

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**STATE OF MISSOURI EX REL.,  
JACKSON COUNTY PROSECUTING  
ATTORNEY**

**v.  
THE HONORABLE ROGER PROKES**

**RELATOR,**

**RESPONDENT.**

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DOCKET NUMBER WD72996  
DATE: December 20, 2011

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Appeal From:

Jackson County Circuit Court  
The Honorable Roger Prokes, Judge

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Appellate Judges:

Lisa White Hardwick, Chief Judge, Presiding, and James M. Smart, Jr., Joseph M. Ellis,  
Victor C. Howard, James E. Welsh, Alok Ahuja, Mark D. Pfeiffer, and Gary D. Witt Judges,  
CONCURRING IN MAJORITY

Karen King Mitchell and Cynthia L. Martin, Judges, DISSENT IN SEPARATE OPINION

Thomas H. Newton, Judge, RECUSED

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Attorneys:

Tim E. Dollar and Michael J. Hunt, Kansas City, MO, for Relator.

Richard W. Johnson and Patrick W. Peters, Kansas City, MO, for Respondent.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS  
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**STATE OF MISSOURI EX REL.,  
JACKSON COUNTY PROSECUTING  
ATTORNEY,**

**v.**

**THE HONORABLE ROGER PROKES,**

**RELATOR,**

**RESPONDENT.**

No. WD72996

Jackson County

Before: Lisa White Hardwick, Chief Judge, Presiding, and James M. Smart, Jr., Joseph M. Ellis, Victor C. Howard, James E. Welsh, Alok Ahuja, Mark D. Pfeiffer, Karen King Mitchell, Cynthia L. Martin and Gary D. Witt, Judges  
Thomas H. Newton, Judge recused

**Majority Opinion of Gary D. Witt, J. holds:**

Relator State of Missouri, Jackson County Prosecuting Attorney, filed a writ of prohibition asking us to prohibit the Honorable Judge Roger Prokes, sitting as a special judge in the Circuit Court of Jackson County, from enforcing his order, whereby, as a sanction, he excluded all evidence in the case of *State v. Richard Buchli*.

The State charged Defendant Richard Buchli with first-degree murder and armed criminal action in May 2000, alleging that Buchli murdered his law partner, Richard Armitage, in their office. This writ involves discovery issues that arose after Buchli's original conviction was reversed and remanded for a new trial. In the prior proceeding, the court granted Buchli's motion for post-conviction relief on the ground that, in failing to disclose exculpatory evidence, the State had violated Buchli's rights under the Due Process clause of the Fourteenth Amendment to the United States Constitution. This Court affirmed the motion court's judgment.

The case was remanded for a new trial on January 22, 2008. In February of 2009, one of the assistant prosecutors assigned to the case, informed the court that due to misconduct by another assistant prosecutor, the State's prior discovery responses could not be relied on as either accurate or complete. On June 2, 2010, because of this and a plethora of other issues that had arisen pertaining to the State's failure to comply with the rules of discovery, Judge Prokes entered a very specific discovery order.

The State did not comply with the terms of the discovery order. Judge Prokes then sent an e-mail to the parties, indicating that he assumed that discovery was proceeding properly and indicating if any issue required his input to immediately contact him. The State did not respond to this communication.

On August 10, 2010, Buchli filed a motion for a show-cause hearing and for sanctions by virtue of the State's failure to adhere to the discovery order. The trial court held a show-cause hearing. The State conceded at the hearing that it had not complied with the discovery order in many respects.

On September 22, 2010, the trial court entered its order, striking all of the State's evidence ("exclusion order"). The State then filed a writ of prohibition, with this Court. We granted a preliminary writ, and the parties filed legal briefs.

The broad rights of discovery afforded criminal defendants have constitutional underpinning rooted in due process. Compliance is not discretionary. Where the State has failed to respond promptly and fully to the defendant's disclosure request, the question is whether the failure resulted in fundamental unfairness or prejudice.

The State asserts two points arguing that it is entitled to the extraordinary remedy of a writ of prohibition. The Points are analyzed in reverse order for ease of analysis. In Point Two, the State argues that the "circuit court erred in concluding that the State had violated parts of the circuit court's June 2, 2010 order." However, the State did not dispute that it had violated the discovery order in multiple respects. The trial court's findings and conclusions were supported by substantial evidence. Point Two is denied.

In its first Point the State argues that "the circuit court erred in failing to consider less drastic remedies than the exclusion of all the State's evidence." Although inartfully drafted, the State argues not *only* that the circuit court failed to consider less drastic remedies, but that the court failed to impose less drastic remedies and, thereby, abused its discretion. We disagree.

