COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2017AP1042
2017AP1043
2017AP1044

Cir. Ct. Nos. 2013TR5626
2013TR5627
2013TR5628

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

COUNTY OF MILWAUKEE,

PLAINTIFF-APPELLANT,

V.

ROSS J. ROMENESKO,

DEFENDANT-RESPONDENT.

APPEALS from an order of the circuit court for Milwaukee County: HANNAH C. DUGAN, Judge. *Affirmed in part, reversed in part, and cause remanded with directions.*

¶1 BRASH, J.[1] The County of Milwaukee appeals an order of the circuit court granting several motions of the defendant, Ross J. Romenesko, relating to charges against him for operating a motor vehicle while under the influence of an intoxicant. Romenesko's motions requested sanctions against the County for alleged violations of the scheduling order; specifically, he sought to (1) suppress evidence contained in a revised report relating to the test results of his blood sample; and (2) preclude the testimony of all but one of the County's experts regarding those test results. Romenesko then filed a subsequent motion seeking further sanctions against the County: dismissal with prejudice of all the charges against him. This motion was based on the same alleged scheduling order violations.

¶2 The circuit court granted Romenesko's motion to suppress the revised report, and further, it ordered that *all* of the County's experts were precluded from testifying, without exception—going beyond Romenesko's request to exclude all but one expert. The circuit court then subsequently granted Romenesko's motion to dismiss all charges with prejudice, agreeing that the County had egregiously violated the scheduling order.

¶3 The County asserts that it did not violate the scheduling order. However, if a sanction is warranted, the County contends that dismissal with prejudice of all charges against Romenesko was not just, and therefore was an erroneous exercise of the circuit court's discretion.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 We affirm the circuit court's decision relating to the motion to suppress evidence contained in the revised report, but reverse the court's decision precluding testimony from all of the County's experts, without exception. We also reverse the court's dismissal with prejudice of all of the charges against Romenesko, and remand this matter to the circuit court to reinstate the charges.

BACKGROUND

¶5 Romenesko was arrested and cited on January 25, 2013 by a Milwaukee County Sheriff's Deputy for operating a motor vehicle while under the influence of an intoxicant—first offense. He was also cited for operating with a prohibited alcohol concentration—first offense, and failure to obey a traffic signal. Romenesko pled not guilty to all of the charges and demanded a jury trial.

¶6 At the time of his arrest, a blood sample was taken from Romenesko and sent to the Wisconsin State Laboratory of Hygiene in Madison for testing. Romenesko sought to suppress that evidence, as well as other evidence from the arrest, on grounds that the deputy did not have probable cause to make the traffic stop. That motion was scheduled to be heard on May 30, 2013, before the Honorable Carolina Stark, but due to an evidentiary issue that hearing, along with the jury trial, were adjourned and rescheduled for September 2013. However, a scheduling order for the case was issued by Judge Stark on May 30, which included the requirement of reciprocal discovery between the parties[2] pursuant to

[2] The scheduling order issued by Judge Stark is generally used in criminal cases, and referred to the prosecuting authority as the State instead of the County. We also note that references to the State, instead of the County, are used throughout the record as interchangeable terms, even though the correct prosecuting authority is the County.

WIS. STAT. § 971.23. The motion to suppress was heard by Judge Stark on September 16, 2013, and was denied.

¶7 The trial was rescheduled for September 23, 2013. On September 19, Romenesko filed a motion *in limine* that included a request that the court exclude any expert testimony unless a ***Daubert***[3] hearing was held. The motion was addressed on the day of the trial, which ultimately was adjourned due in part to the unavailability of Romenesko's expert witness, Mary McMurray, and because of court congestion. With regard to the motion, the County objected on grounds that it was untimely pursuant to the deadlines set forth in the scheduling order of May 30, 2013; nevertheless, the circuit court ordered the County to submit a written summary of any expert testimony by October 21, 2013, and ordered Romenesko to submit specific objections to that summary by November 1, 2013, so that the court could determine whether a ***Daubert*** hearing was necessary. A final pretrial conference was then scheduled for December 20, 2013.

