

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of GRANT THOMAS HALE, a
Minor.

UNPUBLISHED
July 23, 2009

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellant,

v

GRANT THOMAS HALE,

Respondent-Appellee.

No. 281211
Macomb Circuit Court
Family Division
LC No. 2006-002825-DL

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

The prosecution appeals by delayed leave granted from the trial court's order dismissing the delinquency proceedings against respondent. We affirm.

The prosecution contends that the trial court erred in dismissing the delinquency proceedings. We disagree. This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v Jones*, 252 Mich App 1, 4; 650 NW2d 717 (2002). Discovery sanctions are also reviewed for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

Respondent, 11 years old during the incidents in question, was charged with two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (engaging in penetration with a person under the age of 13), arising out of his contact with his ten-year old male acquaintance/friend. Respondent is alleged to have penetrated the victim's anus with his penis.

In December 2006, respondent filed a motion to dismiss and attached the expert affidavits of five physicians and/or psychologists who opined that prosecution was not in the best interests of respondent or the public. They opined that (1) respondent's genital measurements were such that he was incapable of sexually penetrating the victim and causing the anal trauma alleged to have been suffered by the victim, (2) respondent's sexual-acting-out behaviors were normal prepubescent sexual experimentation, and (3) respondent did not have the capacity to understand that what he was doing was wrong. The motion was denied without prejudice at a referee

hearing. Subsequently, on February 27, 2007, a show-cause hearing was held to determine whether the prosecutor should be held in contempt for failing to turn over discoverable evidence. At the hearing, respondent reinvoked his earlier-filed motion to dismiss. The trial court dismissed the juvenile petition on the basis of the prosecutor's multiple discovery violations and on the basis of the expert affidavits attached to respondent's December 2006 motion to dismiss.

The prosecutor argues that the expert affidavits should have been excluded from consideration because she did not receive timely notice of respondent's memorandum of law concerning the show cause hearing, which he filed the day before the show-cause hearing. The prosecutor claims that she was not given the opportunity to cross-examine respondent's experts or rebut their conclusions. This argument is not only unpersuasive, it also misrepresents the facts. Respondent filed his motion to dismiss, to which he attached the now-challenged affidavits, back in December 2006. The February 2007 memorandum of law appears to have reinvoked the December motion to dismiss, without adding new arguments by way of expert affidavits. The prosecutor had ample opportunity to rebut the expert affidavits attached to respondent's December 2006 motion, but apparently chose not to do so. The prosecutor's four-sentence response to respondent's motion to dismiss cited no authority and did not even reference the affidavits. Therefore, the prosecution's alleged lack of notice or opportunity to rebut the expert evidence is not a legitimate basis upon which to reverse the trial court's decision to dismiss.

Even assuming that the trial court did err in basing its dismissal on the expert affidavits, we conclude that the prosecutor's repeated and willful discovery violations constituted a legitimate basis in and of themselves to dismiss the petition.¹ MCR 3.922 governs discovery in juvenile cases and states that a failure to turn over discoverable material may result in the sanctions set forth in MCR 2.313. MCR 3.922(A)(4). MCR 2.313(B)(2)(c) provides that if a party "fails to obey an order to provide or permit discovery," the court "may order such sanctions as are just, including, but not limited to . . . dismissing the action or proceeding"

Respondent asserts that the prosecutor engaged in discovery violations by: (1) failing to timely provide the report from a Care House interviewer addressed to Detective DeGraw, the investigating officer, (2) failing to timely provide the colposcope photographs of the victim's anus that had been in the detective's possession since June 2006, (3) failing to provide the videotape of respondent's Care House interview that it had been ordered numerous times to provide, (4) failing to provide exculpatory notes taken by Detective DeGraw when he interviewed various individuals regarding the incidents in question, (5) failing to provide miscellaneous detective reports concerning statements made by the victim in the presence of officers, and (6) failing to provide a report concerning the victim's interview by Care House. Even assuming that the prosecutor had no access to the discoverable materials in the possession of Care House, an independent agency, the prosecutor engaged in repeated discovery violations with respect to other discoverable items in her possession.

¹ We note that the trial court stated in its order, "And on that basis [discovery violations], the [c]ourt feels that the matter should be dismissed."

First, the prosecutor failed to timely turn over photographs of the victim's anus. The photographs, made discoverable by the court's September 2006 discovery order, an order of which Detective DeGraw was fully aware, were in the detective's possession since June 2006. The court learned of the existence of the photographs in February 2007 and ordered the prosecutor to turn them over. The photographs were important to respondent's case in that one of respondent's main claims was that he was incapable of sexually penetrating the victim's anus and causing trauma. Before the time that the photographs were turned over, Detective DeGraw was sent letters by respondent requesting all discoverable materials. Detective DeGraw assured the court that respondent was given every single piece of documentation in respondent's file. The prosecutor assured as much to the court on more than one occasion. In addition, the evidence suggests that the prosecutor was some five months late in providing a report from a Care House interviewer addressed to Detective DeGraw and presumably in his possession. No explanation was given regarding why Detective DeGraw failed to turn over the above evidence. Although the prosecutor argues that she is absolved of liability where it was the investigating officer, and not she, who engaged in the discovery violation (such as with respect to the colposcope photographs), dismissal is warranted where an investigating police officer engages in a pattern of inexcusable neglect or deliberate deception involving crucial evidence. See *People v Morris*, 77 Mich App 561, 563; 258 NW2d 559 (1977). Here, Detective DeGraw engaged in, at a minimum, inexcusable neglect with regard to discovery.

