Circuit Court for Baltimore City
Case No. 117060002

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2824

September Term, 2018

STATE OF MARYLAND

v.

DERRICK RUCKER

Arthur,
Leahy,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: September 23, 2019

The State appeals from the dismissal of charges against David Rucker, appellee, after a grand jury in the Circuit Court for Baltimore County indicted Rucker on several handgun-related charges. On February 11, 2017, a confidential informant told police that an armed man was standing at the corner of Frankford Avenue and Blair Road. Several officers went to the area and encountered Rucker, who matched the description given by the informant, and who was walking and holding his waistband. Rucker "took off running" when the police approached and then discarded a handgun while police chased him over several fences behind a nearby shopping center. Shortly after seeing Rucker discard the handgun, police caught and arrested him.

As part of an omnibus motion to suppress the handgun and compel discovery disclosures, Rucker sought information relating to the confidential informant. He argued that information about the veracity of the informant was necessary to determine whether police had probable cause to arrest him. The State, however, was unable or unwilling to produce any information relating to the informant because Detective Daniel Hersl, the officer who received the tip, had been indicted on federal racketeering charges after Rucker's arrest.

On the morning of trial, the court considered Rucker's motion to dismiss the charges against him due to the State's failure to disclose the identity of the confidential informant; Rucker also complained that the State failed to notify him that it planned to call the officer who recovered the handgun to testify regarding the firearm's operability. After a colloquy in which the State confirmed for the court that it had not produced the informant

information and was unable to vouch for the veracity of Det. Hersl, the court dismissed the charges against Rucker without further explanation.

The State's timely appeal presents one question for our review: "Did the circuit court err in granting Rucker's motion to dismiss?"

We hold that the circuit court abused its discretion by failing to consider the proper legal standard in dismissing the charges against Rucker as a discovery sanction. Accordingly, we remand the case for the circuit court to consider Rucker's motion to suppress.

BACKGROUND

Baltimore City Police Officer Andrew Brown filed a statement of charges in the District Court that set out the following facts as probable cause to arrest Rucker. Officer Steven Angelini received a call from Det. Hersl informing him that an informant had reported that a black male wearing a black jacket, yellow shirt, and black pants standing on the corner of Frankford Avenue and Belair Road was armed. Off. Angelini relayed the tip to Off. Brown and called for other officers to assist in canvasing the location given by Det. Hersl. At first, the officers who responded did not see anyone matching the description, but they soon observed someone wearing clothes similar to those described walking by a shopping center on the 4200 block of Frankford Ave.[1] The man, who walked

[1] We take judicial notice that Google Maps shows an ALDI grocery store in a shopping center at 4214 Frankford Avenue on the corner of Belair Road; immediately behind the ALDI is 4209 Lasalle Avenue, where police recovered the handgun. *See Pahls v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (taking judicial notice of a Google Map and satellite image); *U.S. v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012)

with his hand on his waistband, made eye contact with an officer and began walking quickly away, then took off running behind the shopping center, still holding his waistband as he ran. The officers chased the man over a set of fences. As they ran toward Lasalle Ave., they saw the man toss a black handgun over a wooden fence at 4209 Lasalle Ave., just before the officers caught him.

When police apprehended the man, he was wearing a black jacket, yellow T-shirt, and black pants. Off. Brown backtracked and found a black handgun (a Hi-Point Model C-9 Luger handgun, loaded with six rounds) as well as a cellphone the man discarded along the way. After identifying the man as Rucker and learning of his criminal record and lack of a gun permit, officers processed and charged him.

A grand jury sitting in the City of Baltimore, on March 2, 2017, indicted Rucker on three counts: possession of a firearm after having been convicted of a disqualifying crime; possession of a firearm after having been convicted of a crime of violence; and wearing, carrying, and transporting a handgun.

