2013 Ill App (1st) 120757

SIXTH DIVISION
December 13, 2013

No. 1-12-0757

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 37-024-395
	)	
BRANDON BAILEY,	)	Honorable
	)	Lorna Propes,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court sanctioned the State for failing to comply with multiple discovery requests and court orders to tender to defendant a video made by an in-squad car camera of defendant's stop and arrest for driving offenses. The State subsequently tendered the video to the defendant and filed a motion for reconsideration of the sanction order, which the trial court denied. The State appealed. We reversed and remanded.

¶ 2 Defendant, Brandon Bailey, was arrested for driving under the influence and other driving offenses and his driver's license was suspended. Defendant subsequently filed a petition to rescind the statutory summary suspension of his driver's license and he filed discovery requests asking the

State to produce various materials at the civil hearing on his petition, including a video made by an in-squad car camera (the in-squad video) of his stop and arrest. The State failed to comply with multiple court orders to produce the in-squad video in accordance with the discovery requests, and, accordingly, the trial court entered a sanction against the State in the statutory summary suspension proceeding by rescinding the summary suspension of defendant's driver's license. The trial court also entered a sanction against the State in the accompanying criminal case by barring the arresting officer from testifying as to "anything observed that could have been captured on [the in-squad] video, including but not limited to field sobriety tests and driving." The State subsequently tendered a working copy of the in-squad video to defendant and then filed a motion to reconsider the sanction order entered in the criminal case and allow the officer to testify about her observations of defendant that could have been captured on the video. The trial court denied the State's motion to reconsider. On appeal, the State contends the denial of the motion to reconsider the sanction order in the criminal case constituted an abuse of discretion. We reverse and remand.

¶ 3 On August 12, 2011, defendant, Brandon Bailey, was arrested for driving under the influence of alcohol (DUI), for speeding between 30 to 39 miles per hour (mph) over the speed limit, for improper lane usage, for illegal transportation of alcohol, and for failure to signal. The arresting officer, a trooper with the Illinois State Police Department, filled out a "law enforcement sworn report" stating she pulled defendant over after observing him driving at a speed of 91 mph in a 55 mph zone. When she went to speak with defendant, the officer smelled the odor of alcohol on his breath, saw that his eyes were bloodshot, red, and glassy, and that he had open alcohol in the vehicle. The officer also reported that defendant had failed all field sobriety tests and refused to submit to a

breathalyzer test. Defendant's refusal to take a breathalyzer test resulted in the suspension of his driver's license.

¶ 4 On August 26, 2011, defendant filed and served on the State a notice to produce pursuant to Illinois Supreme Court Rule 214 (Ill. S. Ct. R. 214 (eff. Jan. 1, 1996)), a notice to produce at the summary suspension hearing pursuant to Illinois Supreme Court Rule 237 (Ill. S. Ct. R. 237 (eff. July 1, 2005)), and a petition to rescind the statutory summary suspension of his driver's license[1]. The statutory summary suspension proceeding was civil in nature (*People v. Wear*, 229 Ill. 2d 545, 559-60 (2008)), and the Rule 214 and 237 notices fell under Article II of the Illinois Supreme Court Rules and applied only to civil and not criminal proceedings. *People v. Sapyta*, 235 Ill. App. 3d 1007, 1010 (1992). Both notices to produce requested the in-squad video of defendant's stop and arrest. At a hearing held on August 29, 2011, defense counsel stated he would be subpoenaing the requested information in the notices to produce directly from the Illinois State Police. The cause was continued to September 14, 2011.

¶ 5 Defendant's subpoena *duces tecum* was served on the Illinois State Police on August 31, 2011[2], and directed the "Keeper of Records/District Commander Captain David P. Nanninga," to

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[1]Defendant contends on appeal that although the filing stamps indicate that these pleadings were filed on August 26, 2011, "[i]t is undisputed amongst the parties" that the pleadings actually were filed on August 29, 2011. However, despite defendant's contention that the parties do not dispute that the pleadings were filed on August 29, 2011, the State in its appellant's brief states that the pleadings were filed on August 26, 2011, as indicated by their filing stamps. For purposes of this appeal, it does not matter whether the pleadings were filed on August 26, 2011, or August 29, 2011; in reciting the facts of this case, we use the August 26, 2011, date indicated on the filing stamps.

[2]The subpoena was served on an officer with Star #4829; the officer's name is illegible on the subpoena.

appear in court on September 14, 2011, and bring among other things "[a]ny and all videotapes of the [d]efendant while he was detained by the arresting agency."

¶ 6 The keeper of records/district commander did not appear in court on September 14, 2011, at the initial hearing on defendant's petition to rescind the statutory summary suspension of his driver's license. The arresting officer did appear in court, however neither she nor the Assistant State's Attorney had any of the subpoenaed items or the items requested in the Rule 214 and Rule 237 notices to produce. Defense counsel made an oral motion for sanctions for failing to comply with the subpoena or with the notices to produce. The trial court denied the motion for sanctions and continued the cause to September 23, 2011. The trial court also addressed the arresting officer as follows:

> "[The Court]: Officer, understand that there has been a motion to produce filed. This is a civil hearing for the petition. You have to be here because they are asking that you be called as an adverse witness along with your-any reports that you wrote, you are responsible for bringing. And I am personally directing you to make sure that you have your reports with you and supplemental for the defense to review at that time, okay.
>
> [The Officer]: Okay.
>
> [The Court]: State, you might want to go through those.
>
> [Assistant State's Attorney]: Sure. I'm asking counsel actually for a copy, Your Honor.

* * *

[Defense Counsel]: In particular to the videotape in this case, Your Honor.

[Assistant State's Attorney]: Sure. And we'll make every effort to do that by 9-23.

* * *

[Defense Counsel]: Your Honor, I am tendering to [the] State, again, the documents that were tendered in open court on the 26th; our notice of filing and the notice to produce pursuant to [Rule] 214. Notice to produce at summary suspension hearing, the petition to rescind the summary suspension, a copy of our appearance. All those documents were filed on the 26th.

