13.

{¶ 6} The special agent obtained a search warrant for the second package destined for Huntmere. The contents were similar to the first package destined for Huntmere — a

¹Darmond had previously been under indictment in Case No. CR-535469 for the same charges. That case was dismissed without prejudice by the state on August 9, 2010, “for further investigation.” The state re-indicted him in this case on August 11, 2010.

package wrapped in happy birthday paper and an envelope with marijuana in it.

{¶ 7} Stipek made a separate report for each of the seven packages, but with the exception of the two Huntmere packages, did not reference the other packages. The record demonstrates that neither the state nor defense had knowledge of the other five packages. Stipek did not have the additional reports with her at trial and was unable to testify about any investigation relative to those packages. Because of this “surprise,” the defense moved to dismiss the case. The court held the request in abeyance, allowed for complete examination of Stipek, then reconsidered the defense request and granted it.

{¶ 8} In dismissing the case, the trial court stated the excluded evidence “could be inculpatory or exculpatory.” The court rationalized its decision as follows:

{¶ 9} “All seven of the boxes were very similar in nature and all were the same box size. All seven of them were addressed and came from either the Phoenix or Tempe, Arizona area from a Kinko’s store.

{¶ 10} “All of them were handwritten with the same handwriting. Possibly the inside packaging on some of them were not exactly the same, but all of them came in a very similar packaging, birthday packaging, birthday cards, and so forth.

{¶ 11} “To then relate these seven boxes together, [] I believe all the other information should have been supplied, the reports, the addresses, the names, the investigation, whether there were charges, and quite possibly maybe if there was an indictment, which I don’t know if there was or wasn’t, and I don’t think anyone can speak to that.

{¶ 12} “* * * [D]id someone own up to a scheme that maybe would have been information and evidence that could have been brought in here and testimony by another person to exonerate the two individuals that were charged in this case?”

{¶ 13} The state’s sole assigned error reads: “The trial court abused its discretion in declaring a mistrial and by dismissing the state’s case with prejudice due to an inadvertent discovery violation.”

II. Law and Analysis

{¶ 14} Crim.R. 16 governs discovery in criminal cases and states that the purpose of discovery is to “provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large.” Crim.R. 16(A). If a party fails to comply with Crim.R. 16’s discovery requirements, a trial court “may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing into evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.” Crim.R. 16(L). It is within the trial court’s sound discretion to decide what sanction to impose for a discovery violation. *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 3, 511 N.E.2d 1138. Therefore, a trial court’s discovery sanction will not be overturned unless it was unreasonable, unconscionable, or arbitrary. *State v. Engle*, 166 Ohio App.3d 262, 2006-Ohio-1884, 850 N.E.2d 123, ¶7.

{¶ 15} Citing *Lakewood*, the state contends that the trial court abused its discretion

by not imposing a less severe sanction than dismissal with prejudice. This court addressed the “least restrictive sanction” element of *Lakewood* in *State v. Jones*, 183 Ohio App.3d 189, 2009-Ohio-2381, 916 N.E.2d 828, stating the following:

{¶ 16} “The holding in *Lakewood* must be read in conjunction with its facts. In *Lakewood*, the defense failed to respond to the prosecution’s demand for discovery. At trial, the state objected when the defense called its first witness, arguing that the state had not been provided with a witness list. The trial court then excluded the testimony of all defense witnesses as a sanction for the failure to respond to the state’s discovery request. The defense attorney proffered the testimony of the two witnesses he was precluded from calling.

{¶ 17} “The Ohio Supreme Court explained that the excluded testimony was material and relevant to the offense charged, and if believed, the defendant may have been acquitted. Consequently, the court concluded that the exclusions denied the defendant his Sixth Amendment right to present a defense. The court recognized that the state has a compelling interest but explained that any infringement on a defendant’s constitutional rights caused by a sanction must be afforded great weight. The court held that ‘a trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery.’ The court also stated: ‘We emphasize that the foregoing balancing test should not be construed to mean that the exclusion of testimony or evidence is never a permissible sanction in a

criminal case. It is only when exclusion acts to completely deny defendant his or her constitutional right to present a defense that the sanction is impermissible.” *Jones* at ¶10-11, quoting *Lakewood* at paragraph two of the syllabus and at ¶5.