On October 27, 2017, Rucker filed a motion to suppress and demand to produce witnesses. Rucker sought to suppress the property seized because, among other reasons, (1) police observed no behavior that justified the arrest; (2) the stop was based on illegal profiling; (3) the subsequent search and questioning was unlawful because it lacked reasonable articulable suspicion; and (4) the identification was fruit of the poisonous tree. In his motion, Rucker averred that Det. Hersl, the officer who relayed the informant's tip

(quoting Fed. R. Evid. 201) (taking "judicial notice of a Google map and satellite image as a 'source[] whose accuracy cannot reasonably be questioned'").

to Officer Angelini, had been federally indicted on charges relating to racketeering, robbery, drug dealing, and planting evidence.[2] Among Rucker's complaints were that the officers "did not independently seek to verify the information provided by Detective Hersl" and "never observed Mr. Rucker commit any unlawful acts or suspicious acts." Further, Rucker alleged that "it [wa]s clear that the police never saw him throw a firearm." He argued that "the police, without probable cause to believe that criminal conduct had occurred, and with no other alleged independent behavior of criminal activity observed to support their illegal arrest of Mr. Rucker, nevertheless illegally stopped, detained, questioned, identified and searched Mr. Rucker."

Rucker sought a hearing and a court order mandating that the State disclose certain information during discovery, including: "information concerning the veracity of the

[2] Eight members of the Gun Trace Task Force were indicted, six of whom pleaded guilty. Justin Fenton, *Baltimore Gun Trace Task Force officers were 'both cops and robbers' at the time, prosecutors say*, BALT. SUN (Jan. 23, 2018) [hereinafter "*Gun Trace Task Force* Article"]. On February 12, 2018, Det. Hersl, along with another officer on the Gun Trace Task Force, was convicted by a federal jury of racketeering, racketeering conspiracy, and robbery. Justin Fenton, *Baltimore Police officers found guilty of racketeering, robbery in Gun Trace Task Force corruption case*, BALT. SUN (Feb. 12, 2018). The charges stemmed from a federal investigation into officers on the Gun Trace Task Force. *Id.* According to an article published by *The Baltimore Sun*, other officers testified at Det. Hersl's trial "to routinely violating people's rights in the court of their work with Baltimore's plainclothes police squads – profiling people and vehicles, performing 'sneak and peek' searches without warrants, using illegal GPS devices to track suspects they claimed to be watching, and driving at groups of men to provoke them to flee so they could be chased and searched." *Id.* Detective Maurice Ward testified that "officers would drive up on groups of men, slam on the brakes and pop open their doors, for no reason other than to see if anyone would run. Those who fled were pursued, detained and searched." *Gun Trace Task Force* Article. This Court may take judicial notice of articles in newspapers that "are 'trustworthy and reliable.'" *See Gravenstine v. Gravenstine*, 58 Md. App. 158, 175 (1984) (quoting *Jones v. Ortel*, 114 Md. 205, 211 (1910)).

alleged Confidential Informant"; access to Detective Hersl's internal affairs file; and the production of Detective Hersl as a witness.

Motions Hearing

The court held a hearing on October 18, 2018.[3] Rucker began by explaining that there was a "quasi-suppression issue" concerning probable cause. He argued that evidence the State collected was "fruit[] of the poisonous tree because [Rucker] was illegally arrested and charged based on the probable cause generated by Officer Hersl." According to defense counsel, body-cam footage revealed that Det. Hersl told the officers on the scene to not disclose that an informant was involved, and that Det. Hersl would "provide the [officers] with the basis for the probable cause for the arrest." In Rucker's view, this rendered "all of the justification and probable cause" inseparable from Det. Hersl and his informant, "should that person even exist." Rucker described the "fundamental problem" as "that the State is relying on probable cause generated from a federally indicted and convicted officer, has not provided us with any information concerning the confidential informant[.]" Without Det. Hersl or "the requested information on the veracity of the alleged confidential informant," Rucker argued, he could not challenge the probable cause for his arrest.

[3] The circuit court held at least one other hearing on Rucker's motion prior to the October 18 hearing. The transcript(s) from the prior hearing(s) were not a part of the record on appeal. Rucker represented that Judge Nugent held a hearing "on the IAD files with regard to Detective Hersl[,]" and "rul[ed] favorably for the defense, explain[ing] to the State that the veracity and reliability of Detective Hersl, because he [wa]s the basis for the probable cause for the arrest, [wa]s a matter of significance in this particular case." At oral argument before this Court, the State represented that disclosure of information relating to the confidential informant was not addressed at that hearing.

