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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 08—CF—2848
)	
MARIBEL G. MASCORRO,)	Honorable
)	T. Jordan Gallagher,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion when it barred the arresting officer's testimony of videotaped matters as a discovery sanction for the State's loss of the squad car's video recording. The trial court erred in granting defendant's motion to suppress evidence and quash arrest, where there was no admissible evidence presented on defendant's motion.

Plaintiff, the State of Illinois, appeals the trial court's order granting defendant, Maribel G. Mascorro's, motion to quash arrest and to suppress evidence. The State contends that (1) the trial court abused its discretion when it barred the arresting officer's testimony as a discovery sanction

for the loss of the video from the squad car; (2) the trial court committed reversible error when it held that defendant did not consent to a search; and (3) the trial court erred when it determined that the police did not have reasonable suspicion to search defendant's belongings. Defendant responds that the trial court correctly imposed the discovery sanction on the State for its destruction of evidence and correctly suppressed the evidence. We reverse and remand.

On October 6, 2008, defendant was charged by a multiple-count complaint with the following offenses: one count of unlawful possession of a controlled substance with intent to deliver in an amount of more than one gram but less than 15 grams of a substance containing cocaine (720 ILCS 570/401(c)(2) (West 2008)); one count of unlawful possession of a controlled substance in an amount of more than one gram but less than 15 grams of a substance containing cocaine (720 ILCS 570/402(c) (West 2008)); one count of unlawful possession of drug paraphernalia in the form of a scale (720 ILCS 600/3.5(a) (West 2008)); and one count of unlawful possession of cannabis in an amount greater than 2.5 grams but not more than 10 grams (720 ILCS 550/4(b) (West 2008)).

On October 14, 2008, defendant filed a motion for discovery. The discovery motion included a request that the State disclose any relevant recorded statements of witnesses, whether there was any electronic surveillance used on defendant, and a request that the State use diligent good faith efforts to secure for the defense any discoverable material. On April 29, 2009, the State filed an answer to defendant's discovery request. In its answer, it stated that an "in-squad video may exist" and that the "State is requesting video from Aurora Police Department and will tender copy to defense if said video exists." On June 3, 2009, defendant filed a motion to quash arrest and suppress evidence.

On July 16, 2009, the trial court conducted an evidentiary hearing regarding defendant's motion. Defendant called Jason Woolsey, the arresting officer, to testify. Woolsey testified that at

approximately 4:20 a.m., on the morning of October 5, 2008, he was on patrol. He testified that he was in his squad car waiting to make a left-hand turn when he witnessed a sedan drive past his vehicle. Woolsey testified that the sedan drove directly past his squad car such that his headlights illuminated the inside of the sedan. Woolsey noticed that the sedan contained about four people, who appeared to be minors, and that the driver was not wearing a seatbelt. Woolsey testified that he pulled up behind the sedan, ran its license plates, and effected a traffic stop. Woolsey testified that there was a video camera in his vehicle that began recording when he activated his overhead lights.

At the close of Woolsey's testimony, the trial court asked Woolsey if there was a video of the incident and Woolsey replied affirmatively. Woolsey testified that the video was downloaded at the end of his shift and that the police department's procedure was to burn a copy of the video on to a disk in the event that it was needed for trial. Woolsey further testified that, at this juncture, he had not been asked to burn the video on to a disk. The trial court then asked Woolsey to burn the video to a disk and to get a copy of it to the State. Woolsey responded that he would do so. Both the State and defense attorney commented that the video might be helpful. They requested leave to introduce the video and the trial court elected to defer arguments on defendant's motion to suppress until the video was received and viewed. The matter was continued.

On August 13, 2009, defense counsel reported to the trial court that he discovered that the video from the Woolsey's vehicle was destroyed and made a motion to impose a discovery sanction against the State. Defendant argued that while dismissal of this case may be too severe a sanction, striking the portion of Woolsey's testimony that described events captured on the video would be

appropriate. The State responded that defendant had not filed a motion to preserve any evidence and that the loss of the video's material was inadvertent and consistent the police department's policy.

On August 19, 2009, the trial court issued its ruling on defendant's motion to quash arrest and suppress evidence. The trial court first addressed the issue of the destroyed video and acknowledged the police department's policy. However, the trial court also acknowledged the serious consequences of a felony charge and then held that any video evidence dealing with felony charges, at a minimum, should be preserved until the resolution of the charges. The trial court further explained that, although the State did nothing wrong and the police department did nothing wrong, procedures should be changed so that videos, which could become important evidence, would be preserved. The trial court then ruled that it would bar Woolsey's testimony as to anything that was videotaped as a discovery sanction. The trial court recognized that its order meant that there would be no testimony on defendant's suppression motion. The trial court further stated:

“As a result of that, the sanction, I guess, that I would impose, the only one I think I could impose is that I'm not going to dismiss it for a due process violation; but I think the sanction would be a discovery sanction, that the officer's testimony as to what happened on that tape would not be allowed.

