

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
MICHAEL KENT WYLIE,
Respondent.

No. 44501

FILED

JAN 12 2006

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court granting respondent Michael Kent Wylie's motion to dismiss. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

On November 2, 2004, Wylie was charged by way of a criminal indictment with one count each of burglary, grand larceny, possession of a controlled substance, and possession of burglary tools. In addition to the four counts, the indictment also gave Wylie notice that the State would be seeking habitual criminal adjudication in the event of a guilty verdict.

The trial began on December 1, 2004. During the State's opening statement, the prosecutor referred to an occurrence that was neither mentioned during the grand jury proceedings, nor found in any police report made available to the defense. The prosecutor stated that, immediately prior to her encounter with Wylie, Officer Liza Salavessa was driving her patrol vehicle during the early morning hours when her attention was drawn to two individuals talking, possibly arguing, by a van parked on the street outside the office building at 310 E. Warm Springs Road. The prosecutor informed the jury that Officer Salavessa made a U-turn in order to investigate the two individuals and find out what they were doing outside the office building. It was when she was making the

U-turn to investigate the two individuals that Officer Salavessa then encountered, and ultimately detained and arrested Wylie for burglarizing a suite inside the office building. Officer Salavessa later testified at trial that she suspected criminal activity outside the office building prior to making contact with Wylie.

At the beginning of the second day of trial, Wylie orally moved to dismiss the case based on the State's nondisclosure of information pertaining to the two individuals located outside the burglarized office building. Wylie argued that the State violated Brady v. Maryland by withholding evidence that was exculpatory, provided grounds to attack the reliability and thoroughness of the police investigation, and could impeach the credibility of the State's witnesses.¹ Wylie contended that knowledge of the withheld evidence would have bolstered the defense's theory of the case, that, in fact, the police "got the wrong guy." After extensive arguments by the two parties, the district court found that the State violated the mandate of Brady and granted Wylie's motion to dismiss the case. The State filed this timely appeal.

We conclude that the district court abused its discretion in granting Wylie's motion to dismiss the case. The United States Court of Appeals for the Ninth Circuit has stated that "our precedents make clear that dismissal of an indictment is an appropriate sanction for a constitutional violation only where less drastic alternatives are not available."² Here, the district court chose the most extreme remedy by

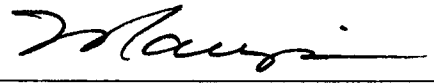
¹373 U.S. 83 (1963); see also Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000).

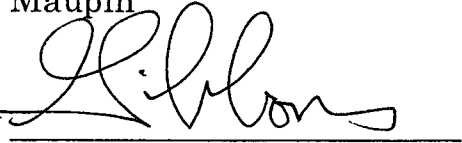
²United States v. Kearns, F.3d 1251, 1254 (9th Cir. 1993) (emphasis added); see also California v. Trombetta, 467 U.S. 479, 486-87 (1984) ("In
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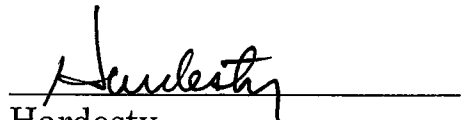
dismissing the case. The alleged Brady violation, if any, could have been remedied by either a continuance or the granting of a mistrial.³ Therefore, we conclude that the order of the district court granting Wylie's motion to dismiss must be reversed.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

 _____, J.

Maupin
 _____, J.
Gibbons

 _____, J.
Hardesty

... continued

nondisclosure cases, a court can grant the defendant a new trial at which the previously suppressed evidence may be introduced.”); Mazzan v. Warden, 116 Nev. 48, 76, 993 P.2d 25, 42-43 (2000).

³See United States v. Gaytan, 115 F.3d 737, 741 (9th Cir. 1997) (noting that “because the Brady violation could have been easily remedied by the granting of a continuance or the ordering of a mistrial, the sanction of dismissal with prejudice was not warranted”); see also United States v. Borokinni, 748 F.2d 236, 237-38 (4th Cir. 1984); United States v. Davis, 578 F.2d 277, 280 (10th Cir. 1978).

cc: Hon. Kenneth C. Cory, District Judge
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Public Defender Philip J. Kohn
Clark County Clerk