¶8 On October 1, 2013, the County filed a notice of proposed expert testimony, naming Daniel McManaway, an advanced chemist at the state lab, as its expert witness. The County summarized that McManaway's testimony would include:

> the method and accuracy of testing blood samples for ethanol, the specific testing conducted in this case, the results of any testing conducted in this case, the number and types of beverages that someone with the defendant's physical characteristics would have to consume to reach certain ethanol concentrations in the blood, and the timeframe in which ethanol would have to be consumed in order to reach certain ethanol concentrations.

[3] *See* ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

¶9 The County also filed a request for a ***Daubert*** hearing for Romenesko's proposed expert witness, Mary McMurray. The County noted that it was not aware of this defense witness prior to Romenesko's request to adjourn the trial on September 23 because of her unavailability. The County further stated that it had no information regarding McMurray's qualifications, nor had it been provided with a summary of her proposed testimony, as required under the scheduling order. At the pretrial conference on December 20, both parties indicated that they had no objection to either expert witness. This case was then set on for trial in late January 2014.

¶10 However, in early January, Romenesko filed a motion to preclude the expert testimony of the deputy who had arrested him relating to the field sobriety tests performed incident to the arrest. Additionally, the County filed a motion to preclude McMurray's proposed testimony regarding the field sobriety tests. The trial, which had been rescheduled to late January, was rescheduled to April 2014.

¶11 At yet another pretrial conference held March 6, 2014, the parties stipulated that: (1) McMurray would not testify regarding field sobriety tests; (2) neither party would present any evidence relating to one particular field sobriety test, the horizontal gaze nystagmus test; and (3) that the deputy's testimony relating to the other field sobriety tests would be as a lay person rather than an expert. The circuit court further found that McManaway's testimony, to which the parties had stipulated as acceptable at the December 20 pretrial, would be allowed.

¶12 The trial set for April 2014 was then rescheduled to September 2014 due to court congestion. The September 2014 trial, which was to be tried before

the Honorable Janet Protasiewicz as the successor to Judge Stark's calendar, was again rescheduled due to court congestion, this time to January 2015.

¶13 In January 2015, the trial again had to be rescheduled due to court congestion. The trial was set and rescheduled three more times in 2015, twice due to the unavailability of the deputy to testify, and once due to a conflict with Romenesko's employment. At the last trial date in 2015, the trial was rescheduled for March 2016.

¶14 By March 2016, a different assistant district attorney, Attorney Taylor Kraus, had been assigned to prosecute the case. On March 1, Attorney Kraus was advised by McManaway that Romenesko's blood test had also tested positive for Delta-9-THC.[4] A revised report had been issued on June 26, 2013 and was transmitted to the Milwaukee County Sheriff's Department Traffic Liaison Deputy; however, it was apparently never forwarded to the district attorney's office.[5] Attorney Kraus immediately obtained the revised report and provided it to Romenesko.

¶15 The trial, which had been scheduled for March 2, 2016, was removed from the calendar in light of this information. It was set on for a plea hearing at the end of March due to discussions relating to a potential additional

[4] The full name of Delta-9-THC is Delta-9-tetrahydrocannabinol, a restricted controlled substance pursuant to WIS. STAT. § 340.01(50m)(e).

[5] McManaway informed Attorney Kraus that he had previously attempted to advise one of the former prosecuting attorneys about Romenesko's Delta-9-THC level in the revised report. This attempted communication by McManaway may have occurred when one of the previous prosecutors was in court discussing the rescheduling of the trial date with McManaway.

charge regarding the Delta-9-THC.[6] The plea hearing was later moved to April 12, 2016 at the request of both parties.

¶16 On April 12, 2016, counsel for Romenesko was advised by McManaway that the blood sample had been destroyed on May 1, 2014, and thus was no longer available for retesting. Romenesko then decided to reschedule a jury trial instead of entering a plea. The trial was scheduled for June 2016 but was adjourned due to the unavailability of Romenesko's expert witness. The trial was then rescheduled to August 2016, before the Honorable Hannah C. Dugan, as successor of Judge Protasiewicz's calendar.

