2012 IL App (3d) 090826-U

Order filed May 7, 2012

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. NELDA WEBSTER, Defendant-Appellee.	))))))))))))	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Appeal No. 3-09-0826 Circuit Nos. 09--DT--935; 09--TR--52633; & 09--TR--52634 Honorable Brian E. Barrett, Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The squad car video recording of defendant's misdemeanor DUI arrest was destroyed by the police agency, subsequent to a timely request to produce by the defense, and the trial court did not abuse its discretion by barring all evidence involving defendant's stop, field sobriety tests, and statements that may have been included on that videotape as a sanction for the failure to comply with the discovery request.

¶ 2 Defendant Nelda Webster received traffic citations for driving under the influence of alcohol (DUI), illegal transportation of alcohol, and improper lane usage on May 22, 2009. On June 12, 2009, the court entered an agreed order for discovery. On June 26, 2009, the State tendered written reports to the defense and defendant, on the record, requested a copy of the videotaped recording of the traffic stop. The State told the court they ordered a copy of the tape two weeks earlier and the

court entered a written order specifying that the videotape should be produced by the State by July 24, 2009.

¶ 3 The police agency deleted the original recording of defendant's stop 45 days after the arrest without making a copy of the recording. Consequently, the State did not produce the videotape as ordered. The defense filed a motion to dismiss all charges due to the discovery violation. The trial court denied defendant's motion to dismiss but barred all evidence involving defendant's stop, field sobriety tests, and statements that may have been included on that videotape as a sanction for the failure to comply with the discovery request. The State filed a certificate of impairment and appealed the court's ruling regarding the discovery sanctions pursuant to Supreme Court Rule 604(a). 210 Ill. 2d R 604(a). This court affirmed the trial court's ruling in a Rule 23 order, filed November 2, 2010.

¶ 4 The State appealed to our supreme court and, in light of the case of *People v. Kladis*, 2011 IL 110920, our supreme court ordered this court to vacate its earlier judgment and reconsider its decision to determine if a different result is now warranted. In light of *Kladis*, 2011 IL 110920, we vacate but again affirm the trial court's decision. We affirm.

¶ 5 BACKGROUND

¶ 6 On May 22, 2009, Braidwood police officer Alan Soucie conducted a traffic stop on defendant's vehicle. As a result, the officer issued traffic citations to defendant for driving under the influence of alcohol (DUI), illegal transportation of alcohol, and improper lane usage.

¶ 7 Defense counsel entered an appearance on June 3, 2009. At the arraignment on June 12, 2009, the court signed an agreed written order requiring the State to provide general discovery to the defense by June 19, 2009. On June 26, 2009, the parties appeared before the court for a hearing on

a petition to rescind and the defense advised the court that the State had not produced a copy of the videotaped recording of the traffic stop that was referred to in the written police reports. On that date, the State informed the judge that they requested a copy of the videotape from the police agency two weeks earlier. The court then entered a second written order, on June 26, 2009, providing that discovery must be completed by July 24, 2009, and specifically ordered the "State to provide video."

¶ 8 On August 7, 2009, the State told the court that it still had not received a copy of the videotape of defendant's traffic stop from the police. The court then again entered a written order requiring the State to produce the "video" to defendant by August 21, 2009.

¶ 9 On September 2, 2009, defendant filed a motion to dismiss all of the charges because the State failed to produce the videotape of defendant's traffic stop. Attached to the motion was a letter to defendant's attorney from the Braidwood Police Department. The letter was dated August 7, 2009, and indicated that the letter was written in response to the defense attorney's letter of July 30, 2009. The letter further claimed the police department "did not receive a court order from the State concerning the availability of this video. If we had received this information in a more timely manner this video would have available for your viewing, however due to an unfortunate set of circumstances, this video has been deleted." Defendant's dismissal motion also stated that she believed that the videotape would show evidence favorable to defendant.

