2016 IL App (5th) 150014-U

NO. 5-15-0014

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Madison County.
	)	
v.	)	No. 14-DT-347
	)	
JACK L. KEUSS,	)	Honorable
	)	Elizabeth R. Levy,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order granting the defendant's motion for sanctions based on the destruction of a booking-room video and rescinding the statutory summary suspension of his driver's license was affirmed, holding that (1) the court did not abuse its discretion in sanctioning the State by barring the arresting officer's testimony about what would have been shown on the video and ruling that it would presume that anything that would have been shown on the video would have been favorable to the defendant and (2) the court did not err in rescinding the statutory summary suspension of the defendant's driver's license due to its ruling on his motion for sanctions.

¶ 2 The State appeals the trial court's order granting the motion of the defendant, Jack L. Keuss, for sanctions, based on the destruction of a booking-room video, and rescinding the statutory summary suspension of his driver's license. On appeal, the State argues that

(1) the trial court's sanction was an abuse of discretion; and (2) the court's grant of rescission was erroneous as a matter of law where the defendant failed to establish a *prima facie* case. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 The defendant was arrested on May 9, 2014, and charged with driving under the influence of alcohol (DUI) (14-DT-347). As a result of the arrest, he was also charged with: (1) misdemeanor possession of drug paraphernalia (14-CM-1399); (2) misdemeanor resisting a police officer (14-CM-1400); and (3) operating an uninsured motor vehicle (14-TR-8648). Only the DUI case is at issue in this appeal.

¶ 5 The defendant's DUI arrest was reported to the Secretary of State, who summarily suspended his driver's license. The arresting officer's sworn report indicates that the defendant had a strong odor of alcohol on his breath, was unsteady on his feet, failed field sobriety tests, and was unable to complete all tests. The officer certified that he gave the defendant written notice that his suspension would commence on the forty-sixth day from May 9, 2014, and that the defendant was issued a written warning to motorist on May 9, 2014.

¶ 6 On June 17, 2014, 39 days after his arrest, the defendant filed a petition for hearing, acknowledging that he had received a confirmation notice of statutory summary suspension. In the petition, he noted that the arresting officer had filed a sworn statement stating that he was arrested for DUI and that he had "refused to submit an analysis as set forth in the law." He requested a hearing to determine, *inter alia*, "[w]hether [he] had

been advised by the arresting officer that [his] privilege to operate a motor vehicle would be suspended if [he] refused to submit and complete the test or tests."

¶ 7 Also on June 17, 2014, the defendant filed a motion for discovery, seeking, *inter alia*, any video recording of him. That same day, he also filed a notice, pursuant to Illinois Supreme Court Rule 237 (eff. July 1, 2005), to the State to have at all trials or hearings in this matter, *inter alia*, any video recording of him.

¶ 8 On July 2, 2014, the defendant filed a motion for sanctions. In the motion, he alleged that he was arrested on May 9, 2014; that he filed a motion for discovery on June 17, 2014, requesting that the State provide him with, *inter alia*, any video recording of him; that the motion was served on the State's Attorney's office by regular mail on June 16, 2014; that the State's response to the motion was received on or about June 19, 2014, and did not contain the booking-room video; that his counsel received a memo from the police department on or about June 19, 2014, notifying him that the video had been destroyed; that the State's failure to preserve and produce the video was a discovery violation; and that the State should be sanctioned for such violation by barring any testimony regarding what would have been shown on the video.

¶ 9 On July 7, 2014, the matter came before the court for a hearing. Defense counsel indicated that, according to the police department, at the time of the defendant's initial discovery request, the booking-room video had already been destroyed. Counsel argued that, without the video, it was impossible to tell what the video would have shown. Asserting that the video was crucial evidence in the DUI case, counsel requested, as a sanction, that everything that would have been shown on the video be inadmissible in

court and that the court presume that anything that would have been shown on the video would have been favorable to the defendant. In response to the court's question as to whether he was seeking the sanction in the criminal case as well, counsel clarified that, at that time, he was only seeking the sanction with respect to the civil rescission hearing presently before the court.

¶ 10 The court then stated: "it was my understanding that the two sides had reached a stipulation *** that the booking room video was destroyed, although it should have been maintained as evidence in this case." Counsel agreed that this was the stipulation. The State argued that, even though the video no longer exists, the arresting officer should be permitted to testify that the defendant was read the warning to motorists in the booking room and given a written copy of that warning, signed by the officer, on the date of the arrest. Defense counsel responded that the requested sanction would preclude any testimony about what would have been shown on the video, including the officer's testimony about the warning to motorist.

