IN THE COURT OF APPEALS OF IOWA

No. 2-926 / 11-1417
Filed January 9, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CLAYTON ELDON LAND,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Stephen Gerard, District Associate Judge.

Clayton Land appeals his conviction of operating while intoxicated. **AFFIRMED.**

Joseph C. Glazebrook of Glazebrook & Moe, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Phil Van Liew, Legal Intern, Janet M. Lyness, County Attorney, and Jude Pannell, Assistant County Attorney, for appellant.

Heard by Doyle, P.J., and Mullins and Bower, JJ.

BOWER, J.

Clayton Land appeals his conviction for operating while intoxicated, in violation of Iowa Code section 321J.2 (2011). Land contends the district court erred in failing to: (1) enforce discovery obligations of the State which prejudiced him prior to trial and (2) grant relief to him when the State failed to disclose exculpatory evidence to him in violation of his due process rights under state and federal law. Upon our review, we conclude Land has failed to prove his rights were violated. Accordingly, we affirm Land's conviction and sentence for operating while intoxicated.

I. Background Facts and Proceedings.

At approximately 12:15 a.m. on February 7, 2011,[1] Johnson County Deputy Sheriff Brad Kunkel and Patrol Deputy Chris Wisman were dispatched to Clayton Land's residence, on Blain Cemetery Road in Swisher, Iowa, for a domestic disturbance. The officers spoke with Land's wife, Sandra, for approximately fifteen minutes. Sandra informed the officers that Land had just left and had "probably gone to his parents' residence," located adjacent to Land's home.

The officers left to find Land in order to make contact with him and advise him to let the situation "diffuse" before returning home. In pursuit of Land, the officers returned to the highway, drove fifty to seventy-five yards, and turned onto Land's parents' driveway. There was snow on the ground, but the driveway was plowed. Approximately thirty yards down the driveway, the officer's encountered

[1] All dates referenced took place in 2011, unless otherwise specified.

a vehicle partially in the snow-filled ditch along the side of the drive. The vehicle's rear was still on the drive, but the front appeared to be stuck in a snow bank. The officers noticed "the car was nosed into the snow at an angle, so the driver would not have been able to exit on the driver's side."

The officers observed an individual sitting in the front passenger seat of the vehicle. Deputy Wisman observed "footprints from the passenger side that went around the front of the car over to the driver's side and basically back." From the footprints, it appeared to Deputy Kunkel that "the occupant of the car had gotten out, walked around to kind of assess the situation he was in, looked at the house to see whether or not it was feasible to walk to the house, and then just gotten back in the car." The vehicle was not on, but Deputy Kunkel noticed the keys were in the ignition.

The officers identified the individual in the car as Clayton Land. The officers asked Land how he had arrived at his current location; Land stated he had driven there. Land showed signs of intoxication and emanated the odor of alcohol. His speech was "slurred," he was "disoriented," and his eyes were "glassy," "bloodshot, and watery." He had "a fixed gaze." Land admitted to drinking "seven beers" at his parents' house while watching the Super Bowl. Land had "long johns" and "a sweatshirt" on, but no shoes or socks. Deputy Kunkel noticed Land "had snow around the cuffs of his long johns." Land asked the officers to carry him out of the vehicle; the officers declined.

Because Land was not wearing shoes or socks and there was snow on the ground, the officers decided it would be unwise and unsafe to conduct field

sobriety tests at the scene. Land was offered a preliminary breath test, which he declined. Based upon their interactions with Land, Land's "obvious" impairment, as well as his admissions to drinking seven beers and driving, the officers suspected Land was intoxicated.

At that time Deputy Kunkel's shift ended and he left the scene; Deputy Wisman continued the investigation. Deputy Wisman transported Land to the Department of Public Safety's DataMaster room for a more controlled environment to conduct field sobriety tests. Once there, Land declined the field sobriety tests. Land also refused a breath test. Land's behavior was described as "argumentative and taunting."

On March 16, 2011, the State filed a trial information charging Land with operating while intoxicated. Land filed a written arraignment and plea of not guilty on March 30. A jury trial was set for June 6.