Second, the prosecutor refused to turn over the videotape in violation of the court's September 2006 discovery order. The order permitted respondent to inspect and/or copy various items, including all recorded statements made by respondent in the possession or control of the prosecution or a law enforcement agency. It is undisputed that the videotape was a recorded statement made by respondent and it was at all relevant times in the possession of the prosecutor. The prosecutor's argument that the statute governing video recorded statements, MCL 600.2163a, prevented her from releasing the tape without a "specific" court order is without merit. As an initial matter, it is not clear that MCL 600.2163a is even applicable to this case. The catchline to MCL 600.2163a provides that it applies to "certain criminal cases," and the body of the statute states that it applies only to prosecutions and proceedings under the penal code. MCL 600.2163a(2). Juvenile cases generally are not criminal proceedings. *In re Carey*, 241 Mich App 222, 231; 615 NW2d 742 (2000); MCL 712A.1(2). Even assuming that the statute applies here, the prosecutor's claim still fails because the statute entitles respondent to a copy of the videotape and does not require a "specific" court order over and above an order like the one issued here in September 2006. See MCL 600.2163a(8).

The prosecutor's statements regarding what she needed in order to turn over the videotape were inconsistent. Initially, the prosecutor stated that a release from respondent's parents was unnecessary and the only thing she needed before turning over the tape was a court order. She then indicated that she did not want the videotape to be played at trial and she would turn it over if an order was entered precluding its use at trial. She then stated that she needed both a release and a court order. At the February 8, 2007, hearing, the referee stated that she had consulted with her supervising judge and she and the judge were in agreement that the videotape was discoverable pursuant to the September discovery order. The referee ordered the prosecutor to turn over the videotape to respondent by February 12, 2007. If she required a release from respondent's parents, she was to prepare one and send it to respondent. The prosecutor neither sent respondent a release, nor turned over the videotape.

The prosecutor refused to turn over the videotape despite the fact that: (1) the September discovery order stated that respondent was permitted to inspect and/or copy all recorded statements made by respondent in possession of the prosecution, (2) Referee Deborah Brune repeatedly stated that the discovery order permitted release of the videotape and directed the prosecutor to turn over the videotape or face dismissal of the petition, (3) Referee Brune stated that she consulted with the supervising judge and he agreed with her ruling concerning the videotape, (4) the prosecutor cited no authority for her claim that the order did not permit release of the videotape, and that another, more specific order was necessary, (5) the referee explained to the prosecutor that the proper next step in light of the prosecutor's disagreement with the court's ruling would be to appeal the discovery order, to which the prosecutor responded, "I'm not appealing it. I told you I would copy it [the videotape] myself and deliver it," and (6) the prosecutor never appealed the discovery order or the court's ruling that the order permitted release of the videotape. The prosecutor engaged in continual and willful violations of the court's directives. Her behavior constituted flagrant defiance. The trial court did not abuse its discretion in foregoing a lesser sanction than dismissal because, although the prosecutor and the public have an interest in seeing this matter proceed to trial, the court has a great interest in ensuring present and future compliance with its orders. *Davie, supra* at 599.

The prosecutor claims that, even if there were discovery violations, dismissal is not warranted because respondent cannot establish prejudice. Because it is not clear whether the videotape or the pictures are actually exculpatory, and because the discovery cut-off was not until 35 days after the dismissal, it is not clear that respondent can demonstrate prejudice. However, prejudice is not the sole or dispositive factor in determining whether dismissal is an appropriate sanction; prejudice is but one factor to consider. See *Bass v Combs*, 238 Mich App 16, 26-27; 604 NW2d 727 (1999), overruled in part on other grounds by *Dimmit & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008) (stating that the factors that should be considered in determining the appropriate sanction include: whether the violation was wilful, the party's history of refusing to comply with discovery requests, the prejudice to the other party, whether there exists a history of the party's engaging in deliberate delay, the degree of compliance by the party with other provisions of the court's order, whether an attempt was made to timely cure the defect, and whether a lesser sanction would better serve the interests of justice). These factors are discussed in large part above, and we believe that they weigh in favor of dismissal.

Finally, the prosecutor contends that dismissal is not warranted because the trial court relied on a Michigan Court Rule that does not apply to the instant case. In its order dismissing the case, the trial court stated that one of the reasons for dismissal was "prosecutorial noncompliance with MCR 6.201." MCR 6.201 is the general discovery court rule in criminal cases. It appears that MCR 6.201 is not applicable to the instant case because another court rule, MCR 3.922, is the discovery court rule pertaining specifically to juvenile cases. However, as we concluded above, the trial court was justified in dismissing the case, pursuant to MCR 3.922, and MCR 2.313 by reference, due to multiple and willful discovery violations. This Court is entitled to affirm a correct result even where it is based on incorrect reasoning. *People v Goold*, 241 Mich App 333, 342 n 3; 615 NW2d 794 (2000).

Affirmed.

/s/ Kathleen Jansen

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood