

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-09-1046

Appellant

Trial Court No. TRC-08-25812

v.

Vanessa L. Kasper

DECISION AND JUDGMENT

Appellee

Decided: October 16, 2009

* * * * *

David Toska, Chief Prosecuting Attorney, and Arturo Quintero, Assistant Prosecuting Attorney, for appellant.

Anthony J. Calamunci and Amy L. Butler, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is a state appeal from the judgment of the Toledo Municipal Court, filed on September 29, 2009,¹ which suppressed various reports and testimony referencing the reports in a driving under the influence of alcohol case as a sanction for

¹The judgment was journalized, via a handwritten docket entry, on February 20, 2009. However, the written judgment entry that was appealed from was not filed in the record until September 29, 2009.

failure to provide discovery under Crim.R. 16. Because we find that the trial court did not abuse its discretion, we affirm.

{¶ 2} The relevant facts are as follows. On September 13, 2008, appellee, Vanessa Kasper, was issued citations for driving under the influence of alcohol, Toledo Municipal Code 333.01(A)(1)(a), failure to control, Toledo Municipal Code 331.32(A), and consumption of alcohol in a motor vehicle, Toledo Municipal Code 331.43(B)(4). The charges stemmed from an incident where appellee, allegedly intoxicated, struck a parked vehicle; appellee refused to submit to a breathalyzer test. On September 23, 2008, appellee entered a not guilty plea to the charges.

{¶ 3} On October 15, 2008, a pretrial was held and a November 5, 2008 trial date was set. The trial date was vacated and a pretrial was set for December 4, 2008. On December 4, appellee orally requested discovery. The trial date was reset for January 15, 2009. In the interim, on December 10, 2008, appellee's counsel filed a demand for discovery and a request and alternative motion for a bill of particulars. The state failed to provide the requested discovery.

{¶ 4} On January 15, 2009, the day of trial, the state provided appellant with incomplete discovery responses. At that time, appellee orally moved to dismiss the charges or, alternatively, for sanctions due to the state's failure to provide discovery as required under Crim.R. 16. The court requested that the parties submit written briefs on the issue and set a February 19, 2009 hearing date.

{¶ 5} On February 2, 2009, appellee filed her motion to dismiss or request for Crim.R. 16 sanctions. In addition to requesting a dismissal of the charges, appellee argued that because the state failed to comply with the discovery rules, the appropriate sanction would be for the court to prevent any testimony or reference to the documents that had not been produced. In response, the state contended that at the November 5, 2008 pretrial, appellee's attorney reviewed the case file which contained many of the discovery items that appellee requested. Further, the prosecuting attorney stated to appellee's counsel that if he wished to have copies made, he should file a request for discovery. The state argued that the delay in providing discovery was not willful and because appellee was aware of the state's evidence, she was not prejudiced.

{¶ 6} On January 23, 2009, while the motion to dismiss or for sanctions was pending, the state provided appellee with additional discovery including the DataMaster report, the DataMaster evidence ticket, and the DUI investigative report.

{¶ 7} On February 19, 2009, a hearing was held on appellee's motion.

{¶ 8} The parties disputed when and what appellee's counsel had access to prior to the January 15, 2009 trial date. The state argued that appellee's counsel had several opportunities to review the materials that were contained in the case file. These items included the report drafted by the arresting officer, the crash report, the BMV report and the citation. Appellee's counsel contended that he was permitted only to review briefly the items and that, at the December 4, 2008 pretrial he was told to file a motion for discovery. On December 10, 2008, appellee filed her motion for discovery. It is

undisputed that the above items were not provided to counsel until the January 15, 2009 trial date, and that supplemental discovery items were provided on January 23, 2009.

{¶ 9} On February 20, 2009, the trial court sanctioned the state by excluding from trial the evidentiary materials provided to appellee on January 15, 2009, as well as the supplemental materials provided on January 23. The court also excluded all references to the materials. The court refused to dismiss the case finding no evidence of bad faith in the state's Crim.R. 16 violation. This appeal followed.

{¶ 10} On appeal the state presents the following assignment of error:

{¶ 11} "Assignment of Error #1: The trial court abused its discretion in ordering that certain evidence be excluded from trial."

{¶ 12} At the outset we will address appellee's contention that the trial court's September 29, 2009 judgment entry was not a final appealable order. The Supreme Court of Ohio has held that any motion, "if granted, effectively destroys the ability of the state to prosecute" is considered a final appealable order within the meaning of R.C. 2505.02. *State v. Davidson* (1985), 17 Ohio St.3d 132, 135. See Crim.R. 12(K). Thus, the court's order suppressing virtually all of the state's evidence was a final order.

{¶ 13} Turning to the state's sole assignment of error, we first note that appellate review of a trial court's sanction for a discovery violation is for an abuse of discretion. *State v. Parson* (1983), 6 Ohio St.3d 442, 445. A trial court abuses its discretion when it acts in an unreasonable, unconscionable, or arbitrary manner. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶ 14} The state argues that when determining the proper sanction for the state's discovery violation, the trial court failed to inquire into the relevant circumstances and apply the appropriate test. Crim.R. 16(E)(3) provides:

{¶ 15} "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."

{¶ 16} In *State v. Parson*, supra, the Supreme Court of Ohio employed a three-part test to determine whether a trial court abused its discretion in excluding evidence following a discovery violation. The court examined: (1) whether the state's failure to disclose was willful; (2) whether foreknowledge of the evidence would have benefited the party deprived; and (3) the extent that the party deprived would be prejudiced or surprised by the evidence. *Id.* at 445.

