

[Cite as *State v. Warfield*, 2006-Ohio-935.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 86055

STATE OF OHIO	:	
	:	LOWER COURT NO.CR-481185
Plaintiff-Appellant	:	COMMON PLEAS COURT
	:	
-vs-	:	MOTION NO. 381487
	:	
GERALD WARFIELD	:	
	:	
Defendant-Appellee	:	

DATE: FEBRUARY 27, 2006

JOURNAL ENTRY

The prior Journal Entry and Opinion of this court released on January 12, 2006, contained an error on the cover page. The names of the Plaintiff-Appellant and the Defendant-Appellee were switched.

This page should have read as the Plaintiff-Appellant being the State of Ohio; and as the Defendant-Appellee being Gerald Warfield.

IT IS HEREBY ORDERED that said Journal Entry and Opinion of January 12, 2006, be amended *nunc pro tunc* to correct the error set forth above. The Amended Journal Entry and Opinion, *nunc pro tunc* January 12, 2006, is attached.

IT IS FURTHER ORDERED that, as so amended, said Journal Entry and Opinion of January 12, 2006 shall stand in full force and effect as to all its particulars.

JAMES J. SWEENEY, P.J., and

MICHAEL J. CORRIGAN, J., CONCUR.

PATRICIA ANN BLACKMON
JUDGE

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86055

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellant	:	
	:	and
-vs-	:	
	:	OPINION
GERALD WARFIELD	:	
	:	
Defendant-Appellee	:	
	:	

DATE OF ANNOUNCEMENT	<u>JANUARY 12, 2006</u>
OF DECISION:	

CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court Case No. CR-461185
--------------------------	--

JUDGMENT:	Reversed.
-----------	-----------

DATE OF JOURNALIZATION:

APPEARANCE:

For Plaintiff-Appellant:	WILLIAM D. MASON Cuyahoga County Prosecutor DENISE R. CAMERON Assistant County Prosecutor 8 th Floor Justice Center 1200 Ontario Street Cleveland, Ohio 44113
--------------------------	--

For Defendant-Appellee:	KEVIN M. RYAN
-------------------------	---------------

35836 Center Ridge Road
Suite 101
North Ridgeville, Ohio 44039

PATRICIA ANN BLACKMON, A.J.

{¶1} Appellant, the State of Ohio, appeals the trial court's dismissing with prejudice the indictment against Appellee Gerald Warfield. On appeal, the State assigns the following error for our review:

{¶2} "I. The trial court erred and abused its discretion in dismissing the indictment with prejudice."

{¶3} Having reviewed the record and pertinent law, we reverse the trial court's decision. The apposite facts follow.

{¶4} On January 19, 2005, the Cuyahoga County Grand Jury indicted Warfield for one count of extortion and one count of aggravated menacing. Warfield pled not guilty at his arraignment. Thereafter, on January 26, 2005, Warfield filed motions for discovery, bill of particulars and request for disclosure of specific intention to use evidence.

{¶5} On February 9, 2005, at the conclusion of a pretrial conference, the trial court issued the following journal entry:

"Pretrial was had with Prosecutor and Defense Counsel participating on Wednesday, February 9, 2005. The Defendant filed for discovery on January 26, 2005 and to date the State has made no response whatsoever for that request for discovery. The State is hereby ordered to make a full and complete response to said discovery demand with no exception no later than delivery to defense counsel on February 17, 2005 at 9:00 A.M. which is the next pretrial in this case. This discovery will include actual production of the rent receipt, which the

complaining witness claims to have received from the Defendant and claims to have turned over to the Cleveland Police. If the State of Ohio has not fully complied with this order relative to complete discovery by February 17, 2005, this case will be dismissed with prejudice. The Defense Counsel is ordered to make a written response to any request for discovery filed by the State of Ohio no later than February 22, 2005. The next pretrial is set for February 17, 2005 at 9:00 A.M. A hearing will be held at the conclusion of the morning on whether the State of Ohio has fully complied with this order as to discovery and whether the case will proceed or be dismissed with prejudice. Trial is hereby set for March 3, 2005 at 9:00 A.M."¹

{¶6} At the pretrial conference on February 17, 2005, the State indicated that it had provided written response to Warfield's discovery request, but could not produce the physical evidence of the pivotal rent receipt. At the conclusion of the compliance hearing, the trial court dismissed the indictment with prejudice.

