

NO. ~~2012-0081~~ & 2012-0195

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

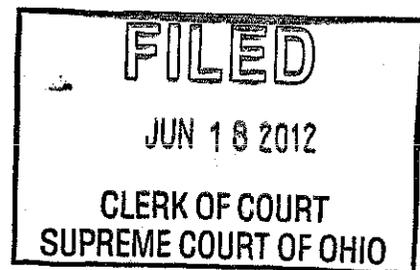
Defendants-Appellees

MERIT BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

This matter is before this Court as a certified conflict and as a discretionary appeal. It presents an issue of statewide concern: 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. The violation was neither willful nor material. In affirming, the Eighth District found that the “least severe sanction” language from *Lakewood* did not apply to state discovery violations. 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. The *Darmond* decision is inconsistent with the purpose of Crim. R. 16 and promotes unpredictability in the application of the criminal rules. 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 can arbitrarily impose the most severe sanction without consideration of readily available alternatives.

Crim. R. 16, this Court’s precedent, and precedent throughout Ohio support answering the certified conflict in the affirmative. Ohio is in need of a consistent approach to discovery violations. Both parties are entitled to a fair trial, and that cannot be accomplished when the parties are subject to different rules. Therefore, the State of Ohio requests this Honorable Court answer the certified question in the affirmative, adopt the State’s proposition of law, and hold that trial courts 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.

STATEMENT OF THE CASE

On August 11, 2010, Demetrius Darmond and Iris Oliver, were indicted by the Cuyahoga County Grand Jury with the following: 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.

Darmond and Oliver were arraigned and 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 due to an alleged discovery violation. The trial 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 sought a discretionary appeal with this Court is OSC 2012-0081.

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 Eighth District granted the State's motion and certified a conflict. The State filed a notice of certified conflict with this Court is case number OSC 2012-0195.

On April 4, 2012, this Court determined that a conflict existed and also accepted the State's discretionary appeal in OSC 2012-0081. This Court consolidated the two cases.

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 the Defendants 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 the Defendants 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.*

LAW AND ARGUMENT

CERTIFIED CONFLICT QUESTION: 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?

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

Crim. R. 16 is meant to provide equality and fairness to the criminal justice system. This goal cannot be accomplished when defendants and prosecutors are subject to a different set of rules; different rules encourage inconsistency. When either party fails to comply with their Crim. R. 16 responsibilities, the trial court should consider the circumstances of the violation and apply the least severe sanction that is appropriate to address the noncompliance. This idea of uniformity is supported by the language of

Crim. R. 16 as well as precedent from this Court and the majority of appellate courts throughout Ohio.

II. *Crim. R. 16*

A. *Original Crim. R. 16*

Crim. R. 16 became effective on July 1, 1973. The rule remained unchanged until 2010. As it is relevant to the issue before this Court, Crim. R. 16 originally stated the following:

“(A) Demand for discovery

“Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.

...

“(D) Continuing duty to disclose

“If, subsequent to compliance with a request or order pursuant to this rule, and prior to or during trial, a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection, or notify the other party or his attorney or the court of the existence of the additional matter, in order to allow the court to modify its previous order, or to allow the other party to make an appropriate request for additional discovery or inspection.

“(E) Regulation of discovery

...

“(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 party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.”

Crim. R. 16 (E)(3) gave a trial court fairly broad authority to regulate discovery and take action for noncompliance. However, precedent supports that the trial court should apply the least severe sanction available for violations from either party.

In *State v. Howard* (1978), 56 Ohio St.2d 328, 383 N.E.2d 912, this Court was asked to review a decision by the Tenth District Court of Appeals in which the appellate court reversed a conviction due to an alleged state discovery violation. In that case, the state called a rebuttal witness but did not provide that witness' name on its witness list. The trial court offered to grant a continuance, but after an extensive voir dire of the rebuttal witnesses, no continuance was requested. *Id.* at 332. This Court noted the trial court's offer of an alternative remedy and held that the trial court was not required to exclude the rebuttal testimony.

In *State v. Parson* (1983), 6 Ohio St.3d 442, 453 N.E.2d 689, this Court reviewed a state discovery violation. In that case, 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 v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987).

