

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,)
)
 Plaintiff-Appellant,)
)
 vs.)
)
JOSEPH GUMATAOTAO TUNCAP,)
)
 Defendant-Appellee.)
_____)

**Supreme Court Case No. CRA96-004
Superior Court Case No. CF0255-96**

OPINION

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Appeal from the Superior Court of Guam

Argued and Submitted on August 18, 1997

Hagåtña, Guam

Attorney for Plaintiff-Appellant
Gerad Egan
Assistant Attorney General
Office of the Attorney General
Prosecution Division
Suite 2-200E, Judicial Center Bldg.
120 West O'Brien Drive
Hagåtña, Guam 96910

Attorney for Defendant-Appellee
Richard Parker Arens, Esq.
Cunliffe & Cook
A Professional Corporation
Suite 200, 210 Archbishop Flores Street
Hagåtña, Guam 96910

BEFORE: PETER C. SIGUENZA; Chief Justice, JANET HEALY WEEKS, and JOAQUIN C. ARRIOLA, Sr., Associate Justices.

SIGUENZA, C.J.:

[1] The People of Guam (“People”) appeal the lower court’s decision dismissing this case with prejudice. It is asserted by the People that the court’s discovery orders were not violated. If a violation did occur, however, the People contend the court’s remedy was inappropriate. In opposition, Joseph Gumataotao Tuncap (“Tuncap”) maintains the dismissal with prejudice was appropriate given the People’s failure to provide discovery pursuant to the court’s orders. He also asserts the failure to provide the discovery amounted to prosecutorial misconduct allowing the court to dismiss this matter through its supervisory authority.

[2] Although we share the trial court’s frustration with the prosecution’s approach to discovery and concur that the conduct of People’s counsel in misleading both the court and the defendant would be sufficiently sanctionable, our review indicates that the trial court’s written order dismissing the case cannot be supported in the record. The applicable statute was not given consideration nor was there an adequate factual finding as to the undisclosed discovery. Consequently, we reverse the lower court’s dismissal of the action.

FACTUAL AND PROCEDURAL HISTORY

[3] Tuncap was charged by the grand jury with possession of a controlled substance, theft, and burglary. At his arraignment, Tuncap pleaded not guilty and asserted his right to a speedy trial. The trial court ordered discovery to be provided to Tuncap; however, prior to arraignment, the People had already provided the nine different police reports which had formed the basis of the charges against him.

[4] On June 19, 1996, the People received two letters from Tuncap’s counsel. The first letter served as “a formal request to inspect or copy all of the evidentiary materials referenced within the

police reports or grand jury transcripts relevant to this case.” This letter referenced several police reports and listed 68 items of physical evidence which Tuncap wanted to inspect or otherwise have made available to him. The second letter requested additional police reports, statements, and other discovery referencing 88 different items wanted by Tuncap. The People did not respond to the letters nor was Tuncap provided with discovery. In spite of the People’s failure to respond, Tuncap did not file a formal motion with the court to compel discovery.

[5] On July 2, 1996, the parties appeared for trial setting. Tuncap’s counsel represented to the court that the items he requested were not provided. The court advised the prosecutor to respond to the letters by July 3, 1996 and inform Tuncap as to the discoverable nature of these items. As ordered, the People wrote a letter to defense counsel and made a general representation that most items would be provided as they were relevant to Tuncap’s case. The letter, however, disputed the disclosure of a few specific items.

[6] On July 5, 1996, a follow up hearing was held as to the discovery issues. The People indicated that additional police reports were being provided to Tuncap. Admissions were also made that other items previously requested had yet to be provided, but were forthcoming. The People, for the first time, stated the requests asked for items irrelevant to the case. The prosecutor also asked the court to review the items and rule as to disclosure. The court initially agreed to the review but later decided the People should review the applicable discovery statutes to determine its obligations and then comply accordingly. No ruling was made as to disclosure of the requested items. During the proceeding, the court also urged the People to dismiss the case and re-indict when ready. The court warned that a contempt citation or dismissal with prejudice was forthcoming if the People did not comply with discovery requests by the next hearing.

[7] The parties next met on July 9, 1996 and, at different times, appeared before two different judges. Again discovery matters were discussed and argued. Consequently, based on the conflicting representations of counsel, a motion to dismiss was scheduled for hearing.

[8] The parties met for the final time on July 11, 1996. Tuncap asked the court to dismiss the case based on repeated and continued abuse of the discovery process. Defense counsel argued his ability to adequately prepare for trial was impaired given the piecemeal discovery and Tuncap's assertion of his right to a speedy trial. The People admitted their responses were less than adequate. However, they maintained that Tuncap was asking for items not related to the charges and consequently, most items were irrelevant to this particular matter. Out of the 156 requested items, they represented only seven were arguably relevant to the charges. Finally, the People argued that if Guam's discovery statute were reviewed, the People would be found to have complied with its requirements and no violation would have occurred.