An extended colloquy then followed during which the court asked the State, "what, if any, information involving this . . . confidential informant did the State provide to the Defense?"

> [THE STATE]: **Your Honor, the State did not provide any information regarding the confidential informant to the Defense.** May I continue or –
>
> THE COURT: Okay. Well, you want to tell me why?
>
> [THE STATE]: Yes. **So what the Defense did not tell you was that based upon what the officers on the scene had understood, they didn't stop Mr. Rucker, they didn't search Mr. Rucker, and they didn't find a handgun on Mr. Rucker. Mr. Rucker proceeded to take off running. He hopped two fences, and then he tossed a handgun over top of another fence and was stopped on the street closely thereafter. He was detained then, and then officers found a handgun two seconds later.**
>
> THE COURT: Okay. I'm going to stop you. **So are you saying that the information obtained from the confidential informant was not utilized?**
>
> [THE STATE]: **The information was utilized.** However –
>
> THE COURT: **In what way?**
>
> [THE STATE]: **In . . . that it directed them to . . . the Defendant.**
>
> THE COURT: Okay. **So the confidential informant directed the police officers to the Defendant?**
>
> [THE STATE]: **Correct.**
>
> THE COURT: Okay. And once they located the Defendant?
>
> [THE STATE]: The Defendant ran.
>
> * * *
>
> THE COURT: Okay. **So these three officers were on scene based on the information they received from Detective Hersl?**
>
> [THE STATE]: **That's correct.**
>
> THE COURT: Okay.

[THE STATE]: And . . . basically, what we're talking about here is that . . . the Defense is alleging that they would need the confidential informant's attested veracity in order to suppress the gun, in order to have a motion to suppress. However, the State's understanding of the law as well as what the facts in this case –

THE COURT: Okay. **Well, were not even to suppression.** I'm just talking about the information on the informant. **So you agree that the basis for the probable cause came from Detective Hersl who got it from the informant?**

[THE STATE]: **Correct.**

THE COURT: Okay. **So where's the information on the informant?**

[THE STATE]: **Your Honor, the State does not have that.** And –

THE COURT: **And why is that?**

[THE STATE]: **The State . . . was unable to procure that information from Detective Hersl.**

THE COURT: **Oh, okay.**

[THE STATE]: **I think I misspoke. The State does not agree that the probable cause for the stop was generated solely from the confidential informant's information. The[] . . . probable cause developed for the stop – or the reasonable suspicion of this defendant [] – began from the confidential informant, yes.**

THE COURT: Okay. **And we don't know who the confidential informant is?**

[THE STATE]: **No, Your Honor.**

THE COURT: **The request was made in compliance with the rule?**

[THE STATE]: **Yes, it was.**

THE COURT: Okay. **So the State was unable, or . . . decided not to supply the information?**

[THE STATE]: **That's correct, Your Honor.**

THE COURT: Okay. **Can you tell me what, if any, steps were taken to obtain that information?**

[THE STATE]: **No, Your Honor.**

THE COURT: Okay. **So how is it that anything that comes from that alleged probable cause is admissible?**

[THE STATE]: **I mean, this could be as simple as an officer driving up to a particular person –**

THE COURT: **Could be, but they didn't.**

[THE STATE]: **That's right. Concedes.**

THE COURT: And I'm not certain, but I'm sure the State's [] not in a position to vouch for the veracity of Detective Hersl.

[THE STATE]: That would be correct.

THE COURT: Okay. So anything that comes from the stop, or the detention of the Defendant, or the officers detaining, stopping the Defendant would be inadmissible?

[THE STATE]: From the stopping of the Defendant, yes, inadmissible. However, . . . there was nothing obtained from the stop of [] the Defendant.

THE COURT: Okay. So if nothing was obtained from the Defendant, then what . . . evidence do you have of a regulated firearm?

[THE STATE]: [] that there was a firearm that was recovered that was not on his person. He had thrown it prior to his stop.

(Emphasis added).

