

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	:	Case No.:	FE-2022-920
	:		
vs.	:	Charges:	Child Abuse x9; DUI, 2nd
	:		within 5 years, Driving a
TROY WESLEY REYNOLDS,	:		Commercial Vehicle while
Accused.	:		revoked, Operate School
	:		Bus w/o endorsement
	:	Jury Trial:	March 21, 2023

**NOTICE AND MOTION TO DISMISS WITH PREJUDICE DUE TO DISCOVERY
ORDER VIOLATION**

COMES NOW the accused, Troy Wesley Reynolds, by counsel, Amy M. Jordan and Elizabeth McCready, and moves this honorable Court to dismiss the case as the Commonwealth has violated Mr. Reynolds's rights under the Sixth and Fourteenth Amendments, as well as the discovery order of this Court and Virginia Supreme Court Rule 3A:11.

PLEASE TAKE NOTICE that on March 17, 2023 at 10:00 a.m., or as soon thereafter as counsel may be heard, counsel will make argument to the Court in support of this Motion.

STATEMENT OF FACTS

Troy Wesley Reynolds is charged with nine counts of child abuse, one count of driving under the influence, 2nd offense within 5 years¹, driving a commercial vehicle while driving privileges were revoked and driving a school bus without the proper endorsement. These charges stem from an event where Mr. Reynolds was driving children back from a field trip.

¹ The Commonwealth has filed a motion to amend this charge. That motion will be heard on March 10, 2023.

A timeline of how the case progressed is important to demonstrate why Mr. Reynolds's case should be dismissed. The timeline is as follows:

1. Mr. Reynolds was arrested on October 27, 2022 and he was held without bond;
2. A preliminary hearing was held on December 1, 2022. Evidence was provided that Mr. Reynolds had been driving the bus under the influence of alcohol. No other Commonwealth theory was provided.
3. At term day on December 22, 2022, this case was scheduled for a jury trial on March 21, 2023. This case was specifically set within speedy trial limits.
4. On December 30, 2022, a discovery order was entered by the court as agreed to by the Commonwealth Attorney with specific deadlines.
5. Discovery was due 45 days before trial, on February 4, 2023. On February 4, 2023, the Commonwealth provided the following discovery: police report, 2 page witness statement, 14 video links containing body worn camera video and/or in car video, checklist for bail determinations, breath alcohol certificate, criminal complaint and DMV suspension notice dated 11/4/2022.
6. On February 17, 2023, the Commonwealth provided a copy of a motion entitled "Notice and Motion to Transfer Certificate of Analysis." That heard and denied on February 24, 2023.
7. On February 19, 2023, 30 days before trial, the Commonwealth's witness list was due.
8. On February 24, 2023, the Commonwealth provided defense counsel with a "Notice and Motion to Amend the Indictment." That motion is docketed for March 10, 2023.

9. On March 1, 2023, the Commonwealth Attorney assigned to this case notified defense counsel that she was not authorized to extend a plea offer in this case.
10. On March 6, 2023, additional discovery was provided in the form of 11 photos.
11. Later on March 6, 2023, a witness list was finally provided by the Commonwealth containing 19 names. No expert witnesses were identified.
12. Also on March 6, 2023, the Commonwealth filed a Motion in Limine to admit certified copies of convictions. Copies of the convictions were not attached to the motion nor have they been provided in discovery. Apparently these convictions are necessary for an alternative theory of criminal liability in this case.
13. Defense discovery to the Commonwealth was due on March 6, 2023. On March 6, 2023, defense counsel responded to the order for discovery to the Commonwealth.

MEMORANDUM OF LAW

I. The Commonwealth did not comply with the Discovery Order because it did not provide Counsel with full discovery until March 6, 2023.

Virginia Supreme Court Rule 3A:11 allows a criminal defendant to move the Court to order the Commonwealth to produce evidence relating to the evidence the Commonwealth intends to introduce against the defendant. Va. Sup. Ct. R. 3A:11(b).

“When a court orders discovery pursuant to Rule 3A:11, the Commonwealth has a duty to disclose the materials” in a timely manner. Lomax v. Commonwealth, 228 Va. 168, 173 (1984) (reversing a conviction where the Commonwealth failed to timely comply with the defendant’s discovery request). When the Commonwealth does not provide discovery in a timely manner, the defendant is prejudiced at trial. Id. “And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to

make pretrial and trial decisions on the basis of this assumption.” United States v. Bagley, 473 U.S. 667, 682-683 (1985).

