

Circuit Court for Baltimore County
Case No. K-08-0739

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1043

September Term, 2017

DESMOND K. JONES

v.

STATE OF MARYLAND

Kehoe,
Berger,
Thieme, Raymond G., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: August 6, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On March 6, 2009, after a jury trial in the Circuit Court for Baltimore County, Desmond K. Jones, appellant, was found guilty of possession with intent to distribute heroin and possession of heroin. He was sentenced as a subsequent offender to incarceration for 25 years without the possibility of parole. On July 14, 2017, we granted appellant’s application for leave to appeal and this timely appeal followed.

ISSUE PRESENTED

The sole issue presented for our consideration is whether the trial court erred in refusing to exclude testimony about a call that was made to a cell phone recovered from appellant after he was arrested because the call was not disclosed in discovery. Finding no error, we shall affirm.

FACTUAL BACKGROUND

On January 29, 2008, Baltimore County Police Detective Milton Duckworth arrested two women, Elizabeth Molinaro and Tammy Adams, for solicitation of prostitution. He brought both women to the police precinct and interviewed them. Based on information obtained during the interviews, Detective Duckworth and his partner, Detective Christopher Bishop, gathered a surveillance team and went to the El-Rich Motel on Pulaski Highway. At about 9 p.m., Molinaro, Adams, Detective Duckworth, and Detective Bishop went into a room at the motel and the remaining members of the surveillance team remained outside. The detectives searched the room to ensure that there were no weapons, drug paraphernalia, “or anything like that” in it. Detective Duckworth, who was not dressed in a police uniform, wore a body wire that was monitored by other members of the surveillance team. Detective Duckworth watched as Molinaro used the

land line telephone in the motel room to dial the phone number (410) 702-1270 in an attempt to reach someone she identified by the nickname “Daz.” Molinaro asked Daz to bring 50 pills of heroin to the motel room.

Sometime thereafter, there was a knock at the door to the motel room. Detective Bishop, who was the “take-down officer,” went into the bathroom and one of the women answered the door. A black man, later identified as Breon Jacobs, entered the motel room. One of the women gave Jacobs \$500 that the detectives had obtained from a police department investigative fund. Jacobs asked the woman if she wanted “that many” and she replied yes. Jacobs then reached into his waist band and began counting out 50 capsules. Detective Duckworth gave Jacobs his hat in order to hold all the capsules. After the capsules were in the hat, Detective Duckworth gave a predetermined signal for the surveillance team to enter the motel room, but before the team arrived there was a knock at the door. Detective Duckworth opened the door and a black man, later identified as appellant, and a white female, identified as Jamie Finnerty, entered the room. Appellant said to Finnerty, “[A]re you trying to get me busted? Why are you coming up to me out in the parking lot like that? There are people out there watching us.” At that point, Detective Bishop came out from the bathroom, identified himself as a police officer, arrested Jacobs, and recovered the \$500 in cash that the police department had provided for the drug purchase. Detective Duckworth also identified himself as a police officer and arrested appellant. Appellant, who appeared to be startled, raised his hands and, in doing so, dropped a plastic bag containing 50 additional capsules of suspected heroin onto the floor. The 50 capsules that had been placed in Detective Duckworth’s hat and the 50 capsules

that were in the baggie dropped by appellant were sent for chemical analysis and determined to be heroin.

In a subsequent search of appellant, the detectives recovered \$1,176 from his pants pocket and two cellular phones. According to Detective Duckworth, the phone number for one of the cell phones matched the phone number that Molinaro had dialed to reach Daz. Detective Duckworth also testified that appellant went by the nickname Daz.

DISCUSSION

I.

Appellant argues that the trial court abused its discretion when it refused to exclude testimony about a phone call made to one of the cell phones recovered from appellant after he was arrested because the State failed to disclose that call in discovery. We disagree and explain.

At the time of appellant's trial, Maryland Rule 4-263(d) provided, in part, as follows:

(d) **Disclosure by the State's Attorney.** Without necessity of a request, the State's Attorney shall provide to the defense:

* * *

(3) *State's Witnesses.* The name and . . . the address of each State's witness whom the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony, together with all written statements of the person that relate to the offense charged;

* * *

(7) *Searches, Seizures, Surveillance, and Pretrial Identification.* All relevant material or information regarding:

(A) specific searches and seizures, eavesdropping, and electronic surveillance including wiretaps; and

(B) pretrial identification of the defendant by a State’s witness;

* * *

(9) *Evidence for Use at Trial.* The opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3(a), recordings, photographs, or other tangible things that the State’s Attorney intends to use at a hearing or at trial[.]

Md. Rule 4-263(d)(2008).

When a party failed to comply with its discovery obligations, the Rule provided then, as it does now, that

the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

Md. Rule 4-263(n)(2008).

