STATE OF LOUISIANA	*	**NO. 2001-KA-1700**
VERSUS	*	**COURT OF APPEAL**
CRAIG M. GORDON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 394-663, SECTION "A"
Honorable Charles L. Elloie, Judge

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Charles R. Jones
Judge

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(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby and Judge Max N. Tobias, Jr.)

Harry F. Connick
District Attorney
Leslie Parker Tullier
Assistant District Attorney
619 South White Street
New Orleans, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

Laura Pavy
LOUISIANA APPELLATE PROJECT
P.O. Box 750602
New Orleans, LA 701750602
COUNSEL FOR DEFENDANT/APPELLANT

CONVICTION AFFIRMED;
SENTENCE AMENDED

Appellant, Craig M. Gordon, appeals his conviction and sentence as a multiple offender for distribution of crack cocaine. We affirm.

Gordon was charged by bill of information with distribution of crack cocaine, a violation of La. R.S. 40:967. Ferdinand Valteau of the Orleans Indigent Defender Panel (hereinafter "OIDP") was appointed to represent him. After discovery motions were resolved, Gordon appeared for trial unattended by counsel, and the district court set the matter for a motion to determine counsel. The district court appointed Shyrl Bagneris of OIDP to represent Gordon. Ms. Bagneris filed additional discovery motions. Gordon appeared for hearings on the motions attended by other counsel, Gary Wainwright. The motions were continued on a motion made by the defense. Gordon then appeared attended by yet other counsel, Kara Williams of OIDP. The district court removed Mr. Wainwright as Gordon's attorney and set the case for trial.

Ms. Williams represented Gordon at trial. Prior to trial, Ms. Williams requested a continuance on the basis of a discovery violation. She was not aware that the state intended to introduce a videotape of the alleged drug

transaction. After allowing Ms. Williams an opportunity to view the tape, trial commenced and the jury found Gordon guilty as charged. He was sentenced to five years at hard labor with credit for time served. The state filed a multiple bill alleging Gordon to be a second felony offender. Gordon pled guilty to the multiple bill, and after vacating the sentence previously imposed, the district court sentenced him to fifteen years at hard labor to be served without probation, parole or suspension of sentence. This timely appeal follows.

At trial, Officer Adam Henry of the New Orleans Police Department, Narcotics Division, testified that on September 5, 1997, he was on what he described as a "buy/bust" operation wherein he made himself available to persons engaged in selling narcotics in the Little Woods area of New Orleans. Officer Henry was in plain clothes and was driving an unmarked vehicle, which was equipped with video and audio transmitting capabilities. Officer Henry engaged in a hand-to-hand transaction with Gordon in which he exchanged a twenty-dollar bill for crack cocaine. For comparison purposes, the twenty-dollar bill had previously been photocopied.

Upon completing the transaction, Officer Henry relayed a description of the perpetrator to officers who were monitoring the audio signal. Sergeant Patrick Brown and Officer Paul Toye testified at trial that they

stopped a subject in the area who matched the description. Officer Henry positively identified the subject in a Polaroid photograph as the person who had sold him the cocaine. Officer Toye testified that he arrested Gordon, and a twenty-dollar bill with corresponding serial numbers to that recorded was recovered. A video and audiotape of the transaction was introduced at trial.

A review of the record for errors patent reflects that Gordon received an illegal sentence. La. R.S. 40:967(B) requires that a defendant serve his sentence without eligibility for parole for a mandatory minimum term of five years. The statute does not provide that the entire sentence be served without parole eligibility. Accordingly, Gordon's sentence shall be amended to provide that he serve fifteen years imprisonment at hard labor without benefit of parole eligibility for the first five years. The district court will be directed to make an entry in the minutes reflecting this change and to issue a new commitment order to the Department of Corrections. Proof of compliance must also be directed to this Court.

Gordon contends that the district court committed error in denying his request for a continuance based on the state's failure to comply with discovery. La. C.Cr.P. art. 729.5, relative to the failure to comply with discovery provides:

> A. If 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 Chapter or with an order issued pursuant to this Chapter, the court may order such party to permit the discovery or inspection, grant a continuance, order a mistrial on motion of the defendant, prohibit the party from introducing into evidence the subject matter not disclosed, or enter such other order, other than dismissal, as may be appropriate.
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> B. In addition to the sanctions authorized in Part A hereof, if at any time prior or subsequent to final disposition the court finds that either the state through the district attorney or assistant district attorney or the defendant or his counsel has willfully failed to comply with this Chapter or with an order issued pursuant to this Chapter, such failure shall be deemed to be a constructive contempt of court.

