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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 55A04-0809-CR-536
)	
JASON M. BENSON,)	
)	
Appellee-Defendant.)	

INTERLOCUTORY APPEAL FROM THE MORGAN CIRCUIT COURT
The Honorable Matthew G. Hanson, Judge
The Honorable Brian Williams, Permanent Judge Pro Tempore
Cause No. 55C01-0711-FD-366

June 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

In this discretionary interlocutory appeal, the State of Indiana appeals the trial court's grant of Jason M. Benson's motion to exclude his toxicology report, which revealed that his BAC was .20%, that the State turned over to him approximately 150 days after the discovery deadline.¹ Because as a general matter the proper remedy for a discovery violation is a continuance and there has been no showing in this case that the State's actions were deliberate or otherwise reprehensible and there is no prejudice to Benson because there has been no trial, we find that a continuance was the proper remedy here. We therefore conclude that the trial court abused its discretion in excluding Benson's toxicology report.

Facts and Procedural History

On November 9, 2007, Benson was arrested and charged with operating a vehicle while intoxicated endangering a person as a Class A misdemeanor and operating a vehicle while intoxicated endangering a person as a Class D felony due to a prior conviction. After receiving a search warrant, a blood sample was taken from Benson at Morgan County Hospital around 4:39 a.m. on November 9 and sent to the Indiana State Department of Toxicology ("the Department"). The trial court issued an automatic discovery order on November 9, 2007, which required the State to turn over to the defense within twenty days, among other things, "[a] copy of all police reports and any reports or statements of experts made as a result of any scientific tests, experiments or comparisons made in connection with this case." Appellant's App. p. 13. Pursuant to the

¹ The State appeals pursuant to Indiana Code § 35-38-4-2(6).

order, “[t]he obligations and responsibilities under this order shall continue throughout the proceedings and until final disposition of the case.” *Id.* at 14.

The Department completed its report on November 29, 2007, and sent it by mail to Officer Bryan McGauhey at the Mooresville Police Department and copied Steven Sonnega at the Morgan County Prosecutor’s Office. State’s Ex. 1. The police department physically received the report in its office on December 6, 2007. *Id.* The toxicology report indicates that Benson’s BAC was .20%. *Id.*

Defense Counsel Scott Knierim filed his appearance on January 7, 2008. Defense Counsel Knierim then filed a motion requesting a continuance of the January 16, 2008, pretrial conference. The trial court granted the motion and reset the pretrial conference for February 27, 2008.

On February 26, 2008, one day before the pretrial conference, Deputy Prosecuting Attorney Sara Chamness (“DPA Chamness”), who was assigned to this case in January 2008, filed a Certificate of Partial Compliance. In it, she certified to the court that the discovery ordered by the court had been partially completed and sent to defense counsel that day. Specifically, the certificate provided: “The State certifies that this Discovery represents all items available to this date, and that the State will continue to update its Discovery as items become available.” Appellant’s App. p. 22. In a separate document also filed on February 26 and entitled State’s Response to Court’s Order Re: Discovery, the State included in its witness list a witness from the Department of Toxicology. There is also a section that provides, “[u]pon request of the defendant, the State shall make arrangements convenient to the parties for the inspection, copying, and photographing of

any such evidence. Such arrangements shall be made expeditiously.” *Id.* at 24. This section includes “Lab results, if any.” *Id.*

The record is not entirely clear, but apparently at the February 27, 2008, pretrial conference, Defense Counsel Knierim indicated to DPA Chamness that he had not received Benson’s toxicology report. DPA Chamness checked her file, and she did not have it either. Therefore, Defense Counsel Knierim requested a continuance, and the pretrial conference was reset for April 30, 2008. Also on February 27, 2008, DPA Chamness sent a letter to Officer McGauhey at the Mooresville Police Department requesting a copy of Benson’s toxicology report because she could not “find one in [her] file.” State’s Ex. 3. In the letter, she asked Officer McGauhey to provide it “as soon as possible.” *Id.*

Officer McGauhey, however, did not timely respond, so DPA Chamness had to contact the Department for Benson’s toxicology report. Eventually, DPA Chamness received Benson’s toxicology report and provided it to defense counsel on April 29, 2008, which was one day before the next scheduled pretrial conference.