¶17 At a pretrial conference on August 15, 2016, Attorney Kraus requested that in lieu of McManaway, another analyst from the state lab, Ryan Pieters, be substituted as the County's expert. Pieters had prepared the revised report containing the Delta-9-THC information. The August 2016 trial date, however, had to be adjourned due to Pieters's unavailability. The trial was then rescheduled for November 2, 2016.

¶18 On October 31, 2016, Romenesko filed a motion to preclude all evidence relating to the Delta-9-THC in his blood sample, including the testimony of Pieters, and to preclude any expert other than McManaway from testifying regarding Romenesko's blood alcohol concentration. Romenesko argued, among other things, that the County had not disclosed Pieters as its expert witness in accordance with the scheduling order issued by Judge Stark in May 2013. He also

[6] No charges relating to Delta-9-THC were ever brought against Romenesko, as it was by that time barred by the statute of limitations. Nevertheless, the County intended to use the information as additional evidence of Romenesko's impairment or for impeachment purposes.

asserted that he had no opportunity to request that his blood sample be preserved for retesting because the sample had already been destroyed by the time he had received the revised report with that information. The November 2 trial date was then adjourned to allow the County time to respond.

¶19 Subsequently, in December 2016, Romenesko filed another motion relating to the County's substitution of Pieters as its expert witness: a motion to dismiss with prejudice as a sanction for the County's alleged failure to comply with the scheduling order.

¶20 In its response to Romenesko's first motion regarding the exclusion of the Delta-9-THC evidence and Pieters's testimony, the County argued that the late disclosure of the revised report containing the Delta-9-THC analysis was not intentional or done in bad faith, but was simply the result of a miscommunication between the state lab and the County. Furthermore, the County maintained that it had complied with Judge Stark's scheduling order with regard to its expert witness. It argued that a summary of Pieters's testimony was not required because Pieters was the person at the state lab who had prepared the report, and under those circumstances a summary is not required pursuant to WIS. STAT. § 971.23(1)(e), the statute upon which the scheduling order was partially based. The County asserted that the substitution had been previously made verbally in court without objection by Romenesko, also noting that it had been agreed that McManaway would be removed from the witness list but not precluded from testifying at a future trial date.

¶21 With regard to Romenesko's motion to dismiss, the County again asserted that it had fully complied with the scheduling order. However, if the circuit court found that there was a discovery violation, the County argued that the

proper sanction would be exclusion of the Delta-9-THC evidence, as opposed to dismissal of the charges with prejudice.

¶22 At a hearing on these motions in February 2017, the circuit court ruled that any testimony relating to the Delta-9-THC evidence was precluded. Moreover, the court found that the County had not followed Judge Stark's scheduling order requiring summaries from its expert witnesses, and therefore also precluded testimony from any expert—including McManaway—who would have testified regarding Romenesko's blood alcohol content. The court, however, permitted additional time for the parties to submit supplemental arguments prior to ruling on Romenesko's motion to dismiss, primarily because the court had not reviewed the County's response to the motion prior to the hearing.

¶23 The County filed a motion to reconsider on March 6, 2017. However, at a subsequent hearing on this issue in April 2017, the circuit court refused to entertain the motion because it was not properly noticed and had not afforded Romenesko the opportunity to respond. The court then ruled that dismissal with prejudice was an appropriate sanction for the County's egregious noncompliance with the scheduling order. This appeal follows.

DISCUSSION

¶24 "The decision to impose sanctions and the decision of which sanctions to impose, including dismissing an action with prejudice, are within a circuit court's discretion." ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898. We will uphold a discretionary decision of the circuit court if it "'has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a

conclusion that a reasonable judge could reach.'" ***Hefty v. Strickhouser***, 2008 WI 96, ¶28, 312 Wis. 2d 530, 752 N.W.2d 820 (citation omitted).