In *Lakewood*, this Court was asked to review a discovery sanction that was imposed against the defense. Defendant Papadelis was charged with violating a

municipal ordinance. Defense counsel filed an initial request for discovery and later filed a motion to compel. The prosecutor provided discovery and filed a reciprocal demand. Defense counsel did not provide discovery. During trial, defense counsel called a witness to the stand. The prosecutor objected and informed the court that defense counsel did not provide a witness list or any other discovery. Defense counsel admitted that he failed to respond. Due to the Crim. R. 16 violation, the trial court excluded all of Papadelis' witnesses. Papadelis appealed and the Eighth District reversed the conviction because the city had failed to file a motion to compel. This Court was asked to consider whether a moving party is required to file a motion to compel before a trial court could impose a discovery sanction.

Once it was established that a sanction could be imposed, this Court was next asked to consider whether or not the sanction was appropriate. This Court noted that "Crim.R. 16(E)(3) provides a range of sanctions which the trial court, in its discretion, may impose on a noncomplying party." *Lakewood* at 4. The *Lakewood* Court expressed concern that the severe sanction of excluding all of a defendant's witnesses would interfere with a defendant's constitutional right to present a defense. To that end, this Court held that "a trial court **must** inquire into the circumstances surrounding a violation of Crim.R. 16 prior to imposing sanctions pursuant to Crim.R. 16(E)(3). Factors to be considered by the trial court include 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." *Id.* (Emphasis added). This Court went on to state that a trial court "must impose the least drastic sanction possible that is consistent with the state's interest. ***We hold 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.” *Id.* at 5.¹

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 [to] 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

¹ In *Lakewood*, this Court went on to state that exclusion may be a proper remedy in some circumstances but may not be used to completely deny a defendant his right to present a defense.

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.

As noted above, this Court has previously applied the “least severe sanction” language to state discovery violations. It is an equitable remedy as the state and the defendant are each entitled to a fair trial. This Court should continue to hold that trial courts must inquire into the circumstances producing the alleged violation of Crim.R. 16 and impose the least severe sanction that is consistent with the purpose of the rules of discovery. *State v. Parker* (1990), 53 Ohio St.3d 82, 558 N.E.2d 1164

B. Amended Crim. R. 16

On July 1, 2010, this Court unanimously adopted a new version of Crim. R. 16.

As it is relevant to the issue before this Court, Crim. R. 16 now states the following:

“(A) Purpose, Scope and Reciprocity. 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. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(L) Regulation of discovery.

(1) The trial court may make orders regulating discovery not inconsistent with this rule. 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 party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.”

The new Crim. R. 16 clearly indicates this Court's intention that the rule be applied in a fair and equitable manner. Crim. R. 16(A). The revised version also requires a trial court to impose a sanction commensurate with the circumstances of the violation. Crim. R. 16(L)(1). The revisions to the applicable portions of Crim. R. 16 remain consistent with this Court's decisions in *Parson*, *Lakewood*, and *Parker*. Therefore, those decisions should be uniformly applied for any discovery violation.

III. Conflict cases

The vast majority of courts in Ohio have applied the "least severe sanction" language from *Lakewood* to cases that involve a state discovery violation. However, 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.

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 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 this Court's decision in *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138. 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. 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.

Darmond, *Siemer*, and *Engle* are in conflict. While the vast majority of Ohio appellate courts have applied *Lakewood* to state discovery violations, the Eighth District has repeatedly refused to do so. This position is unsupported by Crim. R. 16 or this Court's precedent and should be reversed. The trial court's failure to consider and apply

a more appropriate sanction was an abuse of discretion which prevented the State from ever prosecuting Darmond and Oliver for their criminal acts.

IV. Application

In this case the Eighth District Court of Appeals affirmed a trial court's order dismissing a case with prejudice for a discovery violation. *State v. Darmond*, 8th Dist. Nos. 96373 and 96374, 2011-Ohio-6160. The violation was neither willful nor material. 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.

The instant case is a clear example of the need for an equitable remedy. There was no willful violation and only mere speculation that the report(s) 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 Eighth District's failure to apply *Lakewood* to this case is reversible error.

CONCLUSION

The State respectfully requests this Honorable Court adopt the State's proposition of law, answer the conflict issue in the affirmative, and hold that trial court's 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.

