STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP279-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CAROLINE D. PRIETO,

Defendant-Respondent.

ON APPEAL FROM AN ORDER EXCLUDING WITNESSES,

ENTERED IN THE CIRCUIT COURT FOR KENOSHA

COUNTY, THE HON. CHAD G. KERKMAN PRESIDING

BRIEF OF THE DEFENDANT-RESPONDENT

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I.

ISSUES PRESENTED

1. Did the failure of the State to honor the scheduling orders issued by the trial court result, as well, in a violation of duty to make a timely disclosure of discovery to which the defendant was entitled? The trial court answered "yes."

2. After a finding by the trial court that the State had not honored the scheduling orders and therefore had not made a timely disclosure of witnesses to the defense, was the sanction ordered by that trial court an abuse of discretion? The question was not answered by the trial court.

3. By its silence at the trial court level, did the State forfeit the right to have some of its arguments considered on appeal? The question was not answered by the trial court.

II.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary. The briefs of the parties should adequately address the issues raised in this appeal. Publication would be useful. The reasons for publication, advanced by the Plaintiff-Appellant, are thoughtful and well-reasoned. In addition, publication may be useful if it gives guidance to trial courts regarding the imposition of sanctions when violations are suspected of both scheduling orders issued by the court and obligations to disclose discovery information mandated by law.

III.

STATEMENT OF FACTS

The Statement of the Case and Facts presented by the Plaintiff-Appellant is comprehensive and well organized. No additions or corrections are necessary. Any references to the Record that are necessary to the argument of the Defendant-Respondent will be made in the body of that argument.

IV.

ARGUMENT

A.

STANDARDS OF REVIEW

The defendant-respondent agrees with the standards of review outlined by the plaintiff-appellant. Whether the State has violated its discovery obligations is a question of law and subject to independent appellate review. *State v. Delao*, 2002 WI 49 at ¶ 14, 252 Wis. 2d 289, 643 N.W. 2d 480. The imposition of a sanction for the abuse of discovery is within the discretion of the trial court. A review of that discretion determines whether, on its face, the trial court considered the appropriate factors. *State v. Wild*, 146 Wis. 2d 18, 28, 429 N.W. 2d 105, 109 (Ct. App. 1988).

B.

THE REQUIREMENT, AS APPLIED TO THE STATE, TO PROVIDE DISCOVERY "A REASONABLE TIME BEFORE TRIAL" CAN BE IMPOSED FROM TWO DIFFERENT SOURCES

If the defense makes a demand, the State is required to disclose a collection of discovery "within a reasonable time before trial." § 971.23(1), Wisconsin Statutes. If disclosure is

not made in a timely basis, and if there is no good cause for the failure to disclose, the evidence that was not disclosed must be excluded. A selective quotation of the relevant wording is as follows:

971.23 **Discovery and inspection.**

(1) WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state….

(d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment only….

(7m) SANCTIONS FOR FAILURE TO COMPLY.

(a) The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance.

(b) In addition to or in lieu of any sanction specified in par. (a), a court may, subject to sub. (3), advise the jury of any failure or refusal to disclose material or information required to be disclosed under sub. (1) or (2m), or of any untimely disclosure of material or information required to be disclosed under sub. (1) or (2m).

That phrase, "a reasonable time before trial," has been given fluid definitions. The statute does not define "a reasonable time" and there are no cases that establish a per se rule for what is "reasonable." (*State v. [Kevin] Harris*, 2004 WI 64 at ¶35, 272 Wis. 2d 80, 680 N.W. 2d 737.) A scheduling order is different. When a scheduling order is issued by a trial court, the presiding judge gives an explicit definition of "reasonable time" by including a deadline after which enumerated evidence and motions are no longer allowed. The trial court issued two separate orders for the filing of witness lists. At a hearing on December 4, 2013, the trial court required the filing of witness lists within 60 days (R.175:5). The defense filed a list of witnesses on February 5, 2014 (R.18). The State did not file a witness list.

