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2013 IL App (3d) 110931-U

Order filed November 19, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF) Appeal from the Circuit Court
ILLINOIS,) of the 21st Judicial Circuit,
) Iroquois County, Illinois,
Plaintiff-Appellee,)
) Appeal No. 3-11-0931
v.) Circuit No. 10-CF-99
)
R.L. BROOKS,) Honorable
) Gordon L. Lustfeldt,
Defendant-Appellant.) Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Presiding Justice Wright specially concurred.

ORDER

¶ 1 *Held:* Trial counsel was ineffective for failing to request a reasonable and appropriate sanction in light of the State's discovery violation.

¶ 2 Defendant, R.L. Brooks, was charged with driving while license suspended or revoked.

625 ILCS 5/6-303(a) (West 2010). He requested discovery of any video or audio recording

created by the camera in the responding officer's squad car. The State responded that no

recording of the stop existed. At trial, the officer explained that a recording was created but was

later destroyed because the State had not requested the recording within 90 days of its creation. However, defendant's discovery request was made within the 90-day window. The court determined that the State had committed a discovery violation by failing to preserve the recording. As a sanction, the court allowed defendant to cross-examine the officer about the destruction of the recording. Defense counsel was unsatisfied with that remedy but did not suggest an alternative. Defendant was found guilty. He appeals, arguing, *inter alia*, that the discovery sanction was inadequate. We reverse and remand for a new trial.

¶ 3

FACTS

¶ 4 On May 18, 2010, Illinois State Police Officer Steven Sigler was driving home at the end of his shift when he noticed a blue Plymouth minivan stopped on the shoulder of Interstate 57. Sigler pulled over and parked his squad car behind the minivan. He observed two people inside the minivan—defendant was seated in the driver's seat, and defendant's sister, Maryann Taylor, in the front passenger seat. After finding no medical or mechanical emergency, Sigler ran defendant's information and discovered that his driver's license was revoked. Sigler issued defendant a citation for misdemeanor driving while license suspended or revoked, in violation of section 6-303(a) of the Illinois Vehicle Code (Code) (625 ILCS 5/6-303(a) (West 2010)).

¶ 5 At a preliminary hearing on the misdemeanor charge, defendant requested discovery of any potential recording made by the camera in Sigler's squad car. The court entered the discovery order on June 29, 2010.¹

¹ The record on appeal does not include any proceedings that occurred while the offense was charged as a misdemeanor. However, the transcript of defendant's trial includes confirmation by the trial court that defendant requested discovery of the recording while the

¶ 6 The offense was later charged by indictment as a felony because it was defendant's fifth violation of section 6-303(d-3) of the Code. 625 ILCS 5/6-303(d-3) (West 2010). At a preliminary hearing on the felony charge, defendant requested discovery under Illinois Supreme Court Rule 412 (eff. March 1, 2001). Defendant stated that he wanted access to the recordings made from Sigler's in-car camera, because they would establish that defendant was not driving the minivan. The court assured defendant that if a recording existed, it would be turned over to defense counsel.

¶ 7 At a subsequent pretrial hearing, the State explained that it had received information from the State Police that no video existed. Defendant protested, arguing that he had seen an active camera inside Sigler's vehicle. The court explained that defendant could question Sigler at trial about the existence of the recording and allow the jury to decide whether Sigler was being honest about the existence of the recording. The cause proceeded to a jury trial.

¶ 8 The State called Sigler to testify. Sigler testified that on May 18, 2010, he observed a vehicle parked on the right-hand shoulder of Interstate 57. Sigler activated his flashing lights and pulled his police cruiser behind the vehicle. He observed two people in the vehicle: defendant was seated in the driver's seat and defendant's sister, Taylor, was seated in the front passenger seat. Defendant told Sigler that he had been driving. After Sigler ran defendant's information and learned his license was revoked, Sigler issued defendant a ticket. Sigler could not recall defendant's explanation for having pulled over and parked on the shoulder. However, Sigler reasoned that the cause could not have been mechanical or medical, for had it been, Sigler would have taken additional steps to address the mechanical or medical problem. Instead, Sigler issued

offense was charged as a misdemeanor and that a discovery order was entered on June 29, 2010.

defendant a ticket and left the scene.

¶ 9 On cross-examination, defense counsel began questioning Sigler about whether his squad car was properly equipped to record video and audio. The State objected, and the jury was temporarily excused from the courtroom. Sigler explained that the stop, in fact, had been recorded. However, the recording was destroyed because the State Police did not receive a request to retain it within 90 days of its creation.

¶ 10 Defendant argued that he requested production of the video within 90 days of its creation. The court agreed and found that the State had committed a discovery violation under the principles of *People v. Schmidt*, 56 Ill. 2d 572 (1974). See also *People v. Kladis*, 2011 IL 110920 (2011).

¶ 11 The court questioned its power to impose a sanction for the violation:

"THE COURT: *** I wouldn't have the authority to dismiss the case for that.

[DEFENSE]: Okay.

THE COURT: So we do the very same thing we are doing right now as far as I can tell. I don't know what else unless you got a different idea.

[DEFENSE]: Well, you have already heard my ideas so I don't have anything to add.

THE COURT: Idea is what? I mean, I don't—I don't see how—you want the jury to know that the State somehow did something wrong by not giving it to you and the problem with that is that they don't understand about the discovery rule. *** So, I mean, you can ask him about the tape and what happened to the tape, you know. Maybe you ought to have a leading question the tape was destroyed because you didn't get a court

order within 90 days and then I think that's it. ***

* * *

*** I don't think under the case law I can throw out a felony charge because there is not a tape[.] ***

* * *

*** I don't think I can throw the charge out. I really don't.

[DEFENSE]: Okay.

