2018 IL App (2d) 170224-U
No. 2-17-0224
Order filed March 15, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. DASHON LAMAR WARD, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 16-CF-300 Honorable Ronald J. White, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion in excluding all DNA evidence as a sanction for the State's late disclosure of material under Rule 417; a continuance would have enabled defendant to review the material, the DNA evidence was crucial to the State's case, defendant was not prejudiced by the late disclosure, and there was no indication of bad faith on the part of the State.

¶ 2 The State appeals an order of the circuit court of Winnebago County barring all DNA evidence as a sanction for the late disclosure of material—specifically, laboratory notes—under Illinois Supreme Court Rule 417 (eff. Mar. 1, 2001). Because the trial court abused its discretion in excluding the State's DNA evidence, we reverse and remand.

¶ 3 Defendant, Dashon Lamar Ward, was indicted on six counts of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2016)) and one count of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2016)). The charge of being an armed habitual criminal was severed from the first-degree murder counts and is not implicated in this appeal.

¶ 4 Before trial, the State submitted to the Illinois State Police Crime Lab (crime lab) a pair of eyeglasses found at the murder scene. The trial court later ordered that defendant submit to a buccal swab for DNA analysis. The State assured the court that it would ask the crime lab to expedite the testing of the buccal swab. On June 9, 2016, the State obtained the buccal swab, which the State then submitted to the crime lab for DNA testing and comparison to the DNA found on the eyeglasses. On July 6, 2016, the State advised the court that the crime lab had assured the State that it would expedite the DNA testing.

¶ 5 On August 22, 2016, when asked if discovery was complete, the State told the trial court that it was waiting on the crime-lab report for the eyeglasses. On August 30, 2016, when asked if it was ready for trial, the State reiterated that it had asked the crime lab to expedite the DNA testing.

¶ 6 On September 13, 2016, the State reported to the trial court that it had been in contact with the crime lab and expected to have the DNA results before an October trial date. The court advised the State to tell the crime lab to complete the testing. When asked if all discovery other than the testing was complete, the State responded yes. The court set defendant's trial for October 11, 2016.

¶ 7 On October 4, 2016, the State sought another continuance, because the DNA testing was not yet complete. According to the State, it had been in constant contact with the crime lab regarding the testing. The trial court continued the trial to October 24, 2016, with a status on

October 18, 2016. The State told the court that on October 18 it would return the "417 materials along with that DNA." The court stated that, if any discovery other than the DNA testing was not complete by October 18, the court would "maybe not allow [the State] to use it."

¶ 8 On October 19, 2016 (continued from October 18), the trial court, on defendant's motion, continued the trial to November 28, 2016. On November 1, 2016, the State told the court that it was waiting on "one final DNA [result]." The court responded that, because of the trial date, it hoped that it was "done pretty quick." On November 7, 2016, when the court asked if discovery was just about complete, the State answered yes.

¶ 9 On November 23, 2016, defendant moved for a continuance of the trial, because of some discovery (unrelated to the DNA testing) recently provided by the State. When the trial court set the trial date for December 13, 2016, it stated that it hoped that all discovery would be complete. The State agreed.

¶ 10 On December 5, 2016, the trial court asked if all discovery was complete, and the State answered that it was. The court responded that, if any discovery was received after that date, the court, as a sanction, would bar its use.

¶ 11 On December 8, 2016, defendant asked to continue the trial, because he needed time to review further discovery provided by the State. The trial court continued the case to December 12, 2016, for status. On December 14, 2016, the court set the case for trial on January 9, 2017, and for status on December 28, 2016.

¶ 12 On December 28, 2016, defendant requested a continuance to provide discovery to the State. The State, in turn, told the trial court that on the previous day it had received "the DNA results that [it] had been waiting on from the lab." The court set the trial for January 23, 2017, with a status on January 19, 2017.

¶ 13 On January 19, 2017, defendant sought another continuance, and the trial court set the trial for March 14, 2017, with a status on February 21, 2017. When asked if discovery was complete, the State answered yes.

¶ 14 On February 21, 2017, the trial court advised that the trial date would not be continued. When the court commented that discovery was done, the State agreed. The court, in turn, said that there would be no more discovery.

¶ 15 On March 13, 2017, the State told the trial court that it had received additional discovery that day. According to the State, it had subpoenaed the material and "knew it was going to be returnable [that day]." The State told the court that it was the Rule 417 material after the second round of DNA testing and that it had subpoenaed the material to make sure that it had everything. When the court asked if the material had been turned over earlier, the State answered that it had not been. The State explained that the crime lab had provided only the original DNA report and not the one related to the buccal swab. When the court asked how that happened, the State said that it did not know and apologized. Defense counsel stated that he had just received the material, looked through it, and, without thoroughly examining it, remained ready for trial. The court then ruled that, because the material was turned over late, it was not going to allow the State to "use anything on that issue." The court then observed that it was not the State's fault and that the crime lab should have provided the material sooner. The court and the parties then moved on to discuss preliminary matters for the defendant's trial.