The court then shifted the conversation to the issue of expert-witness disclosure. The State explained that its primary and backup firearms experts were unavailable for trial, "[s]o the State asked Officer Brown, who is one of the officers who recovered the handgun

and submitted the handgun, to go to the Firearms Unit today and to shoot the firearm into the water tank." The State asserted that it did not need to qualify Officer Brown as an expert "as long as all he did was pull the trigger to allow the gun to fire."

After the State confirmed for the court that Officer Brown would testify that the gun was the same one recovered from the scene and qualifies as a handgun, the court announced, "that it's heard sufficient information to make a determination in this matter." But first, the court permitted the parties "one final opportunity to resolve this matter." Defense counsel then conferred with Rucker and rejected the State's plea offer.

The court then granted Rucker's motion to dismiss without further explanation, and the State's timely appeal followed.

DISCUSSION

The State argues that, regardless of the circuit court's reason for dismissing the case, "the dismissal was error and must be reversed." The two possible discovery violations, the State says, are (1) its failure to disclose the confidential informant whose tip led the police to Rucker and (2) its intention to call Officer Brown to testify that the handgun was operable. We shall address each in turn.

A. Whether the State Committed a Discovery Violation

Maryland Rule 4-263 governs discovery in the circuit court. Specifically, Rule 4-263(d) outlines what a State's Attorney must provide to a defendant in discovery preceding a criminal trial. During discovery in circuit court in a criminal case, the State must disclose, among other things, "[a]ll relevant material or information regarding: (A) specific searches

and seizures. . . ; and (B) pretrial identification by a State's witness[.]" Md. Rule 4-263(d)(7).

When considering discovery violations on appeal, we afford great deference to the determinations of the trial court, including whether a party was prejudiced by a discovery violation and what sanction should be imposed. *Cole v. State*, 378 Md. 42, 55-56 (2003). In reviewing the court's application of the Maryland Rules to a particular situation, however, "we exercise independent *de novo* review to determine whether a discovery violation occurred." *Id*. at 56 (internal quotations omitted).

The Court of Appeals has instructed that, in regard to the issue of whether the identity of a confidential informant should have been disclosed, "the ultimate decision is within the discretion of the trial court. . . [and i]n determining whether a court properly exercised its discretion, the question is 'whether the court reached the right balance among the competing interests.'" *Elliott v. State*, 417 Md. 413, 428 (2010) (quoting *Edwards v. State*, 350 Md. 433, 442 (1998).

1. Confidential Informant

The State concedes that it refused to identify the confidential informant in this case but maintains that its failure to do so was not a discovery violation. According to the State, "[n]othing about the confidential informant's tip" and "[n]othing Detective Hersl told the other officers contributed to the probable cause to arrest Rucker." This is because, the State explains, police did not arrest (or seize) Rucker until after the officers saw Rucker run and "thr[o]w a gun over a wooden fence." The conclusion, then, that the State was

obligated to identify "the confidential informant, and its failure to do so was a discovery violation, . . . was an abuse of the court's discretion."

Rucker responds that the informant's identity was "of paramount importance" given that his case rested on challenging the existence of probable cause to arrest him, which, he says, depended on the reliability of the informant whose tip led officers to focus their attention on Rucker. In Rucker's view, the circuit court was correct to interject that this case is not one in which officers randomly drove up to a person who responded by running because the "officers were not randomly in this location and the police did not randomly approach Mr. Rucker." Rucker contends that it's "impossible to escape that police officers approached [him] based on information from Detective Hersl," whom the State "could not vouch for the veracity of," and "the State could not produce the identity of the confidential informant[.]" Without this information, Rucker insists, "it was impossible for the defense to challenge the probable cause or the reasonable suspicion to approach [him]."