¶25 Dismissal of an action for failure to comply with court orders is permitted under WIS. STAT. § 804.12(2)(a)3. However, this sanction, as well as other sanctions permitted under the statute, must be "just." Sec. 804.12(2)(a); *see also* ***Industrial Roofing Servs., Inc.***, 299 Wis. 2d 81, ¶43. This requirement that a sanction be "just" has been interpreted to mean "that dismissal requires that the non-complying party has acted egregiously or in bad faith." ***Id.***

¶26 "Where the circuit court finds that failures to respond to discovery and follow court orders are 'extreme, substantial, and persistent' it may dismiss the action with prejudice on the grounds that the conduct is egregious." ***Id.*** (citation omitted). Additionally, conduct that is "extreme, substantial and persistent" may be deemed egregious even if it is unintentional. ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶14, 265 Wis. 2d 703, 666 N.W.2d 38 (citation omitted). Nevertheless, dismissal on these grounds is a "particularly harsh sanction" and is "therefore appropriate only in limited circumstances." ***Industrial Roofing Servs., Inc.***, 299 Wis. 2d 81, ¶42. The preclusion of evidence may also be an appropriate sanction. WIS. STAT. § 804.12(2)(a)2.

¶27 In making its rulings in this case, the circuit court cited several bases for its finding of egregious noncompliance with the scheduling order on the part of the County: the failure of the County to timely provide to Romenesko the revised report from the state lab containing the finding of Delta-9-THC; the fact that Romenesko's blood sample had already been destroyed by the time he received notice of this evidence; and "all the delays that were created by the [County]."

¶28 We first note that this case, which began in January 2013, endured numerous delays resulting in three different judges presiding over the matter, as well as the involvement of several prosecutors. Our review of the record indicates that the delays in this case were primarily due to court congestion that required repeated rescheduling of the trial; there were also several delays due to the unavailability of witnesses for both parties and other procedural issues. The record does not support a finding that the delays in this case were persistently caused by the County.

¶29 With regard to the delay in providing Romenesko with the revised state lab report containing the Delta-9-THC information, the parties agree with the basic facts surrounding this issue: the revised report was forwarded by the state lab to the Sheriff's department in June 2013, but was never sent on to the County, and thus neither the County nor Romenesko were aware of the revised report and its findings until March 2016, long after the blood sample had been destroyed in May 2014 in a regular purge of samples.

¶30 Romenesko suggests that the County could and should have known about the revised report prior to March 2016 because McManaway alleged he had attempted to communicate this information to one of the prosecutors. The record, however, does not indicate that there was bad faith involved in this miscommunication. *See* ***Industrial Roofing Servs., Inc.***, 299 Wis. 2d 81, ¶43. Additionally, the state lab's standard procedures for purging old samples cannot be attributed to the County, as the County certainly has no control over those procedures. Thus, there were no grounds for suppression of the Delta-9-THC evidence based on any egregious non-compliance with the scheduling order on the part of the County.

¶31 Nevertheless, we conclude that the circuit court's decision to suppress this evidence was reasonable, based on admissibility issues. Due to the extensive delay—almost three years—before either party was aware of the revised report, there were no additional charges filed against Romenesko relating to the Delta-9-THC because the statute of limitations had expired. This calls into question the relevance—and thus admissibility—of this evidence.

¶32 "If a [circuit] court reaches the correct result based on erroneous reasoning, we will affirm." ***Bence v. Spinato***, 196 Wis. 2d 398, 417, 538 N.W.2d 614 (Ct. App. 1995). Because the circuit court made a reasonable decision—albeit for the wrong reason—in suppressing the evidence regarding the Delta-9-THC found in Romenesko's blood sample, we affirm. *See* ***id.***

¶33 We do not, however, come to the same conclusion about the circuit court's preclusion of the testimony of *all* of the County's potential expert witnesses regarding Romenesko's blood alcohol content. With regard to this issue, the record indicates that the County initially named McManaway as its expert in accordance with the scheduling order and summarized his testimony regarding Romenesko's blood alcohol analysis, as ordered by the circuit court in response to Romenesko's motion for a ***Daubert*** hearing. This was found to be acceptable by Romenesko at the pretrial conference in December 2013.