¶ 16 On March 14, 2017, the scheduled day of trial, the State asked the trial court to clarify its ruling on the "417 materials." When the State asked the court if it was barring all of the DNA evidence, or just the "new stuff" that had been returned the day before, the court said that it was just barring the new material. However, when the State asked the court if it was barring "the

confirmatory" as well, the court answered that it was barring everything, because it was turned over late. The court reiterated that it was not the State's fault, but added that it was "not going to allow anything because that would delay the case here and that should have been turned over." When the State presented a draft order to the court for signature, which stated that all of the DNA evidence was barred, the court commented that it did not know the facts of the case. The State advised the court that defendant had received all of the lab reports regarding the DNA testing but not all of the Rule 417 material. When the State again asked if it was barred from using everything, the court answered yes. The court's written order states that "all DNA evidence is barred."

¶ 17 The State filed a certificate of impairment (Ill. S. Ct. R. 604(a)(1) (eff. Mar. 8, 2016)) and a timely notice of appeal.

¶ 18 On appeal, the State contends that the trial court abused its discretion in barring all of the DNA evidence as a sanction for the delay in disclosing the laboratory notes related to the DNA analysis of the buccal swab. Defendant initially responds that the State is limited to challenging only the exclusion of the notes, as opposed to all of the DNA evidence, because the State failed to identify, either at trial or on appeal, any excluded evidence other than the notes. Alternatively, relying primarily on *People v. Leon*, 306 Ill. App. 3d 707 (1999), defendant maintains that the sanction was not an abuse of discretion.

¶ 19 We begin by clarifying the scope of the issue on appeal. We disagree with defendant that the trial court's sanction was limited to the exclusion of the laboratory notes pertaining to the buccal swab. The record is quite clear that the trial court sanctioned the State's tardiness in disclosing the notes, by barring all of the State's DNA evidence. The written order, which is evidence of the court's judgment (see *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 87),

clearly state that the court had barred all of the State's DNA evidence. Moreover, the written order is entirely consistent with the court's oral pronouncement. In imposing the sanction, the court stated that it was not going to allow the State to "use anything on that issue." Although, in response to the State's motion to clarify, the court initially stated that it was barring only the new DNA materials, it then added that it was "barring everything." When the State asked if it was barred from using all of the DNA evidence, the court said yes. Thus, as a sanction for the delay in disclosing the notes, the court unequivocally barred the State from using any DNA evidence.

¶ 20 Because we can determine what evidence is at issue in this appeal, we have likewise determined that defendant's reliance on *Leon* is misplaced. In *Leon*, the State failed to timely disclose numerous materials, including witnesses, law enforcement reports, inventory sheets, laboratory reports, and confessions. *Leon*, 306 Ill. App. 3d at 714. On appeal, the State failed to provide a complete record, did not specify the contents of the late discovery, and did not explain how it was prejudiced by the exclusion of the evidence. *Id.* at 715-16. Therefore, this court was unable to conclude that the trial court abused its discretion in barring the late discovery. *Id.* The facts here are readily distinguishable from *Leon*, as the State failed to timely disclose only one item of evidence and has provided us with an adequate record upon which we can effectively review the trial court's ruling. In light of the foregoing, we agree with the State that we have a sufficient record on appeal and that the trial court's order excluded all of the State's DNA evidence.

¶ 21 Turning to the merits, we also agree with the State that the trial court abused its discretion when it excluded all of the State's DNA evidence. Illinois Supreme Court Rule 417(b) (eff. Mar. 1, 2001) obligates the proponent of any DNA evidence to make available to the adverse party all supporting material, including all laboratory notes related to the testing. See *People v. Sutton*,

327 Ill. App. 3d 273, 284 (2002). In turn, Illinois Supreme Court Rule 415(g) (eff. Oct. 1, 1971) provides, in pertinent part, that the trial court, in response to a party's failure to comply with any applicable discovery rules, may order such party to provide the discovery of material not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances.

