STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ISMAEL NUNEZ,

Defendant-Appellee.

UNPUBLISHED
August 20, 1996

No. 188541
LC No. 94-1189-FC

Before: McDonald, P.J., and Markman and C. W. Johnson,* JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order suppressing from evidence testimony concerning a crucial conversation between defendant and an undercover police officer as a sanction, pursuant to MCR 6.201(I), for plaintiff's discovery violations.

Defendant is charged with [attempted] possession with intent to deliver 650 or more grams of a mixture containing cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), conspiracy to possess with intent to deliver cocaine in excess of 650 grams, MCL 750.157a; MSA 28.354(1), and possession of 650 grams or more of a mixture containing cocaine, MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i). The charges arise from a "reverse buy" undercover operation, in which an undercover officer, masquerading as a drug dealer, allegedly importuned defendant to supply defendant and two codefendants with five kilograms of cocaine on a monthly basis. The two codefendants entered guilty pleas.

The evidence at issue pertains to a conversation between defendant and the undercover officer. At the preliminary examination, the officer testified that defendant claimed to have invested substantial capital to put together a transaction and stated that he wanted to establish a source to deliver five kilograms of cocaine on a weekly basis. The officer testified that he and defendant negotiated a price of $18,000 per kilogram.

* Circuit judge, sitting on the Court of Appeals by assignment.

The officer surreptitiously tape-recorded this conversation. The conversation was entirely in a Spanish dialect not widely spoken. From the outset of this case, defendant demanded access to the tape-recording and the prosecution agreed to provide it. However, the prosecution only provided a transcript of the conversation. This transcript sets out statements attributed to the officer but states "inaudible" every time defendant spoke.

Defendant sought the tape-recording in order to effectively cross-examine the officer at trial. He wanted to examine the actual tape to determine if all of his statements were, in fact, inaudible. If so, he intended to have experts electronically enhance the tape to determine if defendant's part of the conversation could be made audible, in whole or in part.

Defendant diligently and repeatedly requested the tape-recording, the trial court repeatedly ordered plaintiff to provide it and plaintiff failed to do so without offering any plausible explanation whatsoever for such failure. At a pretrial conference, the trial court set a "firm" trial date of August 28, 1995 and the parties stipulated to provide each other with a list of outstanding discovery requests by July 10, 1995 and to provide such discovery material by July 24, 1995. As of the trial date of August 28, 1995, plaintiff still had not furnished the tape to defendant despite defendant's timely written request for it. The trial judge excluded evidence of this conversation from trial as a sanction under MCR 6.201(I) for plaintiff's violation of discovery orders requiring it to provide the tape to defendant. In a September 5, 1995 written opinion the court noted that it had adjourned trial several times because plaintiff had failed to comply with discovery orders and that the case had been pending for over seventeen months. In that opinion, it stated:

> This Court opted to exclude evidence about the restaurant meeting because, given the particulars of this case, exclusion is the only meaningful remedy. Accordingly, not only was it within this Court's discretion to do what it did, it would have been an abuse of discretion not to so act.

The court referred to both the right to speedy trial and "the need to protect the integrity and effectiveness of the discovery process" in its opinion. It also stated, "If this is not a case in which it is appropriate to order that testimony or evidence be excluded, Subrule (I) is impotent, leaving totally unenforceable and ineffectual the requirements of the remainder of the rule."

MCR 6.201 governs discovery in criminal matters. Administrative Order 1994-10. MCR 6.201(B)(3) requires prosecuting attorneys to provide, upon request, "any written or recorded statements by a defendant." MCR 6.201(I) states:

> If a party fails to comply with this rule, the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy.

This court reviews trial court rulings regarding discovery in criminal cases for an abuse of discretion. *People v Lemcool*, 445 Mich 491, 498; 518 NW2d 437 (1994). However, in *People v Burwick*, 450 Mich 281, 294; 537 NW2d 813 (1995), the Michigan Supreme Court held that "precluding evidence is an "extremely severe" sanction limited to an egregious case." Here, the trial

court repeatedly allowed plaintiff additional time to provide court-ordered discovery material and plaintiff repeatedly failed to comply with the court order. Plaintiff proffered *no* plausible explanation for its continuing violations of court orders to provide the tape-recording at issue. Further, plaintiff has raised no argument that the court's order is unreasonable in any regard. The case had been pending for seventeen months at the time the court finally ordered that testimony relating to the conversation at issue be excluded from trial. Plaintiff's actions here may fairly be described as extraordinary and egregious. Exclusion of evidence is a severe sanction for a discovery violation but MCR 6.201(I) expressly provides for this remedy in the context of criminal proceedings. Although such a sanction is clearly one of last resort, it is equally clear that this was precisely a situation of last resort. Accordingly, we find no abuse of discretion in the trial court's decision to exclude evidence from trial pursuant to its authority under MCR 6.201(I)[1].

For these reasons, we affirm the trial court's order excluding evidence of the conversation at issue.

Affirmed.

/s/ Gary R. McDonald
/s/ Stephen J. Markman
/s/ Charles W. Johnson

[1] We do not decide here whether the trial court was correct in its assertion that it would have been an "abuse of discretion" for itself to undertake any course of action *other* than that which it undertook in this case.