ORIGINAL

NO. 12-0195

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 and IRIS OLIVER
Defendants-Appellees

NOTICE OF CERTIFIED CONFLICT PURSUANT TO S.CT.PRAC.R. 4.1

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Notice of Certified Conflict

Appellant, the State of Ohio, gives notice of a certified conflict to the Ohio Supreme Court from the Eighth District Court of Appeals, Case Nos. CA-96373 & 96374 decided and journalized on December 1, 2011. On January 30, 2012, the Eighth District has certified the following question to this Court:

> Does the holding in Lakewood v. Papadelis, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987), apply equally to instances where the state has committed a discovery violation?

The Eighth District has declared that its decision in *State v. Darmond* is in conflict with the Third District Court of Appeals opinion in State *v. Engle,* 166 Ohio App.3d 262, 2006-Ohio-1884, 850 N.E.2d 123, and the First District Court of Appeals opinion in *State v. Siemer*, 1st Dist. No. C-060604, C-060605, 2007-Ohio-4600.

Under Sup.Ct. R. 4.1, a copy of the Eighth District's order certifying the conflict and copies of all decisions determined to be in conflict are attached in the accompanying appendix. The State has also filed a notice of appeal seeking discretionary review in this case in Sup. Ct. Case No. 2012-0081.

Respectfully Submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

By: K Mullin

KATHERINE MULLIN (#0084122)
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CERTIFICATE OF SERVICE

A copy of foregoing Notice of Certified Conflict and Appendix has been mailed this 1st day of February, 2012 to:

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Appendix

Order of the Eighth District Court of Appeals certifying a conflict in *State v. Darmond*, 8th Dist. Nos. 96373 & 96374, issued January 30, 2012.

Decision of the Eighth District Court of Appeals in *State v. Darmond*, 8th Dist. Nos. 96373 & 96374, 2011-Ohio-6160.

Decision of the Third District Court of Appeals opinion in State *v. Engle,* 166 Ohio App.3d 262, 2006-Ohio-1884, 850 N.E.2d 123.

Decision of the First District Court of Appeals opinion in *State v. Siemer*, Hamilton App. No. C-060604, C-060605, 2007-Ohio-4600.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellant

COA NO.	LOWER COURT NO.
96373	CP CR-540709
96374	CP CR-540709

COMMON PLEAS COURT

-vs-

DEMETRIUS DARMOND

Appellee

MOTION NO. 451431

Date 01/30/12

Journal Entry

Motion by appellant to certify a conflict is granted. This court's decision in State v. Darmond, Cuyahoga App. No. 96373, 2011-Ohio-6160, is in conflict with State v. Engle, 166 Ohio App.3d 252, 2006-Ohio-1884, 850 N.E.2d 123 and State v. Siemer, 1st Dist. Nos. C-060604, C-060605, 2007-Ohio-4600. In Darmond, we upheld the trial court's dismissal of the indictment against the defendants for a discovery violation by the state.

We hereby certify the following issue to the Ohio Supreme Court pursuant to Article IV, Section 3(B)(40) of the Ohio Constitution and App.R. 25:

Does the holding in Lakewood v. Papadelis, 32 Ohio St.3d 1, 511 N.E.2d 1138 (I987), apply equally to instances where the state has committed a discovery violation?

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JAN 30 2012
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Presiding Judge MARY J. BOYLE, Concurs

Judge JAMES J. SWEENEY, Concurs

Judge LARRY A. JONES

CA 96373

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CA 96374

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellant

COA NO.	LOWER COURT NO.
96373	CP CR-540709
96374	CP CR-540709

COMMON PLEAS COURT

-vs-

DEMETRIUS DARMOND

Appellee

MOTION NO. 450320

Date 01/30/12

Journal Entry

Motion by Appellant to certify conflict is granted. See entry no. 451431.

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JAN 30 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Presiding Judge MARY J. BOYLE, Concurs

Judge JAMES J. SWEENEY, Concurs

Judge LARRY A. JONES

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eighth District, Cuyahoga County.
STATE of Ohio, Plaintiff–Appellant
v.
Demetrius DARMOND, Defendant–Appellee.