¶ 22 The purposes of the discovery rules are to prevent surprise or unfair advantage by either party and to aid in the search for the truth. *People v. Turner*, 367 Ill. App. 3d 490, 499 (2006). Sanctions are intended to accomplish the purposes of discovery, not to punish the offending party, and should not impinge upon a party's right to a fair trial. *Id.* Further, sanctions should be fashioned to meet the circumstances of the particular case. *Id*. The determination of an appropriate sanction lies within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Id.*

¶ 23 Factors that the trial court should consider in determining whether to exclude evidence as a sanction for a discovery violation are (1) the effectiveness of a less-severe sanction, (2) the materiality of the evidence, (3) the prejudice to the adverse party, and (4) the evidence of any bad faith by the offending party. *People v. Scott*, 339 Ill. App. 3d 565, 573 (2003). Those factors must be considered in the context of the factual circumstances of the case. *Id.*

¶ 24 Although the sanction of exclusion of evidence is an available option (see Ill. S. Ct. R. 415(g)(i) (eff. Oct. 1, 1971)), it is disfavored, because it is contrary to the goal of truth seeking. *Turner*, 367 Ill. App. 3d at 499. Accordingly, it is appropriate only in the most extreme situations. *Id.*; see also *Sutton*, 327 Ill. App. 3d at 283 (exclusion of evidence is a last resort, demanded only where a recess or continuance would be ineffective). Thus, a trial court's

exclusion of evidence as a sanction will be closely scrutinized on appeal. *Turner*, 367 Ill. App. 3d at 499.

¶ 25 In this case, when we consider the applicable factors, we conclude that the trial court abused its discretion in barring all of the State's DNA evidence.

¶ 26 First, a less-severe sanction would have sufficed. A brief continuance would have been sufficient to allow defendant an opportunity to more thoroughly review the notes. See *Sutton*, 327 Ill. App. 3d at 282-83 (preferred sanction for a pretrial discovery violation is a continuance if it would protect the defendant from surprise and prejudice); *People v. Rubino*, 305 Ill. App. 3d 85, 88 (1999) (same). That is particularly so considering that the State had already provided the DNA test results and defendant had indicated that, pending a further examination of the notes, he was ready for trial.

¶ 27 Second, there is no doubt that the DNA test results, which purportedly showed defendant's DNA on the eyeglasses found at the murder scene, were material to the prosecution. (Defendant does not dispute this point.)

¶ 28 Third, the record does not show that exclusion of the evidence was necessary to cure any prejudice or surprise from the State's discovery violation. Indeed, defendant did not seek a sanction, never suggested any prejudice, and stood ready for trial. The absence of any prejudice to the defendant weighs strongly against the imposition of such a severe sanction. See *People v. Schlott*, 2015 IL App (3d) 130725, ¶ 25.

¶ 29 Finally, there was no indication that the State acted in bad faith in failing to timely disclose the notes. Notably, the trial court commented twice that the State was not at fault for the late disclosure. Indeed, the record shows that the State diligently sought to timely disclose all of the material required by Rule 417. Although the State might have pressed the crime lab more

vigorously, its efforts at obtaining the notes do not evince a bad-faith failure to comply with Rule 417, as the trial court found.

¶ 30 After carefully reviewing the record, we determine that the trial court abused its discretion when it excluded the State's DNA evidence, which was a sanction the defendant had not specifically requested. We certainly agree with the trial court that the State should have been more diligent in obtaining and tendering its evidence to the defense. However, the exclusion of evidence is a severe measure, and it "is appropriate only where it is necessary to cure any prejudice caused by the discovery violation, or where the offending party's violation is determined to be willful and blatant." *Schlott*, 2015 IL App (3d) 130725, ¶ 25. Here, there is no allegation that defendant was prejudiced by the State's late disclosure in the trial court; moreover, there is a judicial finding that the State did not act in bad faith and that its discovery violation was inadvertent. In short, the trial court *sua sponte* imposed a severe sanction for technical, and ultimately harmless, discovery violation. See *Adams v. Bath & Body Works, Inc.*, 358 Ill. App. 3d 387, 395 (2005) (in crafting a just discovery sanction, "the trial court must remember that the purpose of a sanction is not merely to punish the dilatory party, but to effectuate the goals of discovery"). In the absence of any prejudice to the defendant, or a judicial finding that the State acted in bad faith, the exclusion of the laboratory notes and DNA evidence simply does pay its way in this case. See generally *Davis v. United States*, 564 U.S. 229, 238 (2011).

¶ 31 For the reasons stated, we reverse the order of the circuit court of Winnebago County barring the State's DNA evidence and remand for further proceedings. We note that as part of our judgment, the State has requested that we assess defendant $50 as costs for the State's attorney having prosecuted this appeal as the appellant. See 55 ILCS 5/4-2002(a) (West 2016).

We deny the State's request. Per that statute, and with limited exceptions, State's Attorney's fees are "taxed as costs to be collected from the defendant, if possible, *upon conviction*." (Emphasis added.) *Id*. In other words, a conviction is generally a prerequisite to assessing statutory State's Attorney's fees. Accordingly, as defendant has not been convicted in this case, at present, "there is no authority for taxing this cost against him." *People v. Hall*, 117 Ill. App. 3d 881, 885 (1983).

¶ 32 Reversed and remanded.