NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D., 2004

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 3D03-1546
TONY BERNARD GILLIS,	**	LOWER TRIBUNAL NO. 02-34238
Appellee.	**	

Opinion filed June 30, 2004.

An Appeal from the Circuit Court for Miami-Dade County, Daryl E. Trawick.

Charles J. Crist, Jr., Attorney General, and Steven Berger, Assistant Attorney General for appellant.

Bennett H. Brummer, Public Defender, and Harvey Sepler, Assistant Public Defender, for appellee.

Before SCHWARTZ, C.J., GERSTEN, and SHEPHERD, JJ.

PER CURIAM.

The State appeals the dismissal of a criminal information,

based upon the State's failure to comply with numerous motions to compel discovery, and failure to produce a critical witness at a Richardson hearing. We affirm.

The State filed an information on December 10, 2002, charging Tony Gillis ("defendant"), with burglary, grand theft and criminal mischief. On December 12, 2002, the defendant invoked reciprocal discovery. The State did not comply.

On January 13, 2003, the court granted a defense motion to compel discovery. Again, the State did not comply.

On March 5, 2003, the court granted a second defense motion to compel discovery. The State again failed to comply.

On March 14, 2003, the court granted a third defense motion to compel discovery and ordered the State to comply within five days. The State once again did not comply.

On March 28, 2003, the court granted the State a continuance for trial, after being assured that the State would provide defense counsel with the oft requested discovery. No discovery came forth.

On May 9, 2003, the court granted a fourth motion to compel discovery and ordered the State to comply within five days as the speedy trial period was about to expire. On May 14, 2003, defense counsel filed a notice of expiration of the speedy trial period.

On May 19, 2003, the State finally provided the defense with partial discovery. As a result of this partial discovery, albeit very late, the defense discovered viable defense information. The

partial discovery revealed there were two separate sets of footprints at the crime scene.

Immediately, the defense requested a Richardson hearing alleging that they were prejudiced in their defense preparation because the exculpatory evidence went to the heart of their defense. At the Richardson hearing, the State could not articulate any efforts the State had taken to compare the footprints found at the scene with those of the defendant.

Exhibiting exceptional equanimity, the court reset the Richardson hearing for 9:00 a.m. the following morning and ordered the State to have their witnesses present, specifically the crime scene technician. The court informed the State that if all their witnesses were not present, the court would dismiss the information.

The next morning, the court called the case at 10:35 a.m. The State failed to produce the crime scene technician for the hearing and did not provide any reason for her absence. Thereafter, the court dismissed the information finding that the State's series of acts were willful violations that substantially prejudiced the defendant.

Florida Rule of Criminal Procedure, 3.220(n)(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 an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order the party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a

> mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

While dismissal of an action for failing to obey a court's pre-trial order is an appropriate sanction, it is a drastic remedy which should only be used sparingly and in extreme situations. See State v. Del Guadio, 445 So. 2d 605 (Fla. 3d DCA 1984).

We determine the State's actions in this case fall into the narrow category where this extreme sanction is appropriate. See State v. White, 792 So. 2d 606 (Fla. 4th DCA 2001)(dismissal appropriate sanction for state's failure to secure victim's participation), State v. Alfonso, 478 So. 2d 1119 (Fla. 4th DCA 1985)(dismissal appropriate sanction for repeated discovery violations).

Here, the State failed to comply with the initial discovery request and four motions to compel discovery. The State's actions in failing to provide this requested discovery compromised the defendant's identification defense. It was crucial to the defendant to show that the footprints found at the scene did not match his. The State blatantly ignored numerous court orders thus delaying the administration of justice. See Morales v. Perez, 445 So. 2d 393 (Fla. 3d DCA 1984)(default judgment appropriate sanction where party failed to comply with numerous discovery orders), State v. Hilliard, 409 So. 2d 211 (Fla. 4th DCA 1982)(court did not abuse its

discretion in dismissing information for numerous discovery violations); Singh v. Tolz, 380 So. 2d 1326 (Fla. 4th DCA 1980)(administration of justice cannot be achieved if there is a conscious disregard of a court's order). Under these circumstances, it was within the trial court's discretion to dismiss the information and thus we affirm the order below.

Affirmed.

SCHWARTZ, C.J., and GERSTEN, J., concur.

SHEPHERD, J. (dissenting).

I respectfully dissent.

Although the trial court had reason to be frustrated with the conduct of the State in this case, nevertheless I am of the opinion that dismissal was premature, and would remand this case for the completion of the Richardson hearing.