Nos. 96373, 96374.
Decided Dec. 1, 2011.

Criminal Appeal from the Cuyahoga County Court of Common Pleas, Case No. CR–540709.
William D. Mason, Cuyahoga County Prosecutor By Matthew Waters, Assistant County Prosecutor, Cleveland, OH, for appellant.

Patricia J. Smith, Jeffrey P. Hastings, Cleveland, OH, for appellee.

Before JONES, J., BOYLE, P.J., and SWEENEY, J.

LARRY A. JONES, J.

***1** {¶ 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.[FN1] The charges stemmed from the controlled delivery of a FedEx package containing marijuana to 16210 Huntmere, Cleveland, Ohio.

FN1. Darmond 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.

{¶ 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 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

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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.

*2 {¶ 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

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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.

*3 {¶ 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.

*4 {¶ 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

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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 reindicted 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.

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

Ohio App. 8 Dist.,2011.
State v. Darmond
Slip Copy, 2011 WL 5998671 (Ohio App. 8 Dist.), 2011 -Ohio- 6160

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C

Court of Appeals of Ohio,
Third District, Union County.
The STATE of Ohio, Appellant,
v.
ENGLE, Appellee.

No. 14–05–35.
Decided April 17, 2006.

Background: Defendant charged with trafficking on counterfeit controlled substances and trafficking in cocaine moved to dismiss charges. The Court of Common Pleas, Union County, granted motion, and state appealed.

Holdings: The Court of Appeals, Shaw, J., held that:
(1) trial court abused its discretion in dismissing all charges as sanction for state's violation of discovery order;
(2) trial court was required to make inquiry into circumstances of state's violation prior to imposing sanction; and
(3) trial court was required to determine whether less severe sanction than dismissal would accomplish purpose of discovery rules.

Reversed and remanded.

Rogers, J., concurred separately with opinion.

West Headnotes

[1] Criminal Law 110 ⚷627.8(6)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.8 Proceedings to Obtain Disclosure
110k627.8(6) k. Failure to Produce Information. Most Cited Cases

Trial court abused its discretion in dismissing all charges against drug defendant as sanction for state's violation of discovery order requiring it to produce audio recording of transaction forming basis of charges, where court made no inquiry into circumstances of discovery violation or whether such violation was in bad faith, gave state no opportunity to respond to defendant's motion to dismiss, and made no determination as to whether less severe sanction than dismissal would accomplish purpose of discovery rules. Rules Crim.Proc., Rule 16(E)(3).

[2] Criminal Law 110 ⚷627.8(6)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.8 Proceedings to Obtain Disclosure
110k627.8(6) k. Failure to Produce Information. Most Cited Cases

Criminal Law 110 ⚷1148

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1148 k. Preliminary Proceedings. Most Cited Cases

Trial court is given wide discretion in determining sanctions for discovery violations in criminal matters; therefore, an appellate court will not reverse the trial court's sanction absent an abuse of discretion. Rules Crim.Proc., Rule 16(E).

[3] Criminal Law 110 ⚷627.8(6)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings

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110k627.5 Discovery Prior to and Incident to Trial
110k627.8 Proceedings to Obtain Disclosure
110k627.8(6) k. Failure to Produce Information. Most Cited Cases

In determining the appropriate sanction for a discovery violation by the state in a criminal matter, the trial court must make an inquiry into the circumstances of the discovery violation. Rules Crim.Proc., Rule 16(E).

[4] Criminal Law 110 ⚷627.8(6)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.8 Proceedings to Obtain Disclosure
110k627.8(6) k. Failure to Produce Information. Most Cited Cases

Trial court was required to make inquiry into circumstances of state's violation of discovery order requiring it to produce audio recording of transaction forming basis of drug charges, prior to imposing sanction for such violation. Rules Crim.Proc., Rule 16(E).

