COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3494-CR **Cir. Ct. No. 99 CT 3601**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER P. MARSHALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

¶1 SCHUDSON, J.[1] Christopher P. Marshall appeals from the judgment of conviction for operating a motor vehicle while under the influence of an intoxicant–third offense, following a jury trial. Seeking a new trial, he

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f), (3) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

contends that "[t]he blood test results should have been suppressed following the State's failure to turn over the underlying data from the blood analysis." He argues, therefore, that the trial court erred in denying his motion to exclude the evidence of his blood test results.[2] This court affirms.

¶2 On May 15, 1999, a Milwaukee County deputy sheriff saw Marshall driving erratically on the interstate and, upon pulling him over, observed Marshall's intoxicated appearance and failure to successfully perform certain field-sobriety tests. The deputy also noted Marshall's slurred speech and odor of alcoholic beverages. Marshall's blood was drawn and his blood alcohol concentration was 0.108. The State charged Marshall with operating while intoxicated–third offense.[3] On January 23, 2001, a jury found Marshall guilty.

¶3 In the course of pretrial discovery proceedings, Marshall requested that the State provide, among other things, "any and all reports or statements of experts made in connection with this case, including the results of physical [or] medical … examinations and any specific tests and comparisons of exemplars of any scientific tests, experiments, or comparisons, any State Crime Laboratory reports …, as well as reports regarding the tests …," and "all written … Wisconsin State Lab analysis reports." The State, however, while providing the summary report of the lab analysis of Marshall's blood, failed to provide the underlying reports on which the summary was based.

[2] At trial, Marshall also argued that the court should dismiss the charges due to the State's failure to comply with his discovery demand for the underlying blood-test reports. On appeal, however, Marshall requests a new trial; he does not renew his argument for dismissal.

[3] The State also charged Marshall with driving with a prohibited blood alcohol concentration. That charge, however, was dismissed; it does not affect the issues on appeal.

¶4 Marshall did not bring a motion to the trial court to compel the State to comply with his discovery demand. Indeed, defense counsel did not advise the trial court of the State's failure until the State called its third witness—Christine Goodall, the state chemist who tested Marshall's blood sample—to testify at the trial.[4]

¶5 The trial court immediately made arrangements to have the underlying reports copied and provided to defense counsel. After hearing further argument, the court denied Marshall's motion to dismiss or exclude Goodall's testimony. The court noted that defense counsel, "knowing that these documents would be needed[,] could have brought a motion prior to trial." The court, however, prohibited the State from "utiliz[ing] any of these underlying documents in the course of trial," and added that the defense could use them if it chose to do so.

¶6 When Goodall testified, defense counsel continued his objection, asserting both lack of foundation and noncompliance with discovery. While maintaining that he had needed the underlying reports in order "to investigate the test results," counsel never sought a continuance to do so.

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[4] Defense counsel commented on his failure to bring the matter to the court's attention prior to the appearance of the witness:

> But in this case, this expert or witness shows up in the afternoon of the trial. She wasn't here at the outset, so I didn't know if she was going to really be here. There were occasions I was told they were going to be here, and I was not told that under the circumstances because she showed up after the trial began, and I immediately upon seeing her sitting with counsel asked for the lab reports four times.
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> [The assistant district attorney] refused and at that time I had to bring my motion to the Court.

¶7 Marshall asserts that the underlying reports "were part and parcel of the expert's file" and could have been used "to impeach the reliability and accuracy of the blood test results." He argues that exclusion of the test results was required under WIS. STAT. § 971.23, which, in part, provides:

> **(7)** CONTINUING DUTY TO DISCLOSE. If, subsequent to compliance with a requirement of this section, and prior to or during trial, a party discovers additional material or the names of additional witnesses requested which are subject to discovery, inspection or production under this section, the party shall promptly notify the other party of the existence of the additional material or names.
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> **(7m)** SANCTIONS FOR FAILURE TO COMPLY. (a) The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance.
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> (b) In addition to or in lieu of any sanction specified in par. (a), a court may, subject to sub. (3), advise the jury of any failure or refusal to disclose material or information required to be disclosed under sub. (1) or (2m), or of any untimely disclosure of material or information required to be disclosed under sub. (1) or (2m).

He also contends that, aside from the statutory requirements, the State's failure to turn over the underlying reports denied him due process of law because "the documents were potentially favorable and exculpatory as the data contained therein could, in the hands of a defense expert, be used to attack the accuracy of the testing."