A pretrial conference was held on February 17, 2014. At that short hearing, Judge Milisauskas announced that he received a witness list from the defense, that the defense would be allowed an extension to March 15th to submit an expert report and that the trial was still to begin on June 23, 2014 (R.176:2). At this point, the State had apparently not yet filed a witness list.

On June 4, 2014, almost three weeks before the trial was to commence, a motion hearing was held. The State requested a postponement of the trial date to allow more time to explore obtaining at least one expert (R.177:4). The request had been triggered by the filing of a second expert report by the defense on May 27, 2014 (R.21). Because of issues involving the availability of an expert witness, the defense opposed the request. The Court granted the adjournment request. It is the position of the Plaintiff-Appellant that the postponement of the trial date "cancelled any negative effect the State's noncompliance with the original witness-list requirement may otherwise have had"

(Brief at page 20-21). That statement is true, as far as it goes. The granting of the postponement allowed more time for the defense to manage the information given to it on a list of state witnesses, when that list would be given. A measure of the prejudice resulting from the filing of a witness list close to trial is a consideration when analyzing a potential violation of § 971.23(1), Wisconsin Statutes. However, the granting of a trial postponement does not change a failure to honor a scheduling conference order issued by the court.

C.

THE TRIAL COURT ISSUED A SCHEDULING ORDER

WITH THE EXPECTATION THAT IT WOULD BE HONORED

The trial had originally been scheduled to begin on June 23, 2014, but was postponed during a hearing held on June 4, 2014 (R.177). As a result, the trial court issued another scheduling order to allow a smooth path to the trial that was set to begin on February 9, 2015. A scheduling order was issued on August 15, 2014 (R.25; A-Ap 165). With regard to the furnishing of witness lists, a separate deadline of December 12, 2014 was imposed at a status conference on October 17, 2014 (R.179:19).

A motion hearing was held on January 23, 2015, about two weeks before the trial was to begin. The defense raised the issue of being furnished, by the State, with expert reports, including conclusions by those experts that satisfied the required burden of proof. When asked about those reports and their availability, the assistant district attorney replied that she was following the statue and the court drew a distinction between a statute and an order of the court: “You’ve got to go by court orders. When there is a Scheduling Order

you go by the Scheduling Order" (R.180:8). Later during the same hearing, the trial court learned that the State had not yet filed a witness list (R.180:34). Noting that the State had not filed a witness list in response to two different scheduling orders, the court excluded witnesses whose names had not been given to the defense (R.180:35).

D.

BY FAILING TO FILE A WITNESS LIST AS REQUIRED BY

THE SCHEDULING ORDER, THE STATE DID NOT COMPLY

WITH THE COURT IMPOSED "REASONABLE TIME" DEADLINE

It is suggested that the violation of a scheduling order does not automatically allow the trial court to impose any or all sanctions available for that violation. However, the scheduling order did provide what the trial judge had concluded was a "reasonable time" before trial for a required filing of a witness list. By not filing the witness list until after the reasonable time set by the trial judge, the State violated the discovery obligation imposed by the trial court. The question that follows is what sanction, or sanctions, may be imposed for the failure to file a witness list within a court imposed reasonable time before trial.

E.

WHEN A DISCOVERY VIOLATION RESULTS FROM THE FAILURE

TO CONFORM TO A SCHEDULING ORDER, THE TRIAL COURT

MUST MAKE FINDINGS BEFORE IMPOSING SANCTIONS

For the case at hand, guidance can be found in the opinion written by Judge Scott in *State v. Wild*, 146 Wis. 2d 18, 429 N.W. 2d 105 (Ct. App. 1988). The eventual trial court order excluding evidence arose from a violation of a scheduling order. The charges were child abuse and second-degree murder. The trial court had entered an order requiring that the state provide the defense with written copies of medical reports received from doctors they intended to call at trial and a list of medical reports received from doctors they did not intend to call at trial. The deadline for compliance was September 7, 1987. On October 21, 1987, the defense stated that medical reports had been received after September 7th that were inconsistent with previous reports and described injuries previously unknown to the defense. The defense requested additional time to prepare the case and sought an order excluding the reports submitted after the scheduling order deadline. The trial court denied the adjournment but ordered the exclusion of the reports. On appeal, the exclusion of the reports was reversed. In its opinion, the Court of Appeals interpreted the language of the discovery statute to require two separate determinations. At that time, the discovery statute under consideration by the court was § 971.23(7), Stats, with language virtually identical to the present discovery language:

"…The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance."

