

Court of Appeals of Ohio

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EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA SOUTH EUCLID MUNICIPAL COURT

JOURNAL ENTRY AND OPINION
No. 101610

CITY OF SOUTH EUCLID

PLAINTIFF-APPELLANT

vs.

MICHAEL FAYNE

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
South Euclid Municipal Court
Case No. CRB 1300259

BEFORE: E.T. Gallagher, J., E.A. Gallagher, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: April 9, 2015

THE STATE OF OHIO } I, THE CLERK OF THE COURT
Cuyahoga County } SS. OF COMMON PLEAS WITHIN
AND FOR SAID COUNTY,
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRUE
AND COPIED FROM THE ORIGINAL
JOURNAL ENTRY & OPINION
NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 9TH
DAY OF APRIL A.D. 20 15
CUYAHOGA COUNTY CLERK OF COURTS
By: [Signature], Deput

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

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EILEEN T. GALLAGHER, J.:

{¶1} Plaintiff-appellant, city of South Euclid (“the City”), appeals from the judgment of the South Euclid Municipal Court dismissing a complaint for domestic violence against defendant-appellee, Michael Fayne (“Fayne”), without prejudice. The City raises one assignment of error for review:

1. Whether the trial court erred by dismissing a criminal prosecution for a perceived discovery violation.

{¶2} After careful review of the record and relevant case law, we reverse the judgment of the trial court and remand for further proceedings.

I. Procedural History

{¶3} On July 1, 2013, Fayne was charged in the South Euclid Municipal Court with one count of domestic violence in violation of R.C. 2919.25(A), a misdemeanor of the first degree. On July 2, 2013, an ex-parte temporary protection order (“TPO”) was issued at the victim’s request pursuant to R.C. 2919.26 “as a pretrial condition of release.” Following pretrial hearings, the matter was set for a jury trial on May 12, 2014.

{¶4} On April 16, 2014, defense counsel filed a motion requesting exculpatory and mitigating material, a motion for bill of particulars, and a motion for discovery and inspection. The motion for discovery requested production of, among other things, a copy of the police report, a written list of the

names and addresses of witnesses the prosecutor intended to call at trial, and all evidence favorable to Fayne and material either to guilt or punishment.

{¶5} On May 8, 2014, the prosecutor faxed defense counsel a copy of the police report. On May 9, 2014, defense counsel filed a motion to compel discovery and a motion to dismiss.¹ In its motion to dismiss, defense counsel argued that dismissal of the criminal complaint was appropriate where the City failed to produce a witness list, bill of particulars, or potentially exculpatory evidence in violation of Crim.R. 16.

{¶6} On May 12, 2014, the parties appeared for trial. Before the jury was selected, the trial court addressed the arguments raised in defense counsel's motion to dismiss. Following a brief recess, the trial court granted the motion to dismiss without prejudice pursuant to Crim.R. 48(B) as a sanction for perceived discovery violations. The judgment of the trial court was journalized in an entry dated May 12, 2014.

{¶7} The City now brings this timely appeal from the May 12, 2014 judgment entry.

II. Law and Analysis

{¶8} In its sole assignment of error, the City argues "the trial court erred in dismissing a criminal prosecution for a perceived discovery violation."

¹ Defense counsel maintains that she filed the motions on May 8, 2014, prior to receiving the copy of the police report from the prosecutor. However, the record reflects that the motions were electronically filed on May 9, 2014.

{¶9} Our consideration is guided by Crim.R. 16, which governs discovery matters in a criminal proceeding. The purpose of this rule is “to provide the 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, the rights of defendants, and the well-being of witnesses, victims, and society at large.” Crim.R. 16(A).

{¶10} The overall objective of the criminal rules “is to remove the element of gamesmanship from a trial.” *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 3, 511 N.E.2d 1138 (1987), quoting *State v. Howard*, 56 Ohio St.2d 328, 333, 383 N.E.2d 912 (1978). The purpose of the discovery rules “is to prevent surprise and the secreting of evidence favorable to one party.” *Id.*

{¶11} In challenging the trial court’s judgment, the City initially argues that the court erred in considering Fayne’s motion to dismiss where his motion for discovery was filed “out of rule.” The City contends, pursuant to Crim.R. 16(M), Fayne was required to file his demand for discovery “within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier * * *.”

{¶12} Here, Fayne was arraigned on October 31, 2013, and trial was set for May 12, 2014. Thus, the earlier of the two dates would have required Fayne to file his demand for discovery within 21 days of his arraignment. While Fayne’s April 16, 2014 demand for discovery was not made within 21 days of his

arraignment, Crim.R. 16(M) further states that a demand for discovery may also be made "at such a reasonable time later as the court may permit." Notably, the City never argued that it was prejudiced by the date the motion was filed; nor could the City establish prejudice where it had approximately four weeks to respond to the discovery request. In fact, the City did not object to the timeliness of Fayne's motion requesting discovery until after the court dismissed the matter without prejudice. (Tr. 34-35.) Moreover, the judgment entry reflects that the trial court considered the timeliness of the motion for discovery and determined it was "appropriately filed with this court." Under these circumstances, we cannot say that the trial court erred in enforcing Fayne's motion for discovery in the interests of justice. *See* Crim.R. 16(M).

{¶13} Next, the City submits that no discovery violation took place in this case. Relevant to the trial court's judgment, Crim.R. 16(B) requires the state, upon written demand, to provide discovery of "[a]ny evidence favorable to the defendant and material to guilt or punishment," and "all reports from peace officers * * * ." Crim.R. 16(B)(5) and 16(B)(6). Furthermore, Crim.R. 16(I), which governs the disclosure of witnesses, provides, "[e]ach 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."

