

Circuit Court for Worcester County
Case No. C-23-CR-20000207

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 794

September Term, 2021

JERRELL LAMONT HARMON

v.

STATE OF MARYLAND

Shaw,
Ripken,
Harrell, Glenn T.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: July 11, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Jerrell Lamont Harmon, was convicted by a jury in the Circuit Court for Worcester County of possession with intent to distribute cocaine and three counts of possession of a controlled dangerous substance. He was sentenced to 15 years of incarceration for possession with intent to distribute cocaine which was merged with his conviction for possession of cocaine and two six-month sentences for possession of oxycodone and MDMA to run consecutive to the 15-year sentence. Harmon presents one question for our review, which we have split into two parts:¹

1. Did the trial court err in determining that Appellant's failure to timely disclose a witness was a discovery violation?
2. If there was a discovery violation, did the trial court abuse its discretion in excluding the witness as a sanction?

For the reasons discussed below, we reverse the judgment of the circuit court.

BACKGROUND

On July 30, 2020, Appellant was driving in Worcester County when he was stopped for a traffic violation. Police searched his vehicle and found crack cocaine, powder cocaine, MDMA, and oxycodone. Appellant was charged with possession with intent to distribute cocaine and three counts of possession of a controlled dangerous substance. His trial was scheduled to begin on June 23, 2021.

On June 14, 2021, during a conversation with Appellant, defense counsel learned that he had been undergoing drug abuse counseling with Catherine Whitelock at the

¹ In his brief Appellant phrased the question as follows: "Did the trial court err and/or abuse its discretion in excluding the testimony of the only defense witness?"

Worcester County Health Department. That same day, defense counsel obtained the counselor's contact information and disclosed her as a defense witness to the State.

The day before trial, on June 22, 2021, the State filed a motion *in limine* asking the court to exclude Ms. Whitelock's testimony because it would be hearsay. The court granted the motion, finding there was a violation of Md. Rule 4-263(h)(2), which requires that witnesses be disclosed "no later than 30 days before the first scheduled trial date."

The next morning, defense counsel requested the court reconsider its order. The court explained that the motion was granted based on the "timing" of the disclosure and a "strict application of the rule." Speaking directly to Appellant, the judge explained why discovery deadlines were important and noted that he would reconsider his ruling if Appellant could provide a good reason why he had not previously told his counsel about his counseling sessions. Defense counsel explained that on June 14th, while talking to his client about his upcoming trial, he learned that Appellant was seeing a drug counselor. He stated that his client was unaware of the significance of the information. The court then asked questions about Ms. Whitelock's testimony. Defense counsel informed the court that Ms. Whitelock was not being offered as an expert and her testimony would be centered around her treatment of Appellant's cocaine addiction. The prosecutor told the court about his difficulty in trying to contact Ms. Whitelock and his belief that her testimony would be inadmissible hearsay regardless of the potential discovery violations.

Defense counsel urged the judge not to apply the "strictest possible interpretation and remedy" which, under the circumstances was not warranted because the State had not alleged it would be prejudiced by a less strict remedy, such as a postponement. He

informed the judge that the witness was “the heart” of the defense. After an extended discussion, the judge stated that he found “no compelling reason to change [his] position or ruling.”

Prior to *voir dire*, defense counsel moved to postpone the trial rather than to proceed without Ms. Whitelock’s testimony, and his motion was denied. The trial commenced and ultimately, the jury found the Appellant guilty of possession with intent to distribute cocaine and possession of cocaine, oxycodone, and MDMA. This timely appeal followed.

DISCUSSION

I.

Appellant argues that his failure to inform the State of a key witness until nine days prior to trial was not a discovery violation because his attorney was not aware of the witness and when the information was given to him, he promptly disclosed it. The State argues that Rule 4-263 requires the defense to provide the names of defense witnesses to the State’s Attorney and that, barring a court order, discovery disclosures “shall” be made “no later than 30 days before the first scheduled trial date.” Here, the first scheduled trial date was January 4, 2021, it was moved to March 8, 2021 and finally to June 23, 2021. Appellant’s disclosure was made on June 14, 2021.