[The Court]: Right.

[Defense Counsel]: I also am re-notifying the State as we did, on the last court date, that a subpoena was to be issued after our appearance filed which was issued and it was served on August 31st, 2011.

[The Court]: And you want me to enter and continue your subpoena?

[Assistant State's Attorney]: Yes, Your Honor. To Officer 4829 at the Illinois State Police and it was directed to the Keeper of Records as well as the District Commander Nanninga.

[The Court]: Okay. That will be the order."

¶ 7 At the hearing on September 23, 2011, the arresting officer was present in court and the State tendered the following discovery: original report (nine pages); BAC subject test report (one page); warning to motorist (one page); law enforcement sworn report (one page); arrest card (two pages); and logs (two pages). The State did not produce the in-squad video and apparently did not produce

some other documents that had been requested by defendant (the record is unclear as to what other documents were not produced on September 23, 2011).

¶ 8 Defense counsel again made an oral motion for sanctions based on the State's repeated failure to turn over the in-squad video in compliance with the discovery requests and with the September 14, 2011, court order. The following colloquy occurred:

> "[The Court]: I'm not sure why a notice to produce would not have the same course of effect in this civil proceeding as it would in any civil proceeding. And failing to respond to proper issue discovery does carry sanctions, civil procedures. I'm just wondering what [the State's] response is.
>
> [Assistant State's Attorney]: My response is, is that it's the Illinois State Police who needs to provide the video in this case. This is something that the State's Attorneys [do] not have. I did speak to the trooper this morning. She said that they would be getting the video to my officer by 10:30 this morning. So if we do have the video by 10:30 this morning, we should be able to proceed with the hearing. ***
>
> [Arresting Officer]: Well, the issue is we never received a subpoena. I never got a subpoena in my mailbox. And it was-they were trying to find the subpoena; they found the video. And I was told the copy was going to be here by this morning today. I have no control over anything.
>
> * * *
>
> [Defense Counsel]: Your honor, if I could just respond for one moment. The officer was in court last time. The State's Attorney was advised on 8-26, when I filed the notice to

produce, that I would also be issuing the subpoena. Here is a copy of the subpoena that was delivered and notarized that it was delivered to them. On the last court date as well, it was made clear to the officer that there was a subpoena outstanding. *** It was subpoenaed for September 14th at 9 a.m. It's continued to today; so that the subpoenas were continued. The officer was made aware in open court of the subpoena, as well. The State knew how to reach me and this matter was set for 9 a.m. And the State had ample notice to deal with it.

* * *

[Assistant State's Attorney]: Judge, just for the record, we never begin any type of statutory summary suspensions at 9 o'clock a.m. It needs to begin at 10:30 or 11 o'clock when we are done with our call. If we do have the video at 10:30, this really shouldn't be an issue, then.

[The Court]: We'll see what happens. But I will say this. That this happens frequently. But there just doesn't seem to be any accountability for the Illinois Police on these video[s]. This is not the first case; and it's not personal to you, trooper, I'm sure you understand that. However, you do represent-it's not personal. However, you, in standing in court, you represent the Illinois State Police. I believe it's disingenuous of the State to make any argument, whatsoever, that there is any kind of failure of notice or procedure here on the defense's part. And this is not the first time. So what we'll do is we'll pass it and we'll see if the video gets here."

¶ 9 The case was passed, but the in-squad video never arrived in court that day. As a sanction, the trial court granted defendant's petition to rescind the statutory summary suspension of his driver's

license. The sanction order rescinding the statutory summary suspension of defendant's driver's license is not an issue on this appeal.

¶ 10 After the entry of the sanction order, the following colloquy ensued:

"[Defense Counsel]: Well, I'd like to file a motion to quash arrest and suppress evidence instanter for the next court date, Your Honor, on the criminal case. I'd also [like] to continue the subpoena from this date, that was issued to the State, for those documents requested. They clearly have notice now.

* * *

[The Court]: [Motion to quash set for] December 1st. Counsel?

[Defense Counsel]: December 1st, your Honor. And if the State could also produce that request with discovery on that date or at least tender an answer on it, if it's not available, and why.

[Assistant State's Attorney]: That's something [the] Illinois State Police will handle. We are not in possession of those documents. We are not going to ever file anything.

[Defense Counsel]: Your Honor–

[The Court]: Let me explain something. *** He has a motion that he has presented. You have a relationship with the State Police. The burden is on the State to answer discovery. *** If you can't answer the discovery, then the court does whatever the court does in the face of the fact that he doesn't get the discovery he is entitled to. It isn't a matter of blame; it's just simply a matter of procedure. The procedure is, he asks, you give it. But he has also subpoenaed the State Police. But his remedy, if he doesn't get it, is decided by

the court. It's not a matter of just saying, 'It's not up to us, it's up to them.' "

¶ 11 The trial court passed the case. When the case was recalled, the court stated as follows:

"[The Court]: I've rethought this. Here is what I want. There is a subpoena continued for certain documents and materials from the Illinois State Police. And so what my order is going to say is that I want the Keeper of the Records of the Illinois State Police present in court with those documents next time. Someone may come in lieu of the Keeper of Records. But if the documents aren't here in the hands of some trooper, then I want whoever the Keeper of the Records of [the] Illinois State Police is, here, physically."

¶ 12 The trial court noted it had granted an "extremely long" continuance of the case until December 1, 2011, but stated: "That will give the Illinois State Police plenty of time to find the evidence."

¶ 13 Pursuant to the trial court's oral pronouncement, the following written order was entered on September 23, 2011:

"That pursuant to the subpoena *duces tecum* issued on August 22, 2011, directed to the Illinois State Police Attn: Keeper of Records/District Commander Captain David P. Nanninga with a return date of 9/14/11 continued to 9/23/11 and further continued to 12/1/11 at 9 a.m. in Courtroom 402, Daley Center that the parties the subpoena is addressed to shall appear on the 12/1/11 court date. Keeper of [R]ecords to appear personally unless every document or object requested is produced in court."

