

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,

Appellant,

v.

NICHOLAS DEMIR SAY,

Appellee.

NOT FOR PUBLICATION

Case No. S-2011-544

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR - 6 2012

S U M M A R Y O P I N I O N

MICHAEL S. RICHIE
CLERK

LEWIS, VICE-PRESIDING JUDGE:

The State of Oklahoma, Appellant, appeals the order of the Honorable Michael D. Tupper, Special Judge, suppressing evidence in the District Court of Cleveland County, Case No. CM-2011-507. This Court has jurisdiction pursuant to 22 O.S.2011, § 1053.1(5). The State raises two propositions of error in this appeal:

1. The trial court abused its discretion when it imposed sanctions on the State for Discovery Code violations because the State had not violated the Discovery Code;
2. Respondent Judge abused his discretion in allowing a punitive instruction to be given to the jury as a sanction for a discovery code violation, where no bad faith was found on the part of the State.

This Court reviews the imposition of sanctions based on a party's violation of the Criminal Discovery Code for an abuse of discretion. *State v. Lefebvre*, 1994 OK CR 38, ¶ 7, 875 P.2d 431, 432. We have consistently defined an abuse of discretion as "a clearly erroneous conclusion and

judgment, one that is clearly against the logic and effect of the facts presented.” *Sanchez v. State*, 2009 OK CR 31, 223 P.3d 980, 1001. We find no abuse of the district court’s discretion in its finding that the State willfully violated its discovery order, or the imposition of sanctions for the State’s non-compliance. 22 O.S.2011, § 2002(E)(2); *Lefebvre*, 1994 OK CR 38, ¶ 6, 875 P.2d at 432. Proposition One is denied.

In Proposition Two, the State complains that the proposed “negative inference” instruction of the district court is erroneous. This Court has long held that the statute governing State appeals “expressly restricts the state’s right of appeal to the . . . classes of questions therein enumerated.” *Oklahoma v. Stone*, 56 Okl.Cr. 239, 37 P.2d 320 (1934). The statutes governing State appeals provide no authority for this Court’s interlocutory review of a proposed jury instruction. 22 O.S.2011, § 1053.1. Proposition Two is denied.

DECISION

The order of the District Court of Cleveland County is **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE MICHAEL D. TUPPER, SPECIAL JUDGE**

APPEARANCES AT TRIAL

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OPINION BY LEWIS, V.P.J.
A. JOHNSON, P.J.: Concurs
LUMPKIN, J.: Concurs
C. JOHNSON, J.: Specially Concurs
SMITH, J.: Concurs

APPEARANCES ON APPEAL

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C. JOHNSON, JUDGE, SPECIALLY CONCURRING:

I concur with the reasoning and holding of the majority opinion. I write separately to underscore that the discovery process is as important in criminal cases as it is in civil ones. When “fair play” replaces “trial by ambush,” the parties and the public are better served. A trial is a time-consuming, expensive process. The more information the parties have, the more efficiently they can resolve the litigation between them. Discovery helps the parties determine which issues can reasonably be disputed. Advance knowledge of the strengths and weaknesses of the opponent’s evidence can streamline the trial process, and in some cases make a trial unnecessary.

This Court’s decision in *Allen v. District Court of Washington County*, 1990 OK CR 83, 803 P.2d 1164, represented a sea change in our State with regard to the rights and obligations of both prosecutors and criminal defendants regarding pretrial disclosure of information to each other. In *Allen*, this Court fashioned procedures to ensure that the parties have an opportunity to obtain relevant, discoverable information from their opponent. Those procedures gave district judges broad authority to impose sanctions necessary to ensure compliance with a discovery order, and to punish violations thereof. The Legislature adopted and expanded upon these procedures by enacting the Oklahoma Criminal Discovery Code, 22 O.S. § 2001 *et seq.*, just a few years later. As a result, prosecutors and defense attorneys now know what kind of information they will most likely be required to disclose to the other side. They

are on notice and under a continuing duty to preserve such evidence, even before a discovery order has been issued.

In this case, the district court concluded that the State should have taken steps to preserve potentially discoverable evidence, and the court imposed sanctions on the State for failing to do so. What is an appropriate discovery sanction is a matter within the district court's discretion, to be determined on a case-by-case basis. But rules have little meaning if there is no means or will to enforce them. Common sense dictates that the more severe the sanction, the more likely the problem will be remedied in future cases. While the district court's sanctions might seem harsh to some, it is safe to say that the State's omissions in this case are unlikely to be repeated.