

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 03 MA 11
PLAINTIFF-APPELLANT,)	
)	
- VS -)	O P I N I O N
)	
ANTONIO CRESPO,)	
)	
DEFENDANT-APPELLEE.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 01CR996.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

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Prosecuting Attorney
Attorney Dawn Krueger
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For Defendant-Appellee:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 17, 2004

VUKOVICH, J.

{¶1} Plaintiff-appellant State of Ohio appeals the decision of the Mahoning County Court of Common Pleas dismissing the indictment of defendant-appellee Antonio Crespo for alleged discovery violations on the part of the prosecutor's office. The issue that must be decided by this court is whether the trial court erred in dismissing the indictment. For the reasons stated below, the decision of the trial court is affirmed.

STATEMENT OF THE CASE

{¶2} On October 11, 2001, the state charged Crespo by secret indictment with Gross Sexual Imposition, a violation of R.C. 2907.05(A)(4)(B). It was alleged that on August 14, 2001, at a church in Mahoning County, Crespo touched a minor on the buttocks, her chest, and her private area. He was subsequently arraigned on November 20, 2001.

{¶3} The day after his arraignment, Crespo filed a notice of request for discovery and bill of particulars. On November 27, 2001, Crespo received the Indictment, witness statements, police reports, and reports from the Children Services Bureau. When he still had not received a bill of particulars, Crespo moved for discovery sanctions and once again requested a bill of particulars. The trial court held a hearing on May 21, 2002 regarding the motion and ordered the state to hand over a bill of particulars within seven days. The state failed to comply with that order.

{¶4} On August 13, 2002, Crespo filed a supplemental motion for bill of particulars. The court again ordered the state to produce a bill of particulars by January 17, 2003. Crespo still did not receive a bill of particulars, so on January 22, 2003, Crespo moved to dismiss the indictment based upon the discovery violation. On January 23, 2003, the state untimely filed a bill of particulars. That same day, the trial court sustained Crespo's motion and dismissed the indictment. The state timely appealed raising one assignment of error.

ASSIGNMENT OF ERROR

{¶15} “THE TRIAL COURT ERRED IN DISMISSING THE INDICTMENT AS A SANCTION AGAINST THE STATE WITHOUT A HEARING TO DETERMINE IF IT WAS THE LEAST SEVERE SANCTION.”

{¶16} The state’s assignment of error asks this court to determine whether a court has the authority to dismiss an indictment without a hearing to determine if dismissal is the least severe sanction. The state argues by citing *Lakewood v. Papdelis* (1987), 32 Ohio St.3d 1, that the trial court must impose the least severe sanction. As such, according to the state, since dismissal was not the least severe sanction, the trial court erred in dismissing the indictment.

{¶17} We find two problems with the state’s arguments. First, it is based on the erroneous assumption that “the least severe sanction” is some kind of litmus test to determine the appropriateness of a sanction. The second problem is that it attempts to twist the syllabus of the Ohio Supreme Court in *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, to somehow have applicability to the instant appeal even though the facts are significantly distinguishable.

{¶18} In *Lakewood*, the Court held in paragraph two of its syllabus that: “A trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery.” Common sense dictates that the foregoing holding does not mean that a trial court must impose the “least severe sanction” in every case. Otherwise, dismissal of an indictment could never be an appropriate sanction as there will always be a sanction less severe. Similarly, a jail term for contempt could be eliminated as an option because there are a plethora of less severe sanctions available.

{¶19} Moreover, the holding in *Lakewood* must be read in conjunction with its facts. In *Lakewood*, the defense failed to respond to the prosecution’s demand for discovery. During trial, the state objected when the defense called its first witness on the ground that the state had not been provided a witness list. The trial court then excluded the testimony of all defense witnesses as a sanction for the failure of the defense to comply with the state’s discovery demand.

