

[Cite as *State v. Carabello*, 2017-Ohio-1455.]

[Vacated opinion. Please see 2017-Ohio-4449.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 105021 and 105022

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

HERIBERTO MORALES CARABELLO, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-16-603753-A and CR-16-603753-B

BEFORE: Celebrezze, J., Blackmon, P.J., and Jones, J.

RELEASED AND JOURNALIZED: April 20, 2017

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FRANK D. CELEBREZZE, JR., J.:

{¶1} In this consolidated appeal, plaintiff-appellant, the state of Ohio, appeals from the trial court’s dismissal of the criminal case against defendants-appellees, Heriberto Morales Carabello (“Carabello”) and Michael Pryor (“Pryor”), without prejudice. Specifically, the state argues that the trial court erred by dismissing the criminal case without a hearing and failed to comply with the requirements set forth in Crim.R. 48(B). After a thorough review of the record and law, we affirm.

I. Factual and Procedural History

{¶2} This appeal stems from a joint indictment returned against Carabello and Pryor. In Cuyahoga C.P. No. CR-16-603753,¹ the Cuyahoga County Grand Jury returned a three-count indictment on March 17, 2016, charging Carabello and Pryor with felonious assault, in violation of R.C. 2903.11(A)(1), and kidnapping, in violation of R.C. 2905.01(A)(2); Count 3 charged Carabello with having weapons while under disability, in violation of R.C. 2923.13(A)(2). The charges pertain to an incident that occurred on February 15, 2016, at a clothing store in Cleveland’s Warehouse District where Carabello and Pryor were employed.

{¶3} Carabello was arraigned on March 28, 2016; he pled not guilty to the indictment. Pryor was arraigned on March 31, 2016; he pled not guilty to the

¹ CR-16-603753-A pertained to Carabello and CR-16-603753-B pertained to Pryor.

indictment. Thereafter, the trial court conducted pretrial proceedings during which the matter was set for trial on September 22, 2016.

{¶4} On September 22, 2016, after calling the matter for trial, the trial court dismissed the case without prejudice. Our record is devoid of a transcript of this hearing. The trial court’s journal entries provide, “case called for trial. Outstanding discovery. Case is dismissed without prejudice. Over state’s strenuous objection.”

{¶5} On September 28, 2016, the state filed the instant appeals, which we consolidated for review, challenging the trial court’s dismissal. The state assigns one error for review:

- I. The trial court erred when it dismissed these cases without a hearing, and without adhering to the requirements set forth in Crim.R. 48(B).

II. Law and Analysis

A. Crim.R. 48(B)

{¶6} In its sole assignment of error, the state contends that the trial court’s dismissal failed to comply with the requirements set forth in Crim.R. 48(B). Specifically, the state argues that the trial court failed to state its findings of fact and reasons for dismissing the case on the record.

{¶7} Crim.R. 48(B), governing dismissal by the trial court, provides, “[i]f the court over objection of the state dismisses an indictment, information, or complaint, *it shall state on the record* its findings of fact and reasons for the dismissal.” (Emphasis added.)

The rule requires the trial court to state its findings of fact and reasons for the dismissal on the record — there is no requirement that these findings and reasons be incorporated

into the trial court's journal entry.

{¶8} In the instant matter, as noted above, the trial court's journal entries provide, "case called for trial. Outstanding discovery. Case is dismissed without prejudice. Over state's strenuous objection." The state essentially argues that the journal entries should have been more thorough: "[b]ased on the sparseness of th[ese] judgment entr[ies], it is not clear what the trial court's reasoning was in dismissing these cases over the [s]tate's objection." Appellant's brief at 3. As noted above, while the trial court's findings of fact and reasons for the dismissal must be stated on the record, there is no requirement that the findings and reasons be incorporated into a journal entry.