Respectfully submitted,

WILLIAM D. MASON
Cuyahoga County Prosecuting Attorney

Brenda J. Ditala 0072635

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*per phone
authorization*

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellant was sent by regular U.S. mail this
18th day of June, 2012 to:

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John Parker, Esq.
988 East 185th Street
Cleveland, Ohio 44119

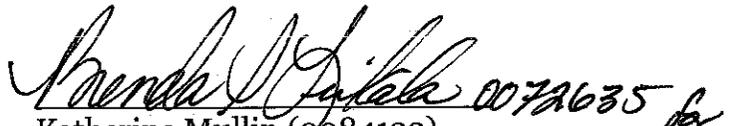
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Assistant Prosecuting Attorney *per phone authorization*

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)

Plaintiff-Appellant)

v.)

DEMETRIUS DARMOND)

Defendant-Appellee)

CASE NO: **12-0081**

On Appeal from the Cuyahoga
County Court of Appeals
Eighth Appellate District

Court of Appeals
Case No. CA-96373 & 96374

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

COUNSEL FOR APPELLANT, STATE OF OHIO

WILLIAM D. MASON (0087540)

Katherine Mullin

By: KATHERINE MULLIN (0084122)

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FILED
JAN 17 2012
CLERK OF COURT
SUPREME COURT OF OHIO

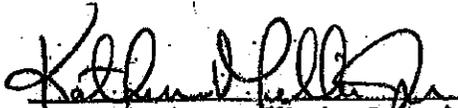
NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Appellant, State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in *State v. Darmond* Appeals Case No. 96373 & 96374, Cuyahoga Common Pleas Case number CR-540709, on December 1, 2011.

This appeal raises a substantial constitutional question, involves a felony, or a question of public or great general interest and invokes this Court's discretionary authority pursuant to Art. IV, § 2(B)(2)(e) and S.Ct. R. II Section 1 (A)(2) and (3).

Respectfully submitted,

WILLIAM D. MASON (0037540)
CUYAHOGA COUNTY PROSECUTOR


By: Katherine Mullin (0084122)
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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail, postage prepaid, on this 17th day of January, 2012 to counsel for Appellee:

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COUNSEL FOR APPELLANT
STATE OF OHIO

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

Counsel for Defendants-Appellees

Counsel for Plaintiff-Appellant

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FILED
FEB 02 2012
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
FEB 02 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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:

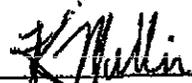
Does the holding in *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987), apply equally to instances where the state has committed a discovery violation?

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: 
KATHERINE MULLIN (#0084122)
Assistant Prosecuting Attorney
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(216) 443-7800

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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250 East Broad St., Suite 1400
Columbus, OH 43215


Assistant Prosecuting Attorney

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.
96373
96374

LOWER COURT NO.
CP CR-540709
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-060805, 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. Papadellis, 32 Ohio St.3d 1, 511 N.E.2d 1136 (1987), apply equally to instances where the state has committed a discovery violation?

RECEIVED FOR FILING

JAN 30 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: [Signature] DEP.

Presiding Judge MARY J. BOYLE, Concur

Judge JAMES J. SWEENEY, Concur

Judge LARRY A. JONES

CA 96373

CA 96374

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1200 ONTARIO STREET
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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.
96373
96374

LOWER COURT NO.
CP CR-540709
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.

COPIES RETURNED TO COURSE FOR
ALL PARTIES. COSTS PAID

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JAN 30 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DER.

Presiding Judge MARY J. BOYLE, Concur

Judge JAMES J. SWEENEY, Concur

[Signature]
Judge LARRY A. JONES

Westlaw

Page 1

Slip Copy, 2011 WL 5998671 (Ohio App. 8 Dist.), 2011 -Ohio- 6160
(Cite as: 2011 WL 5998671 (Ohio App. 8 Dist.))

**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 Dar-
mond and Iris Oliver, were jointly indicted in Au-
gust 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 in-
volved with a package interdiction at a FedEx facil-
ity. She retrieved three packages at that time, in-
cluding 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 pack-
age wrapped in happy birthday paper and an envel-
ope; 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 war-
rant 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. Papadellis* (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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(Cite as: 2011 WL 5998671 (Ohio App. 8 Dist.))

