

[Cite as *State v. Jennings*, 2004-Ohio-3748.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-030839
	:	TRIAL NO. 03TRC-18237A
Plaintiff-Appellant,	:	
vs.	:	<i>DECISION.</i>
BRIAN JENNINGS,	:	
Defendant-Appellee.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed in Part, Reversed in Part and Cause Remanded

Date of Judgment Entry on Appeal: July 16, 2004

Julia L. McNeil, Cincinnati City Solicitor, *Ernest F. McAdams, Jr.*, City Prosecutor, and *Charles A. Rubenstein*, Chief Deputy Prosecutor, for Plaintiff-Appellant,

Joseph B. Suhre, IV, for Defendant-Appellee.

OHIO FIRST DISTRICT COURT OF APPEALS

Please note: We have removed this case from the accelerated calendar.

SUNDERMANN, Judge.

{¶1} Plaintiff-appellant, the state of Ohio, appeals the judgment of the trial court that excluded a videotape and evidence relating to the videotape as a sanction for a discovery violation. For the reasons that follow, we affirm in part and reverse in part.

{¶2} Defendant-appellee Brian Jennings was charged with operating a motor vehicle under the influence,¹ speeding,² a traffic-light violation,³ and having expired license plates⁴ as a result of an incident that occurred on May 13, 2003. On June 19, 2003, counsel for Jennings filed a request for discovery that included a request for any video recordings regarding Jennings's arrest. The state acknowledged that there was a videotape of the arrest. The case was continued on July 17, 2003, so that counsel could obtain the videotape from the state. On August 1, 2003, upon learning that the state had not provided the videotape, the trial court stated that if the videotape was not turned over to defense counsel by August 15, "the [video]tape will be excluded and any evidence on that [video]tape will also be excluded in any form whether it's by testimony or by documents." The state did not provide the videotape until September 11. On September 25, the trial court held a hearing on the state's failure to provide the videotape by August 15, as had been ordered by the court. At the end of the hearing, the court granted Jennings's motion to impose sanctions for the discovery violation and ruled that the videotape and any evidence relating to the videotape would be excluded. The state has appealed, certifying that the trial court's judgment has rendered the state's proof of the charges so weak that any possibility of effective prosecution has been destroyed.⁵

¹ R.C. 4511.19(A)(1).

² Cincinnati Municipal Code 506-8.

³ Cincinnati Municipal Code 506-40.

⁴ Cincinnati Municipal Code 503-52.

⁵ Crim.R. 12(K).

{¶3} In its sole assignment of error, the state asserts that the trial court erred in excluding the videotape and any evidence relating to the videotape because the sanction was not the least severe sanction consistent with the purpose of the rules of discovery.

{¶4} In *Lakewood v. Papadelis*, the Supreme Court of Ohio held that when imposing a sanction for a violation of Crim.R. 16, the trial court “must impose the least severe sanction that is consistent with the purpose of the rules of discovery.”⁶ The court went on to state the purpose of the rules of discovery is “to prevent surprise and the secreting of evidence favorable to one party.”⁷ When reviewing a trial court’s sanction for a discovery violation, we must determine whether the trial court abused its discretion.⁸

{¶5} The trial court acted within its discretion in excluding the videotape. Crim.R. 16(E)(3) specifically cites exclusion of the subject evidence as a possible sanction for violation of a discovery order. The state was repeatedly advised to provide the videotape to Jennings’s counsel. As the trial court pointed out during the hearing, no reason for the delay was given by the state. The exclusion of the videotape was consistent with the purpose of the rules of discovery cited above. Accordingly, we conclude that the trial court did not err in ordering the videotape to be excluded.

{¶6} While we conclude that exclusion of the videotape itself was not an abuse of discretion, we are unable to come to the same conclusion with respect to the exclusion of any evidence related to the videotape. The exclusion of this evidence effectively destroyed the state’s case. There is no evidence in the record that the state’s failure to provide the videotape by August 15 was willful. Jennings’s counsel did eventually receive the videotape days before a previously scheduled suppression hearing. Further, as the state

⁶ (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138, syllabus.

⁷ *Id.* at 3.

⁸ *State v. Parson* (1983), 6 Ohio St.3d 442, 445, 453 N.E.2d 689.

had timely provided the remaining information included in Jennings's discovery request, Jennings's defense would not have been unfairly prejudiced by the inclusion of the other evidence. Therefore, we conclude that the exclusion of the evidence relating to the videotape was an abuse of the trial court's discretion.

{¶7} Therefore, the judgment of the trial court is affirmed with respect to the exclusion of the videotape and reversed with respect to the exclusion of the evidence relating to the videotape. This cause is remanded for further proceedings in accordance with law.

Judgment affirmed in part,
reversed in part
and cause remanded.

WINKLER, P.J., concurs.

GORMAN, J., dissents in part.

GORMAN, J., dissenting in part.

{¶8} I agree that the trial court properly excluded the videotape. The majority's extension of *Lakewood v. Papadelis*, however, goes well beyond its facts. I must respectfully dissent from the majority's conclusion that evidence related to the excluded tape is admissible.

{¶9} In *Lakewood*, the trial court had excluded the testimony of all defense witnesses as a sanction for the failure of the defense to comply with the state's discovery demand. The court engaged in a balancing of the *defendant's constitutional right* to compulsory process of witnesses against the state's interest in pretrial discovery. The court stated 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.” *Lakewood v. Papadelis*, 32 Ohio St.3d at 5, 511 N.E.2d 1138.

{¶10} The trial court should apply the least severe sanction that is 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. See *id.* The majority seems troubled that the trial court’s sanction was tantamount to a dismissal of the complaint. But the trial court must be able, when appropriate, to impose the sanction of dismissal authorized for discovery violations under Crim.R. 16(E)(3). See *State v. Harris* (1998), 127 Ohio App.3d 626, 631, 713 N.E.2d 528. “Otherwise, dismissal * * * could never be an appropriate sanction as there will always be a sanction less severe.” *State v. Crespo*, 7th Dist. No. 03 MA 11, 2004-Ohio-1576, at ¶8.

{¶11} The majority concedes that the trial court, after granting a continuance for the state to provide discovery and deliver the videotape to Jennings, warned the prosecutor of the sanction it would impose for failure to comply. When the state did not comply as ordered, the trial court held a hearing on Jennings’s motion for sanctions. Its conclusions from that hearing were not arbitrary, unreasonable, or unconscionable. See *State ex rel. Russo v. Deters*, 80 Ohio St.3d 152, 153, 1997-Ohio-351, 684 N.E.2d 1237.

{¶12} The trial court’s decision exhibited a sound reasoning process in which it weighed the interests and rights of the accused against the interests of the state. See *Lakewood v. Papadelis*, 32 Ohio St.3d at 5, 511 N.E.2d 1138. The court knew the factual background of the prosecutor’s failure to comply with its order. It viewed the conduct of the parties in its courtroom. We did not.

{¶13} I believe that the trial court’s choice of sanction was reasonable and that it was “the least severe sanction that yet serve[d] the purpose of the rules of discovery.” *State v. Penland* (1998), 132 Ohio App.3d 176, 186, 724 N.E.2d 841; see, also, *Lakewood v. Papadelis*, paragraph two of the syllabus.

{¶14} The assignment of error should be overruled in its entirety.

Please Note:

The court has recorded its own entry on the date of the release of this decision.