

64919-1

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NO. 64919-1-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Appellant,

v.

SAMUEL GONZALEZ,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

The trial court abused its discretion when it determined, without consideration of the appropriate legal standard, that the disclosure of informant statements of impeachment value two court days after the omnibus hearing constituted a delayed disclosure pursuant to CrR 4.7 such that exclusion of the evidence was warranted.

“A discretionary decision rests on ‘untenable grounds’ or is based on ‘untenable reasons’ if the trial court relies on unsupported facts or applies the wrong legal standard.” Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). See also T.S. v. Boy Scouts of America, 157 Wn.2d 416, 423-424, 138 P.3d 1053 (2006), State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003), and State v. Ramos, 83 Wn. App. 622, 636, 922 P.2d 193 (1996). A trial court abuses its discretion when it bases its ruling on an erroneous view of the law. Washington State Physicians Ins. Exchange and Ass’n v. Fisons, Inc., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

The *Hutchinson* court identified four factors that a trial court should consider when determining whether to exclude evidence as a sanction for a discovery violation. 135 Wash.2d at 882-83, 959 P.2d 1061 (citing *Taylor v. Illinois*, 484 U.S. 400, 415 n. 19, 108 S.Ct. 646, 98 L.Ed.2d 798

(1988)). The trial court should weigh: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the witness's testimony will surprise or prejudice the State; and (4) whether the violation was willful or in bad faith. *Hutchinson*, 135 Wash.2d at 882-83, 959 P.2d 1061.

State v. Venegas, 155 Wn. App. 507, 521-23, 228 P.3d 813 (2010).

Generally, the appropriate remedy for late discovery to a party is a reasonable continuance or recess to allow the investigation of and response to the evidence. See State v. Linden, 89 Wn. App. 184, 195-196, 947 P.2d 1284 (1997), rev. denied, 136 Wn.2d 1018, 966 P.2d 1277 (1998); State v. Beard, 39 Wn. App. 601, 609, 694 P.2d 692, rev. denied, 103 Wn.2d 1032 (1985). The exclusion of evidence is an extraordinary sanction that a court should impose only if no other remedy would cure the potential prejudice. State v. Hutchinson, 135 Wn.2d 863, 882-883, 959 P.2d 1061, cert. denied, 525 U.S. 1157 (1999).

In State v. Venegas, the defense surprised the State with proffered expert testimony on the day the witness was to testify in the defense case. The trial court excluded the expert testimony, placing “decisive emphasis on the third *Hutchinson* factor”:

It noted that Dr. Attig's proposed causation testimony had surprised the State, which would have to locate a medical expert mid-trial to rebut Dr. Attig's testimony. The trial court concluded, “I am not going to take that time now in the middle of the trial.”

In finding that the trial court abused its discretion, the Court of Appeals held that:

The other three *Hutchinson* factors do not support the “extraordinary remedy” of exclusion here. *Hutchinson*, 135 Wash.2d at 882, 959 P.2d 1061. First, the trial lasted over three more weeks after Dr. Attig testified. Therefore, postponing Dr. Attig's testimony until the State could locate an expert could have served as an effective, less severe sanction to prevent prejudicial surprise to the State. *See, e.g. Hutchinson*, 135 Wash.2d at 881, 959 P.2d 1061 (stating that a party's failure to identify witnesses in a timely manner is “appropriately remedied” by continuing trial to give the nonviolating party time to interview the new witness). Second, excluding Dr. Attig's causation testimony strongly undermined Venegas's defense on count II. In contrast to counts I and III, the State presented no clear evidence that corroborated JV's testimony about how he cut his chin. Had the jury heard from Dr. Attig that it was highly unlikely that JV's injury occurred as JV described it, the jury may well have disbelieved JV's testimony. Finally, defense counsel's discovery violation appeared to be an oversight rather than a willful or bad faith violation.

State v. Venegas, 155 Wn. App. at 522.

In the case at bar, any violation of the rules of discovery were *de minimus*, if there were such a violation at all considering the fact that the trial court's own omnibus order permitted the filing of witness lists within a week after the entry of the order. CP 10. While the State is not arguing that the trial court's order can circumvent the Criminal Rules of Procedure, the State would suggest that such an order should be

considered in determining whether the trial court abused its discretion in finding that the rules were violated to an extent that exclusion of the evidence was appropriate. CrR 4.5, relating to the omnibus hearing, by its own terms does not reflect an expectation that all discovery will be completed by that date. See, e.g., CrR 4.5(c)(ii) (“ascertain whether the parties have completed discovery and, if not, make orders appropriate to expedite completion”). Here, the information at issue was provided to the Respondent within two court days of the omnibus hearing and within three weeks of the original trial date and within four weeks of the expiration of time for trial.

Here, the State’s position is that, one, the trial court abused its discretion when it failed to apply the correct standard in determining that exclusion of evidence would be the appropriate remedy, and, two, that, after a proper consideration of the Hutchinson factors, the trial court abused its discretion.