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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(Cite as: 2011 WL 5998671 (Ohio App. 8 Dist.))

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 over-

ruled.

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. SWEBNEY, J., Concur.

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

END OF DOCUMENT

Westlaw

850 N.E.2d 123
166 Ohio App.3d 262, 850 N.E.2d 123, 2006 -Ohio- 1884
(Cite as: 166 Ohio App.3d 262, 850 N.E.2d 123)

Page 1

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(B).

[3] Criminal Law 110 627.8(6)

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

850 N.E.2d 123
166 Ohio App.3d 262, 850 N.E.2d 123, 2006 -Ohio- 1884
(Cite as: 166 Ohio App.3d 262, 850 N.E.2d 123)

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 "instantly."

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. Papadellis* (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." *Papadellis*, 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 *Papadellis*.

{¶ 11} Finally, the Supreme Court in *Papadellis* 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. *Papadellis*, 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 *Papadellis* 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 "instantly." 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.

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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 At-
 torney, and Phillip R. Cummings, Assistant Prosec-
 uting 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 vi-
 olations of R.C. 4511.19, operating a motor vehicle
 while intoxicated. Prior to trial, Siemer filed a mo-
 tion requesting that the state preserve and produce
 all video and audio tapes pertaining to the investig-
 ation. 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 sup-
 pressed the results of a horizontal gaze nystagmus

field-sobriety test. The case proceeded to trial,
 where the state presented testimony from the arrest-
 ing officer, Ohio State Highway Patrol Trooper
 Thomas Bloomberg. On cross-examination, Troop-
 er 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 continu-
 ance so that Siemer could better prepare his de-
 fense. The trial court, after hearing brief arguments
 from each party, granted Siemer's motion to dis-
 miss. The state has appealed, arguing in its sole as-
 signment of error that the trial court abused its dis-
 cretion in granting Siemer's motion to dismiss.

{¶ 5} Crim.R. 16 governs discovery, and it
 provides that a trial court may impose various sanc-
 tions when a party has committed a discovery viol-
 ation. Specifically, Crim.R. 16(E)(3) states that
 "[i]f at any time during the course of the proceed-
 ings 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 or-
 der such party to permit the discovery or inspec-
 tion, 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 un-
 der the circumstances."

{¶ 6} The Ohio Supreme Court discussed the
 imposition of sanctions for discovery violations in
 detail in *Lakewood v. Papadellis*.¹ *Lakewood* in-
 volved a discovery violation committed by the de-
 fendant. 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. Papadellis* (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-2250; *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. Potts*, 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 initial 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.⁷⁹⁸ 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.⁷⁹⁹

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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[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

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

Crim. R. Rule 16

Baldwin's Ohio Revised Code Annotated Currentness
Rules of Criminal Procedure (Refs & Annos)

Crim R 16 Discovery and Inspection

(A) Demand for discovery

Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.

(B) Disclosure of evidence by the prosecuting attorney

(1) Information subject to disclosure.

(a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect the copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

(i)

(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;

(ii)

(ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer;

(iii)

(iii) Recorded testimony of the defendant or co-defendant before a grand jury.

(b) Defendant's prior record. Upon motion of the defendant the court shall order the prosecuting attorney to furnish defendant a copy of defendant's prior criminal record, which is available to or within the possession, custody or control of the state.

(c) Documents and tangible objects. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant.

(d) Reports of examination and tests. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, available to or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.

(e) Witness names and addresses; record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which ~~hearing the defendant shall have the right of cross-examination. A record of the witness~~ testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(f) Disclosure of evidence favorable to defendant. Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e) apply to this subsection.

(g) In camera inspection of witness' statement. Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) *Information not subject to disclosure.* Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case or of statements made by witnesses or prospective witnesses to state agents.

(3) *Grand jury transcripts.* The discovery or inspection of recorded proceedings of a grand jury shall be governed by Rule 6(E) and subsection (B)(1)(a) of this rule.

(4) *Witness list; no comment.* The fact that a witness' name is on a list furnished under subsections (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at the trial.

(C) Disclosure of evidence by the defendant

(1) Information subject to disclosure.