Defense counsel received the police reports from the incident. On April 8, defense counsel sent a letter to the Johnson County Attorney's Office disputing the discovery expenses he had incurred for having received police reports for Land's case. The county attorney's office responded in a letter to defense counsel dated April 11, stating it would "no longer automatically provide discovery copies," and if defense counsel wanted to "review discovery materials" or "request photocopies," he needed to contact the county attorney's office to make an appointment.

On April 29, Land filed a motion to produce any relevant "statements" made by Land, any "audio or video records which may exist documenting this

incident in any way," and "any other exculpatory or otherwise relevant evidence the State has or intends to acquire for use in this case." On May 12, Land filed a motion to suppress "all evidence obtained as a result of the unlawful search or seizure" of Land. That day the district court entered an order setting a hearing on Land's motion to suppress on July 20, and resetting trial for August 15.

On May 24, Land filed an objection to the new trial date and motion for sanctions, arguing the new trial date would violate his right to speedy trial. On May 26, the court entered an order vacating its May 12 order resetting trial and ordering trial reset for June 6 as originally scheduled.[2]

Trial commenced on June 6. Deputy Wisman and Deputy Kunkel testified. On June 7, the jury returned a verdict finding Land guilty of operating while intoxicated. On July 7, Land filed a combined motion in arrest of judgment and motion for new trial, which the court denied. Land now appeals from his conviction and sentence, arguing the State engaged in misconduct by failing to comply with its discovery obligations, resulting in a *Brady*[3] violation and a violation of Iowa Rule of Criminal Procedure 2.14. Land also claims the district court abused its discretion in failing to allow him to take depositions.

II. Standard of Review.

Our review of Land's claim involving his constitutional right to due process is de novo. *State v. Jones*, 817 N.W.2d 11, 15 (Iowa 2012). We review a district

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[2] A formal hearing on Land's motion to suppress was never held.

[3] In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held that due process requires the prosecution to disclose exculpatory evidence to the accused.

court's administration of discovery rules for an abuse of discretion. *State v. Clark*, 814 N.W.2d 551, 563 (Iowa 2012).

III. Discovery Issues.

Land argues the State failed to comply with its discovery obligations and that he was prejudiced by this failure. He contends there was an undue delay in discovery which forced him to choose between his due process rights and his right to speedy trial. Land claims the district court erred in failing to grant him relief as a result of the State's failure to disclose exculpatory evidence and that this "error was present in the proceedings from beginning to end and infected the entire trial process, resulting in a denial of due process." Land argues the State's failure to comply with its discovery obligations deprived him "of a fair opportunity to prepare for trial and confront witnesses."

To establish a *Brady* violation, Land must prove: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issue of guilt. *Harrington v*. *State*, 659 N.W.2d 509, 521-22 (Iowa 2003). The purpose of *Brady* is to "assure that the defendant will not be denied access to exculpatory evidence only known to the Government." *United States v*. *LeRoy*, 687 F.2d 610, 619 (2d Cir. 1982). *Brady* does not stand for the proposition that the State must "supply a defendant with all the evidence in [its] possession which might conceivably assist the preparation of his defense." *Id*.

Land also raises state law grounds in support of his contention. Iowa Rule of Criminal Procedure 2.14(2)(a)(1) provides:

> Upon a filed pretrial request by the defendant the attorney for the state shall permit the defendant to inspect and copy or photograph: Any relevant written or recorded statements made by the defendant or copies thereof, within the possession, custody or control of the state, unless same shall have been included with the minutes of evidence accompanying the indictment or information; the substance of any oral statement made by the defendant which the state intends to offer in evidence at the trial, including any voice recording of same; and the transcript or record of testimony of the defendant before a grand jury, whether or not the state intends to offer same in evidence upon trial.

With these legal principles in mind, we turn to the specific issues raised by Land on appeal.

