2014 IL App (2d) 130552-U
No. 2-13-0552
Order filed February 13, 2014

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. KLAAS WALL, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of De Kalb County. Nos. 12-DT-508 12-TR-14428 2-TR-14429 Honorable John F. McAdams, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in imposing sanctions for the State's failure to produce a recording, as defendant had not asked the State to preserve the recording; defendant had merely subpoenaed two police departments, which did not have the recording, and the request to one department did not constitute a request to the other or to the State.

¶ 2 Defendant, Klaas Wall, was charged with driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2010)) and driving with a breath-alcohol content in excess of 0.08 (625 ILCS 5/11-501(a)(1) (West 2010)). After the State was unable to produce a recording of the 20-minute waiting period before defendant took a breath test, the trial court barred the State from presenting

evidence of what the recording depicted. The State appeals, contending that (1) the video was not discoverable pursuant to *People v. Kladis*, 2011 IL 110920; (2) defendant did not properly seek preservation of the video; and (3) the sanction was unreasonably harsh. We agree with the State's second contention, and therefore we reverse and remand.

¶ 3 On October 28, 2012, De Kalb County sheriff's deputies stopped defendant's tractor-trailer after receiving an unspecified complaint. They later arrested defendant for driving under the influence. They took him to the Sycamore police department because the sheriff's department's breathalyzer was inoperable. After the required 20-minute waiting period, defendant took a breath test, which revealed that his breath-alcohol content was 0.191.

¶ 4 On November 13, 2012, defendant subpoenaed the De Kalb County sheriff's department for, *inter alia*, videotapes, including a video of the 20-minute observation period prior to the breath test. On November 29, 2012, defendant subpoenaed the Sycamore police department for any videotapes made after defendant's arrest. The Sycamore police department answered that it could not locate any videos pertaining to defendant.

¶ 5 Defendant moved for sanctions for the State's failure to produce the videotape of the observation period. At a hearing on the motion, Sycamore police lieutenant Cary Singer testified that, although there was a camera in the room where the observation period took place, the videotape of defendant had been automatically recorded over 30 days later.

¶ 6 The trial court granted defendant's motion for sanctions, barring the State from presenting testimony about the observation period, specifically finding that the video was discoverable under *Kladis*. After the court denied the State's motion to reconsider, the State timely appealed.

¶ 7 The parties dispute whether the video of the 20-minute observation period was discoverable under *Kladis*. We need not resolve this issue here because, assuming that it was, defendant failed to properly notify the State that he wanted it preserved.

¶ 8 Illinois Supreme Court Rules 411 (eff. Dec. 9, 2011) through 417 (eff. Mar. 1, 2001) provide for discovery in criminal cases. The rules apply only to cases in which a defendant may be imprisoned for more than one year, *i.e.*, felonies. Ill. S. Ct. R. 411 (eff. Dec. 9, 2011). However, in *People v. Schmidt*, 56 Ill. 2d 572, 575 (1974), the supreme court provided for limited discovery in misdemeanor cases. The court held that the State must furnish the defendant with a list of witnesses, any confession by the defendant, evidence negating the defendant's guilt (see *Brady v. Maryland*, 373 U.S. 83 (1963)), and the results of a Breathalyzer test. In *Kladis*, the court expanded that list to include any videotape made by an in-squad camera of the events leading to the defendant's arrest.

¶ 9 Although the State's discovery obligations require it to provide the defense with certain types of evidence, that duty is not automatic. Illinois Supreme Court Rule 412(a) provides that "upon written motion of defense counsel" the prosecution shall disclose certain enumerated items. Ill. S. Ct. R. 412(a) (eff. Mar. 1, 2001). The committee comments to the rule explain that the decision whether to request discovery in a given case belongs to defense counsel, hence the requirement of a written request. Ill. S. Ct. R. 412, Committee Comments (adopted Mar. 1, 2001). While, as noted, Rule 412 does not apply to misdemeanor cases, case law makes it clear that notice to the State is a prerequisite to any duty to provide discovery.

¶ 10 In *People v. Newberry*, 166 Ill. 2d 310, 317-18 (1995), the supreme court upheld the dismissal, on due-process grounds, of an indictment where the State failed to preserve the controlled substance that the defendant was charged with possessing. As an alternative ground for its holding, the court noted that dismissal would have been appropriate as a discovery sanction under Illinois Supreme Court Rule 415(g)(i), as where "evidence has been destroyed after a defense request," no showing of bad faith by the State was necessary to warrant sanctions. *Id.* (citing Ill. S. Ct. R. 415(g)(i) (eff. Oct. 1, 1971)).

¶ 11 In *Kladis*, the court rejected the State's argument that it was not properly notified to preserve a video. It held that the defendant's request to produce in connection with a hearing on his petition to rescind the statutory summary suspension of his driver's license was sufficient to put the State on notice that the defendant wanted the recording preserved for use in the accompanying criminal case. *Id.*, ¶ 38 & n.6 (citing Ill. S. Ct. R. 237 (eff. July 1, 2005)).

¶ 12 In *People v. Leon*, 306 Ill. App. 3d 707, 712 (1999), we stated that Rule 412 requires the State "upon a defendant's request" to disclose material within its possession. Thus, our later statement that the State "has a duty to use due diligence to ensure that it becomes aware of discoverable matters and that there is a proper flow of information between all the branches and personnel of its law enforcement agencies" (*id.*) presupposes a proper defense request.

¶ 13 The above authorities make clear that, although the State has a duty to preserve evidence after receiving notice that the defendant wants it, the duty is not automatic. In the absence of a request, the prosecution has no duty to notify the various police agencies within its jurisdiction of the need to preserve evidence in a given case.

¶ 14 Here, at least as far as the record shows, defendant never notified the prosecution that he wanted the video preserved. Rather, the defense issued a subpoena to the De Kalb County sheriff's department, which apparently informed him truthfully that it had none. By the time defendant subpoenaed the Sycamore police department, it had already recorded over the video. Defendant cites no authority for the proposition that notice to one police agency constitutes notice to the prosecution, or to other police agencies in the county, to preserve evidence.

¶ 15 Defendant cites cases holding that, in establishing reasonable grounds for an investigative stop, it is proper to consider the collective knowledge of all officers working in concert. See, *e.g.*, *People v. Fenner*, 191 Ill. App. 3d 801, 806 (1989). These cases are inapposite, as they relate to knowledge gained in the course of investigating a crime. Nothing in those cases purports to place

on law enforcement officers a duty to preserve evidence that is in the possession of a different agency.

¶ 16 Given our holding that the State was not placed on notice to preserve the evidence, we need not consider whether the sanction was proper.

¶ 17 The judgment of the circuit court of De Kalb County is reversed and the cause is remanded.

¶ 18 Reversed and remanded.