Now, when we get to the issue at the motion to suppress, if we don't allow [Woolsey's] testimony, there is no testimony. But I want to go further than that in case there is another sanction that I could have imposed. If the appellate court thinks there is another sanction I could have imposed, I am going to grant the motion to suppress, having shifted the burden to the State.”

On the issue of voluntariness of defendant's consent to search, the trial court characterized it as "somewhere between mere acquiescence and consent." The trial court held that, because the situation at bar was ambiguous, it could not conclude that defendant consented to the search. The trial court entered a written order stating that the State had a duty to preserve the video, imposing a discovery sanction barring Woolsey's testimony as to the videotaped events, and granting defendant's motion to suppress evidence for lack of voluntary consent to search. On August 25, 2009, the State filed a certificate of impairment and timely appealed.

The State first contends that the trial court abused its discretion when it barred Woolsey's testimony as to matters that would have appeared on the squad's video recording as a discovery sanction for the State's inadvertent destruction of the video. The State argues that the discovery sanction was too harsh under the circumstances presented.

Defendant responds that the trial court was correct in imposing the discovery sanction for the State's destruction of the video. Defendant argues that precedent has established that the barring of testimony of matters that may have been included on the video is an appropriate sanction to impose for the destruction of an in-squad video taken during a traffic stop. See *People v. Petty*, 311 App. 3d 301, 305 (2000), citing *People v. Koutsakis*, 255 Ill. App. 3d 306,313-14 (1993).

We determine that the trial court did not abuse its discretion when it barred Woolsey from testifying as to the videotaped events as a discovery sanction for the State's destruction of the video. To promote the preservation of evidence, there must be the possibility of a sanction where evidence is lost or destroyed. *People v. Sutherland*, 223 Ill. 2d 187, 237 (2006). In criminal cases, the burden on the government to preserve evidence is stronger; it is the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants. *Brady v. Maryland*, 83 S. Ct. 1194,

1196, 373 U. S. 83, 85 (1963). If at any time during the course of the trial court proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule, the trial court may exclude such evidence, or enter such other order as it deems just under the circumstances. Ill. S. Ct. R. 415(g)(i) (eff. Oct. 1, 1971). We review the trial court's decision to implement a particular discovery sanction for an abuse of discretion. *People v. Schambow*, 306 Ill. App, 763, 767 (1999).

In this case, defendant requested discovery of any electronic surveillance used on defendant as well as any recorded statements of witnesses. The State responded that an “in-squad video may exist” and that the “State is requesting video from Aurora Police Department and will tender copy to defense if said video exists.” In-squad recordings are discoverable pursuant to Supreme Court Rule 412. *Koutsakis*, 255 Ill. App. 3d at 310-11 (1994), Ill. S. Ct. R 412 (a)(ii) (eff. July 1, 1982). At the evidentiary hearing on defendant's motion to quash arrest and suppress evidence, the State sought to introduce the video. Later, the parties learned that the video was inadvertently destroyed. Although, the trial court found that there was no fault by the State, sanctions may be imposed in the absence of bad faith. *Koutsakis*, 255 Ill. App. 3d at 311. Here, the trial court found that the State had a duty to preserve the video. The State failed to do so. Thus, the trial court used its authority to impose a sanction. See Ill. S. Ct. R. 415(g)(i) (eff. Oct. 1, 1971).

Based on our review, we conclude that no abuse of discretion occurred. The State was on notice of its need to preserve the video as early as October 14, 2008, when defendant filed her motion for discovery. The State, at that point, should have taken appropriate actions to preserve the video or to instruct the police department not to destroy it. Moreover, on July 16, 2009, the State sought to introduce the video and the trial court specifically instructed Woolsey to burn the video

on to a disk and tender a copy of the disk to the State. Instead, as of August 13, 2009, the video had been destroyed. Here, the State sought the introduction of the video but took no action to preserve it. Although, there was no bad faith on behalf of the State, there was also no abuse of discretion by the trial court.