{¶ 18} In *Jones*, this court cited a Seventh Appellate District case, *State v. Crespo*, Mahoning App. No. 03 MA 11, 2004-Ohio-1576, wherein the court held that “[c]ommon sense dictates that the [holding in *Lakewood*] does not mean that a trial court must impose the ‘least severe sanction’ in every case. Otherwise, dismissal of an indictment could never be an appropriate sanction as there will always be a sanction less severe. Similarly, a jail term for contempt could be eliminated as an option because there are a plethora of less severe sanctions available.” *Crespo* at ¶8; *Jones* at ¶12. The Seventh District further noted that a distinction exists in cases, unlike *Lakewood*, where the state fails to provide discovery, as opposed to cases where the defendant violated the discovery rules as in *Lakewood*. *Crespo* at ¶11 (“Therefore, the holding in *Lakewood* is not directly applicable in cases where sanctions are imposed upon the prosecution.”)

{¶ 19} The state also contends that both it and the defense were surprised by the additional evidence, and absent a finding by the trial court that the additional evidence was exculpatory, and thus that the lack of knowledge was prejudicial to the defense, the court abused its discretion. The record is clear that both the prosecution and the defense were surprised by the additional evidence, but the fact that the state was surprised did not lessen the purposes of discovery, which in part, is to “protect the integrity of the justice system and the rights of defendants.” Crim.R. 16(A). When potentially exculpatory

evidence is at issue, “the prosecutor may not hide behind the shield of innocence, claiming that the police failed to advise him of such evidence. Whether the non-disclosure is the responsibility of the officer or the prosecutor makes no difference. It is the government’s failure that denies the accused the process due him.” *State v. Sullivan* (Aug. 6, 1990), Tuscarawas App. No. 89AP120094, citing *United States ex rel. Smith v. Fairman* (1985), 769 F.2d 386.

{¶ 20} In regard to the nature of the evidence, that is, whether it was exculpatory or inculpatory, we are not able to make that determination. The trial court correctly stated that the evidence could have been exculpatory or inculpatory. Whatever its nature, it was discoverable, a point conceded by the state.

{¶ 21} We are not persuaded by the state’s reliance on *State v. King*, Muskingum App. No. CT2010-0010, 2010-Ohio-5701. In *King*, the defendant was charged with theft. In its opening statement, the state made reference to text messages sent by the defendant to the victim without objection from the defense. During the defense’s voir dire and opening statement, counsel several times stated that the defendant was going to take the stand and tell her side of the story. Defense counsel also stated that the defendant had a prior theft conviction.

{¶ 22} The state’s first witness to testify was the victim. The victim testified about the incident and also stated that after the incident the defendant sent her text messages apologizing for the incident. The defense did not object while the victim was testifying, but at the conclusion of the state’s direct examination of her, it alerted the court

that it had not received the text messages during discovery and requested a mistrial. The state acknowledged that it had committed “an oversight in the discovery process.” *Id.* at ¶31. The trial court granted the defense’s motion and dismissed the case with prejudice, stating that the “act of the State hints toward intentional overreaching to gain an unfair tactical advantage.” *Id.* at ¶11.

{¶ 23} The Fifth Appellate District found that the trial court abused its discretion. Specifically, the court found there was no evidence that the state’s mistake was an intentional oversight. The court also noted that the defense did not timely object. This case differs from *King*.

{¶ 24} In *King*, the evidence was inculpatory, while here it was not certain whether the evidence was inculpatory or exculpatory. Moreover, further investigation into the matter was likely not needed in *King*, whereas further investigation would have been needed in this case. Additionally, the court here did not find that the state’s act was intentional despite a lack of evidence on that. Rather, the court here found that the evidence was relevant evidence to which the defense was entitled for further investigation, irrespective of how it came to be overlooked.

{¶ 25} The record here evidences that the trial court gave careful and deliberate consideration to the defense’s request for a mistrial. “[T]he trial court is in far the better position to monitor the criminal process. When he elects to exercise discretion we are well advised to recognize and honor it in the absence of error of law.” *Sullivan, supra*, citing *State v. Everhart* (July 23, 1990), Tuscarawas App. No. 89-AP-40036.

{¶ 26} On the record before us, we cannot find that the trial court abused its discretion, especially in light of the fact that the state had already indicted and dismissed charges against Darmond for “further investigation,” and then two days later re-indicted him and Oliver, his mother-in-law. The state’s sole assignment of error is therefore overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

MARY J. BOYLE, P.J., and
JAMES J. SWEENEY, J., CONCUR

