

STATE OF LOUISIANA IN THE INTEREST OF
B. N. AND M. N.

NO. 21-C-27
FIFTH CIRCUIT
COURT OF APPEAL
STATE OF LOUISIANA

March 09, 2021

Susan Buchholz
First Deputy Clerk

IN RE STATE OF LOUISIANA

APPLYING FOR SUPERVISORY WRIT FROM THE JEFFERSON PARISH JUVENILE COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE
ANN MURRY KELLER, DIVISION "A", NUMBER 20-CC-72

Panel composed of Judges Susan M. Chehardy,
Stephen J. Windhorst, and John J. Molaison, Jr.

WRIT GRANTED; REMANDED

Relator, the State of Louisiana, seeks review of the Juvenile Court’s January 14, 2021 judgment precluding the State from introducing into evidence the forensic interview tape of M.N. in this Child in Need of Care (“CINC”) proceeding as a sanction for violating the discovery deadline.¹ For the following reasons, we grant the State’s writ application, vacate the Juvenile Court’s January 14, 2021 judgment, and remand the matter for further proceedings.

On January 14, 2021, the parties appeared for a pre-trial conference. The court heard arguments concerning a request for a Watermeier² hearing based on a motion filed by M.N.’s attorney. The discussion shifted to admissibility of the forensic interview tape of M.N. in this CINC proceeding, and the father’s objection thereto. Among many factual allegations in dispute, counsel for the father informed the court that she called the District Attorney’s office, spoke with a secretary and was informed that there was not a forensic interview tape. The State denied this assertion. Based on the assertions from counsel for the father, the court found that the State had not provided counsel for the father access to the forensic interview tape

¹ Respondent, counsel for M.N.’s father, contends that the juvenile court originally ruled that the forensic interview tape of M.N. was not admissible at the prior hearing on December 10, 2020; thus, he argues that this writ application is untimely. We find this argument is without merit. Apparently, based on the arguments of both parties, there was an off-the record discussion about discovery and possibly the forensic interview tape. However, a review of the minute entry and transcript for December 10, 2020 reveals that the court did not render a judgment that the forensic interview tape of M.N. was inadmissible. Therefore, we find the State’s notice of intent and writ application as to the January 14, 2021 judgment was filed timely.

² Watermeier v. Watermeier, 462 So.2d 1272 (La. App. 5 Cir. 1985), writ denied, 464 So.2d 301 (La. 1985).

prior to the close of discovery,³ and that therefore the forensic interview tape was inadmissible. This was in part because the court's discovery deadline⁴ had passed.

The State objected and moved for an immediate or future evidentiary hearing and that they be allowed to call witnesses to dispute counsel for father's allegation, which the court denied. The State then requested that the parties be allowed to submit briefs on the admissibility of the forensic interview tape in a CINC proceeding before the court ruled, but the court also denied this request.

A trial court has much discretion in imposing sanctions for failure to comply with discovery orders, and its ruling should not be reversed absent an abuse of discretion. Mascaro v. Parish of Jefferson, 10-488 (La. App. 5 Cir. 11/23/10), 54 So.3d 715, 717; Reeder v. New York Life Ins. Co., 01-148 (La. App. 5 Cir. 06/27/01), 790 So.2d 712, 715. The Children's Code does not specifically provide a remedy for a violation of discovery, and provides that when the Children's Code is silent, the juvenile court should follow the Code of Civil Procedure.⁵ La. Ch.C. art. 104.

A proceeding to impose sanctions for failure to comply with a discovery order should be instituted by a written contradictory motion and requires reasonable notice. La. C.C.P. arts. 961-963, and 1469; Walley v. Vargas, 12-22 (La. App. 1 Cir. 09/21/12), 104 So.3d 93, 103; Wall v. Alleman, 488 So.2d 1130, 1132 (La. App. 2 Cir. 1986); Manning v. J.C. Penney Co., Inc., 717 So.2d 271, (La. App. 2 Cir. 1998). If a party fails to respond to discovery initiated by another party, the remedy available to the party who propounded the discovery is to move the court for an order compelling such discovery. If such an order is granted, the recalcitrant party may be sanctioned. La. C.C.P. art. 1469(A)(4); MTU of North America, Inc. v. Raven Marine, Inc., 475 So.2d 1063, 1070 (La. 1985).

Upon review of the writ application, the father's opposition, the transcripts and other exhibits attached, we find that the court erred by excluding admission of the forensic interview of M.N. based on an alleged failure by the State to properly comply with discovery mandates, and to do so timely. The court apparently relied on allegations made by counsel for the father, which were factually disputed by the State, without taking testimony or other evidence. Regardless, this sanction was ordered without reasonable notice and a contradictory evidentiary hearing to determine whether the State committed a sanctionable discovery violation, and whether the exclusion of the forensic interview tape is an appropriate sanction in this CINC proceeding, if any violation has in fact occurred. La. Ch.C. arts. 104, 651-

³ The State's argument challenging whether discovery can be "closed" in a CINC hearing is pretermitted based on this Court's ruling reversing the court's judgment and remanding for further proceedings.

⁴ According to respondent's brief, the discovery deadline was November 27, 2020.

⁵ La. Ch.C. art. 104 provides:

Where procedures are not provided in this Code, or otherwise by law, the court shall proceed in accordance with:

(1) The Code of Criminal Procedure in a delinquency proceeding and in a criminal trial of an adult.
(2) The Code of Civil Procedure in all other matters.

653; C.C.P. arts. 961-963, 1471. Accordingly, the sanction excluding the forensic interview tape must be set aside.

In addition, La. C.C art. 652 provides:

A. At any stage of the proceeding, *upon written motion of counsel for the child or his parent*, the court may order the district attorney or the department to permit counsel to inspect:

* * *

(4) Any videotape of a protected person made in compliance with Chapter 8 of Title III which is in the possession or control of the district attorney. [Emphasis added.]

There has been no indication that the father filed a written motion to inspect evidence pursuant to La. Ch.C. art. 652 A(4), or that the Juvenile Court had issued a prior order pursuant to La. Ch.C. art. 652 B, which could have been the basis of sanctions after notice, hearing, and showing of non-compliance.

Accordingly, this writ application is granted, the Juvenile Court's January 14, 2021 judgment is vacated, and the matter is remanded for further proceedings.

Gretna, Louisiana, this 9th day of March, 2021.

SJW
SMC
JJM

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
HANS J. LILJEBERG
JOHN J. MOLAISSON, JR.

JUDGES



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NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **03/09/2021** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

21-C-27

E-NOTIFIED

Juvenile Court (Clerk)
Honorable Ann Murry Keller (DISTRICT JUDGE)
Jennifer G. Womble

Elizabeth B. Curren
Jody J. Fortunato

MAILED

Honorable Paul D. Connick, Jr.
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