IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00053 COA

LAURENCE Y. MELLEN **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	12/28/95
TRIAL JUDGE:	HON. ELZY SMITH, JR.
COURT FROM WHICH APPEALED:	COAHOMA COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	LAWRENCE LITTLE
	GOODLOE LEWIS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
	BY: DAVE SCOTT
NATURE OF THE CASE:	CIVIL - CRIMINAL DISCOVERY VIOLATION
TRIAL COURT DISPOSITION:	SANCTION OF $1000 IMPOSED UPON DISTRICT ATTORNEY
DISPOSITION:	AFFIRMED - 12/16/97

MOTION FOR REHEARING FILED: 1/16/1998
CERTIORARI FILED:4/10/1998
MANDATE ISSUED:

BEFORE BRIDGES, C.J., PAYNE, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

The Honorable Elzy Smith, Jr., Judge of the Eleventh Circuit Court District, imposed a $1,000 sanction on District Attorney Laurence Y. Mellen. The reason was a perceived discovery violation in a criminal case. Mellen appeals. We find adequate evidence in the record to support the sanction, and therefore affirm.

FACTS

The context of the sanctions imposed against Mellen was the case of *State v. Willie L. Bullins.* Bullins was charged with two counts of murder and one count of aggravated assault. The crimes in question were alleged to have occurred at the time that the area was recuperating from a severe ice storm. Most of the area was without water or electrical services.

One of the State's witnesses was Captain Fortenberry. The crime scene had been gory, with blood on the beds, furniture, walls, floor, and ceiling in several rooms. Captain Fortenberry added to the description that there was brain matter on the walls, ceiling, and at one of the victim's feet. Although Bullins was apprehended shortly after the crime had been committed, no one found any evidence of blood on his clothes or in his car. Fortenberry executed a search warrant and testified to his findings. Although he did not take the clothes into custody or photograph them, Fortenberry testified that there were "fresh-washed clothes" hanging in Bullins's carport.

The defense immediately objected to Fortenberry's testimony. The judge and counsel retired to chambers to discuss the objection. The defense moved for a mistrial on the basis that the State had never made discovery regarding any "fresh-washed clothes" in the carport of Bullins. The trial judge found that there was a violation of what is now URCCC 9.04 (formerly 4.06 URCCP). After lengthy discussion about the alleged violation of the rules of discovery, the trial judge directed defense counsel to talk with Fortenberry and report back as to what alternatives, other than mistrial, may be available. Though other alternatives were discussed, the trial judge was of the opinion that "a strong and prejudicial odor would remain throughout the trial and deliberation by the jury." The defense renewed its motion for mistrial, and the trial court granted the motion. The court based the mistrial on its finding that the non-disclosed evidence was potentially the most incriminating in the case.

Bullins was re-tried and was convicted one year later. The conviction was affirmed on appeal. *Bullins v. State,* 95-KA-00823 COA (Miss. App. Aug. 12, 1997). Shortly after Bullins was convicted, Judge Smith served Mellen with a letter stating that a hearing would be held regarding mitigation of sanctions. Mellen presented testimony at the hearing. On December 28, 1995, Judge Smith sanctioned Mellen $1,000. In sanctioning Mellen, the trial court stated that the State's failure to make discovery of this evidence was a "reckless and egregious violation of the rules" of the court. The trial court stated it was compelled to sanction Mellen, rather than issue a warning, because it was not the court's first experience with conduct of that nature by prosecuting attorneys.

DISCUSSION

Mellen argues that the trial court erred in sanctioning him because there was no discovery violation, and even if there was a violation, it was not willful. It is that first argument that has caused us the most difficulty. Nothing in the record designated on this appeal indicates what discovery was requested. Never in any transcript of the original trial nor in the record of the sanctions hearing does anyone raise the issue of whether there was ever a request for the undisclosed information. The mere fact that knowing in advance of the incriminating evidence of dripping clothes would have been helpful to the defendant in his preparation is insufficient to find a discovery violation. There is no free-standing obligation to tell a defendant everything that he likely would want to know.

Even though the record provided us on the sanctions appeal is silent, the trial court did actually have in the file on the criminal case, of which the sanctions proceedings were a part, a record of all discovery requests. We do not view the absence of the discovery documents in the record of the

sanctions appeal to constitute a failure of evidence, but instead as a failure to designate a sufficient part of the record for our review. Under Appellate Rule 10(e) this court "may order . . . that a supplemental record be filed." **M.R.A.P. 10(e).** We requested that the circuit clerk provide the documents to us, and that was done promptly. We express our appreciation to that office.

The first step in the inquiry is whether or not there was a discovery violation. There is no dispute that Mellen turned over his entire file to the defense so that it could copy whatever was wanted from it. What the defense did not learn was information that District Attorney Mellen was told by the investigator but was not in the written report. Under the applicable rule, the State must disclose "the substance of any oral statement made by" any witness for the State. **URCCC 9.04 A. 1.** Thus the defense was entitled to be told the substance of significant information obtained by the State from a witness, even if not reduced to writing, but only if the defense asked.

In order to determine whether the defense asked for oral statements, we examined the docket sheet in *Bullins v. State*. There was an "Order Establishing General Rules of Discovery" entered on June 14, 1994, a defense "Motion to Invoke Discovery" filed on June 17, and "Motion for Discovery" filed on June 21. That last document requested all oral statements by "all persons who have given recorded statements to the prosecution. . . ." Though a law enforcement officer who gave oral statements to the district attorney beyond what was in a written report may not be the central target of that request, such a person is still included. Thus we find that a discovery violation occurred.

We next turn to whether the conduct was willful, since only willful violations of discovery by an attorney are sanctionable. **URCCC 9.04** (last, unnumbered paragraph). The granting of a mistrial is within the sole, unreviewable discretion of the trial court. The imposing of sanctions is not. There must be evidence in the record to determine if Mellen's conduct was willful. A willful violation of a discovery rule occurs when there is a conscious or intentional failure to comply with the rule's requirements. ***Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385, 1390 (Miss. 1997).** A finding of wilfulness may be based upon either a willful, intentional, and bad faith attempt to conceal evidence or a gross indifference to discovery obligations. ***Id.*** There was certainly no concession by Mellen to willfulness, but the trial court was entitled to reach conclusions on intent based on evidence of actions, or in this case inaction. The court in part relied on what it thought was a pattern in several cases of loose practice with discovery obligations. We have no such evidence before us and it cannot constitute grounds for upholding the factual decision of whether this conduct was willful. However, we read the trial court's comment to mean that the decision to impose sanctions as opposed just to an admonishment was because of past experiences. Since imposing sanctions just for one willful violation is permitted under the rule, we accept the trial court's exercise of his discretion regardless of whether previous violations had occurred.

The trial judge actually never found Mellen to have been "willful," i.e., intentional in his inaction. He only found the violation to be "reckless and egregious . . . ." *Pierce* held that gross indifference was the equivalent of willfulness under the civil rules, and we hold the same for this rule. "Reckless" is an adequate synonym for "gross indifference." Whether the attorney was grossly indifferent was a factual conclusion to be reached initially by the trial court based on the evidence before him. The trial judge was within his discretion to find that failure to disclose this statement was at least gross indifference to the possibility that the defendant would not learn of the "fresh-washed clothes" evidence until he heard it from the stand.

THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY IMPOSING A SANCTION OF $1,000 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED AGAINST APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.

HERRING, J., NOT PARTICIPATING.