STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GABRIEL JACKSON,

Defendant-Appellee.

UNPUBLISHED
January 29, 2009

No. 282141
Wayne Circuit Court
LC No. 07-013512-FH

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

In the prosecutor's appeal, plaintiff appeals as of right from the circuit court's order dismissing the case over a discovery violation. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

A. Arrest

At the preliminary examination, a Detroit Police Officer testified that while on routine patrol on August 5, 2007, he observed a silver Grand Prix parked extremely close to the front entrance of a gas station, impeding traffic. According to the officer, when his partner announced the presence of the police, defendant, who was on the premises, retrieved a clear plastic bag containing suspected cocaine from his pocket and tossed it near the front quarter panel of a Jeep Cherokee parked near the Grand Prix. The officer continued that he approached defendant, who then entered the Cherokee, locked the doors, and attempted to start the ignition, but the officer informed defendant he was under arrest for suspected cocaine possession. The officer then placed defendant in handcuffs and searched him, thereby discovering a revolver on defendant's person.

Defendant was charged with possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*), second or subsequent such offense, MCL 333.7413(2), carrying a concealed handgun, MCL 750.227(2), being a felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Plaintiff further gave notice that defendant would be subject to enhanced sentencing as a second habitual offender, MCL 769.10.

B. Motion to Suppress/Dismiss

Defendant filed a motion to suppress the evidence seized in connection with the arrest on the ground that the police had detained him without sufficient reason to suspect him of criminal activity. See *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997) (evidence obtained in the course of a violation of a suspect's rights under the Fourth Amendment of the United States Constitution is subject to suppression at trial); *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (incorporating the Fourth Amendment against the states under the Fourteenth Amendment). However, this motion became one to dismiss when the prosecution failed to comply with a discovery order for a patrol car video recording of the confrontation between the police and defendant.

The trial court held an evidentiary hearing to decide the matter. As the hearing began on October 12, 2007, the prosecuting attorney stated that she had no indication, until that day, that such a video had been requested. The trial court and defense counsel observed that the existence of the video came to light at the preliminary examination, and that an order to produce it had been signed on that occasion. The prosecuting attorney agreed immediately to try to obtain any such recording. The trial court stated, "It could be inculpatory or exculpatory. It may have some effect on this motion. I don't know. But if a video exists of the incident . . . it could have some bearing on these proceedings."

When proceedings resumed on November 2, 2007, the prosecuting attorney reported that she had spoken with the officer in charge about the video on October 15 and learned that no video existed covering the period between July 31 and August 7, 2007. The prosecuting attorney presented a memorandum from the Technical Support Department of the Detroit Police that indicated that no such video was available. In response, defense counsel stated as follows:

> I'm asking for the Court to dismiss this case . . . . [R]eading this memo . . . , it's dated October 15, 2007. This incident occurred on August the 5th, 2007. The request for the video [was] made on August the 27th, 2007, but no one attempted to pull the video out of the computer until . . . two months later.
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> As any person that's practiced criminal law is well aware . . . the video camera that this officer is talking about holds evidence for thirty days and after thirty days the machines, if you do not make an extra copy, they claim that they start recording and using . . . that space over the next time. That's why on August the 27th, the Judge signed the order, it was served in court on the Prosecutor and the O[fficer] I[n] C[harge] because we knew we had to get it within thirty days or make that request.

The prosecuting attorney maintained that no video was ever made in the first instance because the server was not engaged, but defense counsel protested that there was no evidence that the server had not been functioning. Defense counsel argued that he had routinely asked for videos in such situations, and not received them, and that, "we've had it for years where officers playing with those machines because when they make illegal arrests or assault an individual, they want to say the video wasn't working or it was turned off."

The officer in charge for purposes of producing the requested video testified that he was present at the preliminary examination on August 27, 2007, and there received a court order to produce a patrol car video. Asked what steps he took to comply with that order, the officer spoke vaguely about his workload, and putting in a request, but was not specific about when he took any such steps. The officer did not produce a copy of the request.

Proceedings were continued several days later in order to obtain testimony from the assistant administrator of the camera system of the Detroit Police. That witness testified that he had received a request on October 15 for a police video dating from August 5, 2007, but was unable to retrieve such a video. The witness indicated that his attempt turned up a "missing gap of video stemming from July 31st at 21:41 hours, until August 7th at 18:47 hours." Asked if that meant that no video ever existed within that window, the witness hedged, stating both that such a video may never have been made, or may have been made but overwritten by new computer files. The witness stated that experience suggested to him that, "from that big of a gap, it's usually a hardware issue," but admitted that he had no specific information concerning a malfunction in this instance. The witness further testified that he could find no record of any repair order or related complaint concerning the equipment in question.

The trial court's findings and conclusions included the following:

> Before the Court is a motion to dismiss brought on behalf of the Defense, the basis being the alleged failure of the People to comply with a discovery order issued on October 27, 2007, in the District Court . . . .
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> There was an order for police video in the squad car of the officers who arrested the Defendant . . . back on . . . August 5th, of 2007.
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> It is the contention of the Defense that the failure to timely furnish . . . some recording of what occurred . . . caused a severe prejudice to the Defendant to be able to properly advance the motion to suppress physical evidence.
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> * * *
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> The People's contention is that well, after October the 12th of 2007, that the People attempted to comply with the order of discovery, that is, the August 27th, 2007 order, and have now furnished evidence that, at least, as of October 15th, 2007, no video was available. There was nothing up-loaded to a server. There is a gap of one week of video . . . .
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> * * *
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> The earliest time that [the assistant administrator of the camera system] became aware of a request for video . . . was October the 15th, 2007 . . . . He said he attempted to pull the video and . . . discovered this missing segment of time . . . .
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> He testified that usually where there's such a gap is probably some malfunction in the hard dive [sic] of the car's equipment, but he testified that he

could not tell if there was ever video recorded . . . . But a further check . . . indicated that that were no repair orders or requests indicating that there was any malfunction . . . .