¶34 At that time, of course, the revised report had yet to be discovered. However, after the revised report surfaced, the County verbally requested the substitution of Pieters as its expert because Pieters was the analyst who had prepared that report. The County correctly argued that a summary of expert testimony is not required if the testifying expert is the person who prepared the report to be introduced as evidence under WIS. STAT. § 971.23(1)(e), the statute

referenced in the scheduling order of May 2013. Furthermore, Romenesko did not object to the substitution at the time the request was made by the County.

¶35 Instead, Romenesko filed his suppression motion on October 31, 2016, two days before the trial was next scheduled. In that motion, he sought not only to preclude the testimony of any expert relating to Romenesko's Delta-9-THC level, but also any expert witness for the County from testifying about Romenesko's blood alcohol content, with the exception of McManaway. The basis for this motion was that the County's substitution of its expert did not comply with the circuit court's order for expert testimony summaries from September 2013.

¶36 We disagree that these facts support the finding that the County committed an egregious violation of the scheduling order. In the first place, the record shows that the County timely provided Romenesko with the initial report regarding his blood alcohol content, in accordance with the scheduling order's requirement for compliance with WIS. STAT. § 971.23(1)(e). The circuit court's subsequent order for expert testimony summaries, which ultimately eliminated the need for a ***Daubert*** hearing, resulted in the parties agreeing to McManaway's proposed testimony relating to Romenesko's blood alcohol content. Additionally, Romenesko never questioned the admissibility of the report with regard to his blood alcohol content, nor did he request that his blood sample be retested prior to its destruction by the state lab. Thus, at the very least, McManaway should not have been precluded from testifying.

¶37 Furthermore, while there were a variety of evidentiary rulings made during the evolution of this case, it does not seem particularly unreasonable to request a substitute expert from the state lab, especially given the extended time

frame of the proceedings. In any event, we find no evidence in the record that the County engaged in "extreme, substantial and persistent" conduct relating to the scheduling order that could be deemed egregious. *See* ***Teff***, 265 Wis. 2d 703, ¶14 (citation omitted). Therefore, the circuit court's decision to preclude the testimony of all of the County's experts regarding Romenesko's blood alcohol content was an erroneous exercise of discretion. *See* ***Hefty***, 312 Wis. 2d 530, ¶28.

¶38 Additionally, in its ultimate decision dismissing all of the charges against Romenesko, the circuit court cited this perceived scheduling order violation regarding the County's experts, as well as the delay in providing to Romenesko the revised report containing the Delta-9-THC information, as the basis for its finding that the County had engaged in egregious conduct that warranted dismissal. However, as we have discussed above, the record does not support a finding of bad faith or egregious conduct on the part of the County with regard to the requirements of the scheduling order.[7] *See* ***Industrial Roofing Servs., Inc.***, 299 Wis. 2d 81, ¶43. We therefore conclude that the circuit court's dismissal with prejudice of all of the charges against Romenesko was also an erroneous exercise of its discretion. *See* ***Hefty***, 312 Wis. 2d 530, ¶28.

¶39 In sum, we affirm the circuit court's decision to preclude all evidence relating to Romenesko's blood sample containing Delta-9-THC.

[7] In fact, the record indicates that on several occasions, Romenesko filed motions very close to imminent trial dates, which resulted in the trial being rescheduled to allow time for the County to respond. We question how these filings conformed with the deadlines of the scheduling order, as well as their effect on the overall administration of the circuit court's calendar. *See* ***Lentz v. Young***, 195 Wis. 2d 457, 465, 536 N.W.2d 451 (Ct. App. 1995) ("The filing of motions is a matter that directly impacts the [circuit] court's administration of its calendar. [Circuit] courts have the inherent power to control their dockets to achieve economy of time and effort.").

However, we reverse the court's decision to preclude all of the County's expert witnesses from testifying regarding Romenesko's blood alcohol content. We also reverse the court's dismissal with prejudice of all of the charges against Romenesko, and remand this matter to the circuit court to reinstate those charges and continue the proceedings in a manner consistent with this opinion.

By the Court.—Order affirmed in part, reversed in part, and cause remanded with directions.

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