2012 IL App (2d) 110949-U
No. 2-11-0949
Order filed August 21, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellant,	)	
v.	)	No. 10-CF-2266
KYLE D. WAGNER,	)	Honorable Gary V. Pumilia,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in sanctioning the State's discovery violation by excluding the evidence at issue, as defendant did not receive the documents until trial had begun, the documents were complex such that a brief continuance would not have been sufficient (and, in any event, defendant would have had to continue to sit in jail during a continuance of any length), and the State had other evidence available, such that the sanction did not amount to a dismissal.

¶ 1 Defendant, Kyle D. Wagner, was charged with numerous offenses, including armed violence (720 ILCS 5/33A-2 (West 2010)), following an encounter with Rockford police officers on July 27, 2010. The police seized from defendant a white, rock-like substance. Pursuant to discovery, the

State tendered to the defense a report of a crime laboratory chemist who concluded that the substance was cocaine. After jury selection began, the assistant State's Attorney informed the court that she would be providing the defense with the chemist's "lab notes." As a sanction for the late disclosure, the trial court barred the chemist from testifying. The State timely appeals, contending that the sanction of barring the witness's testimony was too harsh. We affirm and remand.

¶ 2 The record reveals that in the early morning of July 27, 2010, Rockford police officers responded to a report of a man waving a "little handgun" at the corner of Chestnut and Waldo streets. Officers went to that intersection and found defendant, who matched the description of the gun-waving man. Defendant began walking away, ignoring the officers' commands to stop. Outside a house on Chestnut Street, he reached into his pocket, pulled out a small handgun, and threw it away. He then surrendered to the officers.

¶ 3 After the officers recovered a 22-caliber handgun, defendant repeatedly asserted that it was never in his possession. The officers searched defendant and found a clear plastic bag containing 13 "off white rocks." The bag weighed 4.81 grams and field-tested positive for cocaine.

¶ 4 As he was being transported to the police station, defendant again denied having the gun, but stated, "The drugs are mine. I will just get drug court." Later, defendant admitted that he bought $250 worth of crack cocaine from someone "on the east side of Rockford."

¶ 5 Defendant was indicted for armed violence and other offenses related to the drugs and the handgun. He was unable to post bond. The defense requested discovery. In its response to discovery, the State tendered lab reports from forensic technicians at the Rockford crime lab. One such report was from Sara Anderson, who confirmed that the substance seized from defendant contained at least 1.2 grams of cocaine.

¶ 6 After numerous continuances, the parties answered ready for trial on September 19, 2011. Because court began late in the afternoon, the proceedings that day were limited to a discussion of the parties' motions *in limine* and some questioning of the venire.

¶ 7 The next morning, as the trial court finished ruling on the motions *in limine*, the assistant State's Attorney stated that she would be providing "lab notes" to defense counsel as soon as her secretary picked them up from the crime lab. Defense counsel objected, stating, "We've begun trial." Defense counsel asked the court to bar the State from presenting "any evidence in regards to the testimony of their alleged expert." The court stated that it would proceed with jury selection and revisit the issue after the parties had actually seen the lab notes.

¶ 8 When court resumed, the defense renewed its motion to bar the State from presenting "evidence in regards to the drugs." Defense counsel was concerned that 1 of the 13 knotted baggies was open, that some of the substance had spilled out, and that there was a napkin in along with the drugs. There was also a variation in "the gross weights." The prosecutor responded that the defense had received Anderson's report months earlier and that the lab notes presented no new information.

¶ 9 The trial court concluded that the prosecutor had not acted in bad faith. Nevertheless, the court found that the test results, as evidenced by graphs accompanying the lab notes, were "quite complex" and that it would not be fair to require the defense to proceed to trial under the circumstances. Accordingly, the court barred Anderson from testifying on "any of the topics covered by the notes that have been turned over."

¶ 10 The court denied the State's motion to reconsider. The State then filed a certificate of impairment and a timely notice of appeal.

¶ 11 The State contends that the trial court abused its discretion by barring Anderson from testifying about her lab tests. While acknowledging that it committed a discovery violation, the State maintains that the violation was inadvertent and did not seriously prejudice the defense. The State argues that the trial court could have granted a short continuance or allowed the defense to interview Anderson in preparation for trial and contends that excluding the evidence amounted to a *de facto* dismissal of the most serious charges.