When the State's case involves information provided by a confidential informant, the defendant may overcome the long-recognized privilege of the State to protect the identity of informants, *see Brooks v. State*, 320 Md. 516, 522 (1990), by moving to compel disclosure of the informant's identity and presenting "a substantial reason indicating that the identity of the informer is material to his [or her] defense or the fair determination of the case." *Id.* at 528 n.3 (citation omitted). The informant's identity may be material when the defendant alleges a search or seizure was unconstitutional, and the warrantless search or seizure was based on a confidential informant's tip. *Elliott*, 417 at 446. To determine the materiality of an informant's identity and whether the privilege (of nondisclosure)

applies, the Court of Appeals has instructed trial courts to apply the balancing test that the Supreme Court set out in *Roviaro v. U.S.*, 353 U.S. 53 (1957). That test requires the court to weigh "the public interest in protecting the flow of information against the individual's right to prepare his [or her] defense." *Elliott*, 417 Md. at 445 (quoting *Roviaro*, 353 U.S. at 62). The court's assessment of the materiality of the informant's identity to the defendant's case is necessarily tempered if probable cause is insignificant to the case's disposition or if there was sufficient evidence to establish probable cause "apart from his [or her] confidential communication." *Id.* at 446 (quoting *Roviaro*, 353 U.S. at 61).

The Court of Appeals in *Elliott* held that a suppression court erred by denying Winston Elliott's motion to disclose the identity of a confidential informant used by the State. *Id.* at 448. Police in that case received a tip from a registered confidential informant ("CI") that a man named Winston would be delivering a large quantity of marijuana that same day. *Id.* at 422-23. The CI described Winston "as a slim, black male, approximately five feet, eight inches tall, with a heavy Jamaican accent[,]" and said Winston would be driving a black Nissan Maxima, and provided police with a license plate number for the car. *Id.* at 423. Sure enough, police followed the tip and observed a black Nissan Maxima, its license plate nearly an exact match, drive into the shopping center named by the informant. *Id.* Four officers surrounded the car in the parking lot and arrested Elliott and his friend who was a passenger in the car. *Id.* at 423-24. One officer on the scene smelled marijuana emanating from the trunk, used Elliott's keys to open it, and found a suitcase containing 20 pounds of marijuana. *Id.* at 424.

Prior to his trial for the drug-related offenses, Elliott sought to suppress the drug evidence and compel discovery of the CI. *Id.* Elliott argued that the CI set him up and that he did not know the trunk contained drugs. *Id.* at 425. The circuit court denied both motions, and this Court affirmed. *Id.* at 425-27. The Court of Appeals affirmed the denial of the motion to suppress but, as relevant to our case, reversed the denial of Elliott's motion to compel the CI's identity. *Id.* at 444, 448. In the Court's view, "[t]he facts compelled a limit on the State's privilege based on fundamental fairness, because disclosure was both relevant and helpful." *Id.* at 446. Not only was the CI's information relevant to the offenses charged and the defenses Elliott raised, the Court reasoned, but it "was also *integral* in establishing the alleged probable cause to stop and search Elliott's vehicle." *Id.* at 447 (emphasis added). The Court concluded that, "[u]nder *Roviaro*, the State was required to disclose the identity *because there was insufficient evidence apart from his confidential communication to establish probable cause.*" *Id.* at 448 (emphasis added).

Returning to the case before us, the State's position is that it did not need to produce information relating to the confidential informant because any information known to the police prior to Rucker running away was irrelevant to the probable cause,[4] which police

[4] We do not agree that the informant's information was necessarily *irrelevant* to probable cause—as exhibited by Officer Brown's inclusion of the informant's tip in his statement of probable cause and the State's concession below that the reasonable suspicion to stop Rucker began with the confidential informant's tip. A probable-cause determination is based on the totality of the circumstances. *Steck v. State*, 239 Md. App. 440, 459 (2018) ("Our evaluation as to whether probable cause exists 'requires a nontechnical, common sense evaluation of *the totality of the circumstances* in a given situation in light of the facts found to be credible by the trial judge.'" (emphasis added)), *cert. denied*, 462 Md. 582 (2019), *cert. denied*, 139 S. Ct. 2763 (2019).

gained independent of the informant's tip when Rucker fled and discarded his firearm. The State is correct that there was likely sufficient evidence *apart* from the confidential informant's tip to establish probable cause. *Cf. Elliott*, 417 Md. at 448. This is true because a person is not 'seized' by a law-enforcement officer's show of authority unless the person yields to that show of authority. *See California v. Hodari D.*, 499 U.S. 621, 626-30 (1991); *see also Henderson v. State*, 89 Md. App. 19, 24 (1991) (rejecting an appellant's challenge to *Hodari D.* on state constitutional grounds). In other words, a police officer yelling, "Stop!" or chasing a person is not a seizure unless the person stops in response to the show of authority or the officer restrains the person through physical force. *Id.* at 626 ("An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority."). Our inquiry, then, into whether police had probable cause to support a seizure "begins, not where there is a 'show of authority' by police, but when the subject yields to that 'show of authority.'" *Williams v. State*, 212 Md. App. 396, 409-10.