¶ 11 The court granted the defendant's motion for sanctions. The court barred the arresting officer's testimony about what would have been shown on the booking-room video and ruled that it would presume that anything that would have been shown on the video would have been favorable to the defendant in this case.

¶ 12 Defense counsel then moved for rescission of the statutory summary suspension on the grounds of improper warning to motorist. In response, the assistant State's Attorney renewed her argument that the State could present testimony from the arresting

officer but acknowledged that the sanction would prevent that. The court then rescinded the statutory summary suspension due to its ruling on the motion for sanctions.

¶ 13 On August 5, 2014, the State filed a motion to reconsider. The State noted that the defendant had waited 39 days after his arrest to request discovery; that, pursuant to departmental policy, the video had been erased or reused before the motion for discovery was filed; that the State had supplied all of the discovery material it had; that it had not violated any court order; that no discovery violation had occurred; that sanctions were, therefore, inappropriate; and that rescission of the statutory summary suspension was inappropriate. In the alternative, the State argued that, even if the court correctly found a discovery violation, the sanction was inappropriate.

¶ 14 The court denied the State's motion to reconsider on December 23, 2014. The State filed a timely notice of appeal and certificate of substantial impairment.

¶ 15 ANALYSIS

¶ 16 We will first address the State's argument that the trial court's sanction was an abuse of discretion. The parties stipulated "that the booking room video was destroyed, although it should have been maintained as evidence in this case." The State, therefore, concedes that it is precluded from arguing on appeal that the trial court erred in finding that the booking-room video should have been maintained as evidence in this case.

¶ 17 To determine whether the trial court's sanction was an abuse of discretion, we must first determine whether the State's failure to produce the booking-room video constituted a discovery violation. If the video had been destroyed *after* the defendant had requested it, it is clear that the destruction of the video would have been a discovery

violation. See *People v. Kladis*, 2011 IL 110920. In the present case, however, the video was destroyed *before* the defendant requested it.

¶ 18 In *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 121-22 (1998), our supreme court held that, even before a lawsuit is filed, "a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence." The court found that the defendant had a right to perform tests on the evidence in order to formulate its defense and that the plaintiffs' destructive testing of the evidence before the lawsuit was filed interfered with the defendant's right to discovery. *Id.* at 122. The court, therefore, held that the trial court did not abuse its discretion in finding that the plaintiffs' actions were an unreasonable noncompliance with discovery rules. *Id.* at 122-23.

¶ 19 Similarly, given the parties' stipulation in the present case "that the booking room video was destroyed, although it should have been maintained as evidence in this case," we hold that the booking-room video was subject to discovery in this case; that the State's failure to preserve and produce the video was an unreasonable noncompliance with discovery rules; and that the trial court, therefore, had the authority to impose a sanction on the State for failing to take measures to preserve the video. See Ill. S. Ct. R. 219(c) (eff. July 1, 2002) (authorizing the trial court to impose a just sanction on a party who unreasonably fails to comply with discovery rules).

¶ 20 We now turn to the issue of whether the sanction imposed was appropriate for the discovery violation. The decision to impose a particular sanction under Rule 219(c) is within the trial court's discretion, and, thus, only a clear abuse of discretion justifies reversal. *Shimanovsky*, 181 Ill. 2d at 120. A trial court abuses its discretion only when

its decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the court. *Seymour v. Collins*, 2015 IL 118432, ¶ 41.

¶ 21 Illinois courts have imposed a variety of sanctions on the State for the inadvertent destruction of video or audio recordings. A review of the following cases is instructive: *Kladis*, 2011 IL 110920; *People v. Shambow*, 305 Ill. App. 3d 763 (1999); *People v. Aronson*, 408 Ill. App. 3d 946 (2011); and *People v. Camp*, 352 Ill. App. 3d 257 (2004).

¶ 22 In *Kladis*, the defendant was charged with DUI, and her driver's license was summarily suspended. 2011 IL 110920, ¶ 3. Five days after her arrest and 25 days before her first court date, she filed a petition to rescind the statutory summary suspension. *Id.* That same day, she also requested that the State produce any videos of her while she was in custody. *Id.* The police department's policy was that the videos were automatically erased within 30 days of the arrest, and the video of the defendant's traffic stop was erased just hours before the first court appearance. *Id.* ¶ 6. As a discovery sanction for the State's failure to preserve and produce the video in the statutory summary suspension proceedings, the trial court barred the arresting officer from testifying about what would have been shown on the video. *Id.* ¶¶ 9, 11.