The trial court must first determine if there was good cause for the failure to comply with the discovery deadline in the scheduling order. If good cause is not shown, the statute is mandatory. The evidence shall be excluded. *Wild*, 146 Wis. 2d at page 27, 429 N.W. 2d at page 108.

The *Wild* opinion noted that the imposition of a sanction for the abuse of discovery rules is in the discretion of the trial court. *Wild*, 146 Wis. 2d at page 28, 429 N.W. 2d at page 109. The exclusion of evidence was reversed because the trial court had completely failed to consider whether the noncompliance of the state was for good cause and therefore did not exercise discretion at all. *Wild*, 146 Wis. 2d at page 28, 429 N.W. 2d at page 109.

F.

THE TRIAL COURT BELOW DID EXPLAIN ITS EXERCISE OF

DISCRETION IN DETERMINING THE ABSENCE OF GOOD CAUSE

The trial court based its order, excluding witnesses who had not been timely disclosed, on its finding that the State had twice ignored scheduling orders requiring such disclosure. (R.180:35; A-Ap 137). A telephone conference that followed included the trial court restating the reasons for the exclusion of witnesses, repeating the failure to obey the requirements of two scheduling orders (R181:6; A-Ap 147). The gist of the trial court ruling was summarized during the final hearing before trial: "I think that there is a public interest in going forward on Monday and that's because we have court orders and it's important to follow court orders" (R.182:3; A-Ap 156).

G.

THE SANCTION REQUIRING THE EXCLUSION

OF EVIDENCE IS NOT ABSOLUTE

The plaintiff-appellant argues, in its brief, that the sanction of complete exclusion of the undisclosed evidence is not absolute, even when there is no good cause for the failure to

disclose. That argument is correct. There are cases in which a third step has been added to the analysis required before undisclosed evidence is excluded. The plaintiff-appellant correctly cites *State v. DeLao*, 2002 WI 49 at ¶ 51, 252 Wis. 2d 289, 643 N.W. 2d 480 for the proposition that undisclosed evidence must be excluded unless there is a showing of good cause for the non-disclosure. The plaintiff-appellant cited *State v. Lock*, 2012 WI App 99, 344 Wis. 2d 166, 823 N.W. 2d 378 as being in support of the *DeLao* rule concerning the exclusion of evidence that was not disclosed as required. However, in refusing to reverse the conviction based on discovery violations, the *Lock* court noted that even if the evidence should have been excluded under the two step *DeLao* reasoning, that evidence need not be excluded if its admission was harmless (*Lock* at ¶ 122).

We suggest that the difference in the consideration of undisclosed evidence is whether the issue arises before trial or during trial. After the trial has begun, it makes more sense to add the "harmless error" step of reasoning to the two steps required by *Wild* and *DeLao*: whether there was nondisclosure and whether there was good cause for that nondisclosure.

The "harmless error after trial begins" analysis is illustrated in another case cited by plaintiff-appellant. In *State v. (Ronell) Harris*, 2008 WI 15, 307 Wis. 2d 555, 745 N.W. 2d 397, the court determined that the State had failed to disclose evidence and that there was not good cause for that failure (*Harris* at ¶ 36). However, no appellate remedy was available to the defendant because the failure to disclose the evidence was not prejudicial (*Harris* at ¶ 59).

In the present case, trial had not begun. The trial court made its ruling, excluding witnesses who had not been timely disclosed, about two weeks before the trial was to

begin. Based on the failure of the State to follow scheduling orders, the ruling also cited the value of resolving a "very old case" and therefore not postponing the trial further (R.180:7; Ap-A 148). It was an exercise of discretion, with the reasons stated for that exercise.

H.