Given that Officer Brown's statement of probable cause in this case articulated that officers saw Rucker discard a firearm at 4209 Lasalle Avenue prior to his apprehension, the officers had probable cause to seize Rucker—at the time of the seizure—independent from the informant's tip. Rucker has not challenged, in this Court,[5] the account of events Officer Brown provided in his statement of probable cause. On the facts before us, then, we fail to see how the informant's information was integral to the inquiry into whether Rucker discarding the firearm provided police probable cause to arrest him. *Cf. Elliott*,

[5] Before the circuit court, Rucker disputed whether any officers witnessed him discard the weapon.

417 Md. at 447. With that said, the State's interest in protecting the identity of its confidential informant was also negligible, at best, considering the State's inability to identify the informant or vouch for Det. Hersl's credibility. Regardless, we cannot discern from the transcript whether the court performed the *Roviaro* balancing test so that we may determine, as is our responsibility, "whether the court applied correct legal principles and, if so, whether its ruling constituted a fair exercise of its discretion." *Edwards*, 350 Md. at 442. Moreover, as we will explain below, even if the circuit court was within its discretion to compel disclosure of the confidential informant, its remedy for the State's failure to do so should have been tempered by the limited interest Rucker had in the information's disclosure.

2. Witness Disclosure

The State insists that its failure to identify Officer Brown as an expert witness was not a discovery violation because Officer Brown planned to testify only about the gun's operability, which does not require expert testimony and "can be proven by circumstantial evidence alone." In response, Rucker does not characterize Officer Brown as an expert witness but contends, nevertheless, that the State violated Maryland Rule 4-263 by disclosing, on the day trial was scheduled to start, that Officer Brown would test-fire the firearm recovered and testify that it met the definition of a handgun. Rucker argues that the identity of the witness who test-fired the firearm and would testify that the firearm met the definition of a handgun was "evidence for use at trial" under Rule 4-263, and that the State had "an affirmative duty to disclose" Officer Brown's name.

Under Maryland Rule 4-263(d)(3), the State must provide the defense with the following:

> As to each State's witness the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony: (A) the name of the witness; (B) . . . the address and, if known to the State's Attorney, the telephone number of the witness; and (C) all written statements of the witness that relate to the offense charged[.]

Unless ordered otherwise, the State must make its disclosures under subsection (d) "within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court[.]" Md. Rule 4-263(h). The State (and defense) also have "a continuing obligation to produce discoverable material and information to the other side." Md. Rule 4-263(j). So, if the discoverable information was not known to or otherwise available to the State in time to comply with subsection (h), the State must "supplement [its] response promptly." Md. Rule 4-263(j).

As one ground for Rucker's motion to dismiss, defense counsel told the court that the State had "advised [him] today of a potential new expert witness on the part of the State[.]" Defense counsel left it to the State to explain further so as to not "misspeak as to what that witness may be testifying to, but [] believe[d] they ha[d] a new expert witness."

The State is correct that Officer Brown did not need to qualify as an expert witness to testify to the operability of the handgun because, "in the absence of contradictory evidence, the prosecution [i]s not required to introduce specific evidence that the weapon was a firearm; was operable; or was not a toy." *Brown v. State*, 182 Md. App. 138, 167 (2008) (footnote omitted). Further, fact-witness testimony that a firearm was fired can suffice to show a weapon was a handgun. *See id* at 168.

As for whether the State failed to disclose Officer Brown as a fact witness, that issue was not developed in the arguments before the suppression court, and the State represented before this Court that it would have included Officer Brown on its witness list as a matter of course. On the record before us on appeal, we cannot say that the State violated the discovery rules by failing to disclose Officer Brown as a fact witness.[6]

B. The Discretion to Sanction

Even if it committed a discovery violation, the State says, the circuit court abused its discretion by dismissing the case without considering the factors set out in *Raynor v. State*, 201 Md. App. 209 (2011), *aff'd*, 440 Md. 71 (2014). As evidence that the State's violations were not so egregious as to warrant dismissal of the case, the State points to the trial judge's "willingness to give the parties 'one final opportunity' to resolve the case before announcing her ruling on the motion [to dismiss]."