¶ 14 At the hearing on December 1, 2011, the arresting officer appeared in court but did not have

the in-squad video. The Keeper of Records did not appear. Defense counsel stated:

"[Defense Counsel]: [J]ust to refresh the court's recollection, this case first came, appeared on 8-26-11, filed in open court, the petition to rescind, with the notice to produce 214 and a 237 advising the State of it. In addition, a subpoena was issued requesting the exact same documents that was personally delivered on August 31st, 2011. On 9-14 we were back in court ***. The officer, again, was present that day. She had an empty file. [The court] admonished her to the items that were required. And then, again, we were back here on 9-23, Your Honor, requesting the same information. And you entered that long form order requesting it. Additionally, you granted our petition to rescind. And, again, Your Honor, this videotape, we are set for a motion to quash arrest and suppress evidence. There is nobody here from the Keeper of [the] Records Office from the Illinois State Police. We would be seeking today a sanction against the State in the case in chief, in the criminal case, that apply both to the motion to quash arrest as well as to the criminal trial, if that was to continue."

¶ 15 The trial court responded as follows:

"[The Court]: Here is my question: this [September 23, 2011] order, was it served? Besides being given to the trooper, I'm sure in court, because I remember that we discussed this the last time, was this served on the Illinois State Police?

[Defense Counsel]: Your Honor, I did not personally serve it. It was my understanding that you had requested that the State be sure that the Illinois State

Police was aware of it. I believe that was-

[The Court]: I think that was correct. So, State, what was the method by which this order was served on the Illinois State Police? *** Was it by giving it to the trooper in court?

[Assistant State's Attorney]: Yes, Judge."

¶ 16 The trial court passed the case for the Assistant State's Attorney to discuss with the arresting officer the steps "she took to make sure that this [the September 23, 2011 order] got into the hands of her supervisors so that the Keeper of Records could actually respond to the court's subpoena and written order."

¶ 17 After the case was recalled, a different Assistant State's Attorney appeared in front of the court and expressed some confusion as what the court was requesting from the State. The court responded:

"[The Court]: Allow me to recap.

[Assistant State's Attorney]: Sure, Judge.

[The Court]: Counsel had subpoenaed various materials from the Illinois State Police. And getting no response on a couple of occasions. The last time the case was up, he complained of that fact. And I signed an order requiring that the materials be produced.

[Assistant State's Attorney]: I do see that in the file.

[The Court]: And that the Keeper of Records of the Illinois State Police appear in court today; that didn't occur. And the last conversation I had with the State's Attorney who was here earlier-

[Assistant State's Attorney]: Yes.

[The Court]: -was I wanted him to discuss it with the trooper; he was present last time and possibly the time before that. And he was specifically directed by the State, in May, I think, to take this order to the Illinois State Police. Now, she maintains that there's a video. Yet it's never been produced in spite of multiple subpoenas and now a written court order which has just been completely ignored by the Illinois State Police; and by the State's Attorney Office, apparently, because it's the State's Attorney Office, whose obligation is to produce the discovery, hasn't produced the video; that's where we are right now. So I passed the case for the other State's Attorney.

[Assistant State's Attorney]: Judge, was there a court order tendered to the trooper on a previous court date?

[The Court]: Yes.

[Assistant State's Attorney]: Okay. I trust that that happened, I wasn't aware of that.

[The Court]: Well, let's put it this way. I signed the court order-

[Assistant State's Attorney]: Okay.

[The Court]: -and directed the State to give it to the State's Attorneys-

[Assistant State's Attorney]: Sure.

[The Court]: -and I believe we discussed at that time that it should be given to this trooper to take it. She was the representative of the State's case.

[Assistant State's Attorney]: I see a note, Judge. I see a note. And I'm sure-

[The Court]: A note saying?

[Assistant State's Attorney]: -speaking on behalf of my partner, he did follow up and do everything in his power. The video isn't here today, your Honor, as far as I can tell.

* * *

[The Court]: I passed the case so that the other State's Attorney could ask the [arresting officer] and determine what it was she did in response to this court order. And I still have not heard one thing.

* * *

[Assistant State's Attorney]: Judge, I'm not sure that [the arresting officer] actually had any paperwork or court order. *Per se*, she did attempt to reach out [to] the people who deal with the videos and left them a message. And I don't believe she has heard any response; is that correct?

[The Officer]: Yes.

[The Court]: What was it that the note said?

[Assistant State's Attorney]: I'm sorry, what note, Judge?

[The Court]: The note that you wrote–that someone wrote in the file. You said there was a note.

[Assistant State's Attorney]: No. Just that [the other Assistant State's Attorney] wrote on our trial call, 'Judge, not ready; need the video.' "

¶ 18 Defense counsel made an oral motion that a "sanction be issued proportionate to the magnitude of the discovery violation in particular [that the court enter a] sanction to bar the officer [from testifying] as to anything that may have or could have been captured on the videotape." The

trial court granted the sanction motion, and entered the following written order:

> "That as a discovery sanction in the above case that [the arresting officer] is barred from testifying as to anything observed that could have been captured on video, including but not limited to field sobriety tests and driving. The State, ISP and its agents failed to comply with discovery requests, the 237 and 214 Notices to Produce, the subpoena issued to the ISP, the court order of 9/23/11 as well as notice and requests in open court on 8/26/11, 9/23/11, and 9/14/11."

¶ 19 Defense counsel withdrew his motion to quash arrest and suppress evidence and instead entered a demand for a speedy trial. The trial court continued the case to January 25, 2012, for the criminal trial.

¶ 20 On December 28, 2011, the State filed a request to add the case to the court call for December 29, 2011. In court on December 29, 2011, the Assistant State's Attorney informed the court that the State had obtained the in-squad video and he then proceeded to tender a DVD copy to defense counsel. Defense counsel stated he had "no idea" what was on the DVD and he asked "[h]as the State watched the [DVD]?" The Assistant State's Attorney responded that he had not watched the DVD.

