IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT IN AND
FOR MARTIN COUNTY, FLORIDA.
APPELLATE DIVISION

Circuit Case No. 17-AP-5
Lower Tribunal No. 17-TR-4861

ADONIS MARTINEZ CISNERO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Not final until time expires for filing motion for rehearing, and if filed, disposed of.

Decision filed October 23, 2018.

Appeal from the County Court for Martin County; Paige Colton, Traffic Magistrate.

Louis Arslanian, Hollywood, for appellant.

No appearance for appellee.

PER CURIAM.

MORGAN, Acting Circuit Judge.

The Appellant seeks to reverse a guilty verdict in a case wherein the Appellant was charged with speeding. The Appellant contends that dismissal was appropriate because the citing deputy failed to include the type of speed measuring device he used and its serial number in the body of the citation. We disagree and affirm.

Facts

On March 15, 2017, a Martin County deputy patrolling I-95 observed two cars going very fast in the southbound lane. He estimated the speed of a white sports car at 120mph and the Appellant's blue Mustang at 115mph. His radar displayed the Appellant's speed at 110mph, so he initiated a traffic stop. He was unable to stop the driver of the white sports car. The deputy wrote

the Appellant a speeding ticket for driving 109mph in a 70mph zone, in an effort to "cut him a break" on the fine.

The Appellant[1] appeared before the traffic magistrate on May 12, 2017. The Appellant and the deputy had previously discussed the case, and the parties agreed to a deal where the deputy would amend the traffic citation to 29mph over the speed limit. However, when the traffic magistrate stated that she still intended to adjudicate the Appellant guilty, the Appellant announced "[T]hen I am prepared for trial." A 26 minute continuance of the trial ensued to allow the deputy to obtain the evidence he needed to present his case. The clerk then swore the deputy in, and he began testifying to his name and place of employment. At that point, the Appellant interjected with a motion to dismiss based on the discovery rule at Fla. R. Traf. Ct. 6.445. Rule 6.445 provides:

> **Discovery: Infractions Only**
>
> If an electronic or mechanical speed measuring device is used by the citing officer, the type of device and the manufacturer's serial number must be included in the body of the citation. If any relevant supporting documentation regarding such device is in the officer's possession at the time of trial, the defendant or defendant's attorney shall be entitled to review that documentation immediately before that trial.

The Appellant argued that the deputy did not write the type of radar device he used and its serial number on the citation pursuant to the discovery rule, and that the rule required dismissal as a remedy. The Appellant explained that the deputy could have amended the citation pursuant to Fla. R. Traf. Ct. 6.455, but he was precluded from doing so once the clerk administered the oath. Rule 6.455 provides:

> **Amendments**
>
> The charging document may be amended by the issuing officer in open court at the time of a scheduled hearing before it commences, subject to the approval of the official. The official shall grant a continuance if the amendment requires one in the interests of justice. No case shall be dismissed by reason of any informality or irregularity in the charging instrument.

The magistrate questioned the Appellant as to whether any case law existed to support his position. In response, the Appellant argued:

> "I've got case law on a lot of issues, but there's no case law that I know of that says if they violate the traffic rules by not putting the

[1] At the hearing, the Appellant was represented by counsel and did not personally attend. All references to "the Appellant" after this point refer to the Appellant's counsel.

> type – how could I possibly prepare for the case? Is it a radar? Is it a laser? Is it a stop watch? Is it a vehicle speedometer? I have no idea. How can I possibly defend the case since I have no idea how he calculated the speed. So how would that be fair to my client? How is it fair to my client?

The magistrate learned from the deputy that the deputy inadvertently failed to include the required information on the citation, but that the information sought by the Appellant had been included on a "Court Information Sheet" in the court file. The magistrate then offered to pass the case to allow the Appellant time to review that document and prepare accordingly. In response, the Appellant read the Committee Notes associated with Rule 6.445:

> **2009 Amendment.** This amendment is based on the fact that currently to the committee's knowledge there are 5 different measuring devices or types: Radar, Laser, Pace Car, Vascar, and airplane with stopwatch. It is believed that identifying the type of measuring device is not unduly burdensome to the state and it is necessary in the preparation of a defense. Withholding this information until the time of trial unduly prejudices the defense. This amendment is also forward-looking in that as new measuring devices appear, they can be effectively used as long as they are disclosed.

The magistrate again told the Appellant that he could have some "time right now to look at whatever you need so you are not prejudiced. Otherwise we are going to proceed to trial . . ." Despite the Appellant's assertion that "I don't intend to prepare myself in the middle of the trial," he agreed to review the Court information Sheet and let the court know when he was ready.