In his response, Rucker argues that the circuit court was not required to state its rationale on the record because "ample reasons existed on this record." He contends that the State ignores that each of the considerations it lists were discussed at the hearing, at

[6] The State is also correct that any error relating to the disclosure of Officer Brown as a witness did not justify dismissal of the charges. The State explained that it failed to disclose an expert witness because none of its experts were available on the day of trial, so it planned to call Officer Brown to testify as a fact witness instead. We mentioned above that the State says it had disclosed Officer Brown as a fact witness, blunting any prejudice to Rucker. Further diminishing any prejudice is the fact that operability—the topic on which Officer Brown planned to testify—is not a required element of possession of a firearm by a disqualified person. *See Hicks v. State*, 189 Md. App. 112, 138-39 (2009). Even if Rucker was prejudiced, however, a continuance to allow defense counsel to prepare to cross-examine Officer Brown could have cured any prejudice. *See Graham*, 233 Md. App. at 459-60.

which the circuit court judge determined she had "heard enough information to make a determination." The State's inability to identify the confidential informant or produce Detective Hersl prejudiced his case, Rucker says, because it "completely eliminated" his ability "to challenge the credibility of Detective Hersl and the confidential informant, to challenge the probable cause to have approached Mr. Rucker, and to mount a defense." He argues he was also prejudiced by the State's failure to disclose Officer Brown as a witness because "Defense counsel had no prior knowledge that Officer Brown would be testing that weapon, what his training was, or time to prepare to cross-examine Officer Brown on the subject of the test fire or the definition of a handgun." As for whether postponement would remedy the prejudice, Rucker avers that "[i]t would defy logic to think that in a case that had already been pending for one year and seven months, an additional postponement would suddenly enable the State to ascertain the identity of the confidential informant that it had not yet been able to determine." And even if a postponement might have cured the delay in disclosing Officer Brown, Rucker concludes that the State's delay should be viewed in the greater context of its other discovery failures.

Maryland Rule 4-263(n) governs discovery sanctions in the circuit court:

> **Sanctions.** If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, 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. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

A trial court sanctioning a party for discovery violations should consider four factors in exercising its discretion: "(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 (quoting *Thomas v. State*, 397 Md. 557, 570-71 (2007)).

Generally, a court's sanction should be only as severe as necessary to further the purpose of the discovery rules, *Thomas*, 397 Md. at 571, which "is to give a defendant the necessary time to prepare a full and adequate defense." *Raynor*, 201 Md. at 228 (citation omitted). Dismissing the charges against a defendant, is one of "the most drastic sanctions" at a trial court's disposal. *See State v. Graham*, 233 Md. App. 439, 459 (2017). But "if the discovery violation irreparably prejudices the defendant," disposing of the case may be proper even for an unintentional violation. *Raynor*, 201 Md. App. at 228. We review a circuit court's choice of sanction for abuse of discretion. *See Graham*, 233 Md. App. at 460.

We recently considered the propriety of a trial court's dismissal of a criminal case as a discovery sanction. *See Graham*, 233 Md. App. 439. Graham was arrested for drug possession and charged. *Id.* at 442. In October 2015, during discovery in the District Court, defense counsel requested information relating to drug testing the State performed on the substance Graham had possessed. *Id.* The State never produced the information. *Id.* at 444-46. When Graham appeared for trial in the District Court that December, his counsel requested a jury trial, and the court transferred the case to the circuit court, rescheduling the trial for January. *Id.* at 446. On a Friday, one business day before trial