DISMISSAL OF INDICTMENT

{¶7} In its sole assigned error, the State argues the trial court erred and abused its discretion by dismissing the indictment with prejudice. We agree.

{¶8} Our standard of review is discretion. We give substantial deference to the trial court unless we determine that the court's ruling was an abuse of discretion.² The term "abuse of discretion" connotes more than an error of law or of judgment; it implies that

¹ Judgment Entry.

² *State v. Tankersley* (1998), Cuyahoga County App. Nos. 72398 and 72399.

implies that the court's attitude is unreasonable, arbitrary or unconscionable.³ The State and the defense spent a considerable amount of time discussing Crim.R. 48, the Dismissal Rule. However, we are not persuaded that this rule applies. The issue in this case is whether the trial court may use the most severe sanction against the State for its failure to comply with discovery. Crim.R. 16(E)(3) vests trial courts with broad discretion when non-compliance with discovery is shown. This rule provides that the trial court may order such non-complying party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

{¶9} The historical law is that the trial court may not dismiss a case against a party who has failed to respond to discovery requests unless the record reflects willfulness or bad faith on the part of the party who has failed to respond.⁴

{¶10} Here, the record before us reveals the trial court ordered the State to make a full and complete response to Warfield's request for discovery. One of the key components of the discovery request was the production of a rent receipt, which the complaining witness claimed to have received from Warfield and claimed to have turned over to the police. At the compliance hearing, the State

³ *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

⁴ *Toney v. Berkemer* (1983), 6 Ohio St.3d 455, syllabus; see, also, *Jones v. Hartranft* (1997), 78 Ohio St.3d 368, 371.

hearing, the State claimed, that despite its best efforts, it was unable to produce the pivotal rent receipt.

{¶11} The following exchange took place at the hearing:

"The Court: You talked to Detective Pirinelli and he said he was not bringing it?

Ms. Cameron: That's correct, but I talked with him last week.

The Court: Oh, okay was there a reason why he was refusing to bring it?

Ms. Cameron: He's not on duty now and he doesn't have a subpoena so he wasn't going to come down to court.

The Court: You're saying a week ago he said I won't bring it because I'm not under subpoena?

Ms. Cameron: He told me on February 11th.

The Court: That he's not on duty today and he wouldn't bring it without a subpoena?

Ms. Cameron: Yes.

The Court: Did you issue a subpoena?

Ms. Cameron: No, Your Honor, I didn't have authority to."⁵

{¶12} We have carefully reviewed the entire record, and found no indication that the State's failure to abide by the discovery request and order of the court was done willfully or was motivated by bad faith. Thus, the use of the most extreme sanction, that of dismissing the case with prejudice, denotes an abuse of discretion.

⁵Tr. at 5-6.

{¶13} We are mindful that the trial court had sufficient evidence before it that the Prosecutor had not diligently sought to obtain the evidence and present it to the defense. Nevertheless, it appears to this court under those circumstances that the trial court could have held the Prosecutor in contempt, prevented the introduction of the rent receipt into evidence, or barred testimony of its existence.

{¶14} While failures to comply with the rules of discovery should not go unpunished, a court must impose the least severe sanction consistent with the purpose of the rules of discovery.⁶ Here, the trial court's decision to dismiss the indictment went beyond the least severe sanction consistent with the purpose of the rules of discovery. The decision was too severe and constitutes an abuse of discretion given the nature of the infraction. Accordingly, we sustain the State's sole assigned error.

Judgment reversed.

It is ordered that appellant recover of appellee his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

⁶*City of Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, P.J., and

MICHAEL J. CORRIGAN, J., CONCUR.

PATRICIA ANN BLACKMON
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).