Louisiana's discovery rules are intended to eliminate prejudice from surprise testimony and evidence, "to permit the defense to meet the state's case, and to allow a proper assessment of the strength of its evidence in preparing a defense." *State v. Allen*, 94-2262, p. 4 (La. 11/13/95), 663 So.2d 686, 688. Absent a showing of prejudice by the defendant, the state's failure to comply with discovery rules does not bring automatic reversal. *State v. Broadway*, 96-2659, p.16 (La. 10/19/99), 753 So.2d 801, 813.

To grant or refuse to grant a motion for continuance rests within the sound discretion of the trial court. *State v. Martin*, 93-0285, p. 10-11 (La.10/17/94), 645 So.2d 190, 197. A ruling will not be disturbed on appeal

absent a clear showing of abuse of discretion, and a showing of specific prejudice caused by that denial. *State v. Benoit*, 440 So.2d 129 (La. 1983). When a motion to continue is based upon a claim of inadequate time to prepare a defense, the specific prejudice requirement has been disregarded only when the time has been "so minimal as to call into question the basic fairness of the proceeding." *State v. Jones*, 395 So.2d 751, 753 (La. 1981). The reasonableness of discretion issue turns upon the circumstances of the particular case. *State v. Simpson*, 403 So.2d 1214 (La. 1981). "The trial court's discretion in rulings relating to discovery and the dynamics of a trial is considerable." *State v. Taylor*, 98-2243, p.5 (La. App. 4 Cir. 1/26/00), 759 So.2d 112, 115.

The record reflects that on March 9, 1998, a number of motions were filed as well as an application for a bill of particulars and a motion for discovery and inspection. At the outset of the hearing on the motion, defense counsel informed the district court that she had only learned of the videotape that morning and noted that the state had not answered Gordon's discovery requests. The district court noted that the preliminary hearing and motion to suppress had been conducted more than a month before the discovery motions were filed and that the evidence was always available for inspection on the first floor of the courthouse. The following exchange

occurred at the commencement of the hearing:

By Miss Williams:

But, Your Honor, the defense requested a continuance in this matter. The State has insisted they're ready to go. They've never filed any answer to discovery in this matter or provided us with the requested discovery in this matter. But they claim they're ready to go. They never filed answers to discovery and they never provided us with requested discovery. And I realize there's been a succession of attorneys, even DA's [sic], on this matter. But I mean the State claims they're ready to go and we requested discovery and today I find out there's a video and we haven't been provided with any opportunity to observe the video.

By the Court:

And an observation of the video would result in what, Miss Williams?

By Miss Williams:

I don't know. I haven't had an opportunity to view it.

By the Court:

But I'm saying, I've already ruled at the motion hearing 90 days ago.

By Miss Williams:

We can check its authenticity and find out

what objections could be made. Without ever having seen it, we don't know any objections to be made. We do have a right for an opportunity to view it.

By the Court:

How long is this video?

By Miss Beebe:

One minute, Judge.

By the Court:

Okay, then we're going to view it before the trial even starts.

By Miss Williams:

Thank you, Your Honor.

Prior to the tape being introduced Gordon objected saying that the defense was not given a fair opportunity to view and authenticate the video.

On appeal, Gordon argues that had the state filed a written response he would have been better able to assess the strengths or weakness of the state's case, and that the state's failure to file written discovery should not have been permitted to surprise him. However, Gordon does not explain how he was prejudiced, either by the introduction of the tape or the denial of the continuance. There is no contention that a possible defense strategy was derailed or undercut by the tape, *e.g., State v. Brazley*, 96-1657, pp. 10-11

(La. App. 4th Cir. 11/5/97), 703 So.2d 87, 92, *rev'd, State v. Brazley*, 97-2987 (La. 9/25/98), 721 So.2d 841. In the instant case, although the tape was unknown to Gordon's current counsel, the essential facts of the case did not change. With or without the tape, Gordon was alleged to have distributed cocaine to an undercover officer. At trial, counsel argued that she was not given an opportunity to authenticate the tape. No argument has been presented in this appeal regarding the authenticity of the tape. Because Gordon does not demonstrate prejudice, the assignment of error lacks merit.

DECREE

Thus, for the foregoing reasons, the conviction of Craig M. Gordon is affirmed. His sentence is to provide that the sentence is to be served without the benefit of parole eligibility for the first five years. Further, the district court is ordered to make an entry to the minutes reflecting the amended sentence, to provide the Department of Corrections with the corrected minute entry and to provide this Court with a copy of the corrected minute entry.

CONVICTION AFFIRMED;
SENTENCE AMENDED