

No. 33444 - *State of West Virginia ex rel. Terron Godfrey v.
Honorable James J. Rowe*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, C.J., concurring:

The majority reached the correct decision in this case based upon the sparse record it had before it. As the Court’s opinion acknowledges, the absence of “the transcript of the proceedings leading up to the trial court’s declaration of a mistrial,” Majority opinion at page 7, required the granting of the requested writ to prevent the trial court from assessing jury costs against defense counsel, which costs the trial court levied as a sanction for defense counsel’s alleged failure to disclose the defense’s witness list to the State as required by the West Virginia Rules of Criminal Procedure. *See* W. Va. R. Crim. P. 16(b)(1)(D) (“If the defendant requests disclosure under subdivision (a)(1)(F) of this rule, upon compliance with such request by the state, the defendant, on the request of the state, shall furnish the state with a list of the names and addresses of the witnesses the defendant intends to call in the presentation of the case in chief[.]”).

Nevertheless, if the record before this Court had demonstrated that defense counsel had, in fact, failed to disclose the defense’s witness list to the State as found by the trial court in its January 10, 2007, order imposing said sanction, I would have upheld the

sanction. As I admonished at length in my separate opinions in *Estate of Fout-Iser ex rel. Fout-Iser v. Hahn*, ___ W. Va. ___, ___, 649 S.E.2d 246, 252 (2007) (Davis, C.J., dissenting), and *Jenkins v. CSX Transportation, Inc.*, ___ W. Va. ___, ___, 649 S.E.2d 294, 305 (2007) (per curiam) (Davis, C.J., concurring), the purpose of discovery rules is to ensure the fair and orderly administration of justice, W. Va. R. Civ. P. 1, and a party's failure to follow such rules constitutes sanctionable conduct. *See generally* W. Va. R. Civ. P. 37 (permitting trial courts to impose sanctions for "[f]ailure to cooperate in discovery"); *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995) (according discretion to trial courts to determine appropriateness of sanctions for discovery violations).

As was the case with the civil matters before this Court in *Fout-Iser* and *Jenkins*, criminal proceedings, such as the case *sub judice*, also are governed by procedural rules to obtain "the just determination of every criminal proceeding" and to "secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." W. Va. R. Crim. P. 2. Likewise, trial courts in criminal cases may impose sanctions for the violation of rules pertaining to discovery. *See* W. Va. R. Crim. P. 16(d)(2) ("If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the

discovery and inspection and may prescribe such terms and conditions as are just.”); Syl. pt. 5, *State v. Miller*, 178 W. Va. 618, 363 S.E.2d 504 (1987) (“Rule 16(d)(2) [of the West Virginia Rules of Criminal Procedure] enables a trial court to impose sanctions that may have the effect of curing a late discovery problem.”). *See also* Syl. pt. 1, *State v. Ward*, 188 W. Va. 380, 424 S.E.2d 725 (1991) (“Where a trial court is presented with a defendant’s failure to disclose the identity of witnesses in compliance with West Virginia Rule of Criminal Procedure 16, the trial court must inquire into the reasons for the defendant’s failure to comply with the discovery request. If the explanation offered indicates that the omission of the witness’ identity was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it is consistent with the purposes of the compulsory process clause of the sixth amendment to the United States Constitution and article II, section 14 of the West Virginia Constitution to preclude the witness from testifying.”).

Therefore, if the record presented to the Court for its consideration in this case had demonstrated that defense counsel failed to disclose the list of defense witnesses to the State, the trial court’s imposition of sanctions upon defense counsel, including the assessment of approximately \$2,118.98 in jury costs, would have been within the trial court’s discretion. However, because the limited record did not establish whether defense counsel had, in fact, failed to disclose the defense’s witness list to the State as required by the West Virginia Rules of Criminal Procedure, I concur in the majority’s decision to lift the sanctions imposed

by the trial court.