{¶9} Our record does not contain a transcript of the September 22, 2016 hearing during which the trial court dismissed the joint indictment. "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record." *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980), citing *State v. Skaggs*, 53 Ohio St.2d 162, 372 N.E.2d 1355 (1978). *Accord Bakhtiar v. Saghafi*, 8th Dist. Cuyahoga No. 104204, 2016-Ohio-8052, ¶ 3. In the absence of a complete and adequate record, a reviewing court must presume the regularity of the trial court proceedings and the presence of sufficient evidence to support the trial court's decision. *Wells v. Spirit Fabricating, Ltd.*, 113 Ohio App.3d 282, 288-289, 680 N.E.2d 1046 (8th Dist.1996). "When a complete transcript is not available, the appellant has the option of providing a narrative statement of the proceedings, as provided for in App.R.

9(C), or an agreed statement as provided for in App.R. 9(D).” *Cleveland v. Wilson*, 8th Dist. Cuyahoga No. 104746, 2017-Ohio-540, ¶ 6.

{¶10} Here, the state has not provided this court with a transcript of the September 22, 2016 hearing, nor a statement pursuant to App.R. 9(C) or (D).

Where no transcript of proceedings of the trial is included in the record on appeal, and no substitute statement of evidence is provided, and no statement has been filed to indicate that a transcript is not needed in order to consider the appeal, the appellant cannot demonstrate the error of which he complains, and the appellate court must affirm.

Corsaro, Giganti & Assocs. v. Stanley, 8th Dist. Cuyahoga No. 77201, 2000 Ohio App. LEXIS 4299, 5-6 (Sept. 21, 2000). *Accord Wilson* at ¶ 7, citing *State v. Estrada*, 126 Ohio App.3d 553, 556, 710 N.E.2d 1168 (7th Dist.1998).

{¶11} Because the state failed to provide a transcript or a substitute statement of the evidence, we presume regularity — that the trial court complied with Crim.R. 48(B) by stating its findings of fact and reasons for the dismissal in open court during the September 22, 2016 hearing. Accordingly, we find no merit to the state’s argument that the trial court failed to comply with Crim.R. 48(B) in dismissing the criminal case.

B. Discovery

{¶12} The state further asserts that the trial court abused its discretion by dismissing the criminal case without adequately exploring the least restrictive sanction for the alleged discovery violation.

{¶13} Initially, we note that the state’s argument is premised entirely on the assumption that the trial court dismissed the criminal case based on a discovery violation,

rather than the untimeliness of the state's supplemental responses to Carabello's and Pryor's discovery requests.

{¶14} Crim.R. 16 governs discovery matters in a criminal proceeding. The purpose of this rule is “to provide the parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system, the rights of defendants, and the well-being of witnesses, victims, and society at large.” Crim.R. 16(A). Furthermore, Crim.R. 16(L)(1) provides,

[i]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such 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.

{¶15} In *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987), the Ohio Supreme Court held that “[a] trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery.” *Id.* at paragraph two of the syllabus. In *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, the Ohio Supreme Court explained that the *Papadelis* rationale “applies equally to discovery violations committed by the state and to discovery violations committed by a criminal defendant.” *Darmond* at syllabus.

{¶16} In the instant matter, the state contends that the trial court failed to consider the factors set forth in *Papadelis*. There, the court identified four factors for trial courts to consider in imposing sanctions for discovery violations: “the extent to which the

prosecution will be surprised or prejudiced by the witness' testimony, the impact of witness preclusion on the evidence at trial and the outcome of the case, whether violation of the discovery rules was willful or in bad faith, and the effectiveness of less severe sanctions.” *Id.* at 5; *see State v. Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689 (1983), syllabus (trial courts should consider whether (1) the failure to disclose evidence was a willful violation of Crim.R. 16, (2) foreknowledge of the undisclosed material would have benefitted the accused in preparing a defense, and (3) the accused was prejudiced in determining the appropriate sanction for a discovery violation).

{¶17} As noted above, our record does not contain a transcript of the September 22, 2016 hearing during which the trial court dismissed the case, and the state failed to provide this court with a statement of the proceedings pursuant to App.R. 9(C) or (D). Thus, we must presume regularity — that is, if the trial court did, in fact, dismiss the case based on a discovery violation, it considered these factors and determined that a dismissal without prejudice was the least severe sanction warranted under the circumstances before dismissing the case.