[5] Criminal Law 110 ⚷627.8(6)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.8 Proceedings to Obtain Disclosure
110k627.8(6) k. Failure to Produce Information. Most Cited Cases

Trial court was required, in determining appropriate sanction for state's discovery violation in drug prosecution, to determine whether less severe sanction than outright dismissal of all charges would accomplish purpose of discovery rules. Rules Crim.Proc., Rule 16(E).

****123** David W. Phillips, Union County Prosecuting Attorney, and Rick Rodger, Assistant Prosecuting Attorney, for appellant.

Bernard M. Floetker, for appellee.

****124** SHAW, Judge.

***263** {¶ 1} Plaintiff-appellant, the state of Ohio, brings this appeal from the August 30, 2005 judgment of the Court of Common Pleas, Union County, Ohio, granting defendant-appellee John W. Engle's motion to dismiss criminal charges filed against him.

{¶ 2} Following an investigation, officers of the Union County Sheriff's Office and the Marysville Police Department conducted a "sting" operation with the assistance of a confidential informant ("CI"). During this operation, the CI purchased two separate plastic "baggies" for $400 dollars each from defendant Engle and one Jeannine Phillips. The contents of the plastic baggies were tested by the Bureau of Criminal Identification and Investigation, and both were found to be approximately 9.24 grams in weight. The contents of one bag were determined to be crack cocaine, while the contents of the other bag were not a controlled substance. Engle was subsequently indicted in April 2005 on one count of trafficking in counterfeit controlled substances in violation of R.C. 2925.37(B), a fifth-degree felony, and one count of trafficking in cocaine in violation of R.C. 2925.03(A)(1) and (C)(4)(c), a fourth-degree felony.

***264** {¶ 3} The instant appeal involves the prosecution's failure to disclose a copy of an audio recording of the drug transaction in question. Defense counsel first formally requested disclosure of "a copy of the audio disc which contains the alleged drug transaction" in a motion to compel discovery filed on July 5, 2005.[FN1] A hearing was held on this and other motions on July 20, 2005, and the trial court orally ordered the prosecution to turn over

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a copy of the audio tape to defense counsel. The court also filed a written entry on August 5, 2005, ordering the state to provide a copy of the audio disc "instanter."

FN1. Defense counsel argues that a copy of the audio recording was first requested at a scheduling conference on June 21, 2005. However, no transcript of that proceeding was in the record before this court.

{¶ 4} However, the prosecutor failed to turn over a copy of the audio recording at that time. Subsequently, the prosecutor contacted defense counsel, seeking an agreement on a continuance because one of the state's witnesses had scheduled a surgery and was unavailable for trial. Defense counsel indicated that he would not agree to a continuance and told the prosecutor that he had filed a motion to dismiss the charges because the state had failed to turn over the audio recording as ordered by the trial court.

{¶ 5} Engle's motion to dismiss was filed with the court on August 29, 2005. The next day, without giving the state any opportunity to respond to the motion, the trial court granted the motion and dismissed the charges against Engle. The state subsequently filed a memorandum opposing the motion to dismiss and, according to the parties, did turn over a copy of the audio recording at that point. However, there is nothing in the record that indicates that a copy was turned over to defendant.

{¶ 6} The state now appeals the trial court's order dismissing the charges against Engle, asserting one assignment of error:

The trial court abused its discretion and erred when it dismissed the entire case.

[1][2] {¶ 7} The instant appeal asks this court to examine whether the trial court erred in dismissing the charges against Engle due to the state's violation of the court's order to produce discovery. Discovery in a criminal proceeding is governed by Crim.R. 16. Subsection (E) of ****125** that rule authorizes a trial court to sanction a party for discovery violations, providing:

(3) Failure to comply: If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the ***265** party from introducing in evidence the material not disclosed, *or it may make such other order as it deems just under the circumstances.*