¶ 23 The hearing on the defendant's petition to rescind her statutory summary suspension proceeded. *Id.* ¶ 13. Based upon the evidence presented, the trial court held that the arresting officer had no probable cause to stop, detain, and arrest the defendant. *Id.* Accordingly, her petition to rescind the statutory summary suspension was granted. *Id.* The State appealed the sanctions ruling in the statutory summary suspension proceedings but later voluntarily dismissed that appeal. *Id.* ¶ 14.

¶ 24 Defense counsel then moved to quash arrest and suppress evidence in the defendant's misdemeanor DUI case. *Id.* ¶ 14. As a discovery sanction for the destruction of the video, the trial court barred the arresting officer from testifying about anything that would have been shown on the video, just as it had done in the statutory summary suspension proceedings. *Id.* ¶ 15.

¶ 25 Our supreme court began its analysis in *Kladis* by noting that the State did not dispute that it was placed on notice by the defendant to produce the video of her stop and arrest in the statutory summary suspension proceedings. *Id.* ¶ 20. The court also noted that the State did not contest that its inaction resulted in the destruction of the video, and, in fact, conceded that the sanction was proper in the statutory summary suspension proceedings. *Id.* However, the State argued that, under *People v. Schmidt*, 56 Ill. 2d 572 (1974), it had no obligation to produce the video in the misdemeanor DUI case. *Id.* ¶ 21. The State, thus, argued that its failure to preserve the video did not warrant a sanction in the DUI case and that the trial court abused its discretion in imposing a sanction. *Id.*

¶ 26 The supreme court disagreed, holding that the State's failure to preserve and produce the video constituted a discovery violation. *Id.* ¶ 29. The court noted that the use of videos as evidence at trial has become a common practice to allow a defendant the opportunity to present an effective defense and to further the truth-seeking process. *Id.* ¶ 28. The court observed that these videos are relevant and admissible evidence because they show what transpired during the traffic stop, which serves to further the truth-seeking function at trial. *Id.* ¶ 37. The court held that these videos are discoverable even in misdemeanor DUI cases. *Id.* ¶ 29. The court observed that the videos help the fact

finder in seeking the truth and in arriving at a just result. *Id.* ¶ 34. The court noted that the videos may be helpful to both the defendant and the State. *Id.* ¶ 37. The court, therefore, held that the trial court did not abuse its discretion in finding that the video was subject to discovery. *Id.* ¶ 39. The court also held that the trial court properly exercised its discretion in choosing from the spectrum of available options and narrowly tailoring its sanction to bar the State from introducing testimony regarding what was contained in the video. *Id.* ¶ 45.

¶ 27 In *Shambow*, 305 Ill. App. 3d at 765, the defendant was charged with DUI, and his driver's license was summarily suspended. Eleven days after his arrest, he served a subpoena *duces tecum* on the police, requesting an audiotape of radio communications between the arresting officer and police headquarters. *Id.* Pursuant to departmental policy, the requested tape was erased 30 days after the arrest. *Id.* The defendant filed a motion for sanctions, seeking rescission of the statutory summary suspension. *Id.* at 766. The trial court granted his motion for sanctions and rescinded the statutory summary suspension. *Id.* The appellate court, relying on Supreme Court Rule 219, held that the rescission of the statutory summary suspension was not an appropriate discovery sanction because the State's failure to preserve the tape was not deliberate or in bad faith and because the tape had limited evidentiary value for the summary suspension hearing. *Id.* at 768-69. The court noted that, by its holding, it did not "intend to undermine the trial court's ability to enforce its discovery orders." *Id.* at 769. However, the court made clear that the "nature of the sanction must be commensurate with the discovery violation." *Id.* The court noted that "instead of rescinding the summary suspension, the trial court could

have simply precluded [the officer] from testifying concerning statements he made to the police dispatcher as well as any information he learned from the dispatcher." *Id.* The court stated that "[s]uch a sanction would have been more proportional to the magnitude of the discovery violation." *Id.*

¶ 28 In *Aronson*, 408 Ill. App. 3d at 947, the defendant was charged with DUI, and her driving privileges were summarily suspended. She petitioned to rescind the statutory summary suspension, challenging, *inter alia*, whether the arresting officer had reasonable grounds to believe she was driving under the influence of alcohol. *Id.* She subsequently moved for sanctions against the State because a requested video of her stop and performance on field sobriety tests was "not viewable." *Id.* at 948. She argued that, in light of the State's failure to properly preserve and produce the video, the court should, as a sanction, grant her petition to rescind the statutory summary suspension. *Id.* The trial court denied her motion for rescission as a sanction for the absence of the video. *Id.* at 952. In doing so, the court made clear that, where there was no suggestion that the State intentionally destroyed the video, rescission as a sanction was inappropriate. *Id.* The court agreed with the State's argument that, while it was inappropriate under these circumstances to grant rescission solely based on the absence of the video, the court could consider the absence of the video when weighing the evidence. *Id.* at 952-53.