About 2 hours later, the magistrate recalled the case to continue the trial. The Appellant again argued that the case should be dismissed pursuant to Rule 6.445. The Appellant presented an order from a Broward County traffic hearing officer wherein the hearing officer found that the citing officers in several cases had failed to include the type of speed measuring device used in the body of the citations. The hearing officer determined that the discovery violation had "been recurring with alarming frequency" and dismissed the cases.

The magistrate offered to continue the case to allow the Appellant to prepare, but the Appellant stated that he thought that was an inappropriate remedy, given that trial had started and the deputy had been sworn. The trial was then conducted. The Appellant vigorously cross-examined the citing deputy as to his visual estimate of speed, qualifications and training to operate a radar device and the steps he took to ensure the radar device was working properly. The Appellant also vigorously argued against the admissibility of the radar reading. After hearing all the evidence,

the magistrate adjudicated the Appellant guilty.

Standard of Review

When the construction of a procedural rule is at issue, the standard of review is de novo. *Chemrock Corp. v. Tampa Elec. Corp.*, 71 So. 3d 786, 790 (Fla. 2011).

Analysis

Rule 6.445 is a discovery rule allowing the defendant in a traffic infraction case information regarding the speed measuring device used in that particular case. The Committee Notes make the point that recording this information on the citation does not place an unreasonable burden on the officer. Further, given the number of different measuring devices that can be employed by law enforcement officers, withholding this information until the trial unduly prejudices the ability of the defense to prepare for trial. The question presented in this case is whether the defense is entitled to an automatic dismissal when there is a violation of Rule 6.445.

The issue in this case appears to be one of first impression, as no binding authority has been identified by the parties. However, there is an abundance of case law interpreting discovery rules in other types of cases. These decisions uniformly require the court to consider the prejudice suffered by the injured party because of a discovery violation in fashioning a remedy. *See Morris v. Muniz*, No. SC16-931, 2018 WL 4328051 (Fla. Sept. 6, 2018) (The dismissal of an action for failure of the plaintiff to comply with discovery requires a finding of prejudice); *Faris v. S.-Owners Ins. Co.*, 240 So. 3d 848 (Fla. 5th DCA 2018), reh'g denied (Apr. 5, 2018) (The dismissal of an action with prejudice for a discovery violation should only be employed in extreme circumstances).

In the criminal arena, dismissal of an indictment or information as a sanction for a discovery violation is appropriate only in cases where the state suppresses material evidence favorable to the accused. *See Brady v. Maryland*, 373 U.S. 83 (1963). For the vast majority of discovery violations that do not meet this standard, the seminal case of *Richardson v. State*, 246 So. 2d 771 (Fla. 1971) is instructive. In *Richardson*, our Supreme Court considered whether the State's failure to list a witness under the discovery rules entitled the defendant, as a matter of right, to have the non-listed witness excluded from testifying at trial. *Id*. The Court noted that the discovery rule "was designed to furnish a defendant with information which would bona fide assist

him in the defense of the charge against him. It was never intended to furnish a defendant with a procedural device to escape justice. Yet such a result would be inescapable if the State's non-compliance with the rule necessarily required the exclusion of the non-listed witnesses from testifying . . .” *Id*. at 774. The Court then required that an inquiry of the surrounding circumstances be conducted to determine whether the defendant was prejudiced by the discovery violation. *Id*. Here, the Appellant knew before the trial that the required information was not included on the citation. The Appellant spoke to the citing officer and worked out a plea agreement before the trial and thus had the opportunity to inquire about the type of speed measuring device used to determine the Appellant's speed. Moreover, the information was included in the "Court Information Sheet" in the court file. Despite knowing that the citation lacked information regarding the radar device used in this case, the Appellant announced that he was "prepared for trial." The Appellant then intentionally waited until the witness was sworn before raising the issue. Once the issue was raised before the traffic magistrate and it was determined that the omission of the information from the citation was inadvertent, the traffic magistrate gave every opportunity to the Appellant to acquire the desired information and prepare accordingly. Finally, the Appellant's conduct at the trial establishes that the Appellant suffered no unfair prejudice because of the inadvertent discovery violation.

The Appellant's argument that the remedy employed by the magistrate in this case required an amendment to the citation in violation of Rule 6.455 is also without merit. Rule 6.455 concerns an amendment to the actual charge, such as amending the alleged speed of a defendant's vehicle to a different speed. The placement of the type of speed measuring device used and its serial number in the body of the citation is not part of the charge. It is the procedure used to convey discovery to an alleged speeder as it is the only document delivered to the alleged speeder by the prosecution before trial.

Based on all the circumstances of this case, it is clear that the Appellant engaged in a "gotcha" stratagem that will not be validated by this court. The magistrate acted appropriately to ensure that the Appellant suffered no prejudice due to the omission of the required information. As such, the Appellant's conviction and sentence is affirmed.

Affirmed.

COX, and KANAREK, JJ., concur.

Copies of above decision
were furnished to the attorneys/parties
of record on the same date
the decision was filed.