The State argues that, although a discovery sanction may have been warranted under the circumstances, the trial court's chosen sanction was too harsh, as other, less harsh, sanctions were available. We disagree. The trial court did not dismiss the charges, as was done with other cases cited by the State in support of its position that the discovery sanction was too harsh. See *People v. Leannah*, 72 Ill. App. 3d 504 (1979); see also *People v. Camp*, 352 Ill. App. 3d 257 (2004). Furthermore, this court agreed with the third district's determination that "the appropriate sanction for the State's failure to produce requested audiotapes is to preclude the arresting officer from testifying about matters that may have been included on the tapes." *People v. Petty*, 311 Ill. App. 3d 301, 304 (2000), citing *Koutsakis*, 255 Ill. App. 3d at 313-14. Here, the trial court limited the arresting officer's testimony to matters which would not have been included on the video and, we cannot say it was an abuse of the trial court's discretion.

The trial court's ruling on a motion to suppress the fruits of a search presents mixed questions of facts and law. *People v. Kratovil*, 351 Ill. App. 3d 1023, 1030 (2004). Thus, our standard of review is twofold. We will uphold the trial court's findings of fact, unless such findings are against the manifest weight of the evidence. *Id.* However, a reviewing court remains free to undertake its own assessment of the facts in relation to the issues presented and may draw its own conclusions when deciding what relief should be granted. *Id.* Accordingly, we review *de novo* the ultimate issue of whether the evidence should be suppressed. *Id.*

In the present case, the trial court granted the suppression motion after imposing a discovery sanction. The trial court reasoned that without the video, Woolsey could not testify to any facts or observations that could have been determined from the video. While we have already held that the trial court's order striking Woolsey's testimony as a discovery sanction was proper, that holding is not dispositive of this case. Nor does the holding support the trial court's order granting defendant's motion to suppress evidence and quash arrest.

On a motion to suppress evidence obtained as a result of a warrantless arrest, the initial burden of proof is on the defendant. *People v. Garvin*, 349 Ill. App. 3d 845, 851 (2004). Once the defendant puts forth a *prima facie* case, the burden shifts to the State to re-but that evidence. *People v. Linley*, 388 Ill. App. 3d 747, 749 (2009), citing *People v. Beverly*, 364 Ill. App. 3d 361, 369 (2006). The burden does not shift to the State until defendant makes a *prima facie* case. *Id.*

In this case, the trial court prohibited Woolsey's testimony from being used during the proceedings. The hearing on the motion to quash arrest and suppress evidence was a critical part of these proceedings. *People v. Gonzales*, 40 Ill. 2d 233, 237 (1968). Although the State had said that it did not intend to present any evidence at the hearing after defendant rested, and that meant that all of the evidence that was going to be presented had been heard, once the trial court struck Woolsey's testimony, no testimony was available for the trial court to consider. Thus, it was error for the trial court to grant defendant's motion.

Defendant should not have been allowed to use barred testimony to make her *prima facie* case that Woolsey lacked reasonable suspicion to stop her vehicle. See *Garvin*, 349 Ill. App. 3d at 851 (holding that defendant must put forth some admissible evidence to make a *prima facie* case on a motion to suppress). The burden on defendant does not shift to the State until defendant's evidence

presents a *prima facie* case. *Linley*, 388 Ill. App. 3d at 749, citing *Beverly*, 364 Ill. App. 3d at 369. Therefore, the trial court should have held that the burden remained on defendant, and then allowed defendant to present admissible evidence to show that she had done nothing unusual to draw Woolsey's attention as she drove past Woolsey's squad car, that she had not given her consent to have her property searched, and that Woolsey did not have reasonable suspicion to search her belongings. See *People v. Lampitok*, 207 Ill. 2d 231, 255 (2003) ("reasonable suspicion exists when articulable facts, which taken together with the rational inferences from those facts *** warrant a reasonable, prudent officer to investigate further"); also see *People v. Thornburg*, 384 Ill. App. 3d 625, 633 (2008) (holding that an officer may search a person's belongings without a warrant if the search is conducted with voluntary consent). Once that evidence was offered, the burden would shift to the State to negate defendant's *prima facie* case. *Linley*, 388 Ill. App. 3d at 749, citing *Beverly*, 364 Ill. App. 3d at 369. Thus, we reverse the trial court's decision to grant defendant's motion and remand the case for further proceedings consistent with this order.

The State presents two additional contentions on appeal. However, our resolution of the discovery sanction issue obviates the need to address the State's other contentions on appeal. See *People v. Brown*, 236 Ill. 2d 175, 195 (2010) ("reviewing courts will not render advisory opinions or consider an issue when it will not affect the result").

For the forgoing reasons, we reverse and remand the judgment of the circuit court of Kane County.

Reversed and remanded.