No. 22441 - State of West Virginia Ex Rel. Michele L. Rusen, Prosecuting Attorney of Wood County West Virginia v. The Honorable George W. Hill, Judge of the Circuit Court of Wood County, West Virginia

Workman, Justice, dissenting:

I do not necessarily disagree with the majority's recitation of the law applicable to this case. The difficulty with the majority's approach, however, is that it crams a square peg into a round hole. The facts and circumstances of this case simply do not justify the harsh and ultimate sanction of dismissal with prejudice. In short, I would hold that the circuit court abused its discretion in this instance and that the Relator has adequately demonstrated the standard required for granting a writ of prohibition. Accordingly, I respectfully dissent.

The majority sets forth several factors to be weighed in determining whether a circuit court's exercise of discretion is appropriate in a given case. It is helpful, then, to consider those factors in conjunction with the record in this case. First, we are instructed to look at "the importance and materiality of the information that was not disclosed." State ex rel. Rusen v. Hill, No. 22441, slip op. at 14 (W. Va. Dec. 21, 1994). It must be

emphasized that nowhere in the record did the Respondent ever give any good indication of how the requested information was even relevant, much less important and material. Aside from a conclusory statement at the March 11 hearing that the documents were "essential," there does not appear to be any suitable basis in the record for concluding that the documents are either important or material.

Second, we must consider "the ability of the party to try the case without the information or the nature of the prejudice claimed by the failure to comply with the discovery order." Id. Again, the Respondent's ability to try the case without the requested information is left up for speculation. The record is devoid of any hint as to how the missing documents would assist the Respondent either in proving (1) her innocence or (2) an affirmative defense. Further, it appears that some of the documents requested by the Respondent after the Relator's March 21 discovery response may have been duplicative of materials the Respondent had already received. See Relator's Pet. at 12.

As for any prejudice suffered from the Relator's failure to comply with the circuit court's discovery order, the Respondent has answered the question for us. The following exchange occurred at

a June 3, 1994, hearing on the Relator's motion to reconsider the dismissal order:

> JUDGE HILL: Tell me how the defendant has been prejudiced by the delay, other than psychologically?
>
> MR. COSENZA: Well, other than psychologically, Your Honor, probably not.

Relator's Exhib. 5 at 7 (emphasis added).

Next, the Court looks to "the extent to which a continuance or other lesser relief would delay the trial or otherwise impact adversely the administration of justice." Slip op. at 14. The majority sets forth an impressive number of less serious alternatives to a dismissal with prejudice. Further, the majority notes repeatedly that of all the tools at the disposal of the circuit court, the dismissal sanction is to be used most sparingly and only in the most egregious of cases. The majority also notes that "[o]ur cases and the West Virginia Rules of Evidence have declared an implicit

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[1]It is interesting to note that even though the Respondent admitted a lack of prejudice, the majority insists on concluding that prejudice is present. In finding such presumed prejudice based upon delay in the instant case, the majority relies in part on the Supreme Court's recent decision in Doggett v. United States, ____ U.S. ____, 112 S. Ct. 2686 (1992). The citation to Doggett and the implicit suggestion that it has any application to the facts of this case is almost amusing. Doggett dealt with a defendant's right to a speedy trial, and the delay in that case (between indictment and arrest) exceeded eight years. Id. at ___, 112 S. Ct. at 2690.

preference for a continuance when there has been a discovery violation." Id. at 15.

It is important to remember that at the time the dismissal occurred, no new trial date had been set. Relator's Ex. 4 at 5. Further, the circuit court clearly thought that a continuance might still be appropriate, even when it was reconsidering this matter after its dismissal order. At the hearing on the Relator's motion to reconsider on June 3, 1994, the court suggested that it might still be willing to change its dismissal ruling if all of the requested material had been provided by the date of the hearing. Relator's Ex. 5 at 9. When one coalesces (1) the supposed use of dismissal as a weapon of last resort, (2) the "preference for a continuance," and (3) the record as a whole, a rescheduling of the trial was clearly warranted.

Even if a sanction was necessary, however, the administration of justice in this case would have been better served if the circuit court employed a less severe sanction, such as prohibiting the Relator from using the requested material at trial. At least then

this matter would have been decided on the merits rather than on a mere procedural technicality.