¶ 10 By agreement, on September 2, 2009, the court held the hearing on the motion to dismiss. The parties presented no evidence but argued facts to support their positions in open court. The defense argued that defendant was arrested on May 22, 2009, her attorney entered his appearance on June 3, 2009, and appeared in court on June 12, 2009, when the court, in writing, ordered discovery to be completed by June19, 2009. The defense attorney referred to the letter he received from the

Braidwood Police Department, attached to his motion to dismiss, explaining that a copy of that videotape no longer existed. The defense argued that this letter described the department's procedure whereby patrol car videos are downloaded to a master computer which deletes the videos after 45 days, and officers are required to transfer their videos to a CD prior to the 45 days to secure a copy for evidence. In defendant's case, according to the letter, the video was never transferred to a CD within the 45 days prior to the deletion of the original download in the master computer. Since the video could no longer be produced, the defense asked that all charges be dismissed.

¶ 11 The State argued they were diligent and requested the police agency to get them a copy of the video for the first time on June 11, 2009. The prosecutor stated they "requested it again. On the third request, we finally received notice that there was no video." The prosecutor argued, "June 11th was within 45 days, but Braidwood police said we never requested it. I do not have certified copies. However, I do have the fax request that we traditionally use in our office.[1] We continually requested it ranging all the way back to June 11th." The prosecutor asserted that dismissal was an extreme sanction and there was no bad faith shown by the State because they requested the video and Braidwood Police Department did not comply.

¶ 12 The trial court denied defendant's motion to dismiss but, as sanctions, the court barred all testimony or evidence of defendant's stop, the performance of field sobriety tests, and any statements made during the stop. The State filed a motion to reconsider on September 22, 2009.

¶ 13 The court, in denying the motion to reconsider, stated:

> "The reason why the Court barred the evidence is because you have the issues that we have here. The report was found unconscionable. The fact that the City of Braidwood

[1] A copy of this fax request is not part of the appellate record.

would make a DUI arrest in today's day and age with digital recording and not take active steps on their own to preserve it, *** and say well, nobody notified us so we got rid of it. ***

I found that to be egregious. I don't find it to be bad faith. I don't believe that they are trying to tamper with evidence. I don't believe that they are trying to hide some truthful evidence from the defendant. However, based on the fact that the defendant does have certain rights, certain penalties associated with this and the fact that the City of Braidwood despite contradictory evidence from the [S]tate's [A]ttorney's office that they did everything they could to secure the video and the City of Braidwood did not follow that. I find that the remedy in here short of dismissal is that to bar the evidence from the video."

¶ 14 After the court denied the motion to reconsider and barred all evidence or testimony in regards to the traffic stop and field sobriety tests, the State filed a certificate of impairment and appealed the court's ruling regarding the discovery sanctions pursuant to Supreme Court Rule 604(a). 210 Ill. 2d R 604(a). This court affirmed the trial court's ruling in a Rule 23 order, filed November 2, 2010.

¶ 15 The State appealed to our supreme court and, in light of the case of *People v. Kladis*, 2011 IL 110920, our supreme court ordered this court to vacate its earlier judgment and reconsider its decision to determine if a different result is now warranted.

¶ 16 ANALYSIS

¶ 17 The State contends that the trial court abused his discretion in barring the State from presenting any evidence of the traffic stop and performance of field sobriety tests as a sanction

for this discovery violation. The defense argues that the judge's decision was an appropriate discovery violation sanction under these circumstances.

¶ 18 We review a judge's decision regarding sanctions for a discovery violation under the abuse of discretion standard of review. *Kladis,* 2011 IL 110920 ¶ 23; *People v. Hood*, 213 Ill. 2d 244, 256 (2004). The trial court abuses its discretion only in cases where the court's decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Kladis,* 2011 IL 110920 ¶ 42; *People v. Leon*, 306 Ill. App. 3d 707, 713 (1999).

