

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY SESSION, 2000

FILED
March 17, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellant,)

VS.)

LAWRENCE JACKSON,)

Appellee.)

C.C.A. NO. 01C01-9906-CC-00225

MONTGOMERY COUNTY

HON. JOHN H. GASAWAY, III,
JUDGE

(State Appeal—Dismissal
of Indictment)

FOR THE APPELLEE:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The State appeals as of right from the order of the trial court dismissing the case following the State's refusal to reveal the identity of its confidential informant after having been ordered to do so by the trial court. The State presents the following issue for our review: whether the trial court erred in granting the defendant's motion to discover the identity of the State's confidential informant. We hold that the issue presented by the State is not properly before us. We also conclude that the trial court did not abuse its discretion by dismissing the indictment when the State refused to reveal the identity of its confidential informant.¹

The Defendant, Lawrence Jackson, was indicted by the Montgomery County Grand Jury for possession of a controlled substance with intent to sell, possession of a controlled substance with intent to deliver, and possession of drug paraphernalia. On April 9, 1999, he filed a motion asking the trial court to order the State to reveal the identity of its confidential informant. The informant had provided the information used to establish probable cause for the issuance of the search warrant to search the home of the Defendant and his father. At a hearing on the motion, the Defendant asserted that the informant would be a material witness because he could testify that, although the Defendant was present in the house where the drugs were found, he was not selling the drugs.

¹ We note that this exact issue has also been presented to us in the case of State v. George Devon Collins, C.C.A. No. 01C01-9907-CC-0020 (Tenn. Crim. App., Nashville, _____, 2000).

The trial court found the informant to be a material witness and ordered the State to reveal the informant's identity.

On April 20, 1999, the issue was again brought before the trial court on the State's motion to reconsider. The prosecutor informed the trial court that "[i]f the Court does not reconsider, the State will not be disclosing the witness, the confidential informant's identity." The trial court refused to change its prior ruling, and the prosecutor again asserted that the State would not disclose the identity of its witness. At this point, the Defendant moved the trial court to dismiss the case, and the trial court granted the motion. The order of dismissal was filed on May 26, 1999. It is from this order that the State appeals.

Although the State appeals from the order dismissing the case because of its refusal to reveal the identity of its confidential informant, it does not argue on appeal that the trial judge abused his discretion by dismissing the case due to the State's failure to comply with a court order. Instead, it argues that the trial court erred in ordering the State to disclose the identity of its confidential informant. We find that the issue argued by the State is not properly before this Court; thus we will not consider it in this appeal.

Rule 3(c) of the Tennessee Rules of Appellate Procedure governs the availability of an appeal as of right by the State in a criminal case. It provides as follows:

In criminal actions an appeal as of right by the state lies only from an order or judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) the

substantive effect of which results in dismissing an indictment, information, or complaint; (2) setting aside a verdict of guilty and entering a judgment of acquittal; (3) arresting judgment; (4) granting or refusing to revoke probation; or (5) remanding a child to the juvenile court. The state may also appeal as of right from a final judgment in a habeas corpus, extradition, or post-conviction proceeding.

Tenn. R. App. P. 3(c). The specific provision governing this appeal as of right is Rule 3(c)(1), which allows an appeal from an order entered by the trial court that results in the dismissal of the indictment. Thus, the only issue properly before us is whether the trial judge abused his discretion in dismissing the indictment due to the State's refusal to comply with the court's order.

Had the State wished to appeal the order of the trial court mandating the disclosure of the identity of the confidential informant, it should have filed an interlocutory appeal pursuant to either Rule 9 or Rule 10 of the Tennessee Rules of Appellate Procedure. Rule 9 permits appeals of interlocutory orders to this Court with the trial court's permission. Rule 10 allows appeals to this Court without permission of the trial court. If the trial court had refused permission to appeal pursuant to Rule 9, the State could have applied to this Court for interlocutory review under Rule 10. These are the only procedures available for the State to seek review of interlocutory trial court orders which do not have the substantial effect of dismissing the charges. See Tenn. R. App. P. 3, 9, 10.

Having found that the issue argued by the State is not properly before us, we now turn to the question that is properly before us, and we conclude that the trial judge did not abuse his discretion by dismissing the indictment when the State refused to comply with the trial court's order. There is no rule directly

providing for the dismissal of an indictment for failure to comply with court-ordered discovery, but Tennessee Rule of Criminal Procedure 16(d)(2), concerning the regulation of discovery, provides as follows:

Failure to Comply with a Request. – 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.

(Emphasis added). In examining failure to comply with discovery, we have emphasized that a trial court has great discretion in fashioning a remedy for non-compliance with discovery. See State v. James, 688 S.W.2d 463, 466 (Tenn. Crim. App. 1984). The sanction applied must fit the circumstances of the individual case. See id.; State v. Cadle, 634 S.W.2d 623, 625 (Tenn. Crim. App. 1982).

Although Tennessee Rule of Criminal Procedure 16(d)(2) does not specifically provide that a trial court may dismiss an indictment when a party fails to comply with a discovery order, we believe that authority is apparent under the provision granting the court the authority to “enter such other order as it deems just under the circumstances.” See State v. Street, 768 S.W.2d 703, 710 (Tenn. Crim. App. 1988); State v. Freseman, 684 S.W.2d 106, 107 (Tenn. Crim. App. 1984) (suggesting that if a trial court has the authority to dismiss a case as a sanction for failure to comply with discovery orders, it is implied authority pursuant to Tenn. R. Crim. P. 16(d)(2)). Under facts such as those presented in this case, dismissal is the only just sanction available to the trial court. The sanctions enumerated in the rule would be either ineffective or inappropriate.

After a hearing, the trial court ordered the State to disclose the identity of its confidential informant. Subsequently, the State informed the court that it would not comply with the trial court's order. The trial court was therefore faced with the option of imposing some sort of sanction or allowing the State to simply defy the order of the court. Because the State had already been ordered to reveal the identity of the informant, a further order to comply would have been ineffective. Likewise, a continuance would have been ineffective because the State indicated a refusal to reveal the identity of the informant at any time. Exclusion of evidence would have been inappropriate because the evidence sought was on behalf of the Defendant. Citing the assistant attorney general for contempt of court would not necessarily have resolved the trial judge's dilemma. Without the option of dismissing the case, the trial court would have had no effective sanction for failure to comply with its order. To leave a trial court with no means to enforce its orders would subvert the judicial process.

Accordingly, we hold that the trial judge did not abuse his discretion in dismissing the indictment due to the State's refusal to comply with the court's order to disclose the identity of its confidential informant. The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

JERRY L. SMITH, JUDGE

L. T. LAFFERTY, SENIOR JUDGE