The purpose of the discovery rules includes giving defendants “the necessary time to prepare a full and adequate defense” and protecting them from “unfair surprise.” *Green v. State*, 456 Md. 97, 132-33 (2017)(and cases cited therein); *Ross v. State*, 78 Md. App. 275, 286 (1989). “The remedy for a violation of the discovery rules ‘is, in the first instance, within the sound discretion of the trial judge.’” *Raynor v. State*, 201 Md. App. 209, 227 (2011)(quoting *Williams v. State*, 364 Md. 160, 178 (2001)). “[I]n exercising its discretion regarding sanctions for discovery violations, ‘a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any

other relevant circumstances.” *Raynor*, 201 Md. App. at 228 (citations omitted). Maryland’s appellate courts have recognized that trial courts should implement drastic sanctions sparingly and that defendants should proceed with caution when seeking them out. “The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules.” *Thomas v. State*, 397 Md. 557, 571 (2007)(and cases cited therein).

In the instant case, after the jury had been selected, the trial court took a luncheon recess. When the case resumed, the prosecutor advised the trial judge that during the lunch break she learned for the first time that, on or about the date of appellant’s arrest, Detective Bishop had prepared a report that contained information about a telephone call placed to one of the cell phones recovered from appellant. That call was answered by Detective Bishop while he was at the police precinct packaging evidence. The unidentified caller asked for Daz and expressed a desire to purchase “boy.” The prosecutor advised the court that Detective Bishop would testify about the call and that he recognized the term “boy” “to be slang for heroin.” The prosecutor advised the trial court as follows:

[PROSECUTOR]: Your Honor, during the luncheon recess, I spoke with one of my detectives briefly. He inquired as to whether or not I was going to ask him about a telephone call he had received allegedly on the defendant’s cell phone.

I did not know of what he was speaking. He then showed me his report actually from the incident date of 1-29-08, or the next day I should say, that never made it to the [S]tate’s file. I immediately made a copy of the report. I immediately brought it up to [defense counsel] and gave him a copy of the report.

I do not believe the detective was intentionally withholding this. He is not the lead detective. He was the lead detective’s partner.

I note that the report was signed off by the supervisor two weeks later. I suspect that's why it didn't make it over to . . . to the [S]tate's file with the rest of the paperwork that has long since been provided in discovery to [defense counsel].

It's an important piece of information that the [S]tate would like to argue is admissible, but recognizing, Your Honor, this is a discovery violation, certainly not malicious or intentional on the [S]tate's part, but still a violation none the less, I brought it to counsel's attention. I brought it to Your Honor's attention.

I gave copy of the form and basically stand before the court for a ruling as to the appropriate remedy for this violation.

Defense counsel objected to the use of any evidence pertaining to the report and telephone call. Although defense counsel acknowledged that the failure to disclose Detective Bishop's report and information about the phone call was not an intentional discovery violation, he argued that evidence pertaining to the call should be excluded for failure to comply with the discovery rule. Defense counsel argued that evidence of the call would require expert testimony from Detective Bishop, who would testify that the caller asked for "boy" and that that term was a street name for heroin. Defense counsel also asserted that he would "rather not have to cross-examine another police officer who is going to show his expertise." In addition, defense counsel objected because the subject telephone call occurred after the crime was committed, "change[d] the perspective of [counsel's] defense of the case and how [he] was going to defend it," and deprived him of an opportunity to investigate the identity of the person who made the call.

The trial judge offered to give the defense an opportunity to interview Detective Bishop, but defense counsel declined. As for defense counsel's preference not to "have to

cross-examine another police officer who is going to show his expertise,” the court noted that “there wouldn’t be any difference if [the defense] had received the statement through the regular discovery procedure.” The court recognized that there was a discovery violation but declined to remedy it by excluding the evidence, stating:

I am looking at Rule 4-263(n) and trying to fashion an appropriate remedy. As I said, I offered [defense counsel] an opportunity to speak to the detective, but he declined that. He apparently wouldn’t have done it even if he had the statement earlier.

What I did do was offer [defense counsel], he said he wanted to review the statement with his client, which is understandable. I have delayed the trial. Rather than begin trial immediately after lunch, as we intended to do, we have been discussing the issue. I discharged the jury even before they were sworn in to allow [defense counsel] an opportunity to review the matter with his client in any other fashion he wants to do so this afternoon and this evening before we begin the trial.

We will start a little bit later in the morning. We will start at ten o’clock. So I believe that by delaying the trial today, not even starting the trial before [defense counsel] has an opportunity to review the statement with his client and perhaps do whatever else [defense counsel] might deem appropriate. I think that fashions a reasonable way to handle the matter. Therefore, it will afford [defense counsel] the opportunity to deal with the statement.

From this record, we are convinced that the trial court carefully considered the circumstances and reasons for the State’s failure to produce Detective Bishop’s report and found that it was unintentional. The court offered appellant an opportunity to interview Detective Bishop, but he declined. As for appellant’s contention that the late disclosure caused him to realize that the State’s case rested on the testimony of both Detective Duckworth and Detective Bishop, we note that both detectives were included on the State’s witness list. Further, the court granted a reasonable postponement to allow defense counsel

to review more closely Detective Bishop's report and investigate the information it contained. Appellant did not request a longer continuance. The court clearly appreciated the need to guard against surprise and give appellant sufficient time to review the newly disclosed information and prepare his defense. On the record before us, we cannot say that the trial court abused its discretion in denying appellant's request to exclude the evidence or in granting the less severe sanction of a continuance.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.**