At the April 30, 2008, pretrial conference, Defense Counsel Knierim indicated that he would be filing a motion to exclude. As of June 6, 2008, however, the motion to exclude had not been filed, so the court set a pretrial conference for June 18, 2008. The pretrial conference was held on June 18, 2008, at which time Defense Counsel Knierim finally filed the motion to exclude Benson’s toxicology report. The trial court scheduled a hearing on the motion to exclude for July 25, 2008.

At the hearing on the motion to exclude,² the State presented the testimony of Officer McGauhey. DPA Chamness and Defense Counsel Knierim also presented arguments. At the conclusion of the hearing, the trial court left the parties with the following remarks:

All right. I am going to take this under advisement. I want to look at this Court of Appeals case. Here's my first observation and my notion off the cuff and I may have to revise this a little bit off of the review of the case law. But if the State wants to play hard ball and get warrants . . . [t]hen the State needs to be ready to have that playing field ready to go where they can still play by the rules and get information, even if it[']s coming from an odd angle, to the defendant in a timely manner, particularly given the fact that it's an OWI case, we have a local policy regarding 50% reduction.^[3] The defendant needs to be able to make an intelligent choice about this case by the omnibus date and that simply didn't happen in this case. It didn't happen by a matter of months so let me look at it and see what I think, but that's my observation while we are all sitting in the courtroom. That will be all.

July 25, 2008, Tr. p. 35. On August 12, 2008, the trial court issued the following order:

This matter having come before the Court upon the Defendant's motion to exclude certain blood draw medical test results as a result of delay in providing those results to the Defendant;

And the Court finding that the results were provided around 153 days late with respect to the discovery rules;

And that the delay was unreasonable;

And that the delay has resulted in prejudice to the Defendant, albeit very minor.

The Court now orders that any evidence of the blood draw or the medical test results there from be excluded from any trial of this matter.

² At some point, the Department ran another test on Benson's blood sample and issued an Amended Toxicology Report on July 17, 2008. *See* State's Ex. 4. This report still shows that Benson's BAC was .20% but also shows that he tested positive for marijuana. The State presented this evidence to Defense Counsel Knierim on July 24, 2008, the day before the hearing on the motion to exclude.

³ There is no explanation for the 50% reduction local policy.

Appellant's App. p. 28. The trial court then set the matter for another pretrial conference. In the meantime, this discretionary interlocutory appeal pursuant to Indiana Appellate Rule 14(B) ensued.

Discussion and Decision

In this discretionary interlocutory appeal, the State contends that the trial court erred in excluding Benson's toxicology report. The trial court has broad discretion in dealing with discovery violations and may be reversed only for an abuse of that discretion involving clear error and resulting prejudice. *Berry v. State*, 715 N.E.2d 864, 866 (Ind. 1999).

Preliminarily, we note that Benson did not file an appellee's brief. This "circumstance in no way relieves us of our obligation to decide the law as applied to the facts in the record in order to determine whether reversal is required." *Blunt-Keene v. State*, 708 N.E.2d 17, 18 (Ind. Ct. App. 1999). However, controverting arguments advanced for reversal is an obligation which properly remains with counsel for the appellee. *Id.* Accordingly, when an appellee fails to submit a brief, an appellant may prevail by making a prima facie case of error. *Bovie v. State*, 760 N.E.2d 1195, 1197 (Ind. Ct. App. 2002). Prima facie error means "error at first sight or appearance." *Blunt-Keene*, 708 N.E.2d at 19.

Here, the record shows that the trial court entered its automatic discovery order on November 9, 2007, the day of Benson's arrest and charging, and the order required the parties to submit discovery in twenty days and provided the parties with a continuing

obligation to do so. The Department received Benson's blood sample on November 16 and completed its report on November 29. The Mooresville Police Department received Benson's toxicology report, which revealed that his BAC was .20%, on December 6. Although the report was also sent to the prosecutor's office, it is not clear what happened to that copy. What is clear is that Defense Counsel Knierim—without filing any sort of discovery violation motion⁴—asked DPA Chamness for a copy of the report at the February 2008 pretrial conference, and DPA Chamness produced it one day before the April 2008 pretrial conference. Although Defense Counsel Knierim indicated at the April 2008 pretrial conference that he would be filing a motion to exclude Benson's toxicology report, he did not file it until the June 2008 pretrial conference. A hearing on the motion to exclude was then held on July 25, 2008.

