STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TRAVIS LYDELL CAUSEY,

Defendant-Appellee.

UNPUBLISHED
March 4, 2021

No. 352550
Wayne Circuit Court
LC No. 19-006337-01-FC

Before: MURRAY, C.J., and JANSEN and STEPHENS, JJ.

PER CURIAM.

The prosecution appeals as of right the order dismissing this case with prejudice. We reverse and remand for the trial court to exercise its discretion to fashion a remedy for a discovery violation under MCR 6.201(J) free from legal error.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant, Travis Lydell Causey, was charged with one count of armed robbery, MCL 750.529, stemming from an armed robbery that occurred on August 1, 2019 near the intersection of Woodlawn Avenue and Erwin Avenue in Detroit, Michigan. At the preliminary examination, James Clark testified that he was sitting in a vehicle waiting for a friend when he witnessed three men rob another man at gunpoint. Clark testified that the three men returned to a dark sedan, and the vehicle began to back up. The men in the sedan looked in Clark's direction, and Clark saw what he believed to be a gun outside of the vehicle's window. Next, Clark heard a bang which he believed to be a gunshot. Clark, who had a concealed pistol license, fired at the dark sedan with his 9-millimeter Smith and Wesson. The vehicle then hit a building, and the three men exited the car and ran off.

Detroit Police Officer Christopher Dodd testified that he was dispatched to the intersection of Erwin Avenue and Woodlawn Avenue for a report of shots fired and observed a dark sedan with bullet holes in it crashed into a house. Officer Dodd testified that he spoke with Clark, and saw 9-millimeter or .40-caliber cartridges a few houses down from the crash. The casings were recovered by evidence technicians. Officer Dodd further testified that police dogs discovered defendant and

another suspect in a vacant house near the crash. Grosse Pointe Farms Police Officer Tim Harris also testified that he was a canine handler who responded to the scene, and that his dog found a black firearm and cash near the crash site.

On December 17, 2019, defense counsel e-mailed the prosecution and noted that the defense file did not contain any evidence technician reports or any reports related to the casings, bullets, and gun recovered. The prosecution replied on December 30, 2019, and told defense counsel that no such reports existed in the prosecution file. Defendant again raised the issue of the missing evidence technician reports on the record on the first day of trial. The officer-in-charge then located the reports, and they were produced to defendant over the lunch break the same day. Included in the late production were reports that described "the collection and location of evidence such as a .45 Glock Model 21 with loaded magazine, vehicles with bullet impacts and blood drops, spent shell casings and photographs of the scene, U.S. Currency [with] blood and DNA swabs from the road, casings, and the Glock[.]" The jury was sworn in at the conclusion of the first day.

On the second day of trial, defense counsel moved in limine under MCR 6.201(J) requesting relief relating to the late-produced evidence. Defendant requested a continuance, suppression of the evidence, or a mistrial. The trial court inquired into the reason for the delayed production of the reports and found that although there had been no intentional prosecutorial misconduct, the prosecutor had been "culpably negligent" in failing to discover and hand them over earlier. The court also expressed concern that defendant had been awaiting trial in jail for 145 days, and that a DNA swab of the gun found at the scene had been submitted for processing but no results had come in, and no one could guarantee when the results would be available.

After hearing arguments from both sides and taking a short recess, the trial court dismissed the armed robbery charge with prejudice. The trial court made extensive findings on the record regarding the failure to timely produce the evidence requested by defendant. In sum, the trial court found:

> There's no issue that there is – that the undisclosed discovery here is subject to mandatory disclosure under [MCR 6.201], that the evidence techs reports would qualify as a written statement.
>
> I don't think there's much question or any question in the [c]ourt's mind that had the prosecution known about these witnesses, the evidence technicians, and had that report in preparation for trial that they would have turned them over and endorsed those witnesses for trial as well as any expert witnesses in regard to any lab analysis that might have resulted and in this particular case [defense counsel], after reviewing the file in preparation for trial, noticed and wondered about whether or not there was any other information and sent an e-mail to [the prosecution.]
>
> * * *
>
> Not only did [defense counsel] ask for specific reports, he verbalized basically some questions that he had in his mind and [the prosecution] – and I should say that the questions were obviously elicited by [defense counsel's] review

> of the file and [the prosecution's] response was simply that [they] didn't have the items, no indication as to what his thoughts were about the questions [defense counsel] asked.