¶ 12 Illinois Supreme Court Rule 415(g)(i) authorizes a trial court to impose sanctions for a party's inadvertent failure to comply with discovery orders. Ill. S. Ct. R. 415(g)(i) (eff. Oct. 1, 1971); *People v. Rubino*, 305 Ill. App. 3d 85, 87 (1999). A continuance is the preferred sanction if it would sufficiently protect the defendant from surprise, and excluding the evidence should be a last resort. *Rubino*, 305 Ill. App. 3d at 88. Nevertheless, harsher sanctions such as the exclusion of evidence may be warranted where a defendant is denied a full opportunity to prepare his defense and make tactical decisions with the aid of the information withheld. *People v. Leon*, 306 Ill. App. 3d 707, 713-14 (1999). The exclusion of evidence may be appropriate even where the State's failure to disclose was inadvertent. *People v. Garcia*, 312 Ill. App. 3d 422, 423 (2000). The correct sanction to be applied for a discovery violation is generally left to the trial court's discretion, and we give its judgment great weight (*People v. Morgan,* 112 Ill. 2d 111, 135 (1986)), as "[t]he trial court is in the best position to determine an appropriate sanction based upon the effect the discovery violation will have upon the defendant" (*People v. Koutsakis,* 255 Ill. App. 3d 306, 314 (1993)). Thus, we will disturb the trial court's decision only if an abuse of discretion occurred (*Morgan*, 112 Ill. 2d at 135), that is, if no reasonable person could agree with the decision (*People v. Farris*, 2012 IL App (3d) 100199, ¶ 26).

¶ 13 In light of this broad discretion in deciding on an appropriate sanction, we cannot say that no reasonable person would agree with the trial court. We note that, although the case had been pending for more than a year, the documents were not turned over until the parties had begun questioning prospective jurors, *i.e.*, after trial had begun. Further, the notes and attached graphs concerned scientific testing procedures, which would not be readily comprehensible to the average person, and a brief continuance would not have given the defense sufficient time to understand the complex data, investigate the issue of the open bags, and possibly retain its own expert to counter Anderson's testimony.

¶ 14 Moreover, we note that defendant remained in jail pending trial. Although the State suggests that a "brief" continuance would have been preferable, it is not clear how long the defense would have needed to understand the newly disclosed material and when a new jury trial date would have been available. Thus, the State's late disclosure forced defendant to choose between remaining in jail for a further indefinite period and potentially giving up his right to challenge the State's scientific evidence. See *Leon*, 306 Ill. App. 3d at 715 (allowing State to supplement its discovery responses would have required defense counsel to "investigate new evidence, consider new tactics and possible motions, and delay the trial while the defendant sat in jail").

¶ 15 Finally, as defendant points out, the State's concern that excluding Anderson's testimony would effectively dismiss the most serious charges appears to be unfounded. The State will have other evidence available to prove that defendant possessed a controlled substance (and the armed violence charge for which the possession is the predicate felony), including the defendant's admission that he had purchased crack cocaine.

¶ 16 When the State sought to disclose the chemist's lab notes after jury selection began, the trial court was faced with a difficult choice between permitting the late disclosure and granting a

continuance, which would have resulted in an inefficient use of the venire members' time and in defendant remaining in jail longer, and excluding the evidence. Given this difficult choice, and the fact that the trial had already commenced we find no compelling reason to disturb the trial court's decision here. We emphasize that, under the circumstances, the court reasonably and appropriately exercised its authority to manage its docket while ensuring that the purposes of the discovery rules were met.

¶ 17 The circumstances here provide an even more compelling basis for relying on this consideration than the circumstances of either *Leon* or *Garcia*, in which the State sought to supplement its discovery responses approximately two weeks and one month prior to trial, respectively. Nevertheless, this court in both *Leon* and *Garcia* supported its decision to affirm the exclusion of evidence by noting the trial court's power to manage its own docket. We believe that this is true especially where the State seeks to disclose discoverable material after jury selection has begun. In addition, the court's sanction was narrowly tailored to the violation: the court prohibited the State only from questioning Anderson about the testing procedures. The State's cites to this court's holding in *Rubino*, 305 Ill. App. 3d at 87-88. *Rubino*, however, is also distinguishable as in that case the State attempted to supplement its discovery responses two weeks before trial as opposed to after jury selection had begun as in this case.

¶ 18 The State complains about the trial court's reference to a similar incident in an unrelated case earlier in the week. The State contends that a sanction should be based on the facts of each particular case and should not be a punishment for a course of conduct in unrelated cases. We note that in *People v. Kladis*, 2011 IL 110920, the supreme court quoted the trial court's remark that the incident was " 'the third case [it had] had like this in three weeks.' " *Id.* Although it did not refer to this remark in deciding whether the sanction was appropriate, the supreme court ultimately upheld the

trial court's exercise of discretion. In any event, the court's statement here appears to have been something of an offhand remark and does not appear to have been a major factor in the court's decision to impose the sanction that it did.

¶ 19 Accordingly, we affirm the trial court's order and remand the cause.

¶ 20 Affirmed and remanded.