[9] The court granted the dismissal of the case with prejudice and issued a written order. The court's order dismissing the case recites the following factual findings:

1. That the Government was ordered by this court to disclose material evidence to the Defendant.
2. That the Government failed to disclose said evidence despite repeated admonitions by the Court.
3. That there is reasonable probability that had the evidence been disclosed to the defense, that the result of the proceeding would be different.
4. That the Government's repeated failure to disclose material evidence as ordered by the court and as stipulated to by the parties has prejudiced the defendant to his detriment.
5. That the Government's conduct is not excusable neglect.
6. That the Government's failure to disclose the material evidence, as ordered, is shocking and outrageous, amounting to prosecutorial misconduct violative of the fundamental sense of justice.
7. That the Defendant's Motion to Dismiss the Indictment with Prejudice is hereby granted.

People v. Tuncap, CF0255-96 (Super. Ct. Guam Aug. 22, 1996)(Order dismissing indictment with prejudice).

[10] The findings set forth in the order generated by Tuncap was not approved as to form by People's counsel. They disagreed with all findings except for the last. The order was signed by the judge. The People filed a timely appeal with this court.

ANALYSIS

[11] The trial court's discovery orders are reviewed for an abuse of discretion. *United States v. Gonzalez-Ricon*, 36 F.3d 859, 865 (9th Cir. 1994). Likewise, sanctions imposed for a violation of a discovery order are reviewed for an abuse of discretion. *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992). However, whether the trial court had a legal basis for an imposition of a sanction is reviewed *de novo*. *Id.*

[12] An abuse of discretion has been defined as that "exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993). When using this standard, a reviewing court does not substitute its judgment for that of the trial court. Instead, we must first have a definite and firm conviction the trial court, after weighing relevant factors, committed clear error of judgment in its conclusion. *United States v. Plainbull*, 957 F.2d 724, 725 (9th Cir. 1992).

[13] An abuse of discretion may occur in several ways. For example, a court abuses its discretion by not applying the correct law. *United States v. Rahm*, 993 F.2d 1405, 1410 (9th Cir. 1993). The standard is also violated when the law is erroneously interpreted. *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1289 (9th Cir. 1994). Reliance upon a clearly erroneous assessment of the facts has also been characterized as an abuse of discretion. *Rahm*, 993 F.2d at 1410. Similarly, when the record contains no evidence supporting a court's decision, the standard is violated. *United States v. Schlette*, 842 F.2d 1574, 1577 (9th Cir. 1988), *amended by*, 854 F.2d 359 (9th Cir. 1988); *see also United States v. Kramer*, 827 F.2d 1174, 1179 (8th Cir. 1987).

[14] Based on these articulated standards, we find dismissal of the indictment with prejudice for discovery violations to be an abuse of discretion by the trial court. First, dismissal cannot be justified because consideration was not given to the statutory provisions governing discoverable information. Second, the record lacks a showing supporting the characterization of evidence as described in the written dismissal order. Finally, an abuse occurred when the court failed to

consider the mandates of 8 GCA § 70.45 (1993) and case authority which addressed sanctions appropriate for discovery violations. Consequently, dismissal based on alleged discovery violations was inappropriate.

I.

[15] The criminal discovery provisions of 8 GCA §§ 70.10-70.45 (1993) set out an extensive list of discoverable items. In particular, upon noticed motion, a prosecutor must disclose or permit the inspection or copy of the following material or information:

- (1) the name and address of any person whom the prosecuting attorney intends to call as a witness at the trial, together with his relevant written or recorded statement;
- (2) any written or recorded statement and the substance of any oral statement made by the defendant or made by a co-defendant if the trial is to be a joint one;
- (3) any report or statement of an expert, made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments or comparisons;
- (4) any book, paper, document, photograph or tangible object, which the prosecuting attorney intends to use in the trial or which was obtained from or belonged to the defendant;
- (5) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at the trial;
- (6) whether there has been an electronic surveillance of conversations to which the defendant was party or of his premises;
- (7) any material or information which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor.

8 GCA § 70.10(a). The prosecutor's obligations extend to material information controlled by his staff and those who report to him regularly or in reference to a particular case. 8 GCA § 70.10(b).

[16] In situations where discovery is not covered under section 70.10, the defendant may obtain other discovery upon a showing: 1) of materiality to the preparation of his defense; and 2) the request is reasonable. 8 GCA § 70.15 (1993). The court possesses discretion to order the prosecuting attorney to disclose relevant material and information not covered by section 70.10. *Id.* The court must weigh the substantial risk of physical harm, intimidation, bribery, economic reprisals,

unnecessary annoyance or embarrassment that may result to any person against the usefulness of disclosure to the defense. 8 GCA § 70.15(b).