Fourth, we examine "the degree of negligence involved and the explanation of the party's failure to comply with a discovery request." Slip op. at 14. There is ample evidence in the record to support the conclusion that the Relator was doing her best under the circumstances. Utilizing the majority's chronology, the first discovery request under the second indictment was made on October 7, 1993. The Relator responded over one week prior to trial. When informed on November 23 by the Respondent that more information was needed, the Relator undertook to gather the information, and admittedly took some time to do so. Part of the problem arose from Burger King's misunderstanding of the request. When ordered at the March 11 hearing to produce the requested documentation within ten

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[2]What clearly did not further the administration of justice in this case was the circuit court's improper preoccupation with Burger King. A fair reading of the record suggests that a primary motivation of the dismissal order was Burger King's status as "a big company, a big company with lots of resources, plenty of people, plenty of money to act on this . . . ." Relator's Ex. 4 at 7.

It was the circuit court's incorrect perception that its orders were being disobeyed by Burger King that resulted in the citizens of this State being denied an opportunity to litigate the serious offenses with which the Respondent was charged. If the court really wanted to resolve the matter in the interests of justice, it should have required Burger King to show cause for the misunderstanding or be held in contempt. In fact, the court considered this option, but failed to follow through with it. See id.

days, the Relator did just that. She did not learn that her document production was deficient, however, until over one month later on April 27 when the Respondent renewed her motion to dismiss. The bottom line is that while her efforts were not a model of efficiency, the Relator was acting in good faith and substantially complied with the court's discovery order.

The delay in the instant case was the result of honest confusion and clerical errors occasioned by a voluminous amount of information that spans over several months and consists of hundreds and perhaps thousands of pages. The Relator could likely have objected to the request but, in an effort to speed things along, simply tried her best to comply. The totality of these circumstances should clearly have impacted on the circuit court.

Next, we must consider "the effort made by the party to comply with the discovery order." Id. The preceding discussion largely

[3]Perhaps one reason that the Relator could not supply the missing documentation prior to dismissal was the Respondent's utter failure in her April 27 motion to identify the missing documentation with any degree of particularity. Further, there is evidence in the record which suggests that some of the requested information simply did not exist.

applies here as well. We are dealing not with an outright refusal to comply, but rather good faith, substantial compliance.

Sixth, we look to "the number of times the circuit court ordered the party to comply with the discovery order." Id. After examining the record and the majority's chronology, it appears that there were no more than perhaps two such orders. While this Court does not take wilful disobedience of circuit court orders lightly, that is not what happened here. Again, it must be remembered that the Relator substantially complied in good faith with the result mandated by the circuit court. Nevertheless, the court meted out the ultimate sanction.

Finally, we examine "the severity of the offense." Id. The Respondent was charged with no less than twelve counts of embezzlement. While not perhaps as serious as a violent crime, employee theft is a costly, pervasive and immensely serious problem that continues to grow. See Wendy Zellner, Sticky Fingers Are Rifling Through Retail, Business Week, Mar. 28, 1994, at 36 (stating

[4]As for the majority's reference to the Relator's failure to secure a subpoena duces tecum for the documents, the circuit judge suggested at the March 11 hearing that such a measure was unnecessary. See Relator's Ex. 3 at 5.

that "[c]ustomer and employee theft are `increasing fairly dramatically' across the [retail] industry . . . "). Such offenses cannot be ignored. Indeed, they must be vigorously deterred.

An examination of the applicable factors clearly illustrates that the circuit court exceeded its discretion and that its flagrant actions deprived the Relator and the citizens of this State of their right to prosecute the Respondent. While I largely agree with majority's recitation of the law, the facts do not warrant dismissal. I would grant the writ.

[5]The majority opinion purports to consider "the interests of the people of West Virginia." Slip op. at 21. It would indeed be interesting to gauge the reactions of the citizens of this State when they are told that an individual charged with numerous serious felonies will walk away unscathed because the State had difficulty responding to a complex discovery request. I doubt the holding in this case will "appear fair to all who observe." Id. at 22.