Once a discovery violation has been established, this Court turns to whether the violation resulted in fundamental unfairness or prejudice to the aggrieved party. In arguing that Buchli was not prejudiced by the State's violations, the State argues that the "Defendant has the *vast majority* of the evidence in his possession." But the State ignores the factual findings of the trial court that the State was unable to articulate what evidence it had *in its possession* and that Buchli is entitled to *all of the evidence in order to receive a fair trial*. The State's failure to comply with the mandatory rules of discovery, in a case that has been pending for over ten years, has caused fundamental unfairness *and* prejudiced Buchli. Ultimately, the trial court is in the best position to assess the prejudicial effect of the failure to disclose and to determine the remedy.

The trial court's order was a veritable catalogue of how the State's discovery violations created fundamental unfairness to Buchli. We address only a few of the most recent and compelling issues. After the February 2009, disclosure of discovery misconduct by one of the assistant prosecutor's assigned to this case, making the prior discovery responses from the State unreliable, the State represented to Buchli and the trial court that all discovery would be forthcoming, complete, and accurate.

Over a year later, Buchli was forced to file another motion to compel discovery. Then in June 2010, the State responded, not with the discovery that it had promised, but with objections

to almost every discovery request. The trial court then issued its very specific, detailed discovery order. This order was ignored by the State. The trial court subsequently sent the above referenced e-mail indicating that he assumed that all appropriate discovery responses were in compliance. The State ignored the e-mail. Then Buchli filed a motion for a show-cause hearing, the State ignored the motion. When the trial court issued a show-cause order, the State ignored the order. Finally, on the day of the show-cause hearing, the State did not come prepared to show cause why sanctions should not be imposed. The State merely appeared with additional discovery (still not all) and *more promises* to the trial court as to when the additional discovery *might someday* be provided. Only then did the trial court enter its exclusion order imposing the sanctions, from which the State now seeks relief.

Today Buchli is no closer to receiving a fair trial than he was when he was originally charged over eleven years ago. Specifically, the State has failed to demonstrate that the trial court abused its discretion in concluding that Buchli may *never* receive his constitutionally guaranteed right to a fair trial.

The reason for the show-cause hearing was to determine *why* the State had failed to comply with the trial court's specific order and the rules of discovery and for the State to show cause why sanctions should not be imposed. Neither the prosecution nor the defense has the authority to knowingly overrule a direct ruling by the trial court or to intentionally disobey the Court's rules designed to protect the integrity of the process. Willful violations require more serious sanctions than mistaken violations precisely because, they are more likely to cause a "fundamental unfairness" to the opposing party and they show an intentional disregard for the rules and orders of the court rather than a mere negligent violation thereof. Here, the willful violations by the State made it clear that the State had no intent of bringing Buchli to trial anytime in the foreseeable future. The trial court specifically found bad faith on the part of the State.

At the show-cause hearing, the State admitted that *it did not know which witnesses it planned on calling at trial*. This precluded the State from making truthful representations pertaining to these witnesses in its *most recent* discovery responses. Rule 25.03(A)(7) requires the state to disclose "[a]ny record of prior criminal convictions of persons the state intends to call as witnesses at a hearing or the trial." In September 2008, the State affirmatively represented that "[t]he state has no information at this time with respect to any felony or misdemeanor convictions which the State's witnesses may have", but the record is clear that at least one of the State's primary witnesses had numerous prior felony convictions. This would not be so troubling if the State had been forthcoming about the issue. Later the State admitted that it had not been run its witnesses through law enforcement databases, and therefore the state's response that it 'has no information at this time' was found to be a *fraud upon the court and either a misleading or false statement to defense counsel*. As of the show-cause hearing, the State still had not even bothered to "run" the names of the witnesses it was certain to have to call at trial. The State had still not pared down its previously disclosed list of over 190 potential witnesses that it *might* call at trial.

At the show-cause hearing, the State further admitted that *it did not even know what evidence it had in its own possession pertaining to this case*. The State admitted that it still had

not disclosed 22 boxes of financial documents, containing over 20,000 pages, even though these documents had been in the State's possession for over ten years. Further, at the show-cause hearing, when the trial court went through its discovery order, in addition to those requirements which the State admitted it had failed to comply, the State's responses were qualified or noncommittal. The Prosecutor responded to the trial court that he *believed* certain items were in the master file. On several matters the Prosecutor admitted that he had not personally complied with certain requirements but *thought* that it had been done by others and there was nothing to report; on at least one response he then followed up with, "*Maybe there is.*"

Based on the history of this case, these are not answers upon which the trial court should be expected to rely, in order to ensure Buchli could receive his constitutionally guaranteed right to a fair trial. There is no excuse why everything was not previously disclosed; further, to the extent anything was not disclosed, there is no excuse for there to be any question as to what has and what has not been disclosed. The record clearly establishes that there was substantial evidence to support the trial court's conclusion that "*after 2 ½ years of what should have been active trial preparation, four trial settings and in the face of a show-cause hearing, the state is unable to articulate with any certainty what their evidence will be or even what documentation it has in its possession.*"