¶ 21 The State also filed at that time a motion for reconsideration[3] of the December 1, 2011, sanction order. In its motion for reconsideration, the State noted that it had now tendered the in-squad video to defense counsel and therefore that the sanction order entered on December 1, 2011,

[3]The motion was titled "People's response to defendant's motion for discovery sanctions." Despite its title, the motion sought reconsideration of the December 1, 2011, sanction order. The trial court treated it as a motion for reconsideration.

should be reversed so as to allow the arresting officer to testify at the criminal trial "as to the events captured on the video."

¶ 22 The hearing on the motion to reconsider was continued to the already-scheduled trial date of January 25, 2012. In court on January 25, 2012, on the motion to reconsider, the Assistant State's Attorney tendered to defense counsel a new DVD copy of the in-squad video, stating that this was a "good copy of the DVD." The hearing on the motion to reconsider was continued again to February 10, 2012.

¶ 23 In court on February 10, 2012, the Assistant State's Attorney noted that the in-squad video had been produced and tendered to defense counsel and he requested that the sanction entered on December 1, 2011, be lifted so that the arresting officer could testify at the criminal trial "as to what was observed on the [in-squad] video." Defense counsel stated that the DVD which the State had tendered to him on December 29, 2011, was blank, but that the new DVD the State tendered to him on January 25, 2012, contained a working copy of the in-squad video.

¶ 24 The Assistant State's Attorney explained that after tendering the first DVD to defense counsel on December 29, 2011, a different Assistant State's Attorney had a conversation with the arresting officer later that same day in which the officer stated that defense counsel had returned to court and complained that the DVD did not work. One week later, the State received another DVD of the in-squad video, made sure that it worked, and then tendered it to defense counsel on January 25, 2012.

¶ 25 Defense counsel responded that he never returned to court on December 29, 2011, and that he never informed the State that the DVD tendered to him on that date was blank. Defense counsel stated that he was intending to inform the State at the hearing on January 25, 2012, that the DVD was

blank. At the January 25, 2012, hearing, the State gave him the new DVD before he even had the chance to inform it that the first DVD was blank.

¶ 26 The trial court stated:

"[I]t's discretionary whether I grant this motion or not. The situation has been remedied because you have a DVD that does show the occurrence. And so you now have a DVD which was the reason for granting the motion in the first place.

The question in my mind is and I haven't resolved this question is whether, and I sort of see it in two ways. The conduct of the Illinois State Police in this case, and I hold the State responsible for the actions of the Illinois State Police because they are their witnesses, and they have control over whether they come to court and what they do. And if they don't then those two groups need to work that out.

But the fact of the matter is that the conduct with the State police has been horrible. Nobody coming to court when *** a written court order demand[ed] that someone be in court, directing that someone be in court. Not having it, never having it. Subpoenaed by the State and the defense numerous times and then showing up, I don't know. It's supposed to be delivered. It will be delivered at ten and it isn't delivered at ten.

The entire history of it is, the words I would use would be negligent at best. And just insubordinate towards the court and really the State at worst. So that's that. But does that require that now that the video has been produced the motion to bar remain in force? I'm not sure.

The second, on the other hand the question is I guess in my mind, how is the defense

prejudice[d] by this. It isn't that a year's past. It isn't that money has been spent. It isn't that his right to a good defense is diminished that I see. None of those things that I see. So there may be some prejudice to the defendant. Although, you know, only a couple of months had passed since the motion was even granted. When was [the] motion [for sanctions] granted? Back in December, so. It was set for trial maybe one time.

And so those are [the] things that are percolating around in my mind."

¶ 27 Following arguments by the parties, the trial court denied the State's motion to reconsider, stating:

"I think that I come down on the side of the necessity of the procedural rules being followed ***. The record of this is abysmal from the stand point of discovery. And I-and this is absolutely not personal[ly] directed towards [the Assistant State's Attorney] because he's a fine lawyer and an excellent State's Attorney. But the procedure, and I've seen this in more cases than just this one. With regard to these videos and the Illinois State Police, the attitude towards them bringing things and responding to subpoenas is in general, but I'm only relying on this case now and not what I saw in others, lackadaisical and nonresponsive.

And it really seems astonishing to me that there could be a video *** which we now know there was. And after all of these months and orders and court dates and hearings and the trooper has been in court, I've seen her in court, stand here and hear the court [tell her that the court was] not happy with the fact that there was no response and no, nothing happening with it, is just not acceptable. And it's the purpose of sanctions. And so therefore the *** motion to reconsider my ruling of December 1st, 2011, is denied."

¶ 28 The Assistant State's Attorney stated he would appeal the trial court's ruling. The cause was continued to March 12, 2012, "for status on [the] appeal." On March 12, 2012, the State filed a certificate of substantial impairment and a notice of appeal under Illinois Supreme Court Rule 604(a)(1) (Ill. S. Ct. R. 604(a)(1) (eff. July 1, 2006)) from the February 10, 2012, order denying the State's motion for reconsideration of the sanction order entered on December 1, 2011.

¶ 29 On appeal, the State does not argue that the trial court erred in sanctioning it on December 1, 2011, by barring the arresting officer from testifying about anything she observed that could have been captured on the in-squad video, including the field sobriety tests and defendant's driving. Rather, the State's argument on appeal is that after it tendered a working copy of the video to the defense on January 25, 2012, prior to trial, the trial court erred on February 10, 2012, when it denied the State's motion to reconsider the December 1, 2011, sanction order. To completely address the State's argument, we first discuss the sanction order entered on December 1, 2011. Second, we consider the February 10, 2012, order denying the State's motion to reconsider the December 1, 2011, sanction order.