(Emphasis added.) Crim.R. 16(E)(3). Crim.R. 16(E) grants the trial court wide discretion in determining sanctions for discovery violations. *State v. Parson* (1983), 6 Ohio St.3d 442, 445, 6 OBR 485, 453 N.E.2d 689; *State v. Decker,* Seneca App. No. 13–03–17, 2003-Ohio-4645, 2003 WL 22049624, ¶ 20, citing *State v. Myers,* 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186, at ¶ 75. Therefore, an appellate court will not reverse the trial court's sanction absent an abuse of discretion. *Parson,* 6 Ohio St.3d at 445, 6 OBR 485, 453 N.E.2d 689. The term "abuse of discretion" connotes that the court's decision is unreasonable, arbitrary, or unconscionable; an abuse of discretion constitutes more than an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140. When applying this standard, "an appellate court must not substitute its judgment for that of the trial court." *State ex rel. Strategic Capital Investors, Ltd. v. McCarthy* (1998), 126 Ohio App.3d 237, 247, 710 N.E.2d 290 .

[3] {¶ 8} However, in determining the appropriate sanction, the trial court must make an inquiry into the circumstances of the discovery violation. *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138, ¶ 2 of the syllabus. In addition, the trial court "must impose the least severe sanction that is consistent with the purpose of the rules of discovery." Id. The purpose of that rule is to pre-

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vent surprise and the secreting of evidence favorable to one party; "the overall purpose is to produce a fair trial." Id. at 3, 511 N.E.2d 1138. Therefore, we must determine whether the trial court made the appropriate inquiry into the circumstances of the discovery violation and whether the court abused its discretion in determining that dismissing the charges was the least severe sanction available.

[4] {¶ 9} First, it is clear from the record that the trial court failed to make any inquiry into the circumstances of the discovery violation. The first indication that the court was aware of the fact that the prosecution had failed to turn over a copy of the audio recording subsequent to the court's order was Engle's filing of a motion to dismiss. The court filed an entry granting that motion the very next day, without conducting a hearing and without providing the state any opportunity to respond to the motion. When the state did file a memorandum opposing Engle's motion, the trial court apparently gave no consideration to that memorandum and did not reconsider its entry. Moreover, due to the trial court's failure to make any inquiry into the reasons for the prosecutor's failure to comply with the order, it is impossible to determine an appropriate sanction. There is no indication in the record as to why the prosecutor failed to comply with the court's order. The trial court was required to inquire into the circumstances of the violation in order to fashion an appropriate remedy.

***266** [5] {¶ 10} Second, it is clear that the trial court imposed the most severe sanction available without making any determination whether a less severe sanction would be appropriate. "[T]he trial court ****126** must find that no lesser sanction would accomplish the purpose of the discovery rules." *Papadelis,* 32 Ohio St.3d at 5, 511 N.E.2d 1138. In the instant case, the trial court made no findings whatsoever. The trial court's entry read, in its entirety: "Defendant's Motion to Dismiss is SUSTAINED, for the reasons stated in the Motion. State's Motion for Continuance is OVERRULED as moot." Thus, it is clear that the trial court did not properly balance the need to impose a sanction with the purpose of the discovery rules, as required under *Papadelis.*

{¶ 11} Finally, the Supreme Court in *Papadelis* gave guidance as to what factors the trial court is to consider in determining the appropriate sanction. Those factors include the extent that one party will be surprised or prejudiced by the evidence that should have been disclosed, the impact that excluding the evidence or testimony will have on the outcome of the case, whether the violation was "willful or in bad faith," and the effectiveness of less severe sanctions. *Papadelis,* 32 Ohio St.3d at 5, 511 N.E.2d 1138. This court is unable to determine whether the state acted in bad faith in the instant case, because there is nothing in the record indicating the prosecution's justification or excuse for failing to comply with the discovery order. Moreover, it seems clear that less severe sanctions were available that could produce a fair trial, including granting a continuance or excluding the evidence from the proceedings.

{¶ 12} Based on the foregoing, 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. Accordingly, the assignment of error is sustained, the judgment of the trial court is reversed, and the matter is remanded for further proceedings according to law.

Judgment reversed and cause remanded.

THOMAS F. BRYANT, P.J., concurs.
ROGERS, J., concurs separately.
ROGERS, Judge, concurring separately.