At this hearing, the State argued that it did not know what happened to the copy of Benson's toxicology report that was sent to the prosecutor's office, that DPA Chamness tried to get a copy from Officer McGauhey once Defense Counsel Knierim requested the report in February 2008 and she realized it was not in her file, and that DPA Chamness had to eventually contact the Department for a copy. Specifically, DPA Chamness pointed out:

We haven't even set a trial date in this case. [Benson's toxicology report] is clearly relevant. The State would be hugely prejudiced if this was not

⁴ The trial court's November 9, 2007, automatic discovery order clearly contemplates such a motion. *See* Appellant's App. p. 14 ("The parties shall have a continuing obligation to assist the Court in the enforcement of this order. If a response to the order is not filed in a timely manner, then the opposing party shall file an appropriate motion within 5 days of the failure seeking sanctions or any other appropriate remedy. If such a pleading is not filed by the party getting the benefit of a discovery response then the failure to file shall be deemed a waiver of any right to a continuance allegedly necessary for preparation for any hearing or trial of this case. Failure to comply with this order may be enforced by contempt on the court's own motion or the motion of any party.") (formatting altered) (capitalization omitted).

entered. These are – this is a motion based on alleged failures by the State and maybe [Defense Counsel Knierim’s] right, maybe we should follow up on this everyday. Unfortunately, we have hundreds of cases that w[e] are dealing with this stuff on, but we did get it to him, it wasn’t flagrant, wasn’t deliberate, did not impair any right to a fair trial, the due process rights have not been troubled here, we discovered it as quickly as we could, uh, I didn’t withhold it, I was not holding it [in] my file trying to be funny. Mr. Knierim stated that I don’t care about omnibus dates, I take offense to that, because I do, I don’t try my cases and I think [he] knows me well enough to realize that I try to get things done on time and quickly and fairly. I do care about omnibus dates. If I had had this evidence sooner, I would have done a motion to amend to include the percentage of alcohol as well as possession of marijuana charge. If I had these I would have done a motion to add those charges. So, I don’t think defense counsel has proven that we weren’t acting in good faith and I think continuance was a proper remedy, which [was] what was done

July 25, 2008, Tr. p. 32-33. Defense Counsel Knierim, on the other hand, argued that the State “dropped the ball” because either the prosecutor’s office or the Mooresville Police Department had Benson’s toxicology report in its possession since early December 2007 and therefore it was a “clear violation of the discovery rules by 150 days.” *Id.* at 26, 27. As for prejudice, Defense Counsel Knierim alluded to missing out on a “50% reduction.” *Id.* at 28.

It is apparent that the State violated the local discovery rules, which is not to be condoned. However, as a general proposition, the proper remedy for a discovery violation is a continuance. *Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000). Exclusion of evidence as a remedy for a discovery violation is *only* proper where there is a showing that the State’s actions were deliberate or otherwise reprehensible and the conduct prevented the defendant from receiving a fair trial. *Id.*

Given our prima facie standard of review because Benson did not file a brief on appeal, we conclude there is simply no showing that the State’s actions were deliberate or

otherwise reprehensible. The State lost Benson's toxicology report that was completed in late November 2007 and probably received in the prosecutor's office in early December 2007 and then did not provide it soon enough once requested by defense counsel in February 2008. This may demonstrate carelessness, inattentiveness, and lack of follow through, but it does not demonstrate conduct that is deliberate or reprehensible. Moreover, this did not prevent Benson from receiving a fair trial. At no point during this process was a trial even scheduled. In fact, there were several continuances of the pretrial conferences to address this matter. And because this is an interlocutory appeal, Benson has yet to have a trial. We therefore fail to see prejudice to Benson.⁵ As a result, we find that a continuance was the proper remedy to address the discovery violation in this case. We therefore conclude that the trial court abused its discretion by excluding Benson's toxicology report and remand this case for proceedings consistent with this opinion.

Reversed and remanded.

NAJAM, J., and FRIEDLANDER, J., concur.

⁵ And because Benson did not file an appellee's brief, we do not understand his "50% reduction" prejudice argument as alluded to at trial. In its order, the trial court found "very minor" prejudice to Benson, which sheds some light on the persuasiveness of this argument. Appellant's App. p. 28.