THE COURT: I don't think there is any—I mean, the case law says you are to pick an appropriate sanction and throw the charges out as a thing of last resort[.] *** I don't think I can throw a case out for that, not when you got eye witnesses. I mean, if that had been the only evidence, that might be different, but I don't think it would be appropriate.

*** So this is the only thing I know to do. Argue the inference and we will go from there.

[DEFENSE]: Okay."

On cross-examination, defense counsel questioned Sigler about the recording. Sigler testified that a recording of the stop was made but later destroyed when no court order issued requiring the State Police to preserve the recording.

¶ 12 The defense called Taylor to testify. Taylor testified that she was driving the minivan on the morning in question, and her brother was riding in the passenger seat. Defendant had not been driving at all that day. Taylor pulled the minivan over to the shoulder because she was not feeling well. After Taylor pulled over, defendant exited the car to relieve himself. Taylor moved from the driver's seat to the now-empty passenger seat, planning to let defendant take over the driving. Defendant was still standing outside the vehicle when Sigler pulled up. After learning

from Sigler that defendant's license was revoked, Taylor decided to continue driving, despite feeling ill.

¶ 13 Defendant testified that Taylor was driving and pulled over because she was sick.

Defendant exited the vehicle and was standing outside when Sigler arrived. Taylor moved to the passenger seat because she was feeling sick. Defendant was considering driving if Taylor did not begin to feel better. Defendant testified that he did not tell Sigler he was driving.

¶ 14 The State called Sigler to testify again in rebuttal. Sigler testified that when he arrived at the scene, defendant was seated in the driver's seat, and Taylor was seated in the front passenger seat. Neither defendant nor Taylor alerted Sigler to any medical problem. Sigler knew this because he did not call a paramedic or generate a medical field report.

¶ 15 The jury returned a verdict of guilty, which the court accepted. The parties agreed to a sentence of one year's imprisonment. Defendant appeals.

¶ 16 ANALYSIS

¶ 17 A. Discovery Violation

¶ 18 On appeal, defendant first claims that the trial court imposed an insufficient sanction in response to the State's discovery violation.

¶ 19 The trial court determined that the State's failure to secure and disclose the recording was a violation of the misdemeanor discovery principles set out in *Schmidt*, 56 Ill. 2d 572. Defendant argues that, in response to the violation, the court imposed an insufficient sanction. Defendant raises this claim in two ways: (1) the court erred in imposing the insufficient sanction; and (2) trial counsel was ineffective for failing to request a more severe sanction.

¶ 20 To establish a claim of ineffective assistance of counsel, a defendant must show: (1) that

his attorney's performance was objectively unreasonable under prevailing professional norms, and (2) a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 21 In the present case, defendant argues that it was deficient for his trial counsel not to request that the court impose a more onerous sanction in response to the discovery violation. In particular, defendant argues that counsel should have moved for the court to limit Sigler's testimony such that Sigler could not testify to any facts that would have appeared on the recording. We agree with defendant.

¶ 22 Case law establishes that, in response to the State failing to produce a video or audio recording, the court may limit the State's witnesses from testifying to events that may have appeared on the recording. See, e.g., *People v. Kladis*, 2011 IL 110920; *People v. Petty*, 311 Ill. App. 3d 301 (2000); *People v. Koutsakis*, 255 Ill. App. 3d 306 (1993). In the present case, when crafting a sanction, the trial court explained that it could not dismiss the charge against defendant. The court stated, "I don't know what else unless you got a different idea." Defendant did not suggest any alternative sanction. In the absence of any alternative, the court stated, "So this is the only thing I know to do." The court then entered a sanction that the defendant could cross-examine Sigler as to the destruction of the recording.

¶ 23 Under prevailing professional norms, trial counsel should have provided the court with an alternative sanction that would have more adequately addressed the violation, particularly where the court was literally asking for counsel to provide an alternative. Under existing case law, limiting the testimony of the State's witnesses was a recognized sanction that would have benefitted defendant at trial. Counsel acted unreasonably by not requesting such a sanction.

¶ 24 Counsel's deficient performance prejudiced defendant because there was a reasonable probability that the court would have granted defendant's motion and imposed the sanction. The court explained that it wanted to impose a sanction but was not aware of any options other than dismissal and the sanction it imposed. The court expressed its openness to alternatives by asking defense counsel whether he had any other ideas. Under these circumstances, we find a reasonable possibility that, but for counsel's failure to request it, the trial court would have imposed a sanction limiting the testimony of Sigler.

¶ 25 Trial counsel provided ineffective assistance of counsel. As relief, defendant is entitled to a new trial.

¶ 26 *B. Voir Dire*

¶ 27 Defendant claims that the trial court failed to comply with Illinois Supreme Court Rule 431 (eff. May 1, 2007) while conducting *voir dire* examinations.

¶ 28 Having found reversible error on defendant's first claim, we need not decide the present claim. We note, however, that "Rule 431(b) requires that the trial court ask potential jurors whether they *understand* and *accept* the enumerated principles, mandating 'a specific question and response process.' " (Emphasis in original.) *People v. Wilmington*, 2013 IL 112938, ¶ 32 (quoting *People v. Thompson*, 238 Ill. 2d 598, 607 (2010)). Compliance with Rule 431 requires that each juror confirm that he or she both understands and agrees with each of the four principles outlined in the rule.

¶ 29 **CONCLUSION**

¶ 30 The judgment of the circuit court of Iroquois County is reversed. The cause is remanded for a new trial.

¶ 31 Reversed and remanded.

¶ 32 PRESIDING JUSTICE WRIGHT, specially concurring.

¶ 33 I concur in the judgment.