¶ 30 I. The December 1, 2011, Sanction Order

¶ 31 The December 1, 2011, sanction order sanctioned the State in the criminal case for its failure to comply with the multiple discovery requests and with the September 14, 2011, and September 23, 2011, court orders to tender the requested in-squad video to defendant (or ensure the appearance of the Keeper of Records to explain the video's absence). Illinois Supreme Court Rule 415(g) (Ill. S. Ct. R. 415(g) (eff. Oct. 1, 1971)) authorizes the trial court to impose sanctions in felony cases for the

failure to follow discovery orders. However, the criminal case at issue here is a misdemeanor case[4]. "There is no codification in Illinois of the allowable sanctions to be imposed in misdemeanor cases for failure to comply with discovery. A trial court may not apply a sanction pursuant to Supreme Court Rule 415(g) *** in a misdemeanor case as though it were a felony case." *People v. Anderson*, 80 Ill. App. 3d 1018, 1020 (1980). Even in a misdemeanor case, though, "[a] trial court has the inherent power to enforce its orders by means of imposition of sanctions against one who is subject to the court's orders but who declines without lawful reason to follow them." *Id*. at 1019. See also *People v. Menssen*, 263 Ill. App. 3d 946, 950 (1994) and *People v. Bagley*, 338 Ill. App. 3d 978, 982 (2003) (the trial court in a misdemeanor case has the inherent power to enforce its orders by means of sanctions). As the trial court in a misdemeanor case has the same power as the trial court in a felony case to impose sanctions to enforce its orders, we may look to the case law discussing sanctions imposed in felony cases, as well as case law discussing sanctions imposed in misdemeanor cases, for guidance as to whether the trial court erred in the imposition of the sanctions here. *People v. Kladis*, 403 Ill. App. 3d 99, 117 (2010), *aff'd*, 2011 IL 110920.

¶ 32 "The State has a duty to use due diligence to ensure that it becomes aware of discoverable matters and must see that there is a proper flow of information between all the branches and personnel of its law enforcement agencies and legal officers." *People v. Leon*, 306 Ill. App. 3d 707, 712 (1999). "The goals of discovery are to eliminate surprise and unfairness and to afford an opportunity to investigate." *People v. Rubino*, 305 Ill. App. 3d 85, 87 (1999).

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[4]The sanction entered in the civil statutory summary suspension proceeding (*i.e.*, the rescission of the summary suspension of defendant's driver's license) is not at issue here.

¶ 33 Where the trial court imposes sanctions to enforce its discovery orders, "the sanctions which are imposed should be fashioned so as to meet the circumstances of the particular case and with the ultimate object of compelling compliance, not the punishment of a party for the oversight or errors of his attorney." *Anderson*, 80 Ill. App. 3d at 1019. "The preferred sanction for a discovery violation is a recess or a continuance if the granting thereof would be effective to protect the defendant from surprise or prejudice." *Leon*, 306 Ill. App. 3d at 713. "The exclusion of evidence is not a preferred sanction because it does not further the goal of truth seeking." *People v. Edwards*, 388 Ill. App. 3d 615, 628 (2009). "It has been held in a misdemeanor case that the exclusion of evidence as a sanction for noncompliance with discovery is such a drastic sanction that it should be applied only where there is a flagrant or willful disregard of the court's authority." *Anderson*, 80 Ill. App. 3d at 1020. "[S]anctions, such as the exclusion of evidence, dismissal, or the granting of a new trial, may be warranted where the defendant is denied a full opportunity to prepare his defense and make tactical decisions with the aid of the information withheld." *Leon*, 306 Ill. App. 3d at 713-14.

¶ 34 "The correct sanction to be applied for a discovery violation is a decision appropriately left to the discretion of the trial court, and its judgment shall be given great weight. [Citation.] The trial court is in the best position to determine an appropriate sanction based upon the effect the discovery violation will have upon the defendant. [Citation.] *** [A]n abuse of discretion exists only where the decision of the trial court is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would take the view adopted by the trial court." *People v. Kladis*, 2011 IL 110920, ¶ 42.

¶ 35 In the present case, to determine whether the trial court abused its discretion in entering the December 1, 2011, sanction order, we give a brief recap of the events leading to said order.

¶ 36 Defendant here filed and served the State a Rule 214 and Rule 237 notice to produce on August 26, 2011, both of which requested the State to produce the in-squad video at the commencement of the statutory summary suspension hearing. On August 31, 2011, defendant served a subpoena *duces tecum* on the Illinois State Police, which is an agent of the State (see *People v. Walker*, 308 Ill. App. 3d 435, 440 (1999)), directing the keeper of records/district commander Captain David P. Nanninga (hereinafter referred to as the Keeper of Records) to bring (among other things) the in-squad video to court on September 14, 2011. At the hearing on September 14, 2011, the Keeper of Records failed to appear; the Assistant State's Attorney gave no explanation as to why the Keeper of Records did not appear in court in accordance with the subpoena *duces tecum*. The arresting officer was in court, but neither she nor the Assistant State's Attorney had any of the subpoenaed items or the items requested in the notices to produce. Again, no explanation was given for the failure to produce the requested discovery items. Defense counsel made an oral motion for sanctions, which the trial court denied. However, the trial court specifically addressed the arresting officer, "personally directing" her to bring "your reports with you and supplemental for the defense" at the next court date on September 23, 2011. Defense counsel specifically stated he wanted the in-squad video and he also tendered to the State the Rule 237 and Rule 214 notices to produce which requested the in-squad video. The Assistant State's Attorney said the State would "make every effort" to produce the in-squad video on September 23, 2011.