In this case, the Commonwealth was ordered to provide discovery no later than 45 days before trial, or by February 4, 2023 with a witness list to be provided no later than 30 days before trial, or by February 19, 2023. April 29, 2022. While some discovery was provided by February 4, 2023, not all discovery was provided in a timely manner. In addition, the witness list was provided 15 days late and 15 days prior to trial. Mr. Reynolds remains incarcerated with charges totaling a potential sentence of 47 and a half years. The Commonwealth’s disregard for the court’s order and failure to comply with their obligation is sufficient to warrant a dismissal of these charges.

II. Because the Commonwealth did not comply with the discovery order, Mr. Reynolds’s constitutional rights were violated.

The Constitution of the Commonwealth of Virginia grants the criminally accused an unconditional right to call for evidence in his favor. Va. Const. Art. I; see also Bobo v. Commonwealth, 187 Va. 774, 779 (1948) (holding that “[A]n accused has the unqualified right to ‘call for evidence in his favor.’ This includes the right to prepare for trial which, in turn, includes the right to interview material witnesses and to ascertain the truth”).

Mr. Reynolds has the right to have effective assistance of counsel, a fair trial, the right to call for evidence on his behalf, and due process. Each of these rights has been violated by the Commonwealth by their blatant disregard for and violation of the Discovery Order in this case. Mr. Reynolds cannot possibly have a fair trial when the Commonwealth violates a court order by not turning over full discovery in a timely manner, in accordance with the Order for Discovery and Inspection and the late disclosure of Commonwealth witnesses. Mr. Reynolds is likewise denied the effective assistance of counsel and to call for evidence on his behalf when counsel has

not been provided with any of the evidence the Commonwealth intends to introduce against him until days before his trial. For example, until the Commonwealth provided a witness list, defense counsel has been unable to question the witnesses and prepare cross examination on Mr. Reynold's behalf. Many of the witnesses on the late disclosed witness list were unknown to defense counsel. At least 13 of the 19 witnesses were unknown to the defense until March 6, 2023. This does not provide defense counsel enough time to reach out to witnesses to discuss their testimony.

Also, a Motion in Limine was filed on March 6, 2023 regarding potential alternative theories of criminal liability in this case. Despite this motion being filed, the Commonwealth has yet to provide copies of these prior convictions. Defense counsel is under no obligation to seek out Commonwealth evidence against Mr. Reynolds.

III. The remedy for the violations of the discovery order is dismissal.

Rule 3A:11 requires that, "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 this Rule or with an order issued pursuant to this Rule, the court must order such party to permit the discovery or inspection of materials not previously disclosed, and may grant such other relief authorized by Virginia law as it may in its discretion deem appropriate." Rule of Supreme Court 3A:11(h). Virginia Code § 19.2-265.4 further states that, "the court may order the Commonwealth to permit the discovery or inspection, grant a continuance, or prohibit the Commonwealth from introducing evidence not disclosed, or the court may enter such other order as it deems just under the circumstances."

Where a court enters a discovery order in a case, that order governs discovery in that case. Abunaaj v. Commonwealth, 28 Va. App. 47, 53 (1998). When the Commonwealth fails to

adequately and fully provide discovery as required by the court's order, "the court may order the Commonwealth to permit the discovery or inspection, grant a continuance, or prohibit the Commonwealth from introducing the evidence not disclosed, or the court may enter such other order as it deems just under the circumstances." The relief to be granted following the late disclosure of evidence is within the trial court's discretion." Knight v. Commonwealth, 18 Va. App. 207, 211-212 (1994) (quoting Virginia Code § 19.2-265.4).

In Stotler v. Commonwealth, the Court of Appeals stated that it was the duty and responsibility of the court to deter inappropriate tactics by the Commonwealth seeking to introduce improper or inadmissible evidence "by taking such action, imposing such sanctions, or granting such relief as it deems appropriate." Stotler v. Commonwealth, 2 Va. App. 481, 484 (1986).

The only appropriate remedy is for the court to dismiss the charges against Mr. Reynolds. Virginia Code § 19.2-265.4 allows the court to fashion a remedy for a discovery violation deemed appropriate based on the circumstances. "[W]hen the Commonwealth fails to comply with a discovery order, continuance is not always the necessary or proper remedy or sanction. There are other sanctions available to the court, including disciplinary action, for failure to comply with a discovery order." Harrison v. Commonwealth, 12 Va. App. 581, 586 (1991). (See also, Commonwealth v. Timberlake, 2021 Va. Cir. LEXIS 166 (2021) wherein this court provided a remedy to the defendant of excluding the Commonwealth from introducing expert testimony and Commonwealth v. Gonzalez, 2020 Va. Cir. LEXIS 439 where the court's remedy was a jury instruction explaining the violation and inferences that could be drawn from it.)