(a) Documents and tangible objects. If on request or motion the defendant obtains discovery under subsection (B)(1)(c), the court shall, upon motion of the prosecuting attorney order the defendant to permit the prosecuting attorney to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, available to or within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of examinations and tests. If on request or motion the defendant obtains discovery under subsection (B)(1)(d), the court shall, upon motion of the prosecuting attorney, order the defendant to permit the prosecuting attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, available to or within the possession or control of the defendant, and which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial, when such results or reports relate to his testimony.

(c) Witness names and addresses. If on request or motion the defendant obtains discovery under subsection (B)(1)(e), the court shall, upon motion of the prosecuting attorney, order the defendant to furnish the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial. Where a motion for discovery of the names and addresses of witnesses has been made by the prosecuting attorney, the defendant may move the court to perpetuate the testimony of such witnesses in a hearing before the court in which hearing the prosecuting attorney shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the defendant's case in chief in the event the witness has become unavailable through no fault of the defendant.

(d) In camera inspection of witness' statement. Upon completion of the direct examination, at trial, of a witness other than the defendant, the court on motion of the prosecuting attorney shall conduct an in camera inspection of the witness' written or recorded statement obtained by the defense attorney or his agents with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist the statement shall be given to the prosecuting attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the prosecuting attorney, and he shall not be permitted to cross-examine or comment thereon.

Whenever the prosecuting attorney is not given the entire statement it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) *Information not subject to disclosure.* Except as provided in subsections (C)(1)(b) and (d), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the defense attorney or his agents in connection with the investigation or defense of the case, or of statements made by witnesses or prospective witnesses to the defense attorney or his agents.

(3) *Witness list; no comment.* The fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial.

(D) Continuing duty to disclose

If, subsequent to compliance with a request or order pursuant to this rule, and prior to or during trial, a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection, or notify the other party or his attorney or the court of the existence of the additional matter, in order to allow the court to modify its previous order, or to allow the other party to make an appropriate request for additional discovery or inspection.

(E) Regulation of discovery

(1) *Protective orders.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party the court may permit a party to make such showing, or part of such showing, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) *Time, place and manner of discovery and inspection.* An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted, and may prescribe such terms and conditions as are just.

(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 party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(F) Time of motions

A defendant shall make his motion for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. The prosecuting attorney shall make his motion for discovery within seven days after defendant obtains discovery or three days before trial, whichever is earlier. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

CREDIT(S)

(Adopted eff. 7-1-73)

OH ST RCRP Rule 16

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Baldwin's Ohio Revised Code Annotated Currentness
 Rules of Criminal Procedure (Refs & Annots)
 →→ Crim R 16 Discovery and inspection

(A) Purpose, Scope and Reciprocity. 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. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) Discovery: Right to Copy or Photograph. Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

- (1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;
- (2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;
- (3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;
- (4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;
- (5) Any evidence favorable to the defendant and material to guilt or punishment;
- (6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered

to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;

(7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

(C) Prosecuting Attorney's Designation of "Counsel Only" Materials. The prosecuting attorney may designate any material subject to disclosure under this rule as "counsel only" by stamping a prominent notice on each page or thing so designated. "Counsel only" material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, "counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the "counsel only" material to the defendant.

(D) Prosecuting Attorney's Certification of Nondisclosure. If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

- (1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;
- (2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;
- (3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;
- (4) The statement is of a child victim of sexually oriented offense under the age of thirteen;
- (5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney's certification shall identify the nondisclosed material.

(E) Right of Inspection in Cases of Sexual Assault.

(1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

(F) Review of Prosecuting Attorney's Certification of Non-Disclosure. Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.

(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

(G) Perpetuation of Testimony. Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-

examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(H) Discovery: Right to Copy or Photograph. If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

(1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;

~~(2) Results of physical or mental examinations, experiments or scientific tests;~~

(3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;

(4) All investigative reports, except as provided in division (J) of this rule;

(5) Any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in rebuttal.

(I) Witness List. Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

(J) Information Not Subject to Disclosure. The following items are not subject to disclosure under this rule:

(1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;

(2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim. R. 6;

(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

(K) Expert Witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

(L) Regulation of discovery.

(1) The trial court may make orders regulating discovery not inconsistent with this rule. 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 party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(2) The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

(M) Time of motions. A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-10)

Current with amendments received through January 1, 2012.

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