

ORIGINAL

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

REPLY BRIEF OF APPELLANT

Counsel for Plaintiff-Appellant

**WILLIAM D. MASON (0037540)**  
**CUYAHOGA COUNTY PROSECUTOR**  
**KATHERINE MULLIN (0084122)**  
Assistant Prosecuting Attorney  
The Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7800

**Counsel for Demetrius Darmond**

John Parker, Esq.  
988 East 185<sup>th</sup> Street  
Cleveland, Ohio 44119

**Counsel for Iris Oliver**

Jeffery P. Hastings, Esq.  
50 Public Sq., Suite 3300  
Cleveland, OH 44113

**Counsel for Amicus Curiae, The Ohio  
Prosecuting Attorney's Association**

Joseph T. Deters, Esq.  
Hamilton County Prosecuting Attorney

Philip R. Cummings, Esq.  
Assistant Prosecuting Attorney  
230 E. 9<sup>th</sup> St., Suite 4000  
Cincinnati, OH 45202

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## REPLY BRIEF

**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.**

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. 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. The State's position is supported by the language of Crim. R. 16 as well as precedent from this Court and the majority of appellate courts throughout Ohio.

**I. Dismissal with prejudice may still be an appropriate remedy under certain circumstances.**

Appellees argue that under the State's proposed application, the "trial court could **never** sanction the state by dismissing the criminal charges for a discovery violation because there would always be a less severe sanction available." (Appellees' Merit Brief, pg. 1). (Emphasis in original). That is not true. The State has not argued that dismissal with prejudice is never a possibility. Rather, the State's argument is that the trial court must impose the least severe sanction that is consistent with the purpose of the discovery rules. A dismissal with prejudice may be the appropriate remedy in some circumstances. The State's "application" of *Lakewood* only requires that a trial court first inquire into the circumstances of the violation and consider less severe sanctions

before precluding the State from prosecution. This “application” is not only reasonable, but it is consistent with Crim. R. 16 and this Court’s precedent. Therefore, the State respectfully requests this Honorable Court answer the certified conflict question in the affirmative and adopt the State’s proposition of law.

**II. Both the state and defense are entitled to discovery and both can be sanctioned for noncompliance.**

There is no constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). However, the State is obligated to disclose evidence favorable to a criminal defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). Crim. R. 16 defines discovery violations for both the prosecutor and the defendant. Crim. R. 16(L), Regulation of Discovery, states that 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.” This Court’s decision of the instant case should turn on an interpretation of precedent and Crim. R. 16, as it is apparent that both the defense and the prosecution can be sanctioned for discovery violations.

Appellees argue that the *Lakewood* “least severe sanction” language should not apply to the State because that case was decided in the context of a defense violation. Appellees note that a severe sanction against a defendant could unconstitutionally prohibit a defendant’s right to present a defense. Appellees are correct that *Lakewood* involved a defense violation, and that this Court expressed concern that preventing a

defendant from calling all of his witnesses could be unconstitutional. However, nothing in the *Lakewood* opinion prohibits its application to state discovery violations. To the contrary, this Court has previously applied the “least severe sanction” language to state discovery violations. See *State v. Parker*, 53 Ohio St.3d 82, 558 N.E.2d 1164 (1990).

Appellees argue that *Lakewood* should not apply to state violations because the “Bill of Rights applies to individuals and protects individuals from state action.” (Appellees’ Merit Brief, pg. 7). As previously discussed, a defendant does not have a constitutional right to discovery. In Ohio, discovery is regulated by Crim. R. 16. Crim. R. 16 applies to both the state and the defense. Therefore, the application of any sanctions should be applied uniformly to both parties. Such a rule promotes consistency among trial and reviewing courts throughout Ohio and is consistent with Crim. R. 16 and this Court’s precedent. Therefore, the State respectfully requests this Honorable Court answer the certified conflict question in the affirmative and adopt the State’s proposition of law.

**III. *State v. Engle*, 166 Ohio App.3d 262, and *State v. Siemer*, 2007-Ohio-4600, are in conflict with *Darmond*.**

Appellees claim that in both *Engle* and *Siemer*, the appellate courts reversed because the trial courts did not adequately inquire into the circumstances of the violation. Appellees claim that this fact distinguishes *Darmond* because, they argue, the trial court in this instant case did appropriately consider the circumstances. To the contrary, it is the State’s position that the trial court neither adequately considered the circumstances of the violation nor did the court properly consider less severe sanctions that were more appropriate given the inadvertent nature of the violation.