{¶10} In that context, the court in *Lakewood* discussed a balancing test between a defendant's constitutional rights and the state's interest in pre-trial discovery, and concluded that "the foregoing balancing test should not be construed to mean that the exclusion of testimony or evidence is never a permissible sanction in a criminal case. It is only when exclusion acts to completely deny defendant his or her constitutional right to present a defense that the sanction is impermissible." *Id.* at 5.

{¶11} It is difficult to extend that same rationale in a case where the sanction is imposed on the prosecution. For example, it would be rare that a ruling imposing a sanction against the state would deny a defendant of "his or her constitutional right to present a defense" when it more logically would improve the ability to present a defense. Therefore, the holding in *Lakewood* is not directly applicable in cases where sanctions are imposed upon the prosecution. To the extent that *Lakewood* stands for the proposition that a trial court should weigh the interests and rights of an accused with the interests of the state prior to considering a sanction against the state, it is applicable. The trial court should then apply the least severe sanction appropriate to the circumstances of the case, the severity of the offending conduct, and the impact of the offending conduct upon the ability of an accused to present a defense.

{¶12} Here, defendant first requested a bill of particulars on November 21, 2001. This was ignored by the prosecutor's office. On April 2, 2002, defendant moved for sanctions. This was also ignored by the prosecutor's office. On May 21, 2002, and after a hearing on sanctions, the trial court ordered the state to deliver a bill of particulars to defendant by May 28, 2002. This was ignored. On August 12, 2002, defendant filed a supplemental motion for a bill of particulars. On January 16, 2003, the date the criminal case was to go to trial, the trial court continued the trial and ordered the prosecutor's office to file a bill of particulars the next day. Again, the court's order was ignored. On January 23, 2003, over 422 days after defendant first requested a bill of particulars, after at least two specific court orders, after at least two hearings, and after several trial continuances, the trial court dismissed the indictment noting: "The court has attempted, on numerous occasions, to impose the least restrictive sanction against the state. This has resulted in numerous continuances of the case. These sanctions have fallen on deaf ears." (01/23/03 Trial Court J.E., pg.3).

{¶13} The facts here, therefore, are vastly different and more flagrant than the facts in *Lakewood*. The trial court attempted to goad the state into compliance without success. The fact that it dismissed the indictment without a hearing is of no consequence since the prosecutor attended several hearings and was ordered several times to furnish a bill of particulars and chose to ignore each and every one of them. Moreover, the court is not required to always impose the least severe sanction against the state. It is merely required to impose a sanction that is reasonably related to the offensive or non-compliant conduct and the impact of that conduct upon the ability of the accused to present a defense. The trial court met that standard. Accordingly, the trial court's decision should stand.

{¶14} For the foregoing reasons, the decision of the trial court is hereby affirmed.

Donofrio, J., concurs; see concurring opinion.
DeGenaro, J., dissents; see dissenting opinion.

Donofrio, J., concurring.

{¶15} I write this concurring opinion only to make one point. This case involves the situation where dismissal of the case occurred in the lower court before conviction, rendering a harmless error analysis ineffectual. The cases cited in the dissent each involve the situation where a conviction has already been obtained, harmless error can be reviewed, and the conviction is affirmed on appeal. I believe that is an important distinction to highlight especially as it regards our standard of review.

DeGenaro, J., dissenting:

{¶16} I must respectfully dissent from the majority since the failure to provide a bill of particulars does not constitute a discovery violation as contemplated by Crim.R. 16. It is more analogous to a procedural violation of Crim.R. 7 which would be reviewed under a harmless error analysis. Therefore, the standard applied by the

parties, the trial court, and the majority, whether the trial court imposed the least severe sanction appropriate to the circumstances of the case, does not apply to the trial court's decision.

{¶17} Thus the issue becomes whether it was within the trial court's discretion to dismiss the indictment if Crespo suffered no prejudice by the late filing of the bill of particulars. Because the trial court made no effort to determine whether Crespo was prejudiced by the state's failure to timely file a bill of particulars, I would conclude it abused its discretion by dismissing the indictment without any demonstration of prejudice.