[17] Guam’s discovery statutes were based primarily on the ABA Model Standards for Criminal Justice. These standards were promulgated with the goal, among others, of processing cases using expedited procedures. Thus, general delays associated with motion practice and specific disagreements as to the discoverability of a particular item would be eliminated. At the same time, judicial supervision of basic discovery would be minimized. In order to achieve such goals, Guam’s statutes anticipate the disclosure of information and materials between prosecutors and defense counsels to be approached in a cooperative manner with the terms of the statute given generous interpretations. This is especially important in light of section 70.10(a)(7), adopting the mandate originally articulated in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197 (1963); requiring disclosure of material or information which: 1) tends to negate the guilt of the defendant as to the offense charged; or 2) would tend to reduce his punishment therefor. 8 GCA § 70.10(a)(7). Because the *Brady* standard has been described as “imprecise,” the United States Supreme Court commented “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” *United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399-2400 (1976).

[18] If a dispute should arise, however, the specific requirements and limitations set forth throughout 8 GCA § 70.10(a) and (b) must be looked to for guidance. For example, 8 GCA. § 70.10(b) imposes a general materiality requirement upon items before disclosure.¹ Although this standard is not difficult to meet, this general limitation must be considered prior to disclosure.

[19] At the same time, the statutes impose more specific conditions on material or physical evidence. Consideration of the terms set forth in section 70.10(a)(1)-(7) requires disclosure for

¹Bill 662 was submitted by the Thirteenth Guam Legislature and became effective via Public Law 13-186 when signed by the Governor. The Bill, submitted and signed into law, deviated from the ABA Standards and imposed the materiality requirement now set forth in 8 GCA § 70.10(b). As previously stated, we will respect the boundaries between the respective branches of government and will not tread on their ground.

certain types of information only after these requirements are met. This necessitates both a determination as to the type of materials in dispute and an examination of the statute's specifications. For example, the language of 8 GCA § 70.10(a)(1) requires a determination that the material sought is indeed a statement of the witness that the prosecution intends to call at trial. Furthermore, section 70.10(a)(1) imposes a relevancy requirement upon such statement before disclosure. Consequently, when disputes arise, Guam's discovery statutes must be considered and the articulated requirements be met before disclosure is required. A simple request for discovery does not automatically make the information material for purposes of the statute and thus requiring disclosure.

[20] The dismissal order in this matter cannot be justified because the criminal discovery statutes were never applied specifically to the materials in dispute. We cannot find support, either in the written order or by review of the record, that the statutory requirements listed in 8 GCA § 70.10 were given proper consideration. In addition, discussion was never entertained addressing the standards of the statute and where the undisclosed materials may fit within that statutory scheme.

[21] The record also lacks the necessary analysis supporting the court's characterization of the disputed discovery. The court's order indicates the evidence was in fact material and of the sort that could change results of a proceeding. However, the record only reveals discovery was requested by the defendant, disclosure of which was initially agreed to by the prosecutor but later disputed. The record also shows the vast majority of items were not discussed in any manner. In the few instances where specific materials and information were actually addressed, the showing was never meaningful or complete. More importantly, the court never ruled whether the items should be disclosed. Finally, we note that a recitation of the facts supporting the adverse effect upon the defense is absent. Therefore, a finding of prejudice to the defendant's detriment cannot be justified from the record.

[22] Instead of considering the nature of the evidence and the requirements of the discovery statute, the record shows the court dismissed the case based on the inaction of the prosecutor. While

we understand the court's frustration with the People's cavalier attitude toward discovery, the order's recitations as to the undisclosed items are merely conclusory statements unsupported by the record.

II.

[23] Assuming that a valid court order was violated, the court must determine whether the sanction employed to remedy the infraction was appropriate. Guam law specifically states:

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 an order issued pursuant to this Chapter, the court may order such party to comply with the prior order, grant a continuance, or issue such other order as it deems just under the circumstances.

8 GCA § 70.45. Comment to this provision states "it seems better policy for the court 'to apply sanctions which affect the evidence at trial and the merits of the case as little as possible'." See Note to 8 GCA §70.45 (citation omitted).

[24] Although the appropriateness of a sanction rests in the trial judge's sound discretion, *United States v. Gee*, 695 F.2d 1165, 1168 (9th Cir. 1983)(interpreting similar Federal Rule of Criminal Procedure 16), the sanction chosen must be proportionate to the misconduct. *Id.* at 1169. The phrase "it deems just under the circumstances," present in the statutes of both Guam and the United States, has been interpreted to mean that "the court should impose the least severe sanction that will accomplish the desired result prompt and full compliance with the court's discovery orders." *United States v. Sarcinelli*, 667 F.2d 5, 7 (5th Cir. 1982).