{¶18} The state directs this court to *State v. Warfield*, 8th Dist. Cuyahoga No. 86055, 2006-Ohio-96,² where the trial court dismissed the indictment with prejudice based on the state's failure to comply with discovery. On appeal, this court determined that Crim.R. 48 did not apply because the issue was “whether the trial court may use the

² Due to a clerical error, the January 12, 2006 opinion was amended nunc pro tunc on February 27, 2006. *State v. Warfield*, 8th Dist. Cuyahoga No. 86055, 2006-Ohio-935.

most severe sanction against the [s]tate for its failure to comply with discovery.” *Id.* at ¶ 8. This court recognized that historically, trial courts “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.” *Id.* at ¶ 9. This court reversed the trial court’s dismissal, concluding that the record did not indicate that the state’s failure to comply with the defendant-appellee’s discovery request and the trial court’s discovery order “was done willfully or was motivated by bad faith.” *Id.* at ¶ 12. This court explained that the trial court could have imposed less extreme sanctions for the state’s failure to comply with discovery, such as holding the prosecutor in contempt, prohibiting the introduction of the evidence at issue, or barring testimony regarding the evidence. *Id.* at ¶ 13. Accordingly, this court concluded that the trial court’s use of the most extreme sanction — dismissing the indictment with prejudice — was not consistent with the purposes of the rules of discovery and an abuse of discretion. *Id.* at ¶ 14.

{¶19} The instant matter is readily distinguishable from *Warfield*. The trial court’s dismissal was without prejudice, such that the state can reindict Carabello and Pryor. In *Warfield*, the trial court held a discovery compliance hearing, after which the court dismissed the case with prejudice and issued a journal entry that provided, in relevant part, “state of Ohio not in compliance with full and complete discovery as ordered by the court[.]” Here, the trial court did not hold a discovery compliance hearing. In fact, based on the record before this court, we are unable to identify any specific discovery request or order that the state failed to comply with. The trial court

called the matter for trial on September 22, 2016, and, rather than commencing the trial, dismissed the case due to “outstanding discovery.” Thus, the state’s reliance on *Warfield* is misplaced.

{¶20} After reviewing the limited record before this court, we are unable to conclude that the trial court abused its discretion by dismissing the case without prejudice. To the extent that the state suggests that a less severe sanction, such as a continuance or excluding the outstanding evidence, would have been more appropriate than a dismissal, this court has explained that “[g]iven the nature of a dismissal without prejudice, it cannot necessarily be said that a trial court abuses its discretion by dismissing an indictment without prejudice as a sanction for discovery violations where a continuance may have sufficed.” *S. Euclid v. Fayne*, 8th Dist. Cuyahoga No. 101610, 2015-Ohio-1378, ¶ 21, citing *State v. Craig*, 8th Dist. Cuyahoga No. 88313, 2008-Ohio-3978, ¶ 13. Furthermore, we note that a dismissal without prejudice is not necessarily a more severe sanction than excluding the evidence or discovery materials that were outstanding.

{¶21} For all of the foregoing reasons, the state’s sole assignment of error is overruled.

III. Conclusion

{¶22} Based on the record before this court, we find that the state failed to meet its burden of demonstrating that the trial court abused its discretion by dismissing the joint indictment without prejudice. Without either a transcript of the September 22, 2016

hearing or a statement of the proceedings pursuant to App.R. 9(C) or (D), we are unable to determine whether the trial court failed to state its findings of fact and reasons for the dismissal, as required by Crim.R. 48(B). Furthermore, we are unable to determine whether the trial court considered the least restrictive sanction consistent with the purposes of the discovery rules. Accordingly, we have no choice but to presume regularity — that the trial court’s dismissal complied with Crim.R. 48(B) and 16.

{¶23} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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.

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
LARRY A. JONES, SR., J., CONCUR