{¶18} Admittedly, the state failed to provide the bill of particulars until the day the trial court dismissed the indictment. However, the state claims its behavior resulted in no prejudice to Crespo since the state had already submitted discovery to Crespo which contained all of the information which would be found in the bill of particulars. In response, Crespo correctly points out that Crim.R. 7(E) provides that when requested by a defendant, the state must provide a bill of particulars setting forth specifically the nature of the offense and the defendant's conduct constituting the offense. *State v. Stepp* (1997), 117 Ohio App.3d 561, 565. When the state possesses the specific dates and times of an alleged offense, it must supply these in the bill of particulars. *State v. Sellars* (1985), 17 Ohio St.3d 169, syllabus.

{¶19} What Crespo fails to mention, however, is that a bill of particulars "is not designed to provide the accused with specifications of evidence or serve as a substitute for discovery." *Sellars* at 171. Inherent in that statement is the idea that the production of the bill of particulars should be treated differently from the production of evidence through discovery. This is true mainly because the failure to hand over a bill of particulars, especially if an indictment with adequate detail was provided, will have less effect on a defendant's ability to defend himself than an outright denial of full and open discovery. In support of this proposition, I find the fact that there are two separate and distinct criminal rules dealing with each of these situations to be compelling. In particular, Crim.R. 16 specifically lists the items that must be provided in discovery and nowhere in that list is the bill of particulars mentioned. Accordingly,

the standard found in Crim.R. 16 for imposing sanctions does not apply to this situation.

{¶20} It should now be determined what standard the trial court should have applied when dealing with the prosecutor's untimely filing of the bill of particulars. Since Crim.R. 7 does not provide a remedy for the failure to produce a bill of particulars, it is appropriate to look to the decisions of other courts for guidance. It has been repeatedly held that the failure of the state to provide the defendant a bill of particulars will not prejudice the defendant where the indictment provided the defendant with all pertinent information and properly advised the defendant as to the time, place, nature, and substance of the harm allegedly inflicted. *State v. Brown* (1993), 90 Ohio App.3d 674, 682.

{¶21} Significantly, in a case cited by Crespo, *State v. Chinn*, 85 Ohio St.3d 548, 1999-Ohio-0288, the trial court denied appellant's motion for a bill of particulars noting that the motion had been untimely filed and determined that, even if the motion was timely, a bill of particulars was not necessary to aid appellant in preparing for trial. The appellant in *Chinn* argued the trial court's denial of his request for a bill of particulars rendered him unable to present an adequate defense. The Supreme Court disagreed.

{¶22} The Court first acknowledged that if appellant's motion had been timely made, it was clear error for the prosecution to fail to provide a bill of particulars and for the trial court to have denied appellant's motion. The Court explained that the law is clear. "In a criminal prosecution the state must, in response to a request for a bill of particulars * * *, supply specific dates and times with regard to an alleged offense where it possesses such information." *State v. Sellards* (1985), 17 Ohio St.3d 169, syllabus.

{¶23} Importantly, the Court then stated that the issue in *Chinn* ultimately turned on the question whether appellant's lack of knowledge concerning the specific facts a bill of particulars would have provided him actually prejudiced him in his ability to fairly defend himself. The Court determined that the denial of appellant's request in no way precluded or otherwise hindered him from effectively presenting his defense since the record did not support appellant's claims that he lacked specific information

as to the offenses charged. Accordingly, the Court upheld the appellant's conviction concluding, "while the denial of a timely request for a bill of particulars should never occur, it is clear that appellant suffered no prejudice as a consequence of the denial that occurred in this case." *Id.* at 569.

{¶24} Likewise, in *State v. Jackson* (May 24, 1999), 12th Dist. No. CA98-11-022, the Twelfth District upheld a conviction even though the state never provided the appellant with a bill of particulars. Because the indictment stated all of the relevant information that Crim.R. 7(E) requires be included in a bill of particulars, the court concluded that, had the state provided appellant with a bill of particulars, appellant would not have been given any more information than he already had. Thus, appellant was not prejudiced by the state's failure to provide a bill of particulars. *Id.* at 5.