The State does not dispute that the defense attorney was unaware of the potential witness until after the deadline. The State, also, does not dispute that defense counsel complied with his continuing disclosure obligation. Instead, the State argues that because Appellant was aware of the witness, there was a discovery violation.

Discovery in the circuit court is governed by Md. Rule 4-263. We highlight five pertinent provisions:

(c) Obligations of the Parties.

(1) Due diligence. The State's Attorney and defense shall exercise due diligence to identify all of the material and information that must be disclosed under this Rule.

(2) Scope of Obligations. The obligations of the State's Attorney and the defense extend to material and information that must be disclosed under this Rule and that are in the possession or control of the attorney, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case.

* * *

(e) Disclosure by Defense. Without the necessity of a request, the defense shall provide to the State's Attorney:

(1) Defense Witness. The name and, except when the witness declines permission, the address of each defense witness other than the defendant, together with all written statements of each such witness that relate to the subject matter of the testimony of that witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a State's witness is not required until after the State's witness has testified at trial.

* * *

(h) Time for discovery. Unless the court orders otherwise:

(1) the State's Attorney shall make disclosure pursuant to section (d) of this Rule within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213 (c), and

(2) the defense shall make disclosure pursuant to section (e) of this Rule no later than 30 days before the first scheduled trial date, except that asserting a defense pursuant to subsection (e)(6) of this Rule shall be made at least 10 days before the first scheduled trial date.

* * *

(j) Continuing duty to disclose. Each party is under a continuing obligation to produce discoverable material and information to the other side. A party

who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

* * *

(n) Sanctions. If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

The Rule's primary purpose is to "assist the defendant" in case preparation "and to protect . . . [against] surprise." *Hutchins v. State*, 339 Md. 466, 473 (1995). The Rule mandates due diligence by both the State and Defense to identify and share relevant information. Due diligence consists of reasonable action and good faith. It is assessed viewing "the totality of the circumstances." *See Alarcon-Ozoria v. State*, 477 Md. 75, ___, (2021).

A trial court has discretion to impose sanctions if the Rule is violated. *See Thompson v. State*, 395 Md. 240, 258 (2006). A court is not required to take any action and a judge can decide what, if any, sanction is necessary. *See Evans v. State*, 304 Md. 487, 500 (1985). The appropriateness of sanctions is reviewed under the abuse of discretion standard. *See State v. Graham*, 233 Md. App. 439, 457 (2017). A court abuses its discretion when its decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 14 (1994).

“The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules.” *Thomas v. State*, 397 Md. 557, 571 (2007). “Exclusion of evidence[, like witness testimony,] for a discovery violation is not a favored sanction and is one of the most drastic measures that can be imposed.” *Id.* at 572. “The exercise of discretion contemplates that the trial court will ordinarily analyze the facts and not act, particularly to exclude, simply on the basis of a violation disclosed by the file.” *Taliaferro v. State*, 295 Md. 376, 390 (1983) (citing *Bradford v. State*, 278 So.2d 624 (Fla.1973) (trial court erred by excluding defense witnesses based solely on the absence of their names from witness list furnished by the state) and *State v. Bias*, 393 So.2d 677 (La.1981) (trial court erred by treating statute that made exclusion discretionary as if exclusion were mandatory)).

In the present case, we shall assume, *arguendo*, that there was a discovery violation, and we will focus our attention on whether the court abused its discretion in excluding the defense witness’ testimony. The Court of Appeals, in *Thomas*, identified the following factors for a trial court’s consideration in determining sanctions: “(1) the reasons why the disclosure was not made;[] (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility[sic] of curing any prejudice with a continuance; and (4) any other relevant circumstances.” 397 Md. at 570-71 (citing *Taliaferro v. State*, 295 Md. 376, 390, (1983); *United States v. Hastings*, 126 F.3d 310, 317 (4th Cir.1997)). See generally, JOHN E. THEUMAN, *Exclusion of Evidence in State Criminal Action for Failure of Prosecution to Comply with Discovery Requirements as to Statements Made by Defendants or Other Nonexpert Witnesses*, in 33 A.L.R.4th 301 (1984).