A. *Videos from Deputy Wisman's squad car and DataMaster room*. On May 27, ten days before trial, the Johnson County Sheriff's Department sent both defense counsel and the county attorney's office a video from Officer Wisman's squad car and a video from the DataMaster room. Even if we were to assume this evidence was favorable to Land and was material to the issue of guilt, we do not find the prosecution suppressed this evidence. *See Harrington*, 659 N.W.2d at 521-22 (requiring proof that the prosecution suppressed evidence to establish a *Brady* violation). Land received the video ten days before trial; defense counsel was allowed adequate time to review the video and prepare his case.[4]

In addition, on April 11, nearly two months prior to trial, defense counsel received notice from the county attorney's office that it would no longer automatically provide discovery copies. *See* Iowa R. Crim. P. 2.14(2)(a)(1) (providing that "the state shall permit the defendant to inspect and copy or photograph [evidence] within the possession, custody or control of the state").

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[4] The State received the video the same day as Land.

As the county attorney's office instructed, if defense counsel wanted to "review discovery materials" or "request photocopies," he needed to contact the county attorney's office to make an appointment and that copies of such materials would not be free of charge. *See id.*; *see also United States v. Freedman*, 688 F.2d 1364, 1366-67 (11th Cir. 1982) (finding the government must allow defendants access to inspect and copy requested discovery material, but the government is not required to furnish, at its own expense, copies of discretionary discovery material to defendants); *United States v. Tyree*, 236 F.R.D. 242, 244 (E.D. Pa. 2006) (observing the government has a duty to make discovery documents "available for inspection, copying or photographing" or to allow the defense "to inspect and to copy or photograph" documents, and has "no affirmative duty . . . to pay for copying); *Schaffer v. Superior Ct.*, 111 Cal. Rptr. 3d 245, 248-49 (Cal. Ct. App. 2010) (observing the State's obligation to produce discovery is fulfilled by making documents "available for review" and noting prosecutors' offices in several states, including Iowa, charge "reasonable reproduction costs" associated with the production of such discovery).

At no point did defense counsel contact the county attorney's office to review discovery. In any event, the county attorney's office did not receive the video until May 27, the same day as defense counsel. The record does not support Land's claim that the State suppressed the evidence at issue.

B. *Video from Deputy Kunkel's squad car and photographs of footprints in snow*.[5] At trial, Deputy Wisman testified there could potentially be a video from Deputy Kunkel's squad car. Deputy Wisman explained that activation of a squad car's emergency lights automatically engages the audio and video recording and that Deputy Kunkel probably had his emergency lights activated en route to Land's residence. Deputy Wisman testified he did not recall whether any photographs were taken at the scene and he did not look at any pictures as part of his investigation, but it would "not surprise" him to learn that Deputy Kunkel took some pictures of the scene.

After trial, Land subpoenaed the video and photographs. Land received a video from Deputy Kunkel's car which showed Deputy Kunkel driving to the Land's residence, parking in front of the garage, and getting back into the vehicle. Land was not depicted or recorded on the video. No photographs were found in the file.

Land contends the video was "incomplete" and alleges "the video was either intentionally turned off during the investigation of Mr. Land, or it was partially destroyed or misplaced." Land argues the "missing" portion of the video and photographs are "highly exculpatory" and "at best, they evidence a sloppy and mishandled police investigation in which critical evidence to the Defense went missing." The district court addressed these contentions in its order on

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[5] The State contends Land failed to preserve error on this issue. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v*. *Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Upon our review, we find the issues raised by Land on appeal were raised by Land and were decided by the district court.

Land's posttrial motion in arrest of judgment and motion for new trial when it stated "the Court finds there was no shoddy police work in this case, declines to accept in any manner Defendant's conspiracy theory about the second video, and does not believe that it contains or contained any exculpatory evidence not fully presented and litigated at trial."

Evidence known to the prosecution or police but unknown to the defense is "suppressed." *See Harrington*, 659 N.W.2d at 523-24. In this case, Deputy Kunkel and Deputy Wisman responded to Land's residence for a possible domestic disturbance. After they determined the disturbance was no longer ongoing, the officers left to find Land. Although Deputy Wisman's squad car video continued recording, Deputy Kunkel's did not.[6] Neither Land nor Land's car was depicted on Deputy Kunkel's video. Because the video did not contain any information in regard to Land, we find Land did not show that the prosecutor suppressed exculpatory evidence.[7] *See also* Iowa R. Crim. P. 2.14(2)(a)(1).