{¶25} Similarly, in *State v. Miller* (Feb. 12, 1999), 11th Dist. No. 98-P-0023, the court decided that, "although the language of Crim.R. 7(E) is mandatory, appellant was not prejudiced by failing to receive a bill of particulars. The purpose of a bill of particulars is to clarify a complaint that is vague or indefinite so that a defendant knows the exact nature of the charges against him." *Id.* at 2. The court further explained, "In *State v. Brown* (1993), 90 Ohio App.3d 674, 682, 630 N.E.2d 397, 402, this court held that failing to provide a defendant with a requested bill of particulars was harmless error when the indictment gave adequate notice of the time, place, nature, and substance of the offense. *Id.* at 402." *Id.* Accordingly, because the appellant in *Miller* was not harmed by not receiving a bill of particulars because the traffic citation she received included the time, place, and specific nature of the charged offense, the court upheld her conviction. *Id.*

{¶26} In a slightly different case where the appellant did not make a timely request for a bill of particulars, *State v. Bayer*, (1995), 102 Ohio App.3d 172, the trial court still granted his motion. In that case, the prosecution claimed that it responded to the motion by providing appellant with a copy of its entire file, which contained the police report detailing the incident. Although the Eleventh District was unable to conclude the prosecutor complied with the trial court's order, it concluded that the state's failure did not rise to the level of prejudicial error requiring a reversal on that issue.

{¶27} The *Bayer* court explained that it was evident that appellant was aware of the "nature of the offense charged and of the conduct * * * alleged to constitute the offense." Crim.R. 7(E). Because the appellant was prepared to defend himself against the charge, the prosecution's failure to provide him with a "formal response" elevates form over substance, and it was not prejudicial to appellant's trial preparation. *Bayer* at 184, citing *Brown* at 682.

{¶28} In several other fairly recent decisions, courts have repeatedly held that the failure to timely provide or even the complete failure to provide a bill of particulars constitutes harmless error unless some prejudice to the defendant is demonstrated. See *State v. Luna* (Sept. 2, 1994), 6th Dist. No. H-93-24; *State v. Roy* (Oct. 12, 1995), 8th Dist. 67462; *State v. Houser* (May 30, 1996), 8th Dist. No. 69639; *State v. Fontanella* (Dec. 17, 1999), 11th Dist. No. 98-P-0085; *Mentor v. Molk* (Apr. 14, 2000), 11th Dist. No. 98-L-263; *State v. Sinclair*, 2nd Dist. No. 2002-CA-33, 2003-Ohio-3246.

{¶29} In the present case, although the state failed to timely hand over the bill of particulars, the state argues, and Crespo does not deny, that all the information that would be contained in the bill of particulars had already been handed over to Crespo in some other form, i.e., police reports, witness statements, and the indictment. Moreover, it is clear from the record that the state had already alleged in the indictment the identity of the alleged victim, when and where the alleged crime occurred, and the violation of the law that was alleged. Because the bill of particulars would not provide Crespo with any new information, there would be no unfair surprise and therefore, no prejudice. Crespo has failed to demonstrate he has been prejudiced in any way.

{¶30} In light of the long line of precedent which clearly shows that the complete failure to ever file a bill of particulars would constitute harmless error if no prejudice were shown, I cannot now say that the failure to timely file a bill of particulars warrants a dismissal of the indictment in this case. The "sanction" is simply too harsh. Accordingly, the trial court abused its discretion by dismissing the indictment.

{¶31} That is not to say that I condone the behavior of the prosecutor in this case. I agree with the Supreme Court's statement in *Chinn* that the denial of a timely request for a bill of particulars should never occur. I join in the trial court's apparent

frustration with the prosecutor's repeated defiance of its orders, but the severity of the penalty is excessive. In order for the trial court to punish the prosecution for its indolence, some other form of punishment, like contempt would be much more appropriate in this situation.