was scheduled to begin, defense counsel contacted the Assistant State's Attorney ("ASA") assigned to the case to inform her that he had not yet received material in response to his discovery request. *Id.* Following the weekend, when the clerk called the case for trial, defense counsel informed the court of the State's failure to produce the requested drug-testing information. *Id.* The ASA apologized and informed the court that she was not aware of the request until the preceding Friday, seemingly because the State's Attorney Office's notes on the case file did not include the request when the case transferred from the District Court to circuit court. *Id.* at 447. Defense counsel argued that the request, then three months outstanding, was standard in drug cases and should not have come as a surprise to the ASA. *Id.* at 447-48. The court opined that it did not matter that Graham made his request in the District Court because the State's Attorney Office is "all one . . . office." *Id.* The ASA responded, "the State's just letting you know, Your Honor, I was made aware Friday and we'll be glad to get [Graham's counsel's] discovery [request] but the State does not have it in its possession." *Id.* at 449. Defense counsel then moved to dismiss the case, and, without further discussion, the court granted the motion. *Id.*

The State appealed, and this Court vacated the court's sanction. *Id.* at 460. First, we upheld the court's conclusion that the State's failure to produce the requested discovery information was a violation and opined that dismissal was a sanction available to the circuit court. *Id.* at 453, 457. We then applied the factors set out in *Raynor* to determine whether, on the facts before the circuit court, dismissing the case as a sanction was an abuse of discretion. *Id.* at 457-58. Starting with why the State failed to produce the information, we reasoned that (1) the State's failure was inadvertent and was the result, presumably, of

poor communication; (2) "at no time during the three-month delay did Graham's attorney notify the State's Attorney's office that he had not received the information requested"; (3) Graham's counsel waited until the last business day before Graham's trial . . . to inform the State that he had not received this 'critically important' information"; and (4) "the State offered to rectify its error by providing the material requested." *Id.* at 457-58. We then addressed the second and third factors—amount of prejudice and feasibility of curing prejudice—together. *Id.* at 458. On those points, we reiterated the State's willingness to comply, and we noted that Graham did not dispute that a continuance would cure the prejudice. *Id.* Despite the State's assurances, we reasoned, the circuit court imposed "one of the most drastic sanctions at its disposal" *without indicating why it chose to do so* and without inquiring into how long it would take the State to produce the material. *Id.* at 459. Given the State's willingness to comply and that the speedy-trial deadline was still five months in the future, we concluded that a continuance would have furthered "'the purpose of the discovery rules,' which 'is to give a defendant the necessary time to prepare a full and adequate defense.'" *Id.* at 459-60 (quoting *Raynor*, 201 Md. App. at 228). Finally, applying the fourth *Raynor* factor, we observed that "the circuit court did not identify any other relevant circumstances that it considered in concluding that dismissal was the appropriate remedy for the State's failure to provide the discovery sought by Graham." *Id.* at 460. Accordingly, we held "that the circuit court, although vested with the authority to impose the sanction it did for the State's discovery violation, abused its discretion in dismissing the charges against Graham." *Id.*

Applying the *Raynor* factors to the facts before us, we conclude that the circuit court abused its discretion by dismissing the charges against Rucker. The reason the disclosure was not made in this case is relatively atypical: the State conceded that it "was unable to procure [information on the informant] from Detective Hersl" before he was arrested and sentenced on federal racketeering charges. The import of this troubling explanation, however, is limited by the second *Raynor* factor. For the reasons we discussed above, the informant information was unlikely to affect the ultimate probable-cause determination. Considering the limited (if any) prejudice to Rucker, a much less severe curative sanction would have still allowed Rucker to prepare a full and adequate defense. *See Raynor*, 201 Md. at 228. The fourth *Raynor* factor—other relevant considerations—does not change that conclusion because the circuit court failed articulate *any* considerations before it imposed one of "the most drastic sanctions" at its disposal and dismissed the charges against Rucker. *See Graham*, 233 Md. App. at 459.

For the reasons set out in this opinion, we conclude that the trial court abused its discretion by failing to consider the proper legal standard in dismissing the charges against Rucker as a discovery sanction. *See id*. at 460. We remand the case to the circuit court for consideration of Rucker's motion to suppress. To allow for maximum remedial flexibility on remand, we offer no opinion on what, if any, less-drastic curative sanction the circuit court may impose on remand should the court find, on the record, a discovery violation that warrants such a sanction.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; APPELLEE TO PAY COSTS.