

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DARNELL EUTSAY,

Petitioner,

v.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D11-5689

STATE OF FLORIDA,

Respondent.

_____/

Opinion filed May 24, 2012.

Petition for Writ of Certiorari. Original Jurisdiction.

Kevin Robert Alvarez, Tallahassee, for Petitioner.

Pamela Jo Bondi, Attorney General, and Trisha Meggs Pate, Assistant Attorney General, Tallahassee, for Respondent.

RAY, J.

Darnell Eutsay, Petitioner, is the defendant in a pending prosecution for first-degree murder. He seeks a writ of certiorari to quash an order denying his motion to compel discovery and request for sanctions. Because Petitioner has not shown that the order causes a type of injury that is remediable by certiorari, we dismiss his petition. We write to address the portion of his petition concerning the alleged discovery violations.

Petitioner filed his motion to compel discovery approximately three months after filing a notice of discovery under Florida Rule of Criminal Procedure 3.220(a). He alleged that the State had failed to provide several items it is required to produce under Florida's reciprocal discovery rule, even though the time for providing those items had passed long before the filing of the motion to compel. Appellant's motion was denied without a hearing or an adequate explanation by the State for its alleged delay in providing the required discovery.¹

Although we are not unsympathetic to Petitioner's concerns, we cannot exercise certiorari jurisdiction unless Petitioner has shown that the trial court departed from the essential requirements of law in denying his motion to compel discovery, and that this ruling causes him irreparable harm for which there is no adequate remedy on appeal. See State v. Smith, 951 So. 2d 954, 957 (Fla. 1st DCA 2007). The type of harm that warrants certiorari relief is also that which will remain throughout the balance of the trial court proceedings. Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097, 1099 (Fla. 1987), superseded by statute on other grounds, as stated in Williams v. Oken, 62 So. 3d 1129, 1134 (Fla. 2011). As stated previously by this Court, "orders having the effect of denying discovery are almost invariably not reviewable by certiorari because of the absence of irreparable harm." Boyd v. Pheo, Inc., 664 So. 2d 294, 295 (Fla. 1st DCA 1995). Unlike

¹ It appears from the parties' filings in this Court that the State has since produced several, but not all, of the requested items.

situations where a trial court erroneously compels the exchange of information (the proverbial “cat out of the bag” orders), the harm done by the failure to provide information can be corrected on appeal in most cases. See Giacalone v. Helen Ellis Memorial Hospital Foundation, Inc., 8 So. 3d 1232, 1234 (Fla. 2d DCA 2009); Mingle v. State, 429 So. 2d 850, 850 (Fla. 4th DCA 1983) (denying a petition for writ of certiorari challenging the denial of a motion to compel disclosure of the name of a confidential informant due to the defendant’s “full, adequate and complete remedy on plenary appeal”).

When considering whether a particular type of harm may be remedied by appeal, we bear in mind that the burden of enduring a trial that may ultimately have to be repeated is not the type of harm certiorari exists to prevent. Cont’l Equities, Inc. v. Jacksonville Transp. Auth., 558 So. 2d 154, 155 (Fla. 1st DCA 1990); see also State v. Lozano, 616 So. 2d 73, 75 (Fla. 1st DCA 1993) (recognizing this standard but granting the petition due to unique circumstances not applicable to the instant case). Similarly, delay in the initial proceedings is not the type of harm contemplated by Florida’s certiorari standards. See Sjuts v. State, 754 So. 2d 781, 783-84 (Fla. 2d DCA 2000) (acknowledging that the delay caused by a discovery order in proceedings under Florida’s Involuntary Commitment of Sexual Predators Act was “necessarily more burdensome” for the defendant, who was being detained while the case was pending, than for a typical civil litigant, but declining to find irreparable harm).

In some civil cases, this Court has found irreparable harm based, at least in part, on the lack of a practical way to determine after the judgment how the denial of certain discovery materials would have affected the outcome of the proceedings. See, e.g., Queler v. Receivership of Cumberland Cas. & Sur. Co., 1 So. 3d 1140, 1140 (Fla. 1st DCA 2009); Baldwin v. Shands Teaching Hosp. & Clinics, Inc., 45 So. 3d 118, 122-23 (Fla. 1st DCA 2010). However, this consideration is less compelling in a criminal case, given the differing standards between civil and criminal cases concerning the burden to show harmful error. In a civil case, the burden is on the appellant to establish a reasonable probability “that a result more favorable to the appellant would have been reached if the error had not been committed.” Webster v. Body Dynamics, Inc., 27 So. 3d 805, 809 (Fla. 1st DCA 2010). In contrast, in an appeal from a criminal conviction, once the appellant exposes a preserved error, the State has the burden to establish beyond a reasonable doubt that the error did not contribute to the verdict. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). Under this test, the lack of a practical way to determine the effect of the denied discovery would increase the likelihood of reversal.

Here, Petitioner argues that the State’s delay in providing the materials required under Rule 3.220 is causing irreparable harm by inhibiting his ability to prepare a defense. In connection with this point, he argues that the alleged discovery violations are causing him to remain detained without making progress

on his defense, even though a trial date has been set. Petitioner also contends that the denial of the requested materials will effectively eviscerate his defense and that an appellate court will have no practical way to determine the effects of the trial court's ruling after the jury reaches a verdict.

Except for the delay in the current proceedings and the burden of possibly facing a second trial due to errors in these proceedings, any harm Petitioner suffers from the State's alleged discovery violations can be remedied on appeal, if those violations continue. Although Petitioner may not be able to proffer the withheld evidence for the record, he will be able to present arguments on appeal similar to those he has presented in his petition. In light of the "harmless error" standard that is applicable in criminal appeals, it is not necessary that there be a practical way to determine the effect of the error on the verdict before an appellate court may enforce Petitioner's discovery rights. If Petitioner is required to proceed to trial without the benefit of mandatory discovery and he preserves this issue at the time of trial, he will be entitled to a new trial with the benefit of the denied discovery unless the State can establish that there is no reasonable possibility that the trial court's error contributed to the verdict. See DiGuilio, 491 So. 2d at 1135. As a result of this available appellate remedy, we dismiss the petition for failure to satisfy the jurisdictional requirement of showing irreparable harm.

DISMISSED.

LEWIS and ROBERTS, JJ., CONCUR.