And the Court finds that the People were aware of the August 27th, 2007, order at the time it was issued by the . . . District Court, but virtually no steps were taken to comply with that order until the first date of an evidentiary hearing in the matter on the motion to suppress, which was October the 12th of 2007.

There has been no explanation sufficient[ly] satisfactory to this Court as to why no steps were taken by the People to locate the video prior to the October 12, 2007, hearing.

* * *

Then we come to a hearing of . . . November 2nd, 2007 . . . . And the Court is then presented with an October 15, 2007, memo . . . indicating that there was no video found to exist. This date of the 2nd of November is beyond the five to ten days that it would have overwritten or over-recorded in the car video. And, now we know that even if there was a video, it certainly is no longer available.

. . . [A]s I view the evidence that was adduced during the hearing [it] is not conclusive that there was no video. The evidence tends to show that there was a video because one of the reasons testified to . . . is that well, maybe there was a malfunction . . . , but there's no evidence that there was a malfunction . . . .

The evidence is to the contrary. There's no documentation, no oral reports, or any other kind of evidence that there was a malfunction which was addressed with any kind of mechanical or technical correction.

. . . [I]t took three hearing for it to get to the point where we are today to try to find out what happened. And that time-frame, given the date of the order from the District Court of August 27th, 2007, . . . is just inexcusable. That information should have been furnished to this Court at the time, at least of the first hearing . . . if the police had taken the necessary steps to locate the video. They did nothing, and that is inexcusable.

So, I would find that there has not been compliance with [the] District Judge's . . . order.

* * *

I find that the failure by the police to timely respond to the order does prejudice the ability of the Defense to pursue the motion to suppress. . . .

. . . I find that there's no reasonable compliance with the . . . discover order to . . . even attempt to locate a video or make a determination if a video had ever existed.

> For those reasons, I find that the Defense's position with respect to pursuing this motion . . . have been prejudiced.
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> * * *
>
> I am compelled, I think under the circumstances to grant to Defendant's motion. It will be dismissed.

II. Standards of Review

This Court reviews a trial court's decision regarding the appropriate remedy for failure to comply with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). A trial court's decision on a motion to dismiss is likewise reviewed for an abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1999). An abuse of discretion occurs where the trial court chooses an outcome falling outside a "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A trial court's factual findings are reviewed for clear error, while its application of the law to the facts is reviewed de novo. *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996). "A finding is clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

III. Analysis

Plaintiff repeatedly suggests that the video the defense sought in this case never existed in the first instance, but stops short of asserting that the trial court clearly erred in reaching the conclusion that a video did exist but was not preserved. Given the evidence that patrol car videos were customarily made, the explanation that possible equipment failure accounted for the lack of one in this instance was speculative, because there was no evidence of any equipment failure beyond the lack of videos for a certain period. Because we are not left with a definite and firm conviction that the court erred in this regard, we affirm the trial court's determination that the video sought did exist at one time but that the prosecution failed to produce it.

Plaintiff argues that neither constitutional Due Process, nor the court rules, required disclosure of the video sought in this instance. We disagree. Due Process mandates disclosure of evidence favorable to, and requested by, a criminal accused if it is material to the issues of guilt or punishment. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Similarly, MCR 6.201(B)(a) requires disclosure, upon request, of "any exculpatory information or evidence known to the prosecuting attorney." In this case, the defense wanted the video most immediately for purposes of a pretrial suppression motion. However, had the case gone to trial, the video could well have shed light on whether defendant in fact ever possessed the cocaine that he allegedly tossed from his person as the police approached. And had the case proceeded to sentencing, defendant's behavior as reflected in that video might have affected his minimum sentence. The lack of the video simply leaves a credibility contest between defendant and a police witness. The trial court thus did not clearly err in finding that the defense was prejudiced

for want of the video. Because the video sought related to questions of defendant's guilt or punishment, it was subject to discovery.[1]

Plaintiff argues that there was no evidence of bad faith. We disagree. The trial court regarded the lack of timely activity in response to the discovery order issued by the district court as "inexcusable," given that the video was in danger of being overwritten if not promptly retrieved. Those in possession of that key piece of evidence flouted the district court's order until it was reiterated by the circuit court several weeks later, then still more weeks went by before there was any attempt to explain the lack of any such video. Assuming, without deciding, that this was mere inadvertence and not a deliberate attempt to withhold evidence, we nonetheless agree with the trial court that such egregious dalliance bespeaks something less than a good-faith attempt to comply with the discovery order.

Finally, plaintiff argues that the remedy of dismissal was erroneously harsh. Again, we disagree. A trial court has wide discretion in deciding how to respond to discovery violations. See *Davie, supra*. This was not a case of mere delay, but one where the delay led to the destruction of the evidence sought. In light of the prosecution's inexcusable delay in responding to the discovery order in question, we do not deem the remedy of dismissal to lie outside a principled range of outcomes. See *Babcock, supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra

[1] Our resolution of this issue obviates any need to decide whether a video recording qualifies as a "document, photograph, or other paper" subject to disclosure under MCR 6.201(A)(6).