*Engle* is not distinguishable from *Darmond*. In *Engle*, the trial court granted the defense motion to dismiss without giving the prosecution an opportunity to respond. *Engle*, 166 Ohio App.3d 262, 265, ¶9. While the *Engle* court noted this fact, the court also noted that “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 must find that no lesser sanction would accomplish the purpose of the discovery rules.” *Id.* at ¶10 citing *Lakewood*. For those reasons, and because the trial court failed to consider the factors provided in *Lakewood*, the court reversed. In *Darmond*, the trial court similarly failed to adequately consider the *Lakewood* factors and also failed to consider less severe sanctions. Further, *Engle* stands for the proposition that trial courts should apply *Lakewood* to state violations, a position that was clearly rejected by the Eighth District in *Darmond*. *State v. Darmond*, 8<sup>th</sup> Dist. Nos. 96373 and 96374, 2011-Ohio-6160, ¶18.

*Siemer* is not distinguishable from *Darmond*. In *Siemer*, the trial court heard arguments from each party before it granted Siemer’s motion to dismiss. *Siemer*, 2007-Ohio-4600, ¶4. The *Siemer* court found that because 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.” *Id.* at ¶10. The *Darmond* trial court similarly foreclosed the State’s ability to prosecute Appellees for an inadvertent violation. Like *Siemer*, the trial court’s improper leap to the imposition of the most severe sanction warrants reversal. The *Siemer* court specifically found that while *Lakewood* was created in the context of a defense discovery violation, it was

“nonetheless relevant and equally applicable to cases involving discovery violations committed by the state.” *Id.* at ¶9. The *Siemer* court’s application of *Lakewood* in a factually indistinguishable case is in conflict with *Darmond*.

Because a conflict currently exists, the State respectfully requests this Honorable Court answer the certified conflict question in the affirmative and reverse the Eighth District’s decision in *Darmond*.

**IV. The State did argue against dismissal**

Appellees argue that the State did not object to the dismissal with prejudice. Contrary to Appellee’s claim, the State did argue against dismissal. This is a fact that Appellees note in their statement of facts. (Appellees’ Merit Brief, pg. 5). It is clear that the State opposed the drastic sanction of dismissal. Therefore, the State was not precluded from appealing the trial court’s ruling.

**V. The nature of the violation must be considered when imposing a sanction.**

Appellees argue that the good faith vs. bad faith of the prosecution is a “red herring.” To the contrary, this Court has instructed trial courts to consider whether or not a violation is willful or in bad faith. *Lakewood* at 5. See also *State v. Parson* (1983), 6 Ohio St.3d 442, 453 N.E.2d 689; *State v. Hale* (2008), 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864. In *Darmond*, both the trial court and the Eighth District failed to appropriately consider the inadvertent nature of the violation. The Eighth District wrote that 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.’” *Darmond* at ¶19. While the Eighth District is correct about a State’s

discovery obligations, it incorrectly jumped to the conclusion that such a violation can automatically warrant dismissal. This false assumption was likely caused by the Eighth District's failure to apply *Lakewood*.

There was no willful violation in this case. Despite the minimal importance of the additional report(s), 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 warrants reversal.

### CONCLUSION

The State respectfully requests this Honorable Court answer the certified conflict question in the affirmative, adopt the State's proposition of law, and reverse the Eighth District Court of Appeals decision in *Darmond*.

Respectfully submitted,

WILLIAM D. MASON  
Cuyahoga County Prosecuting Attorney

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Katherine Mullin (0084122)  
Assistant Prosecuting Attorney  
The Justice Center, Courts Tower  
1200 Ontario St., Eighth Floor  
Cleveland, Ohio 44113  
(216) 698-7919  
(216) 443-7806 fax  
kemullin@cuyahogacounty.us email

**CERTIFICATE OF SERVICE**

A copy of the foregoing Reply Brief of Appellant was sent by regular U.S. mail this  
27<sup>th</sup> day of August 2012 to:

**Counsel for Demetrius Darmond**

John Parker, Esq.  
988 East 185<sup>th</sup> Street  
Cleveland, Ohio 44119

**Counsel for Iris Oliver**

Jeffery P. Hastings, Esq.  
50 Public Sq., Suite 3300  
Cleveland, OH 44113

**Counsel for Amicus Curiae, The Ohio Prosecuting Attorney's Association**

Joseph T. Deters, Esq.  
Hamilton County Prosecuting Attorney

Philip R. Cummings, Esq.  
Assistant Prosecuting Attorney  
230 E. 9<sup>th</sup> St., Suite 4000  
Cincinnati, OH 45202

*K. Mullin (BD)*

---

Katherine Mullin (0084122)  
Assistant Prosecuting Attorney