FORFEITURE SHOULD BE SELECTIVELY APPLIED

Without repeating the case law in support, defendant-respondent agrees with the forfeiture analysis provided by the plaintiff-appellant. Where arguments are not raised at the trial court level, it can be appropriate to hold that the chance to make those arguments has been waived. On the other hand, where the issue is of sufficient public interest, the court has discretion to consider an issue that has been forfeited.

The potential application of the ruling in *Industrial Roofing Services Inc. v. Marquardt*, 2007 WI 19, 299 Wis. 2d 81, 726 N.W. 898 to a criminal prosecution and appeal is of sufficient public interest and deserves analysis. The plaintiff-appellant urges consideration of the holding in *Marquardt* in two respects: 1.) Although the attorney for the plaintiff in *Marquardt* had been ineffective, the consequences of the attorney's ineffectiveness should not be visited upon the blameless client of that attorney. In our case, the innocent "client" is the public. 2.) Because district attorneys are overworked, scheduling orders will be violated or ignored in the future and courts dealing with those violations should know if dismissal with prejudice is an available sanction.

The holding in *Marquardt* should not be extended to apply to a criminal prosecution. There are two reasons for this. First, it is not clear that the *Marquardt* held that "innocent"

clients should be sheltered from the ineffectiveness of their attorneys. The court did say that it is "an erroneous exercise of discretion for a circuit court to enter a sanction of dismissal with prejudice, imputing the attorney's conduct to the client, where the client is blameless." ¶ 61. However, the court determined that Industrial (the client) was not blameless and did not rule in its favor. There are other reasons not to extend the *Marquardt* reasoning to a criminal prosecution. *Marquardt* assumes, and held, that the client of an attorney can be at fault for the resolution of the case and therefore not "blameless" (*Marquardt* at ¶ 85). It is difficult to understand how an entity called the public can share in the blame where a prosecutor has not performed effectively. The public will always be blameless. The *Marquardt* court also noted that consequences of dismissal to the blameless litigant are extraordinarily severe (¶ 62). The consequences of a failed prosecution, because of the mis-steps of the attorney, are serious but diffuse, spread throughout society and not the same as the considerations in *Marquardt*.

We do not question that the task of a district attorney is a daunting one and that the workload is heavy. However, it may be questionable to fashion a decision based on the prediction that there will be a continuing failure on the part of prosecutors to ignore or fail to honor scheduling orders. Our view is that prosecutors are better than that, that they find a way to honor court directives in spite of the work load they must carry. The Court in *State v. Harris*, 2008, WI 15, 307 Wis. 2d 555, 745 N.W. 397 spoke to the issue of prosecution work loads: "The State did not have good cause for failing to disclose the two reports. We understand that many district attorneys' offices are short-staffed and the workload is heavy. Nevertheless, accuseds whose lives and liberty are at stake have

statutory and constitutional rights to information in the district attorney's possession to enable them to prepare adequately for trial" (*Harris* at ¶ 36).

The doctrine of forfeiture should be applied to the argument of the plaintiff-appellant that the exclusion of witnesses amounted to a dismissal with prejudice. The place for that argument to be made was in the trial court where offers of proof could be made to demonstrate what the case of the State would have been before the exclusion of witnesses and what it would be after the exclusion. The State chose not to make that presentation. Instead, they first did not oppose the motion to exclude witnesses (R.179:37; Ap-A 139) and then presented to the trial court citizens affected by this crime and other crimes, people who might be characterized as "blameless" under the *Marquardt* reasoning. The trial court was the venue in which to demonstrate the consequences, to the prosecution of the case, resulting from the exclusion of witnesses.

V.

CONCLUSION

Defendant-Respondent requests that this Court conclude that the trial court appropriately exercised the discretion available to enforce legitimate court orders and impose appropriate sanctions when those orders are disregarded. It is requested that the decision of the trial court be affirmed.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,466 words.

Dated this 13th day of July, 2015

_____

Eric Schulenburg: Attorney for Defendant-Respondent

CERTIFICATE OF COMPLIANCE WITH

WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of July, 2015.

_____

Eric Schulenburg: Attorney for Defendant-Respondent