¶ 37 At the hearing on September 23, 2011, the arresting officer was in court and the State tendered certain discovery materials. However, the officer did not produce the in-squad video as required by the September 14, 2011, court order. The trial court asked the State for an explanation

as to why the video had not been produced. The Assistant State's Attorney's response was to blame the Illinois State Police for failing to provide the State with the video. The arresting officer then addressed the court. Although the trial court had personally addressed the arresting officer on September 14, 2011, and ordered her to bring the requested in-squad video to court on September 23, 2011, the arresting officer attempted to excuse her failure to bring the video to court by stating she "never got a subpoena in [her] mailbox" and that the Illinois State Police had been unable to locate the subpoena *duces tecum*. The arresting officer then said "they found the video" and that she had been told a copy would arrive in court later that morning. The Assistant State's Attorney said the video should be in court by 10:30 a.m. The trial court passed the case to wait for the video, but it did not arrive in court that day. As a sanction, the trial court granted defendant's petition to rescind the statutory summary suspension of his driver's license.

¶ 38 Defense counsel filed a motion to quash in the criminal case which the trial court continued to December 1, 2011. Defense counsel made an oral request that the State produce the in-squad video on that date, or provide an explanation as to why the video was not available. The Assistant State's Attorney responded: "That's something [the] Illinois State Police will handle," because the State was not in possession of the video. The trial court then correctly informed the Assistant State's Attorney that the State was responsible for ensuring that the Illinois State Police produce the video. See *Leon*, 306 Ill. App. 3d at 712. The trial court entered a written order directing the Keeper of Records to appear on the December 1, 2011, court date unless every object requested by the defense (including the in-squad video) was produced in court. The trial court noted it had granted an "extremely long" continuance of this case until December 1, 2011, but that such a lengthy

continuance would give the Illinois State Police "plenty of time to find the evidence."

¶ 39 On December 1, 2011, the arresting officer appeared in court but she did not have the in-squad video as required by the September 23, 2011, order. The officer gave no explanation for the failure to produce the video other than to say that she had left a message with "the people who deal with the videos" but had not heard any response. The Keeper of Records did not appear. No explanation was given for the failure of the Keeper of Records to appear in court as required by the September 23, 2011, order to explain why the video had not been produced. The trial court questioned the Assistant State's Attorney about the steps, if any, taken to serve the September 23, 2011, order on the Illinois State Police. The Assistant State's Attorney's only response was to say that the September 23, 2011, order had been given to the arresting officer in court on that day. The trial court passed the case for the Assistant State's Attorney to discuss with the arresting officer the steps which had been taken to ensure that the Keeper of Records was notified of the September 23, 2011, order. When the case was recalled, a different Assistant State's Attorney appeared and stated there was a note in the record and that her partner had done "everything in his power" to ensure the production of the video and/or the appearance of the Keeper of Records. When the trial court asked the Assistant State's Attorney what the note actually said, she responded that the other Assistant State's Attorney had written on the trial call: "Judge, not ready; need the video."

¶ 40 Defense counsel made an oral motion for a sanction based on the State's failure to comply with the multiple discovery requests and with the September 14, 2011, and September 23, 2011, court orders to produce the requested in-squad video (or ensure the appearance of the Keeper of Records to explain the video's absence). The trial court granted the motion, barring the arresting

officer from "testifying as to anything observed that could have been captured on video, including but not limited to field sobriety tests and driving."

¶ 41 The trial court committed no abuse of discretion in entering said sanction order on December 1, 2011, where the State's repeated failure to produce the in-squad video pursuant to the multiple discovery requests and the September 14, 2011, and September 23, 2011, court orders (or to ensure the appearance of the Keeper of Records to explain the absence of said video as required by the September 23, 2011, court order) constituted a flagrant and willful disregard of the trial court's authority. In so holding, we note this is not a case where the State (or an agent of the State) inadvertently lost or destroyed the video. There was never any argument made in the trial court that the video itself could not be found prior to December 1, 2011. Rather, this is a case in which the Illinois State Police, an agent of the State, had the video in its possession, yet repeatedly failed to produce it in violation of the following discovery requests and court orders: the Rule 237 and Rule 214 notices filed and served on the State on August 26, 2011, requesting said video; both notices which were tendered again to the State at the hearing on September 14, 2011; the subpoena *duces tecum* served on the Illinois State Police on August 31, 2011, directing the Keeper of Records to bring the in-squad video to court on September 14, 2011; the trial court's express order to the arresting officer at the September 14, 2011, hearing (after the Keeper of Records failed to appear and the State failed to produce the items requested in the subpoena *duces tecum* and notices to produce) that she bring in the requested discovery at the next court date on September 23, 2011, and the Assistant State's Attorney's promise that "every effort" would be made to produce the in-squad video on September 23, 2011; and the trial court's written order entered on September 23, 2011, (after the

State again failed to produce the in-squad video) requiring that said video be produced at the next hearing on December 1, 2011, or that the Keeper of Records appear to explain the absence thereof. Also, at the hearing on September 23, 2011, the trial court expressly informed the Assistant State's Attorney of the State's responsibility to ensure that the Illinois State Police produce the video at the next court date on December 1, 2011, yet the video was never produced on that date, the Keeper of Records never appeared, and no cogent explanation was ever offered on December 1, 2011, for the failure to comply with the repeated discovery requests and with the trial court's September 14, 2011, and September 23, 2011, discovery orders. On these facts, the State flagrantly and willfully disregarded the trial court's authority by failing to provide the in-squad video (or ensure the appearance of the Keeper of Records to explain the absence of the video) as ordered, thereby justifying the court's December 1, 2011, order sanctioning the State by barring the arresting officer from testifying about events she observed which could have been captured on the video. *Anderson*, 80 Ill. App. 3d at 1020.

¶ 42 We further note that even *if* the State's failure to tender the in-squad video by December 1, 2011, was not willful and flagrant but rather resulted because the Illinois State Police inadvertently lost or misplaced the video, we would hold that the sanction order did not constitute an abuse of discretion. *People v. Kladis*, 2011 IL 110920, *People v. Petty*, 311 Ill. App. 3d 301 (2000), *People v. Schambow*, 305 Ill. App. 3d 763 (1999), and *People v. Koutsakis*, 255 Ill. App. 3d 306 (1993) are informative.