¶ 29 The matter then proceeded to a hearing on the defendant's petition to rescind the statutory summary suspension, during which both she and the arresting officer testified. *Id.* at 949-50. The arresting officer testified that the defendant failed the field sobriety tests, but the defendant testified that she passed them. *Id.* at 950. The trial court granted

the defendant's petition to rescind the statutory summary suspension. *Id.* In doing so, the court noted that it thought the arresting officer testified more credibly than the defendant but that it was rescinding the statutory summary suspension because of the absence of the video, which was in the State's possession. *Id.* at 951.

¶ 30 The appellate court noted that the trial court considered and weighed the testimony of both the defendant and the arresting officer and that the court found that the officer testified credibly. *Id.* at 953. However, the trial court also discussed the general proposition that, when evidence in one party's control is missing or destroyed, an inference may be drawn that the evidence was detrimental to that party. *Id.* Thus, in the process of weighing the in-court testimony, the trial court factored into its deliberations that the video would have spoken to the credibility of the testimony and presumptively would have weighed against the State. *Id.* Therefore, although the trial court found the arresting officer more credible than the defendant based solely on their testimony, the court implicitly determined that the defendant's testimony, when bolstered by the presumption that the video would have been detrimental to the State, outweighed the arresting officer's testimony such that rescission was warranted. *Id.* The appellate court concluded that the trial court's findings were not against the manifest weight of the evidence. *Id.* at 954. Giving deference to the trial court's findings that the arresting officer's testimony was outweighed by the evidence in the defendant's favor and, thus, that there were no reasonable grounds to believe that the defendant was driving under the influence of alcohol, the appellate court agreed that rescission was warranted. *Id.*

¶ 31 In *Camp*, 352 Ill. App. 3d at 258, the defendant moved to dismiss DUI charges against him, arguing that he could not receive a fair trial because the State had lost a video of his field sobriety tests. The trial court granted the request, and the appellate court reversed on the basis that dismissal of the charges was an excessive sanction for the inadvertent loss of the video. *Id.* Although the court found dismissal of the charges to be a sanction disproportionate to the discovery violation, the court stated that it would be appropriate for the trial court to consider a variety of less drastic options, including "instructing the jury that the absence of the videotape requires an inference that the tape's contents are favorable to defendant." *Id.* at 262.

¶ 32 Based upon the cases discussed above, we conclude that the trial court in the present case properly exercised its discretion in choosing from the spectrum of available options and narrowly tailoring its sanction to bar the arresting officer from testifying about anything that would have been shown on the booking-room video and ruling that the court would presume that anything that would have been shown on the video would have been favorable to the defendant in this case.

¶ 33 We turn now to the State's argument that the trial court's rescission of the statutory summary suspension was erroneous as a matter of law where the defendant failed to establish a *prima facie* case. "A hearing on a petition to rescind a summary suspension is a civil proceeding in which the driver bears the burden of proof." *People v. Wear*, 229 Ill. 2d 545, 559-60 (2008). "If the driver establishes a *prima facie* case for rescission, the burden shifts to the State to come forward with evidence justifying the suspension." *Id.* at 560. One of the issues that may be raised is "[w]hether the person, after being advised

by the officer that the privilege to operate a motor vehicle would be suspended or revoked if the person refused to submit to and complete the test or tests, did refuse to submit to or complete the test or tests to determine the person's blood alcohol *** concentration." 625 ILCS 5/2-118.1(b)(3) (West 2014). A trial court's finding that a *prima facie* case has been made will not be disturbed on appeal unless it is against the manifest weight of the evidence. *People v. Paige*, 385 Ill. App. 3d 486, 489 (2008).

¶ 34 At the hearing in the present case, the defendant sought rescission of the statutory summary suspension on the basis that no proper warning to motorist was given. The trial court granted the defendant's motion to rescind the statutory summary suspension due to its ruling on his motion for sanctions.

¶ 35 The State argues that, at the hearing, the defendant presented no evidence and, therefore, failed to make a *prima facie* case. What the State fails to recognize is that the trial court, as part of its sanction, ruled that it would presume that anything on that booking-room video would have been favorable to the defendant in this case. Implicit in that ruling is a presumption that no proper warning to motorist was given because the parties agreed that the warning to motorist would have been shown on the video. Accordingly, the trial court's finding that, based on that presumption, the defendant made a *prima facie* case for rescission is not against the manifest weight of the evidence.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 38 Affirmed.