As to the first factor, Appellant argues his attorney provided the information nine days prior to trial and he exercised due diligence. The State argues the reasons given by Appellant for nondisclosure do not excuse the violation. Both parties agree that the attorney provided the information as soon as he became aware of it. The parties also agree that he complied with his discovery obligations and that he did not act in bad faith. We note that where courts have found bad faith, they have considered exclusion of evidence as a factor in granting a harsher sanction. *See Thomas*, 397 Md. at 570, n.8. Here, there is no assertion of a willful violation, lack of due diligence, or bad faith.

The State argues, as to the second factor, that it suffered prejudice because the prosecutor was unable to contact the witness prior to trial and he was, therefore, limited in his ability to prepare. However, at the hearing, the prosecutor advised the court about the witness's professional background and argued that she lacked sufficient credentials to diagnose addiction. Based on those arguments, it would appear that the State had conducted some research. We note that both the State and Defense were in the same position regarding witness preparation as neither had been able to personally interview the witness.

The State next argues that postponing the case would have resulted in considerable delay to a case that had been pending for an extended amount of time, and this delay would prejudice the State. We observe that most of the delay was attributed to the pandemic and courtroom closures, and the record contains no evidence that a short continuance or pause in the proceedings would have resulted in prejudice. A jury had not been selected, the State's case consisted primarily of law enforcement officials and there was no indication

that these witnesses would be unavailable on a future date. Considering the limited nature of the testimony, and that the State was not unduly surprised and had done some preparation, we hold the State failed to demonstrate prejudice.

Finally, the State contends that Ms. Whitelock’s testimony would have been inadmissible hearsay, and thus a continuance would not have cured the exclusion of her testimony. In our review, we could find no indication that the court made an actual determination that Ms. Whitelock’s testimony would have been inadmissible hearsay. Instead, the court excluded her testimony because of the discovery violation. Nevertheless, we agree with the State that certain portions of her testimony may have been hearsay, but based on the proffer, certain portions of her testimony would have been admissible. Under these circumstances, a short continuance was feasible and would have given both sides the opportunity to interview the witness.

The “[e]xclusion of evidence for a discovery violation . . . is one of the most drastic measures that can be imposed.” *Thomas*, 397 Md. at 572 (citing *State v. Tascarella*, 580 So.2d 154, 157 (Fla.1991); *People v. Rubino*, 305 Ill.App.3d 85, 238 Ill.Dec. 342, 711 N.E.2d 445, 448–449 (1999); 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE § 20.6(b), p. 935 (2d ed.1999) (stating that “appellate courts frequently warn against the unnecessary use of the preclusion sanction”); THEUMAN, *supra* at § 2[a], p. 307 (stating that “[b]arring the admission of undisclosed evidence at trial is one of the most drastic sanctions available to the trial court, and the courts may be reluctant to exclude otherwise probative evidence on such grounds”)). “Although the exclusion of evidence is authorized under Rule 4–263, Rule 16 of the

Federal Rules of Evidence, and most State court rules, as well as the ABA Criminal Justice Standards, because the exclusion of prosecution evidence as a discovery sanction may result in a windfall to the defense, exclusion of evidence should be ordered only in extreme cases.” *Thomas*, 397 Md. at 573 (citing *United States v. Rodriguez*, 765 F.2d 1546, 1557 (11th Cir.1985); *People v. Jenkins*, 98 N.Y.2d 280, 746 N.Y.S.2d 651, 774 N.E.2d 716, 719 (2002)). “It has been said that the exclusion sanction should be one of last resort, to be invoked only in those cases where other less stringent sanctions are not applicable to effect the ends of justice.” *Taliaferro*, 295 Md. at 395 (internal quotations and citations omitted).

We hold, in the present case, there were less stringent options available to the court for implementation. The court could have allowed the attorneys to talk to the witness prior to her testimony or could have granted a short continuance. Choosing the most severe sanction when, the violation was not substantial, it occurred prior to the start of trial, the witness was the “heart” of the defense, and there were other available remedies that would have minimized any potential prejudice to the State, was an abuse of discretion. Here, the judge’s determination was clearly well removed from the center mark.

**JUDGMENT OF THE CIRCUIT COURT
FOR WORCESTER COUNTY REVERSED;
COSTS TO BE PAID BY APPELLEE.**