What makes this violation so egregious is that the Commonwealth has a recent history of failing to provide discovery in a timely manner.

Adding insult to injury, because of the changes in the Commonwealth Attorney's office in the last few years, failing to comply with discovery is unfathomable. Ever since the Commonwealth held the Fairfax Courts and Fairfax County hostage with their refusal to prosecute misdemeanor offenses due to a "lack of resources," the Fairfax County Board of Supervisors has flooded the Commonwealth Attorney's office with additional staff and funding. The Commonwealth is currently staffed at **54 attorneys**, 13 paralegals and a litany of other support staff (they went from 63 employees to 84). Their funding jumped from \$5 million in FY2021 to \$9 million in FY2023. The Commonwealth's Attorney, Steve Descano, repeatedly told the Board of Supervisors that they needed additional staff to be able to comply with their discovery obligations, especially as it related to body worn cameras. Hence, the vast increase in funding, attorneys, and paralegals such that they would be able to comply with discovery. What makes it even more galling is that the Public Defender's Office has 25 attorneys, four investigators, three mitigation specialists and seven other administrative staff. The office handles approximately 75% of the criminal caseload in Fairfax County. Yet, we do not repeatedly violate orders of the court without compunction.

In case after case, discovery violations have ground the effective administration of justice in this court to a halt. Continuing this trial while Mr. Reynolds is incarcerated is not the answer. Mr. Reynolds has statutory speedy trial rights. Forcing defense counsel to request a continuance because of the late disclosures would in effect force Mr. Reynolds to waive speedy trial during the continuance. Virginia Code Annotated 19.2-243. This simply cannot be the answer.

The Commonwealth will most likely argue that a continuance is the appropriate remedy. However, Mr. Reynolds has been incarcerated for four months and 14 days. He has both statutory and Constitutional speedy trial rights. He should not be required to abandon those rights

because of the Commonwealth's incompetence. Mr. Reynolds is provided a panoply of rights, all of which he is permitted to assert. As such, he is asserting all of them, including his speedy trial rights which he asserted at term day by requesting a trial date within 5 months of his preliminary hearing.

Further, any potential motion by the Commonwealth to *nolle prosequi* the charges against Mr. Reynolds should be denied. Virginia Code § 19.2-265.3 provides that *nolle prosequi* shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown. Virginia trial courts properly deny such motions where circumstances “manifest a vindictive intent” resulting in “oppressive and unfair trial tactics.” Duggins v. Commonwealth, 59 Va. App. 785, 790-91 (2012), citing Battle v. Commonwealth, 12 Va. App. 624, 630 (1991) and Harris v. Commonwealth, 258 Va. 576, 584 (1999). Allowing a *nolle prosequi* under these circumstances would result in oppressive and unfair trial tactics as Mr. Reynolds has been incarcerated since the date of offense and the Commonwealth has failed to meet her obligations as ordered by this court when the Order for Discovery and Inspection was entered by this court on December 30, 2022, which gave the Commonwealth over a month to provide both discovery and notice of witnesses. Allowing the Commonwealth to work around the court's order to provide discovery runs afoul of Mr. Reynold's due process rights. Therefore, dismissal with prejudice is the only appropriate sanction.

If the court is not inclined to dismiss the charges, the court should order the exclusion of any evidence that was not provided as required under the discovery order. That would include, but not be limited to: any witness testimony as the Commonwealth failed to provide a witness list and other evidence until well after the required deadline as provided by this court.

WHEREFORE, Mr. Reynolds respectfully requests that this Court dismiss the charge due to the violation of the discovery order and Mr. Reel's constitutional rights.

Respectfully submitted,

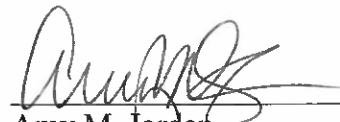
Troy Wesley Reynolds
By Counsel



Amy M. Jordan
Senior Assistant Public Defender

Certificate of Service

I, Amy M. Jordan, hereby certify that on this 10th day of March 2023 a true copy of the foregoing motion was hand-delivered to the Office of the Commonwealth Attorney, 4110 Chain Bridge Road, Fairfax, VA 22030.



Amy M. Jordan