In regard to the allegedly missing photographs, Land alleges Deputy Kunkel's police report indicates photographs were taken. However, no photographs were found in the file. *See* Iowa R. Crim. P. 2.14(2)(a)(1). It is unclear whether photographs actually existed. Land argues the photographs would have shown he did not fall in the snow and would depict the snowy

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[6] There is no indication in the record this was an intentional act or much less a "sloppy" police investigation. *See State v*. *Craig*, 490 N.W.2d 795, 796-97 (Iowa 1992) ("Where the lost evidence is only *potentially* exculpatory, where by its nature the lost evidence cannot be evaluated by a fact finder, a due process violation will not be found in the absence of a showing of bad faith."). Further, as Deputy Wisman was the officer handling the OWI investigation, we find it significant that his car continued recording.

[7] In any regard, the suppression of evidence is not a denial of due process unless the evidence is "material to the issue of guilt." *Harrington*, 659 N.W.2d at 522.

circumstances, which would explain why he drove into the ditch. At trial, the officers testified about the footprints they observed immediately surrounding Land's vehicle. On cross-examination, the officers agreed with defense counsel that there were no tracks to show that Land stumbled or fell upon exiting the vehicle. They also described the snowy and icy conditions, including the fact that Land's parents' driveway was covered in snow. In addition, the video from Deputy Wisman's car clearly shows the snow-packed road and snowy conditions.

Evidence is material when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Harrington*, 659 N.W.2d at 523. "In deciding whether our confidence in the verdict is undermined, we consider the totality of the circumstances, including the possible effects of nondisclosure on defense counsel's trial preparation." *Id.* at 523-24 (internal quotation marks omitted). Here, we are unable to find that the photographs, had they existed in the file, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 523 (quoting *Strickler v*. *Greene*, 527 U.S. 263, 290 (1999)).

C. Depositions of Deputy Wisman and Deputy Kunkel. Land alleges he was never able to depose witnesses in this case. On May 3 Land filed a notice of deposition stating "Counsel will subpoena [Deputies Wisman and Kunkel] in a timely fashion in collaboration with the State of Iowa." Land alleges defense counsel sent a letter to the county attorney's office on May 13, "laying out convenient times to hold the deposition prior to trial."[8] Land argues he "was

[8] The May 13 letter is not included in the record.

forced to wait in declaring his intention to take depositions in this case because he had not heard back at this point regarding his earlier discovery request." Land alleges the State "failed to respond to [his] request to take depositions."

"The right to present a defense does not afford a criminal defendant the right to depose witnesses. A criminal defendant has no due process right to pretrial discovery." *Clark*, 814 N.W.2d at 561. "Discovery matters are committed to the sound discretion of the trial court, and are reviewable only upon an abuse of that discretion. Error in the administration of discovery rules is not reversible absent a demonstration that the substantial rights of the defendant were prejudiced." *Id*. at 563.

Here, Land did not seek an order to compel depositions. Land did not subpoena Deputy Wisman or Deputy Kunkel for depositions. In addressing Land's discovery concerns at the start of trial, the district court set forth, "We have already discussed all the discovery issues. The Court finds that the State has acted reasonably in this matter given the constraints imposed by the Defendant and the Defendant's speedy trial demand." The court further observed, "It should be noted the Defendant has elected a trial tactic of demanding speedy trial and being unwavering from that demand." Where Land has no constitutional right to depose witnesses, we cannot find a violation of Land's due process rights on this issue. We find the court properly exercised its discretion in finding Land's rights were not impinged by his inability to depose Deputies Wisman and Kunkel in this case.

IV. Conclusion.

Upon our review, we conclude Land has failed to prove his rights were violated. We affirm Land's conviction and sentence for operating while intoxicated.

AFFIRMED.