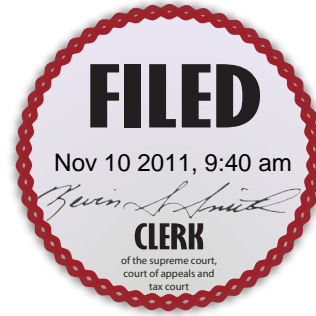


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA and the)
METROPOLITAN DRUG TASK FORCE,)
)
Appellants-Plaintiffs,)
)
vs.)
)
JOSEPH FERGUSON,)
)
Appellees-Defendants.)

No. 49A05-1106-MI-271

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Thomas J. Carroll, Judge
Cause No. 49D06-0910-MI-49796

November 10, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

The State of Indiana and the Metropolitan Drug Task Force (collectively “the State”) appeal the trial court’s order granting Joseph Ferguson’s oral motion to sanction the State for the untimely filing of its witness and exhibit list by excluding the State’s witnesses and exhibits. The State presents a single issue for review, namely, whether the trial court abused its discretion when it excluded the State’s witnesses and exhibits.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 3, 2009, officers of the Metropolitan Drug Task Force seized personal property from Ferguson and two other men as the result of a traffic stop and the execution of a subsequent search warrant.¹ On October 29, 2009, the State filed a complaint for forfeiture under Indiana Code Section 34-24-1-1 through -9, seeking an order forfeiting Ferguson’s personal property that was seized on August 3.² The complaint alleged that the personal property “had been received from the sale of controlled substances in violation of Indiana law.” Appellants’ App. at 8-9. The property at issue belonging to Ferguson consisted of a 1998 Ford Expedition and \$3020 in U.S. currency, as well as other personal property. Ferguson filed an answer to the complaint on November 4.³

¹ Based on the evidence discovered, the State filed charges against Ferguson and, on March 1, 2010, he was convicted of possession of marijuana, as a Class D felony, and sentenced to one year with 361 days suspended with credit for time served.

² Patrick Draper and Jesse Ward were also named as parties in the forfeiture complaint. Under Indiana Appellate Rule 17(A), Draper and Ward are parties on appeal, but they are not participating in this appeal.

³ On March 15, 2010, the State filed a motion for default judgment, which the trial court erroneously granted on March 24. As a result of the default judgment, Ferguson’s Expedition was sold. A nunc pro tunc entry dated May 11, 2010, set aside the default judgment against Ferguson as to \$3020 in

The matter was eventually set for an April 13, 2011, trial date. The order setting that date also provided that

[w]itness lists must be exchanged and filed with the Court seven (7) days prior to trial, and exhibits must be physically displayed to each other and a list supplied to the Court seven (7) days prior to trial or they will be non-admissible and witnesses will not be allowed to testify.

Appellant's App. at 82. On April 6, seven days prior to trial, Ferguson filed his witness and exhibit list and served the same on the State. And on April 7, the State filed its witness and exhibit list and served the same on Ferguson.

On April 13, at the start of trial, Ferguson orally moved for the trial court to exclude the State's witnesses and exhibits due to the State's failure to timely file and exchange the same pursuant to the court's order. The trial court confirmed that the State had filed its witness and exhibit list on April 7 and found that the filing was untimely. As a result, the trial court granted Ferguson's motion to exclude the State's witnesses and exhibits, stating: "it's a technical rule, but it's a technical order. I'm going to grant [the motion]." Transcript at 7. The following colloquy then occurred:

[State]: So we're done?

The Court: Yes.

[Ferguson's counsel]: Thank you, Your Honor.

[State]: Thank you, Your Honor.

The Court: Now do you need a[n] order, Mr. Gray [Ferguson's counsel]?

[Ferguson's counsel]: I can prepare one, Your Honor.

cash. And in the later Entry of Judgment in favor of Ferguson, the court in part awarded Ferguson the proceeds from the sale of his Ford Expedition.

trial court. Daub, 629 N.E.2d at 875 (citing Riehle v. Moore, 601 N.E.2d 365, 370 (Ind. Ct. App. 1992) trans. denied. See also Brown v. Terre Haute Regional Hospital, 537 N.E.2d 54, 57 (Ind. Ct. App. 1989); Chuck Callahan Ford, Inc. v. Watson, 443 N.E.2d 79, 80 (Ind. Ct. App. 1983). Under our standard of review, we will not reverse a discretionary decision of a trial court unless a manifest abuse of discretion is shown. Watson, 443 N.E.2d at 81. In discovery rulings, the law affords the trial judge latitude, and we will not reverse on appeal unless we are persuaded that the trial court's decision is clearly against the logic and effect of the circumstances before the court. Daub, 629 N.E.2d at 875 (citing Riehle, 601 N.E.2d at 370).

Our opinion in Daub, a slip-and-fall case, is instructive. There, neither party filed a witness and exhibit list as directed in a pre-trial order. As a result, the trial court excluded all of the witnesses and exhibits and, ultimately, entered judgment on the evidence in favor of the defendants. The plaintiff argued that the defendants should have derived knowledge of the plaintiff's witnesses and exhibits from prior discovery responses. The trial court rejected that argument, noting that the plaintiff had also stated in discovery that the "witness list and expert witness list [had] not yet [been] compiled." Daub, 629 N.E.2d at 875.

Here, the trial court entered an order under Trial Rule 16 setting out the deadline for the parties to file and exchange their respective lists of witnesses and exhibits prior to trial. Because of a calendaring error, the State filed its witness and exhibit list, and served the same on Ferguson, one day late. Although the filing was only one day late and was not meant to frustrate or delay the trial, the State was on notice that an untimely filing would result in the exclusion of the evidence.

Although we have already determined the issue presented on the merits, we pause to briefly consider Ferguson’s contention that the State has waived review for lack of an offer to prove. The State counters that it was not required to make an offer to prove in order to preserve this issue for appeal. In particular, the State argues that requiring an offer to prove would have been “illogical” and unduly burdensome because the State would have had to present essentially its entire case. Appellant’s Brief at 6. But the State has not shown that the facts and evidence in this case are complex or legion. And an offer to prove would have essentially summarized the evidence in the State’s case, which in turn would have allowed the trial court to determine the prejudice suffered by Ferguson, if any, from the untimely filing. See Enservco, Inc. v. Ind. Sec. Div., 623 N.E.2d 416, 421 (Ind. 1993) (by neither introducing nor making an offer to prove, court was unable to determine prejudice suffered by exclusion of evidence). By not making an offer to prove, the State deprived the trial court of the opportunity to determine prejudice. See id. The State’s argument that an offer to prove was unnecessary is without merit.

In sum, the State was fully aware that untimely filing of its witness and exhibit list would result in the exclusion of that evidence. Although the State’s failure to timely file the list was due to an administrative mistake, the pre-trial order provided for the exclusion of that evidence. The State has not shown that the trial court abused its discretion when it imposed the consequences stated in the pre-trial order.

Affirmed.

RILEY, J., and MAY, J., concur.