The trial court found that the prosecution's failure to investigate this matter further constituted a violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and that the evidence in question was material evidence. While the trial court did not believe that there was "any intentional failure to disclose by [the prosecution], the Court finds that there's culpable negligence" on the part of the prosecution. The trial court ultimately dismissed this case with prejudice, finding:

> The Court is going to grant the [d]efendant's motion to dismiss the case, jeopardy having attached. The dismissal will be with prejudice. The Court finds that the prosecution was culpably negligent in not discovering and providing this evidence prior to the time that it did, that the evidence is material to the issues as to whether or not the [d]efendant is guilty of the crimes that he's charged with, that the – there's been no – he's been in custody for at least a hundred and forty-five days, but there's no – not offered any idea of when – cause discovery is not complete.
>
> There's unknown – there's other things that are unknown about what happened with this evidence once it was obtained and submitted. There's no telling when this case would be ready for trial. So it's not a question of adjourning it Monday or Tuesday or two weeks or three weeks.
>
> For those reasons the Court dismisses the case against – the armed robbery case against [defendant].

This appeal by the prosecution followed.

II. STANDARD OF REVIEW

On appeal, the prosecution argues that a dismissal with prejudice was not required by double jeopardy principles, and that in fact any dismissal was required to be without prejudice. MCR 6.201 governs discovery in a criminal proceeding. *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997). Under MCR 6.201(B),

> (B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:
>
> > (1) any exculpatory information or evidence known to the prosecuting attorney;
> >
> > (2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;

> (3) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;
>
> (4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and
>
> (5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

Should the prosecution fail to comply with MCR 6.201(B), the trial court, in its discretion, "may order the party to provide the discovery or permit the inspection of materials not previously disclosed, or enter such other order as it deems just under the circumstances." MCR 6.201(J). "When determining the appropriate remedy for discovery violations, a trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). A trial court's order fashioning a remedy for a discovery violation "is reviewable only for abuse of discretion." MCR 6.201(J). "An abuse of discretion occurs when the decision falls outside the range of principled outcomes." *People v Warrant*, 505 Mich 196, 203; 949 NW2d 125 (2020).

Additionally, whether a retrial is barred by double jeopardy principles is reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). The trial court's factual findings are reviewed for clear error. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

III. ANALYSIS

In this case, it is undisputed that the prosecution failed to hand over the police evidence technician reports before trial, despite a timely and specific request from defendant, in violation of MCR 6.201(B). See also *People v Dickinson*, 321 Mich App 1, 19; 909 NW2d 24 (2017) (the prosecution's failure to turn over a police report likely constituted a discovery violation despite lack of knowledge of the report); *Banks*, 249 Mich App at 252 (determining that a discovery violation occurred when the prosecution failed to turn over a police report which it had inadvertently not received from police). Where a discovery violation occurred, the trial court had discretion to fashion a remedy, MCR 6.201(J). Its chosen remedy was dismissal with prejudice on the basis that a *Brady* violation had occurred, and that dismissal with prejudice was required where double jeopardy had attached.

Dismissal with prejudice is a severe remedy which can put a defendant in a "better position than he would have enjoyed had disclosure been timely made," and while such a remedy is within the trial court's discretion, it should not be granted lightly. *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987).