¶ 43 In *Kladis*, the defendant there was arrested for DUI on May 3, 2008, and made a discovery request for the in-squad video on May 8, 2008. *Kladis*, 2011 IL 110920, ¶ 3. Pursuant to

departmental policy, the in-squad video was automatically erased on June 3, 2008, 30 days after defendant's arrest. *Kladis*, 2011 IL 110290, ¶ 6. Defendant then moved for sanctions. *Kladis*, 2011 IL 110290, ¶ 6. The trial court granted defendant's motion for sanctions and entered an order barring the arresting officer from testifying about "what was contained on the videotape." *Kladis*, 2011 IL 110290, ¶ 1. The supreme court affirmed, holding that the sanction was narrowly tailored and proportionate to the discovery violation. *Kladis*, 2011 IL 110290, ¶¶ 43-45.

¶ 44 In *Petty*, the defendant there was arrested on February 8, 1998, for DUI and failing to signal and he subsequently made a discovery request for the audiotape recording of his arrest. *Petty*, 311 Ill. App. 3d at 302. The police inadvertently erased the requested audiotape on an unidentified date after defendant moved for discovery. *Id*. As a sanction, the trial court barred the arresting officer from testifying. *Id*. The appellate court reversed and remanded, holding that the trial court abused its discretion in completely barring the officer from testifying. *Id*. at 304. The appellate court held 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." *Id*.

¶ 45 In *Schambow*, the defendant there was arrested for DUI on December 12, 1997, and his driver's license was summarily suspended. *Schambow*, 305 Ill. App. 3d at 765. On December 23, 1997, defendant served a subpoena *duces tecum* on the Illinois State Police requesting an audiotape of radio communications between the arresting officer and police headquarters. *Id*. Pursuant to departmental policy, the police erased the requested audiotape on January 11, 1998, 30 days after the original taping. *Id*. Although defendant acknowledged that the destruction of the audiotape was not meant to circumvent his discovery request, defendant filed a motion for sanctions on March 30,

1998, seeking the rescission of the statutory summary suspension of his driver's license. *Id*. at 766. The trial court granted defendant's motion for sanctions, and entered an order rescinding the statutory summary suspension of his driver's license. *Id*. The appellate court reversed and remanded, holding that the rescission of the statutory summary suspension of defendant's driver's license was "too harsh a sanction" and that instead the trial court could have precluded the officer from testifying about statements he made to the police dispatcher as well as any information he learned from the dispatcher. *Id*. at 769. The appellate court held that "[s]uch a sanction would have been more proportional to the magnitude of the discovery violation." *Id*.

¶ 46 In *Koutsakis*, the defendant there was arrested on November 11, 1992, for cannabis trafficking. *Koutsakis*, 255 Ill. App. 3d at 308. On December 9, 1992, defendant filed a motion for pretrial discovery requesting the audiotape of radio transmissions made by the State police officers who stopped and searched his vehicle. *Id.* Pursuant to department policy, the audiotape was reused and erased on December 11, 1992. *Id*. at 309. The trial court determined that the State did not intentionally destroy the audiotape to circumvent defendant's discovery request; however, the court determined that a sanction against the State was appropriate. *Id*. at 310. The trial court entered a sanction order that "essentially precluded the officers from testifying concerning matters that may have been included on the tape." *Id*. at 314. The appellate court affirmed, holding that the sanction was "limited and proportionate to the discovery violation." *Id*.

¶ 47 Pursuant to *Kladis*, *Koutsakis*, *Petty*, and *Schambow*, the trial court may sanction the State for the inadvertent failure to comply with discovery due to the destruction of the in-squad video by barring the arresting officer from testifying about the events captured on said video. Although the

in-squad video was never destroyed here, the effect as of December 1, 2011, was the same where the State had repeatedly failed to produce the video in accordance with multiple discovery requests and court orders, the Keeper of Records had repeatedly failed to appear to explain the absence of the video, and there was no indication then that the video would ever be tendered. Accordingly, the trial court committed no abuse of discretion in determining that the State's conduct was sanctionable, not did it abuse its discretion in the sanction imposed. In accordance with *Kladis*, *Koutsakis*, *Petty*, and *Schambow*, the December 1, 2011, sanction order was limited and proportionate to the discovery violation, as it did not completely bar the arresting officer from testifying; rather, her testimony was properly limited to observations regarding events other than those captured on the in-squad video.

¶ 48 II. The February 10, 2012, Order Denying the State's Motion for Reconsideration

¶ 49 The State does not argue that the trial court erred in sanctioning it on December 1, 2011, for its failure to comply with the multiple discovery requests and with the September 14, 2011, and September 23, 2011, court orders to produce the requested in-squad video or to ensure the appearance of the Keeper of Records to explain the absence of the video. The State's argument on appeal is that the trial court erred on February 10, 2012, when it denied the State's motion to reconsider the December 1, 2011, sanction order. The State's motion to reconsider was based on new matters not previously presented, specifically, the State's tendering of the in-squad video to the defense subsequent to the issuance of the sanction. Where, as here, a motion to reconsider is based on new matters not previously presented, we apply an abuse of discretion standard. *People v. Pollitt*, 2011 IL App (2d) 091247, ¶ 18.

¶ 50 In the present case, although we share the trial court's strong disapproval of the State's

discovery violations leading to the December 1, 2011, sanction order, we agree with the State that the trial court abused its discretion in denying the motion to reconsider the sanction order following the tendering of a working copy of the in-squad video to the defense.

¶ 51 "The goal of discovery is to eliminate surprise and unfairness and afford opportunity to investigate. [Citation.] Sanctions are designed to accomplish the goal of discovery [citation], that is to compel compliance rather than to punish. [Citation.] For this reason, exclusion of evidence is not favored as a sanction as it does not contribute to the goal of truth seeking. [Citation.] The preferred sanction is a recess or continuance if the granting thereof would be effective to protect the defendant from surprise or prejudice [citation], and exclusion of evidence is a last resort, demanded only where a recess or a continuance would be ineffective. [Citation.]" *People v. Hawkins*, 235 Ill. App. 3d 39, 41 (1992).