{¶ 17} Arguing that the sanctions imposed by the trial court were improperly based, in part, on the court's case scheduling practices the state relies on *State v. Johnson*, 169 Ohio App.3d 552, 2006-Ohio-6227. In *Johnson*, the state failed to provide certain evidence and, the day before trial, the defendant filed a motion to dismiss. At the hearing on the motion, it was apparent that the state's failure was inadvertent and the state requested a short continuance. Denying the continuance and dismissing the case, the

court relied on the Rules of Superintendence which require that a case be tried within 90 days. *Id.* at ¶ 10.

{¶ 18} Reversing the trial court's judgment, the Second Appellate District first noted that the initial pretrial was set following the expiration of the 90-day limit. *Id.* Next, the court stated that the defendant should have known that the missing discovery would be evidence in the case from the face of the complaint. *Id.* at ¶ 11. Finally, the court indicated that it was the first continuance requested by either party. *Id.* at ¶ 12.

{¶ 19} Though the state argues that this case is "substantially similar" to *Johnson*, we note several key differences. First, in the instant case the trial court sanctioned the state pursuant to Crim.R. 16, not the Rules of Superintendence. Further, in *Johnson*, the court dismissed the charges. Finally, and most importantly, though incomplete, in *Johnson* the state did timely provide discovery.

{¶ 20} In the instant case, in the trial court's September 29, 2009 judgment entry, the court noted its practice to set all pretrials and trials for the morning docket. If a matter could not be resolved, it was set for an afternoon trial. Upon review, we fail to see how this comment indicates that this case "did not fit nicely into the court's preferred case timeline" or was an "inconvenience" to the court. It appears that the court was merely indicating the opportunities that the state had to provide discovery; there is no evidence that the court's judgment was in any way retribution for the case being set for a full trial.

{¶ 21} The state next argues that, under the first *Parson*, *supra*, factor, the discovery violation was not willful or in bad faith. The court specifically found this and

appellee does not dispute the finding. Appellee contends that the issues before the court were the remaining *Parson* factors; namely, what benefit appellee would have had had the discovery been provided prior to the trial date and the prejudice or surprise caused by the discovery violation.

{¶ 22} The state contends that appellee was not prejudiced or surprised by the non-disclosure of the evidence. In support of its argument the state relies on this court's case captioned *State v. Shade* (1996), 111 Ohio App.3d 565, for the proposition that because appellee knew of the content of the evidence being challenged, she could not demonstrate prejudice. In *Shade*, the trial court excluded the trial testimony of an officer who was to testify as to the chain of custody involving a controlled substance. The defense did not receive the witnesses name until the day before trial. *Id.* at 567.

{¶ 23} Reversing the trial court, this court noted that the officer's name appeared on several documents that the state had provided in discovery. *Id.* at 568. Further, the trial court made no finding that the omission was willful. *Id.* Finally, we stressed that defense counsel admitted that there was no element of surprise due to the state's failure to disclose the officer's name. *Id.*

{¶ 24} In the present case, at the February 19, 2009 hearing, appellee's attorney acknowledged that he was given a brief opportunity to review the case file but that it was taken from him; the prosecuting attorney then informed appellee's attorney that he would need to make a written request for discovery. The prosecuting attorney disputed appellee's attorney's characterization of his opportunity to review the file. Here, unlike

Shade where the state timely provided discovery with the exception of the name of an additional witness, the evidence that was provided on the day of trial and the supplemental evidence provided a week thereafter, was material to the preparation of appellee's defense. Accordingly, we cannot say that the trial court abused its discretion when it found that appellee was prejudiced by the state's failure to timely provide discovery.

{¶ 25} We must now address whether the trial court abused its discretion when it excluded the state's evidence. The state, citing *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, contends that the trial court was required to impose the least severe sanction that would accomplish the purpose of the discovery rules. In *Lakewood*, the Supreme Court of Ohio afforded "great weight" to the fact the exclusion of the defendant's evidence infringed on his constitutional right to present a defense. *Id.* at 5.

{¶ 26} Examining *Lakewood*, in *State v. Crespo*, 7th dist. No. 03 MA 11, 2004-Ohio-1576, the Seventh Appellate District noted that, unlike *Lakewood*, the exclusion of the state's evidence typically does not affect a defendant's Sixth Amendment right to present a defense. *Id.* at ¶ 11. The court concluded that "the court is not required to always impose the least severe sanction against the state. It is merely required to impose a sanction that is reasonably related to the offensive or non-compliant conduct and the impact of that conduct upon the ability of the accused to present a defense." *Id.* at ¶ 13.

{¶ 27} In the present case, we find that the trial court's order suppressing all the discovery items that were not timely provided was reasonably related to the state's

inaction. The court did not order the most severe sanction, the dismissal of the case. Further, it did not order the exclusion of the arresting officer's testimony or the testimony of any additional state's witnesses. Based on the foregoing, we find that the trial court did not abuse its discretion when it ordered the suppression of the discovery materials belatedly provided to appellee. The state's sole assignment of error is not well-taken.

{¶ 28} On consideration whereof, we find that substantial justice was done the party complaining, and the judgment of the Toledo Municipal Court is affirmed. Pursuant to App.R. 24, the state is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James J. Sweeney, J.
CONCUR.

JUDGE

Judge James J. Sweeney, Eighth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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