Here, the trial court inquired into the prejudice to defendant, inquired into the reasons for the delay, and considered other remedies. Indeed, the trial court engaged in an extensive discussion on the record with all parties to fully understand how this violation occurred. The trial court was clear that it did not believe the prosecution acted purposefully, but rather negligently, in failing to obtain the evidence reports when requested by defense counsel. The trial court discussed the relevance of the evidence at issue, and expressed concern that there was no clarity from the

prosecution or the officer-in-charge regarding when the processing of DNA and other evidence would be complete. The fact that it was unclear when the evidence would be available made it impossible for the prosecution to predict when it would be prepared for trial, which is a particularly salient consideration in light of the amount of time defendant had already been in custody awaiting trial. On the basis of the record before us, we are satisfied that the trial court did conduct a significant inquiry into the circumstances of this case before dismissing with prejudice. Additionally, we acknowledge that the trial court has broad discretion to fashion a remedy for a discovery violation under MCR 6.201(J). However, we ultimately conclude that the trial court did abuse its discretion by basing its order of dismissal on two errors of law.

The trial court found that the prosecution's conduct amounted to a *Brady* violation that warranted dismissal pursuant to its authority under MCR 6.201(J). However, we conclude that the trial court's reasoning is flawed where a *Brady* violation is not a prerequisite for a court's exercise of power under MCR 6.201(J). Michigan's discovery rules and the constitutional *Brady* doctrine are not mutually exclusive. See *People v Dickinson*, 321 Mich App 1, 19; 909 NW2d 24 (2017), where this Court concluded that the failure to hand over a police report likely constituted a discovery violation, giving the trial court discretion to fashion a remedy under MCR 6.201(J) without discussion of *Brady*. Accordingly, the prosecution need not have committed a *Brady* violation for the trial court to have discretion under MCR 6.201(J) to fashion a remedy. Under the plain language of MCR 6.201(B)(2), the prosecution was required to turn over the evidence requested because they constituted "any police report . . . concerning the case[.]" See *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002), where this Court determined that the failure to turn over a police report concerning a witness interrogation constituted a violation under MCR 6.201(B)(2). Thus, a discovery violation occurred, and that violation alone was sufficient to trigger the trial court's discretion to fashion a remedy.

The trial court also erroneously based its decision to dismiss this case with prejudice on the premise that principles of double jeopardy had attached. Dismissal of a case once the jury has been sworn, as is the case here, constitutes a mistrial. See *People v Grace*, 258 Mich App 274, 279-280; 671 NW2d 554 (2003); *People v Tracey*, 221 Mich App 321, 327; 561 NW2d 133 (1997). Double jeopardy principles permit a retrial when a defendant consented to the mistrial and was not intentionally goaded into a mistrial by the prosecution. *People v Lett*, 466 Mich 206, 215; 644 NW2d 743 (2002); *Tracey*, 221 Mich App at 326.

Defendant's motion sought a mistrial as a third alternative to a continuance or preclusion of the evidence at trial. Once the trial court indicated on the record that it would not grant a continuance, defendant argued that evidence preclusion would be insufficient and requested dismissal with prejudice. Thus, we conclude defendant consented to a mistrial, *Tracey*, 221 Mich App 327-329, and double jeopardy principles did not attach. Where double jeopardy principles did not attach, dismissal with prejudice was not required.

Again, the trial court found that dismissal with prejudice was required because the prosecution had committed a *Brady* violation and because double jeopardy principles had attached. As discussed, both findings constituted mistakes of law, and a trial court abuses its discretion when it acts on the basis of a mistake of law. *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017). Thus, we conclude that where the trial court does have the discretion to fashion a remedy

for this discovery violation under MCR 6.201(J), remand is required to allow the trial court to exercise its discretion free from legal error.

We reverse and remand for the trial court to exercise its discretion to fashion a remedy for a discovery violation under MCR 6.201(J) free from legal error. We retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens

Court of Appeals, State of Michigan

ORDER

People of MI v Travis Lydell Causey

Docket No. 352550

LC No. 19-006337-01-FC

Christopher M. Murray
Presiding Judge

Kathleen Jansen

Cynthia Diane Stephens
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall be completed within 28 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, we reverse and remand for the trial court to exercise its discretion to fashion a remedy for a discovery violation under MCR 6.201(J) free from legal error. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

March 4, 2021
Date

Chief Clerk