¶8 The State responds that disclosure of the reports was not required because, under WIS. STAT. § 971.23(1)(e), it did not "intend[] to offer [the underlying reports] in evidence at trial." This court disagrees. Regardless of the State's evidentiary intentions, the underlying reports were subject to discovery and had been properly and repeatedly demanded. Indeed, in its brief to this court, the State "concedes that the better practice would have been to provide Marshall with

the records he requested prior to trial … regardless of whether he was entitled to them or not."

¶9 More reasonably, the State also responds that "once Marshall was in possession of the documents he requested," he could have "simply ask[ed] the trial court for a short recess to give his expert the opportunity to review the documents." Marshall, the State continues, "would have then been afforded the opportunity to cross-examine [the State's witness from the laboratory] concerning the results, as well as[] have his own expert address them on direct examination."

¶10 Still, the State's failure to provide the underlying reports well in advance of trial was improper and its initial refusal to do so at trial was inexcusable. Thus, the trial court correctly precluded the State from utilizing the reports. *See* ***State v. Wild***, 146 Wis. 2d 18, 27, 429 N.W.2d 105 (Ct. App. 1988);[5] *see also* ***State v. Delao***, 2002 WI 49, ¶51, 246 Wis. 2d 304, 629 N.W.2d 825. On appeal, therefore, this court must determine whether the trial court erred in limiting its exclusion of evidence to the underlying reports, rather than extending that exclusion to Goodall's testimony and the summary report of the blood test.

¶11 "The imposition of a sanction for discovery abuse is in the discretion of the trial court." ***Wild***, 146 Wis. 2d at 28. This court will not reverse a trial court's decision to admit or exclude evidence absent "an erroneous exercise of discretion." ***State v. DelReal***, 225 Wis. 2d 565, 570, 593 N.W.2d 461 (Ct. App.

[5] In ***State v. Wild***, 146 Wis. 2d 18, 429 N.W.2d 105 (Ct. App. 1988), we explained that where the noncomplying party fails to show good cause for its failure to comply with discovery, WIS. STAT. § 971.23(7) (1987-88) "is mandatory—the evidence *shall* be excluded." ***Id.*** at 28. We note that the content of the version of § 971.23(7) quoted in ***Wild*** is essentially the same as the content of the current § 971.23(7) and (7m). Mandatory exclusion of evidence is addressed by the current § 971.23(7m), not § 971.23(7).

1999). Further, in evaluating a trial court's imposition of a sanction for a discovery violation, this court is not required to reverse if this court "can conclude from an *ab initio* review of the record that the facts support the trial court's decision." ***Wild***, 146 Wis. 2d at 28. Here this court concludes that the facts support the trial court's decision.

¶12 This court recognizes that, because of the close connection between the underlying reports, the summary report, and Goodall's testimony, exclusion of only the former amounted to little more than a Pyrrhic evidentiary victory for Marshall. Still, this court is mindful of the supreme court's caution:

> Perhaps not all evidence which should be disclosed to the defendant need be excluded. The harm may be slight and avoided by a short adjournment to allow the defendant to investigate or acquire rebutting evidence. *The penalty for breach of disclosure should fit the nature of the proffered evidence and remove any harmful effect on the defendant*.

Wold v. State, 57 Wis. 2d 344, 351, 204 N.W.2d 482 (1973) (emphasis added). Here, the trial court's sanction was appropriate given the circumstances of this case.

¶13 The trial court *did* exclude the underlying reports the State had failed to provide. The court, however, *did* allow Marshall to utilize the reports if he desired. Here, apparently, the harm resulting from the nondisclosure of these reports was so "slight" that Marshall not only failed to bring a pretrial motion to compel their disclosure, he also failed to seek a continuance once he received them. And the reason, perhaps, emerges from the record.

¶14 Marshall's theory of defense was never based on any challenge to the accuracy of the State's blood-alcohol test results. Instead, as defense counsel explained at a pretrial hearing, "It's obviously a blood curve case" at which he was

going "to use the blood curve defense." As reflected by the extensive pretrial proceedings, Marshall accepted that the State's test showed a blood alcohol concentration of 0.108, arranged for independent testing, and, as reflected by both the pretrial proceedings and the defense presentation of evidence at trial, tried to establish that, at the time of driving, his blood alcohol concentration was 0.038. Notwithstanding the trial court's decision limiting the exclusion of evidence to the underlying reports, Marshall remained fully able to pursue his theory of defense.

¶15 Thus, Marshall suffered no prejudice. Accordingly, this court concludes that Marshall has failed to establish that the trial court erroneously exercised discretion in limiting the exclusion of evidence to the underlying reports. *See* ***Irby v. State***, 60 Wis. 2d 311, 320-21, 210 N.W.2d 755 (1973) (discovery violation "does not necessarily require a reversal unless there is a showing of surprise and prejudice by the defendant").

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.