¶ 52 In the present case, the trial court's December 1, 2011, sanction order, which barred the arresting officer from testifying about anything she observed that could have been captured on the in-squad video, accomplished the goal of compelling the production of said video in advance of trial on December 29, 2011. Although the video tendered on December 29, 2011, was blank, the State tendered a working copy of the video to the defense on January 25, 2012, prior to trial. After the working video was tendered to defense counsel on January 25, 2012, in advance of trial, the trial court expressly noted that it did not see how the defense was any longer prejudiced by the State's earlier failures to tender the video. The trial court stated, though, that there "may be some prejudice to the defendant" of which the court was unaware and it denied the State's motion to reconsider the December 1, 2011, sanction order. The denial of the motion to reconsider constituted an abuse of

discretion. As a working copy of the in-squad video was produced to the defense prior to trial, the harsh sanction of exclusion of the arresting officer's testimony regarding the events she observed that could have been captured on the in-squad video was no longer appropriate; the preferred sanction of a continuance would have protected defendant from any surprise and prejudice while allowing him the opportunity to fashion his defense after viewing the video and engaging in additional investigation. See *People v. Rubino*, 305 Ill. App. 3d at 88-89 (where the State committed a discovery violation but disclosed the material requested prior to trial, the appellate court held that the exclusion of the evidence was too harsh a sanction and that the appropriate sanction was to grant the defendants a continuance to review the material and engage in additional investigation).

¶ 53 Defendant argues that the trial court did not abuse its discretion in denying the State's motion to reconsider the December 1, 2011, sanction order because the State's earlier failure to comply with the multiple discovery requests and with the September 14, 2011, and September 23, 2011, court orders to produce the in-squad video (or ensure the appearance of the Keeper of Records to explain the video's absence) constituted a willful and flagrant disregard of the court's authority. We disagree. As already discussed, the State's failure to produce the in-squad video or ensure the appearance of the Keeper of Records in accordance with the multiple discovery requests and court orders justified the court's December 1, 2011, order sanctioning the State by barring the arresting officer from testifying about events she observed that could have been captured on said video; however, once a working copy of the in-squad video was tendered to defense counsel on January 25, 2012, prior to trial, the justification for the exclusion sanction no longer existed. We have held that "[a]ny sanction imposed should be fashioned to meet the circumstances of the particular case and with the ultimate

object of compelling discovery, not to punish a party for the oversight or errors of his attorney." *People v. Petru*, 52 Ill. App. 3d 676, 679 (1977); see also *People v. Petty*, 311 Ill. App. 3d 301, 303 (2000), and *People v. Ramsey*, 239 Ill. 2d 342, 427 (2010) (holding that the purpose of sanctions for discovery violations is to compel the party's compliance with discovery, not to punish him). As the purpose of the December 1, 2011, sanction order has been met by compelling the State's compliance with the discovery requests and with the September 14, 2011, and September 23, 2011, orders requiring production of the in-squad video prior to trial, said sanction may not remain in place solely to punish the State. The appropriate sanction, as discussed, is not to continue to bar the arresting officer from testifying about events she observed that could have been captured on the in-squad video but, rather, to grant defendant a continuance to review the in-squad video and engage in additional investigation.

¶ 54 Defendant argues that the trial court did not abuse its discretion in denying the State's motion to reconsider the December 1, 2011, sanction order because the sanction entered was narrowly tailored and proportionate to the State's discovery violations. In support, defendant cites *People v. Kladis*, 2011 IL 110920, *People v. Koutsakis*, 255 Ill. App. 3d 306 (1993), *People v. Petty*, 311 Ill. App. 3d 301 (2000), and *People v. Schambow*, 305 Ill. App. 3d 763 (1999).

¶ 55 As already discussed, *Kladis*, *Koutsakis*, *Petty*, and *Schambow* support the trial court's December 1, 2011, order sanctioning the State for failing to comply with multiple discovery requests and court orders to tender the in-squad video to defendant (or ensure the appearance of the Keeper of Records to explain the video's absence) by barring the arresting officer from testifying about the events she observed that could have been captured on the video. However, unlike in *Kladis*,

Koutsakis, *Petty*, and *Schambow*, the State here did eventually tender a working copy of the video to the defense on January 25, 2012, prior to trial and, thus, as discussed earlier in this order, the justification for said sanction no longer exists. Accordingly, the trial court abused its discretion in denying the State's motion to reconsider the December 1, 2011, sanction order.

¶ 56 Defendant argues "[i]f this Court holds that the State should not be sanctioned for its behavior in this case, it will send the message to the State and the police that they do not need to comply with discovery requests in a timely manner as there will be no consequences for their inaction." Defendant's argument is unavailing, as the record discloses that the State *was* sanctioned for its behavior in this case. Specifically, the trial court entered a sanction order on September 23, 2011, granting defendant's petition to rescind the statutory summary suspension of his driver's license and it entered a second sanction order on December 1, 2011, barring the arresting officer from testifying in the criminal case about events she observed that could have been captured on the in-squad video. The sanction order on December 1, 2011, served its purpose by compelling the State to comply with the discovery requests and with the September 14, 2011, and September 23, 2011, court orders by tendering a working copy of the requested in-squad video to the defense prior to trial. As the December 1, 2011, sanction order served its purpose, the only reason for refusing to lift said sanction would be to punish the State. However, as discussed earlier in this order, sanctions for a discovery violation may only be imposed to compel discovery, not to punish a party for the oversight or errors of his attorney. *Petru*, 52 Ill. App. 3d at 679; *Petty*, 311 Ill. App. 3d at 303; *Ramsey*, 239 Ill. 2d at 427. Accordingly, we reverse the February 10, 2012, order denying the State's motion to reconsider the December 1, 2011, sanction order and remand for further proceedings.

¶ 57 Reversed and remanded.