It has long been the law in this state that upon learning of a potential discovery violation, the trial court has an obligation to conduct a Richardson hearing to examine the possible harm or prejudice to the defendant. Richardson v. State, 246 So. 2d 771 (Fla. 1971); Evans v. State, 721 So. 2d 1208 (Fla. 3d DCA 1998). In its discretion, and only after an adequate inquiry has been made into all of the surrounding circumstances, the trial court may dismiss the case. Richardson, 246 So. 2d at 775. Richardson outlined the minimum framework of the court's inquiry. Namely, the court must consider whether the State's violation was inadvertent or willful; whether the violation was trivial or substantial; and finally, whether the violation affected the defendant's ability to properly prepare for trial. Id.; See also Wilson v. State, 789 So. 2d 1127, 1129 (Fla. 2d DCA 2001) (outlining Richardson test). Indeed, when faced with a possible discovery violation, the court must conduct a Richardson hearing even when not requested by the

defense. Evans v. State, 721 So. 2d 1208, 1209-10 (Fla. 3d DCA 1998).

Applying these principles, I am of the view that it was premature to dismiss the information. Contrary to the suggestion in the majority opinion, the State did not completely ignore the discovery orders of the trial court. Rather, it appears that the prosecutor did make efforts to obtain the necessary discovery in response to the discovery orders and provided it all—albeit in piecemeal fashion. As to the last item produced, the crime scene photos that included the controversial boot prints, the prosecutor sought to explain that her failure to obtain them was due to miscommunication among multiple parties rather than willful conduct that would demand dismissal of the information. Indeed, it is clear from the record of previous hearings that defense counsel knew certain of the photos contained a boot print, and merely asked for their production. Moreover, at these earlier proceedings, defense counsel rebuffed prosecution offers of depositions of State witnesses made in an attempt to avoid precisely the claims of prejudice that later arose. Thus, it is not at all clear to me that absent a completed Richardson hearing, the defense is entitled to a dismissal of the entire case.

Of course, the actual precipitating cause of the dismissal was the failure of the crime scene technician to be present in court on

May 20, 2003, pursuant to the court's oral order of the prior day. However, the court should have at least heard argument as to why the technician failed to appear before it ascribed her absence as willful on the part of the State. Instead, the court invited and summarily granted a motion to dismiss by the defendant within seconds of the time the hearing began. Moreover, the court made no effort to determine whether there were any procedures or sanctions short of dismissal that would vitiate any prejudice to the defendant or affront to the court.

In this case, the defendant filed his notice that the speedy trial period under Fla. R. Crim. P. 3.191(a) had expired on May 15, 2003. Thus, the State had fifteen days under the so-called "recapture window," i.e., until May 30, 2003, to try its case against the defendant. Armas v. State, 811 So. 2d 775 (Fla. 3d DCA 2002); Fla. R. Crim. P. 3.040, 3.191(p)(3) (2004). When the court dismissed the case against the defendant on May 20, 2003, there were ten days left within the recapture window during which appellee could have mitigated, if not completely resolved, any alleged prejudice from learning of the second set of footprints the day before. The defendant still had time to examine the photographs,[1]

[1] While certainly not binding on the defense, the prosecution indicated at the aborted Richardson hearing that it had concluded that the prints were of "no value," meaning apparently that they were of insufficient definition from which to draw any conclusions relevant to the prosecution or defense of the case. The prosecutor also stated that, to the best of her knowledge, the State had done no comparison or analysis using the photos.

compare the prints with the boots taken from the defendant at the time of his arrest, or to seek expert advice. At a minimum, the ultimate sanction could have been delayed until it was clear that the defendant was prejudiced by State discovery misconduct.

As the majority recognizes, dismissal represents the most severe form of sanction and is a last resort when no viable alternative exists. State v. Del Gaudio, 445 So. 2d 605, 608 (Fla. 3d DCA 1984), rev. denied, 453 So. 2d 45 (Fla. 1984). The reasoning behind this principle is that the court's interest in punishing the State must be balanced against the even greater *public* interest in insuring that persons accused of crimes be brought to trial. Del Gaudio, 453 So. 2d at 608. Even exclusion of a witness, much less dismissal, is an extreme sanction not to be imposed when other reasonable alternatives are available. Taylor v. State, 643 So. 2d 1122, 1123 (Fla. 3d DCA 1994). See also State v. Farley, 788 So. 2d 338, 340 (Fla. 5th DCA 2001) (before excluding testimony, the court must consider less alternative sanctions). The civil cases upon which the majority relies involving dismissal as a sanction for discovery violations (see Morales v. Perez, 445 So. 2d 393 (Fla. 3d DCA 1984), and Singh v. Tolz, 380 So. 2d 1326 (Fla. 4th DCA 1980)) do not have a public interest component and do not appreciate this unusual facet of a criminal case.

While the State may have been close to the line here, my belief is that the trial court acted prematurely in administering the

ultimate penalty. If, as suggested by the State, the boot-print photos were "of no value," then the failure of the crime scene technician to appear may have been of no moment.

Accordingly, I dissent from the extreme sanction of dismissal and would reverse and remand for a full Richardson hearing.