

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY CARMICHAEL WILCHER,

Defendant-Appellant.

UNPUBLISHED

May 8, 2012

No. 301487

Wayne Circuit Court

LC No. 10-006562-FH

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

BECKERING, J. (*concurring*).

I concur with both the result reached and the analysis employed by my colleagues. I write separately to further address defendant’s arguments regarding the failure to produce and ultimate destruction of the patrol-car video. In particular, I wish to address defendant’s more subtle, nonconstitutional argument that the trial court abused its discretion when it failed to dismiss the charges against him under MCR 6.201(J) as a remedy for the prosecution’s noncompliance with the court’s discovery order.

“MCR 6.201 governs discovery in criminal cases.” *People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003). “There is no general constitutional right to discovery in a criminal case.” *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000); see also *People v Jackson*, 292 Mich App 583, 590; 808 NW2d 541 (2011). Thus, a violation of MCR 6.201 is not constitutional in nature. See *Elston*, 462 Mich at 765-766. “However, due process requires the prosecution to disclose evidence in its possession that is exculpatory and material” *Jackson*, 292 Mich App at 590; see also *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994) (“Defendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment.”). To warrant reversal on due process grounds, “a defendant must prove that the missing evidence was exculpatory or that law enforcement personnel acted in bad faith.” *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). Failure to preserve evidence that may have exonerated the defendant will not be a denial of due process unless bad faith is shown. *Id.*; see also *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988) (failure to preserve potentially useful evidence for a defendant did not deprive the defendant of due process where there was no showing of bad faith).

I agree with my colleagues that, although through no fault of his own, defendant can only theorize that the patrol-car video was exculpatory. As such, defendant must establish bad faith to succeed on his due process claim. I further agree that, accepting the trial court's credibility determinations, the record evidence does not demonstrate bad faith. Therefore, defendant's due process claim fails.

In addition, with respect to defendant's nonconstitutional claim, I would hold that the trial court did not abuse its discretion when it decided not to dismiss the case under MCR 6.201(J) for the prosecution's noncompliance with its discovery order. This Court reviews "a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion." *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). This Court likewise reviews for an abuse of discretion the trial court's decision on defendant's motion to dismiss. See *People v Stone*, 269 Mich App 240, 242; 712 NW2d 165 (2005). A trial court abuses its discretion when it reaches a decision that falls outside the range of reasonable and principled outcomes. *Jackson*, 292 Mich App at 591.

MCR 6.201(J) provides:

If a party fails to comply with [MCR 6.201], the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

"When determining an appropriate remedy for a discovery violation, 'the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances'" *Jackson*, 292 Mich App at 591, quoting *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). The balancing of interests includes consideration of the reasons for noncompliance and resulting prejudice to the defendant, if any. *Davie*, 225 Mich App at 598. "Mere negligence of the prosecutor is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved." *People v Callon*, 256 Mich App 312, 328; 662 NW2d 501 (2003).

The present case is not an egregious case where the prosecutor or the police acted in bad faith to intentionally withhold the patrol-car video; the officers were simply negligent—although I certainly hope measures have been taken to avoid such problems in the future. Thus, dismissal, an extreme sanction, would not have been appropriate under the circumstances. See *id.*; *Davie*, 225 Mich App at 598. Therefore, I would hold that the trial court's decision not to dismiss the charges against defendant as a remedy under MCR 6.201(J) did not fall outside the range of reasonable and principled outcomes. See *Jackson*, 292 Mich App at 591.

/s/ Jane M. Beckering