The Respondent asserts that the State has waived its argument that the trial court abused its discretion by failing to “bring the issue to the attention of the superior court judge.” Brief of at 20. However, the record before this Court is clear that the State provided the trial court with the appropriate legal standard. CP 59. The State brought the appropriate

standard to the attention of the trial court at the first opportunity to do so, which was the State's Motion to Reconsider. The State was not provided the opportunity for much in the way of oral argument because initially the trial court was not going to consider the motion at all. 2RP 4, 13, 28. When the State again sought clarification of the court as to whether the court was going to consider the motion, the court, without asking for further argument, held that "[t]he decision has been made. The question is whether there will be a reconsideration of that decision. Absent new evidence, that decision will stand." The court went on to finally hold that the motion to reconsider was denied. 2RP 43-47. There is no authority for the proposition that the State needs to do more than it did do to apprise the trial court of the issue and applicable law.

When we turn to a consideration of the factors that the trial court should have considered, it is clear that no Hutchinson factor supports exclusion.

The Respondent asserts that the first Hutchinson factor (the effectiveness of less severe sanctions) supports the exclusion because "the prosecutor had consistently been tardy in providing discovery throughout the case, intentionally withholding discovery in order to obtain the upper hand in plea negotiations." Brief of Respondent at 21. This is simply not

supported by the record. The trial court never made any such finding. All of the citations to the record made by the Respondent are simply assertions that defense counsel had made to the trial court¹. None of the citations are to findings made by the trial judge. The fact is that the trial court's sole concern with respect to discovery was this issue of the statements of the informant not being disclosed earlier. The Respondent also argues that a continuance would not have been sanction enough because "[t]he prosecutor had just moved for a continuance of the trial date, and the motion had been granted." Brief of Respondent at 21. However, the trial court had already made its decision that it would exclude evidence before ruling on the State's motion to continue. 1RP 17-18. It should also be noted that the time requested for the continuance was only one week, to a date that was within the original time for trial. Furthermore, while punishment may be one of the reasons for sanctions, the main purpose of sanctions is to ensure compliance with the discovery rules and orders of the trial court. So, to argue that a continuance is not punishment enough, is a specious argument. A continuance, whether requested by the State or

¹ With the exception of CP 31, which is the State's filing.

the Respondent, would have provided an effective “sanction”, or means, to prevent an prejudicial surprise to the Respondent².

The Respondent concedes that the second Hutchinson factor (impact of exclusion on the State’s case) does not support exclusion.

The Respondent argues that the third Hutchinson factor (extent to which witness’s testimony will surprise or prejudice the defendant) supports the remedy of exclusion. However, the only prejudice alleged is that “[i]n a case with numerous witnesses, the suppression of any other information concerning this witness clearly prejudiced the defense.” Brief of Respondent at 22. The Respondent articulates no prejudice. Indeed, the impeaching information helps the Respondent. There is no prejudice to the Respondent to receive impeaching evidence on the State’s key witness three weeks prior to the trial.

The Respondent argues that the fourth Hutchinson factor (whether the violation was willful or in bad faith) supports exclusion because “[w]hile the court did not find the failure to disclose evidence was willful or in bad faith . . . there is information support such a finding.” Brief of Respondent at 22. This simply is not true. What the record shows is that

² Assuming that the three weeks still remaining before trial was insufficient.

while the Respondent made many filings claiming such things, those claims were not supported. Simply by way of example, and as referred to by the Respondent in his brief at p.35, the Respondent made several requests for information on CI 1 and CI 2, despite the fact that CI 1 was not going to be called by the State and despite the fact that there was no CI 2 with any relevance whatsoever with this case. 1RP 20; CP 23-26. The record does support significant effort by the State to obtain and provide information to the Respondent. CP 30-31, 61-67. Contrary to the assertions of the Respondent, the record on review is clear that the State made efforts throughout the month of December to obtain discoverable materials and provide them to defense. The record is clear that only two court days passed after the omnibus hearing before the information that was of concern to the trial court was provided to the Respondent.

Excluding evidence is an “exceptional remedy” that a trial court should rarely use. Here, there was a viable alternative to exclusion of the evidence. Here, was neither bad faith on the part of the State, nor prejudice to the defendant from the alternative to exclusion. Here, the impact of the trial court’s ruling was to terminate the State’s ability to prosecute the three class A felonies and the unlawful possession of a firearm. As a further result, the adult court lost jurisdiction over the case for the remaining two charges. The Respondent had ample time to prepare for the

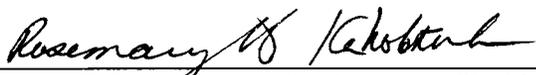
informant's testimony and was not prejudiced by receiving the information three to four weeks prior to trial.

D. CONCLUSION

Where the defendant had possession of the statements of the informant four weeks prior to trial, and two court days after the omnibus hearing, the trial court abused its discretion when it found a "delayed disclosure" such that suppression was the appropriate remedy pursuant to CrR 4.7.

This Court should reverse the order of suppression.

Respectfully submitted this 28 day of December, 2010.


ROSEMARY H. KAHOLOKULA, #25026
Attorney for Appellant

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Elaine L. Winters, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 28th day of December, 2010.



KAREN R. WALLACE, DECLARANT