¶ 19 In a criminal case, the trial court has the inherent power to impose sanctions, including the dismissal of the case, to ensure that a defendant obtains a fair trial and to compel compliance with its discovery orders. *Kladis*, 2011 IL 110920 ¶ 42; *Leon*, 306 Ill. App. 3d at 716. When the State fails to comply with an order for discovery, the "court may order a variety of sanctions, including discovery of the previously undisclosed statement, a continuance, the exclusion of the evidence *in toto,* or some other remedy it sees fit." *People v. Harper*, 392 Ill. App. 3d 809, 822-23 (2009). The exclusion of evidence is generally not a preferred sanction because it does not further the goal of truth seeking. *People v. Edwards*, 388 Ill. App. 3d 615, 628 (2009); *People v. Bagley*, 338 Ill. App. 3d 978, 982 (2003); *People v. Damico,* 309 Ill. App. 3d 203, 212 (1999).

¶ 20 This court has previously held that, when evidence has been destroyed following a specific defense discovery request, no showing of bad faith by the State is required for the trial court to act on the violation. *People v. Koutsakis*, 255 Ill. App. 3d 306, 312 (1993). Once a discovery violation has occurred, the trial court may impose any sanction which, in its discretion, it deems just. *Koutsakis*, 255 Ill. App. 3d at 312. Additionally, 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. *Leon,* 306 Ill. App. 3d at 713. The correct sanction is a decision appropriately left to the discretion of the trial court, and its judgment is entitled to great weight. *Leon,* 306 Ill. App. 3d at 713; *Koutsakis,* 255 Ill. App. 3d at 312.

¶ 21 Recently, our supreme court has addressed this same issue, in *People v. Kladis*, 2011 IL 110920, and the holding in *Kladis* is consistent with our previous Rule 23 order in this case. In *Kladis*, the police officer's squad car was equipped with video recording equipment. *Id.* The defense, in *Kladis*, requested a copy of the video recording of the traffic stop which resulted in a DUI arrest. *Id.* This request came in a timely manner and before all copies of the video recording were destroyed. *Id.* As a sanction for the destruction of the relevant video recording evidence, the trial judge, in *Kladis*, barred the State from presenting any testimony regarding what was contained in the video recording. *Id.* Our supreme held the trial court did not abuse its discretion by imposing this sanction based upon the circumstances. *Id.*

¶ 22 In the instant case, the record shows the State sent three faxed notices to the Braidwood Police Department requesting a copy of the videotape, the first one being on June 11, 2009, for the stop that occurred on May 22, 2009. In contrast, by letter to defense counsel, the police agency claimed that they did not receive the State's requests, but only received a copy of the court order from the defense on July 30, 2009, after the original recording was already destroyed pursuant to department policies. Nonetheless, it is undisputed that when the court entered the second written discovery order, on June 26, 2009, requiring the State to produce the videotape, the videotape should have still existed before the policy allowed its deletion on or about July 6, 2009, which was 45 days after the defendant's arrest. The facts in the instant case are very

similar to those in *Kladis*.

¶ 23 As in *Kladis*, here, the State contends that the trial court effectively dismissed its case by barring all evidence obtained while the videotape was recording the stop. Citing *People v. Camp*, the State argues that dismissal is an inappropriate remedy under these circumstances. *People v. Camp*, 352 Ill. App. 3d 257 (2004). We conclude that the facts in the instant case are inapposite from those in *Camp* because *Camp* involved an outright dismissal by the trial judge and the second district remanded the case to the trial judge to consider more appropriate sanctions for the discovery violation.

¶ 24 Here, as in *Kladis*, the trial judge did not dismiss the charges, but barred the officer from testifying to any matters which would have been contained in the deleted video recording. While the sanction is harsh, based upon the recent decision in *Kladis* and the facts in the instant case, this court concludes this sanction was not an abuse of the trial court's discretion.

¶ 25 CONCLUSION

¶ 26 The earlier judgment entered in this case on November 2, 2010, is vacated. After reconsidering our previous decision in light of *Kladis,* as directed by the supervisory order of our supreme court, we affirm the trial judge's sanctions imposed for the State's violation of discovery.

¶ 27 Affirmed.