{¶14} Here, the City contends that it did not violate Crim.R. 16(B) because the contents of the prosecutor's file, including the police report and statements, were faxed to defense counsel on May 8, 2014. Thus, the City argues that defense counsel was provided with all information necessary to present an adequate defense at trial. The record, however, does not support the City's position.

{¶15} In its May 12, 2014, judgment entry, the court held that the City failed to meet its burden to provide discovery in a timely manner and that the failure "did not provide the defendant with the opportunity to formulate a defense" and limited "access to evidence, witnesses or information that may, upon inspection, proven to be exculpatory." In reaching this conclusion, the court found that although the state provided the police report to defense counsel via facsimile just days before trial was scheduled to begin, "said provision did not contain a witness list nor supplemental evidence, later identified as a 9-1-1 emergency recording that was noted in the police report." Significantly, the City does not dispute the fact it failed to disclose a witness list and failed to inspect the 911 recording prior to trial.

{¶16} Based on the foregoing findings of the court and the admissions made by the City during the May 12, 2014 hearing, the trial court did not err in concluding that the City failed to comply with Crim.R. 16. While the City focuses on its disclosure of the police report, albeit just days before trial was

scheduled to begin, it neglects to address its failure to provide defense counsel with a witness list or supplemental evidence that may have been favorable to Fayne or material to his guilt as mandated under Crim.R. 16(B)(5) and 16(I).

{¶17} Finally, the City contends the trial court abused its discretion by failing to adequately explore the least restrictive sanction for the alleged discovery violations. Under Crim.R. 16(L)(1), if it is brought to the attention of the trial court that a party has failed to comply with this discovery rule, the trial court may order or permit the discovery, order a continuance, prohibit the party from introducing the material not disclosed, or make any other order it deems just under the circumstances. *State v. Miller*, 8th Dist. Cuyahoga No. 100461, 2014-Ohio-3907, ¶ 66.

{¶18} A trial court has broad discretion in regulating discovery and in determining the appropriate sanction for discovery violations. *State v. Smiler*, 8th Dist. Cuyahoga No. 100255, 2014-Ohio-1628, ¶ 13, citing *State v. Wiles*, 59 Ohio St.3d 71, 78, 571 N.E.2d 97 (1991). Upon imposing a sanction, however, the trial court must conduct an inquiry into the surrounding circumstances and impose “the least severe sanction that is consistent with the purpose of the rules of discovery.” *Lakewood*, 32 Ohio St.3d 1, 3, 511 N.E.2d 1138 (1987) *supra*, paragraph two of the syllabus. Such an inquiry applies equally to discovery violations committed by the prosecution as well as violations committed by a

criminal defendant. *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, syllabus.

{¶19} Three factors that govern a trial court's exercise of discretion in imposing a sanction for a discovery violation include (1) whether the failure to disclose was a willful violation of Crim.R. 16, (2) whether foreknowledge of the undisclosed material would have benefitted the accused in the preparation of a defense, and (3) whether the accused was prejudiced. *Darmond* at ¶ 35, citing *State v. Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689 (1983), syllabus. We review a trial court's sanction for a discovery violation for an abuse of discretion. *Id.* at ¶ 33.

{¶20} In this case, the trial court did not specifically consider the foregoing factors. In its judgment entry, however, the court observed that although the prosecutor's failure to provide the requested discovery materials in a timely manner does not appear to be willful, it certainly hampered defense counsel's ability to prepare a sufficient defense in such a short period of time, and therefore, was prejudicial to the accused. Thus, while a severe sanction, such as a dismissal with prejudice, would have been inappropriate under the facts of this case, the trial court properly determined that it was necessary to impose a sanction that would remedy the prejudice created by the City's failure to comply with Crim.R. 16.

{¶21} Given the nature of a dismissal without prejudice, it cannot necessarily be said that a trial court abuses its discretion by dismissing an indictment without prejudice as a sanction for discovery violations where a continuance may have sufficed. *See generally State v. Craig*, 8th Dist. Cuyahoga No. 88313, 2008-Ohio-3978, ¶ 13. However, in this case, the crime charged was domestic violence and the victim obtained a TPO against Fayne pursuant to R.C. 2919.26. By dismissing the complaint, albeit without prejudice, the trial court also terminated the TPO in its May 12, 2014 judgment entry. Under these circumstances, and with concern for the safety of the victim,² we find that a continuance would have served as the least restrictive sanction because the TPO would have remained in place throughout the disposition of the criminal proceedings. *See Lakewood*, 32 Ohio St.3d at 5, 511 N.E.2d 1138 (stating a continuance should be ordered if it is feasible and would allow for an opportunity to minimize any surprise or prejudice caused by the discovery violation). Moreover, the potential benefits of a dismissal without prejudice were minimized in this case because Fayne waived his speedy trial rights on October 10, 2013. Accordingly, the trial court abused its discretion by dismissing the criminal complaint without prejudice.

{¶22} The City's sole assignment of error is sustained.

² Fayne was released from custody on a \$10,000 surety bond following his arrest.

III. Conclusion

{¶23} When imposing a discovery sanction, a court should impose the least severe sanction consistent with the purposes of the discovery rules. *Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, *supra*, at ¶ 38. Given the circumstances of this case, we find a continuance would have been the least restrictive sanction to remedy the prosecutor's discovery violations. Accordingly, the trial court abused its discretion by dismissing Fayne's criminal complaint without prejudice.

{¶24} For the reasons discussed in this opinion, the judgment of the South Euclid Municipal Court is reversed and the matter remanded for further proceedings.

It is ordered that appellant recover from appellee 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 South Euclid Municipal Court to carry this judgment into execution.

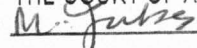
A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
TIM McCORMACK, J., CONCUR

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PER APP.R. 22(C)

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