

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF MORTON

SOUTH CENTRAL JUDICIAL DISTRICT

Case No. 30-2017-CR-243

State of North Dakota,

Plaintiff,

vs.

Waste'Win Young,

Defendant.

ORDER ON
MOTION TO DISMISS

[¶ 1] Defendant Waste'Win Young ("Young") is charged with committing the offenses of Criminal Trespass, a Class A Misdemeanor offense, and Engaging in a Riot, a Class B Misdemeanor offense. The offenses are alleged to have occurred on or about February 1, 2017 in Morton County when a number of individuals were arrested for the same offenses during the DAPL protests. The case has been continued two times and is currently set for jury trial on December 5, 2018.

[¶ 2] On October 4, 2018, Defendant Young filed a motion to dismiss the complaint for alleged discovery violations by the State. Defendant contends that the State failed to disclose that its law enforcement witnesses in this case had been deposed in a case against one of the co-defendants involving the same charges. They contend this failure is in violation of Rule 16 N.D.R.Crim.P. and *Brady v. Maryland*.

[¶ 3] Defendant contends she first learned of the existence of the depositions On October 2, 2018 in the State’s response objecting to the Defendant’s witness list. In its initial response to the motion, the State indicated that the depositions are confidential by court order and cannot be disclosed. A hearing was held on the motion on October 5, 2018, and, after the State had an opportunity to submit a responsive brief, a second hearing was held November 5, 2018. The case has been rescheduled for trial on December 5, 2018.

[¶ 4] Rule 16(f) N.D.R.Crim. P. requires the prosecution to provide, upon written request, the names of all witnesses the prosecution intends to call in its case in chief and any statements made by the listed prosecution witnesses. The Defendant made a written discovery request for this information pursuant to Rule 16. The State admits that it did not disclose the existence of deposition testimony of its witnesses in its response to discovery. The State contends that it was not required to disclose the names of the law enforcement officers deposed because of a protection order issued in the case in which the depositions were taken. The State also contends that the deposition testimony and transcripts are not “statements” as defined by Rule 16(f)(4)(B) N.D.R.Crim.P. because the statements were made to defense counsel at the depositions and not made to an agent of the prosecution. The State also contends that no *Brady* violation occurred. Finally, the State argues that even if the court determines that the State failed to disclose, or failed to timely disclose, information, the appropriate remedy would be a continuance and not a dismissal.

[¶ 5] In this case, the State’s law enforcement witness were deposed in the case of *State v.*

Iron Eyes, 30-2017-CR-223. Although a separate Information was subsequently filed in the *Iron Eyes* case, *Iron Eyes* and Defendant Young were originally charged as co-defendants in this action with both being charged with the offense of Criminal Trespass in Count IV and *Iron Eyes* name continues to appear in Count IV of the Complaint. The *Iron Eyes* case was resolved by plea agreement on August 21, 2018. In the *Iron Eyes* case, the State filed a proposed protective order to prohibit disclosure of the transcripts of the depositions taken in that case [30-2017-CR-223, Index #710]. The court signed the protective order on August 17, 2018 [30-2017-CR-223, Index #737].

[¶ 6] The State argues that it was not required to disclose the existence of the depositions under the protective order and that the depositions are not “statements” which must be disclosed under Rule 16. Even if the court agreed with the State’s position that the portions of the transcripts involving statements made to defense counsel at the depositions were not “statements” which needed to be disclosed under Rule 16(f)(4)(B), any statements made in response to questions by the State at the depositions would fall under the definition of statements that needed to be disclosed. The State failed to disclose any such statements.

[¶ 7] Failure to provide the defendant in this case with notice of the existence of transcripts of depositions of law enforcement officers named as witnesses in this who were deposed in a case involving a defendant in another case charged with the same offense occurring at the same time and place as the offense charged against the defendant in this case fails to pass the smell test for due process and fundamental fairness. The protective order prohibits disclosure

of the transcripts of the depositions, it does not prohibit the State from disclosing the existence of the depositions and does not relieve the State of its duty to make such a disclosure.

[¶ 8] The protective order in the *Iron Eyes* case was issued by a different judge and this court is unaware of the reasons for the issuance of the order. The parties have suggested that if the State objects to the disclosure of portions of the depositions, then the court could review the transcripts and determine which portions are discoverable. The court has no inclination to expend more judicial time and resources to review numerous deposition transcripts in a case which: (1) is nearly two years old; (2) has been twice continued; (3) which has already consumed numerous hours of court time and which has required the defendant and her attorneys to make numerous appearances before the court; and (4) which involves misdemeanor charges against a defendant with no criminal record and who in all likelihood at most would receive a deferred sentence if convicted. Such review would only cause additional delay in this case which has already been delayed by the State's failure to disclose the existence of depositions of its law enforcement witnesses in this case.

[¶ 9] The State argues that if the court determines the State failed to timely provide discovery in this case, the remedy should be a continuance and not dismissal. However, it appears that further delay of this case is likely if a determination needs to be made as to which portions, if any, of the transcripts can be disclosed. The reason for that delay is caused primarily by the State's failure to timely disclose the existence of the depositions of its witnesses in the *Iron Eyes* case. For that reason, for the reasons stated in the preceding paragraph, and pursuant

to Rule 48(b)(4) N.D.R.Crim.P., the court determines that dismissal is appropriate in this case.

[¶ 10] For the foregoing reasons, the Defendant's motion to dismiss is GRANTED and the Complaint in this case is hereby DISMISSED.

SO ORDERED.

Dated this 30th day of November, 2018.

BY THE COURT:

A handwritten signature in black ink, appearing to read "David Reich", written over a horizontal line.

David Reich
District Judge

CC: Chase Lingle
James Fennerty
Andrea Carter
Bruce Nestor
Patricia Handlin