[25] In deciding the appropriateness of a sanction, *Sarcinelli* set out the following factors: 1) reasons why the disclosure was not made; 2) the extent of the prejudice, if any, to the opposing party; 3) the feasibility of rectifying that prejudice by a continuance, and 4) any other relevant circumstances. *Id.*

[26] The sanction of dismissal is a disfavored remedy. *People v. Marada*, Crim. No. CR94-00070A, 1995 WL 604365 (D.Guam App. Div. Sept. 18, 1995)(citing *United States v. Rogers*, 751

F.2d 1074, 1076-77 (9th Cir. 1985)). “Indictments are rarely dismissed for alleged government misconduct which occurs outside the indictment process because such misconduct must be ‘grossly shocking and so outrageous as to violate the universal sense of justice.’” *Id.* (citations omitted).

[27] It appears the sanction of dismissal was inappropriate and unjust under the circumstances. The goal of the court was to get prompt and full compliance with the discovery order. In the court’s words “. . . I keep trying to figure out how to get you guys to understand, when they ask for discovery, provide it . . . [Y]ou guys have got to provide it to them, and I don’t know how to be able to get this to you guys.” Transcript at 61-62 (Motion to Dismiss, July 11, 1996). Assuming the materials were discoverable, dismissal would not accomplish the goal of compliance. Instead, dismissal prevented the case from going forward on its merits.

[28] Less harsh sanctions could have been imposed. This includes holding the attorney in contempt and punishment by personal fines. At one time this particular sanction was suggested by the court. Other alternatives include holding the Chief Prosecutor or Attorney General in contempt and levying fines, initiating disciplinary action by reference to the bar, or chastising counsel in a public opinion.

[29] As discussed earlier, the trial court made no inquiry into the specific items of discovery. Thus, most of the factors set forth in *Sarcinelli* cannot be analyzed. Neither the reason for non-disclosure nor the extent of the defendant’s prejudice, if any, are known. While continuance of the trial was not feasible as the defendant had asserted his right to a speedy trial,² we note the trial was not scheduled to begin for another eight days. Thus, time was still available to remedy the actual prejudice, if any, suffered by the defendant.

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²Another issue arises as to the application of the speedy trial clock. Specifically, whether the shorter, 45 day time period applies when the defendant is held pursuant to federal order versus an order of the local courts. We do not address this issue and consequently, this opinion should not be read to affirm a reading of the statute in this matter.

III.

[30] Although we find dismissal with prejudice unsupportable, we feel compelled to sanction People's counsel by commenting on his actions. The prosecutor handling this matter chose to be unresponsive at first and later, evasive as to the discoverable nature of the requested information. This conduct occurred although he was well aware that numerous items of discovery were being sought by the defendant and the speedy trial clock was running.

[31] We believe People's counsel misled both the defense counsel and the trial court. In the response mandated by court order, the People agreed that most of the items requested would be disclosed. This was further confirmed at a court hearing when additional reports were turned over and assurances made that further discovery was forthcoming. Only later, without notification or warning, did the People take the position that they were in compliance with the discovery statutes and that most of the information would not be disclosed. This happened after both the defense and the court relied upon the People's assertion that no issues surrounding discovery existed. Disclosure of the information suddenly became an untimely issue.

[32] As we discussed above, our statutes were developed with the goal of expediting cases through elimination of judicial supervision. The discovery statutes require a prosecutor's diligent review of the discovery and both timely responses and complete admissions as to whether information will or will not voluntarily be disclosed. This is especially true when discovery requests are made that specifically identify the items sought.

[33] While the prosecutor may very well be correct in his legal position, he neither timely nor clearly communicated this view of the undisclosed information. This failure to properly communicate is contrary to the goals of Guam's statutes. It appeared that the prosecutor had reviewed the materials and agreed to make them available to the defendant. This initial response was not timely and only made due to court order. The prosecutor was not candid when he first indicated most items would be disclosed and then later, conditioned disclosure upon a showing of relevance.

[34] We are especially troubled because notice of the new condition was never given to the defense. Only later in open court did the prosecutor reveal his position regarding nondisclosure. This type of “hide the ball” gamesmanship is contrary to the statute’s goals and is neither warranted nor welcomed in this jurisdiction.

CONCLUSION

[35] Based on the foregoing, the court hereby **REVERSES** the decision and **REMANDS** the matter back to the trial court.

PETER C. SIGUENZA
Chief Justice

JANET HEALY WEEKS
Associate Justice

JOAQUIN C. ARRIOLA, SR.
Associate Justice