In seeking the extraordinary remedy of a writ of prohibition, the State still fails to suggest any future timeline as to when it will *actually produce the entire discovery to Buchli*. Indeed, the State's failure in this writ to even recognize that it has, in fact, violated the rules of discovery (see Point II), leads to the conclusion that, but for the trial court's order, Buchli would continue to be indefinitely prejudiced by the State's fundamentally unfair refusal to disclose required information. In seeking the extraordinary remedy of a writ of prohibition, the State argues that "the circuit court's focus should be on removing the prejudice that the other party suffers because of the party's violation." But, this is precisely what the trial court's order of sanctions did, in light of the Court's conclusion that Buchli will never receive his constitutionally guaranteed right to a fair trial.

Finally, the State argues that "the need to conserve [judicial] resources" has no bearing on whether the trial court was warranted in issuing its order of sanctions. Rule 25.17 was designed, among other things, to *expedite the trial process*. The State's failure to properly comply with its discovery obligations has resulted in the continuance of four prior trial settings since the case was remanded for a new trial. When "judicial resources" are considered, it is not the effect on the individual judge, but the effect on the other litigants in other cases, who are awaiting their day in court, that becomes paramount. It is only logical that the judiciary has the inherent power to impose sanctions in this context.

Based on the substantial evidence that supported the trial court's order of sanctions, as expressly permitted by Rule 25.18, the State's first Point Relied On is denied. We find on the record before this Court that the trial court did not abuse its discretion in the sanction that it imposed. Accordingly, the preliminary order in prohibition, is quashed, and we deny the State's writ.

## **Dissenting Opinion of Karen King Mitchell, J. would hold:**

### Opening:

The question presented here is: did the circuit court abuse its discretion in dismissing first-degree murder charges as a sanction for the State's noncompliance with a pretrial discovery order when the record does not support a finding that the State's noncompliance prejudiced the defendant? The answer is "yes." Accordingly, I would make absolute our preliminary writ of prohibition.

### The dissent would hold:

In determining whether a trial court has abused its discretion, appellate courts in Missouri have consistently considered (1) the prejudice the non-offending party would have suffered as a result of the discovery violation; and (2) the effect on the offending party of the remedy imposed. *State v. Martin*, 103 S.W.3d 255, 260 (Mo. App. W.D. 2003); *see also State v. Allen*, 81 S.W.3d 227, 229 (Mo. App. W.D. 2002); *State v. Hopper*, 315 S.W.3d 361, 368-70 (Mo. App. S.D. 2010). "In fashioning sanctions for a discovery violation, the focus is generally on the removal or amelioration of any prejudice that the [non-offending party] suffers due to the violation." *Martin*, 103 S.W.3d at 260, *see also Allen*, 81 S.W.3d at 232 (Holliger, J., concurring) ("Particularly essential" to the trial court's discretion "is an analysis of the potential prejudice to the party who has not received timely disclosure."); *State v. Simonton*, 49 S.W.3d 766, 781 (Mo. App. W.D. 2001). Where the prejudice to the non-offending party is nonexistent or negligible, the imposition of drastic sanctions is generally not appropriate. *Martin*, 103 S.W.3d at 260 (citing *Allen*, 81 S.W.3d at 233 (Holliger, J., concurring)); *Hopper*, 315 S.W.3d at 368. In other words, a sanction generally should avoid substantially affecting the offending party's ability to proceed with trial unless the prejudice to the non-offending party cannot otherwise be cured. *See Martin*, 103 S.W.3d at 261.

Here, the record before us does not support a finding that the defendant was prejudiced by the State's noncompliance with the trial court's discovery order. The defendant made no attempt to prove prejudice below, and he does not argue on appeal that he was prejudiced. Further, the trial court denied the State's request below to show that prejudice did not, in fact, result from its noncompliance with the discovery order.

In contrast to the lack of prejudice flowing to the defendant, the level of prejudice to the State caused by the remedy imposed was very high. It is not as if the court's order had a negligible effect on the State, in which case the sanction would not constitute an abuse of discretion even if there were a complete absence of prejudice to the defendant. Rather, the court's order prevents the State of Missouri from bringing its case to trial. Accordingly, I would hold that the trial court abused its discretion, and I would make the preliminary order of prohibition absolute. I respectfully dissent.

Majority Opinion by Gary D. Witt, Judge; Lisa White Hardwick, Chief Judge, Presiding, James M. Smart, Jr., Joseph M. Ellis, Victor C. Howard, James E. Welsh, Alok Ahuja, Mark D. Pfeiffer, Judges, concur in the majority  
Dissenting Opinion by Karen King Mitchell, Judge; Cynthia L. Martin, Judge concurs in dissent

December 20, 2011

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