{¶ 13} I concur with the majority that the trial court acted too hastily in summarily ruling on the motion to dismiss and failing to allow the state time to respond to the motion. I write separately because I do not join the majority in the conclusory statement that "it seems clear that less severe sanctions were available that could produce a fair trial, in-

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cluding granting a continuance or ***267** excluding the evidence from the proceedings." This statement too closely resembles a mandate to the trial court to impose a lesser sanction on rehearing. Without a record of *Papadelis* factors, which the majority agrees must be considered, this court is not in a position to suggest what sanction is most appropriate in this case.

{¶ 14} I am particularly concerned that the defense had allegedly requested the audio as early as June 21, had allegedly tendered a blank CD for the purpose of obtaining a copy of the audio, and had filed a motion for a copy of the audio disc that contained the alleged drug transaction on July 5. Additionally, at the July 20 hearing, the state was directed to produce the audio immediately. Further, the August 5 judgment entry again ordered the audio produced "instanter." Yet the audio was never produced prior to the date the trial was due to commence. It is possible that the trial court could interpret such persistent delays as willful and in bad faith and to be a sound basis for dismissal.

{¶ 15} As noted by the majority, this court has too little evidence before it to ****127** determine whether the delay in production was willful, although it seems obvious that it was at least negligent. I would remand with the specific instruction to hold a hearing on the motion and to then determine the appropriate sanction that should be imposed in this case.

{¶ 16} That having been said, I would offer my general observations, not directed to the prosecution in this case but to the criminal justice system in general. It has been my experience that in pursuing justice against guilty defendants, courts have been quite lenient against prosecutors who have been negligent or worse. Even gross prosecutorial misconduct will not result in a reversal of a conviction unless the defendant can demonstrate that the misconduct prejudicially affected a substantial right. *State v. Brinkley,* 105 Ohio St.3d 231, 252, 2005-Ohio-1507, 824 N.E.2d 959, at ¶ 135.

{¶ 17} I have further observed that when granted such leniency, instead of striving to perform in a more professional manner, some prosecutors have realized that they are not likely to be seriously sanctioned for negligence or even willful misconduct and, as a result, their conduct has gotten worse rather than better. An occasional dismissal or other serious sanction for persistent or gross prosecutorial misconduct would surely grab the attention of conscientious prosecutors, resulting in more professional behavior. For less scrupulous prosecutors, it could alter election results. In either case, the consequences would greatly improve our criminal-justice system and the credibility of the courts.

Ohio App. 3 Dist.,2006.
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C
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
First District, Hamilton County.
STATE of Ohio, Plaintiff-Appellant,
v.
Ean SIEMER, Defendant-Appellee.

Nos. C-060604, C-060605.
Decided Sept. 7, 2007.

Criminal Appeal from Hamilton County Municipal Court.
Joseph T. Deters, Hamilton County Prosecuting Attorney, and Philip R. Cummings, Assistant Prosecuting Attorney, for Plaintiff-Appellant.

Donovan Law, Mary Jill Donovan, and Michael P. McCafferty, for Defendant-Appellee.

SYLVIA S. HENDON, Judge.

*1 {¶ 1} Plaintiff-appellant, the State of Ohio, appeals a judgment of the trial court that dismissed the state's case against defendant-appellee Ean Siemer as a sanction for a discovery violation. For the following reasons, we reverse the trial court's judgment.

{¶ 2} Siemer was arrested and charged with violations of R.C. 4511.19, operating a motor vehicle while intoxicated. Prior to trial, Siemer filed a motion requesting that the state preserve and produce all video and audio tapes pertaining to the investigation. The state provided Siemer with a copy of the videotape from the arresting officer's police cruiser.

{¶ 3} Siemer filed a motion to suppress. The trial court partially granted the motion and suppressed the results of a horizontal gaze nystagmus field-sobriety test. The case proceeded to trial, where the state presented testimony from the arresting officer, Ohio State Highway Patrol Trooper Thomas Bloomberg. On cross-examination, Trooper Bloomberg referred to statements made by Siemer that were not on the videotape that Siemer had been given. Upon further questioning, it was revealed that neither the state nor Siemer had been given a complete copy of the cruiser's videotape. Approximately 20 minutes of the original videotape had not been provided to the state, and in turn had not been provided to Siemer, when the state copied its tape.

{¶ 4} Following this discovery, Siemer moved for dismissal of the case, or, in the alternative, that he be allowed to reopen his motion to suppress or be granted a mistrial. The state requested a continuance so that Siemer could better prepare his defense. The trial court, after hearing brief arguments from each party, granted Siemer's motion to dismiss. The state has appealed, arguing in its sole assignment of error that the trial court abused its discretion in granting Siemer's motion to dismiss.

{¶ 5} Crim.R. 16 governs discovery, and it provides that a trial court may impose various sanctions when a party has committed a discovery violation. Specifically, Crim.R. 16(E)(3) states that "[i]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances."

{¶ 6} The Ohio Supreme Court discussed the imposition of sanctions for discovery violations in detail in *Lakewood v. Papadelis.*[FN1] *Lakewood* involved a discovery violation committed by the defendant. As a sanction, the trial court had excluded

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the testimony of all the defendant's witnesses, thus denying him the right to present a defense.

FN1. *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138.

{¶ 7} The *Lakewood* court set forth a balancing test between the state's interest in pretrial discovery and the defendant's constitutional rights. When employing the balancing test, a trial court should consider "the extent to which the prosecution will be surprised or prejudiced by the witness' testimony, the impact of witness preclusion on the evidence at trial and the outcome of the case, whether violation of the discovery rules was willful or in bad faith, and the effectiveness of less severe sanctions." FN2 The *Lakewood* court held that, when imposing sanctions under Crim.R. 16, a trial court must inquire into the circumstances surrounding a discovery violation and "must impose the least severe sanction that is consistent with the purpose of the rules of discovery." FN3

FN2. *Id.* at 5.

FN3. *Id.*

*2 {¶ 8} But the court further noted 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." FN4 This concern noted by the *Lakewood* court does not arise in cases involving a discovery violation committed by the state, as exclusion of the state's witnesses and evidence most likely will not deny a defendant his or her constitutional rights.

FN4. *Id.*

{¶ 9} We recognize that the *Lakewood* balancing test was created in the context of a discovery violation committed by the defendant. But *Lakewood* is nonetheless relevant and equally applicable to cases involving discovery violations committed by the state.FN5 Applying the balancing test to the facts of this case, we review the trial court's decision to dismiss the charges against Siemer as a discovery sanction for an abuse of discretion.FN6 An abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." FN7

FN5. See *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.

FN6. *State v. Parson* (1983), 6 Ohio St.3d 442, 445, 453 N.E.2d 689.

FN7. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 10} In this case, the state's initital discovery violation was not committed willfully or intentionally. The state had not knowingly provided Siemer with an incomplete copy of the videotape, but had given Siemer an exact copy of the videotape in its possession. The record does indicate that the state first became aware that it had not received a complete copy of the videotape from Trooper Bloomberg, and hence that it had not provided a complete copy to Siemer, on the morning of the second day of trial. But the state did not provide this information to Siemer, and it was not revealed until the cross-examination of Trooper Bloomberg. The state's failure to inform Siemer of this informa-

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tion was a willful violation of its duty to supplement discovery. [FN8] But given that the initial violation was not willful, that the trial court's sanction frustrated the state's interest in prosecuting those who drive while under the influence, and that Siemer's constitutional rights would have still been protected by a less severe sanction, we conclude that the trial court abused its discretion in granting Siemer's motion to dismiss.[FN9]

FN8. See Crim.R. 16(D).

FN9. See *State v. Jennings,* supra, 2004-Ohio-3748, at ¶ 6.

{¶ 11} The state's first assignment of error is sustained. The judgment of the trial court is reversed, and this case is remanded for further proceedings consistent with the law and this decision.

Judgment reversed and cause remanded.

SUNDERMANN, P.J., and CUNNINGHAM, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

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Not Reported in N.E.2d, 2007 WL 2541121 (Ohio App. 1 Dist.), 2007 -Ohio- 4600

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