

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE : CASE NO. 0302017363

Vs. :

DAVID B. SHUGARD :
Defendant :

*Eric Mooney, Esquire, appearing for Defendant below, Appellee.
Carole Davis, Esquire, Deputy Attorney General, appearing for the State, Appellant*

DECISION

This case is before the Court on an appeal filed by the State pursuant to 10 Del.C. §9902(b) from a pre-trial ruling of the Justice of the Peace suppressing evidence in a DUI prosecution. Prior to establishing a briefing schedule in this Court, the Defendant filed a Motion for Rule to Show Cause requesting that the Court dismiss the State’s appeal for failure to provide, for appellate review, a transcript of the hearing at which the pre-trial Motion to Suppress was argued.

FACTS

The parties appeared before the Justice of the Peace on May 13, 2003 for suppression and trial for a DUI case. At the hearing, which was apparently recorded, but prior to the taking of any testimony, the Defense

argued that the State had failed to preserve evidence in the form of a videotape of the Defendant's driving, field test performance and arrest. The defense requested that all evidence purportedly caught on tape be suppressed under *Deberry v. State*, 457 A. 2d 744, (Del. 1983). During this exchange, the State conceded that the tape was subject to discovery under Rule 16 and that the tape had been destroyed due to another officer taping over the Defendant's arrest. The State argued that other evidence, specifically the testimony of the police officer, should be permitted. At this point, the agreement between the parties as to what occurred before the Magistrate varies. The Defense claims that the Magistrate ordered briefing, with the Defense opening and the State answering. The Defense argued against the order of briefing, as it would have to make assumptions on facts not in the record as to what happened to the tape in forming its arguments in the brief. The State claims that the parties stipulated to the facts proffered by the State as to the destruction of the tape. Both parties agree that no testimony was presented to the Magistrate on the circumstances surrounding the destroyed evidence and that neither party requested a "hearing". The tape of legal argument before the Magistrate has been reused precluding the preparation of a transcript of the arguments below.

After briefing the Magistrate granted Defendant's Motion to Suppress. On October 27, 2003, the State requested that the Justice of the Peace dismiss the case pursuant to 10 Del.C. §9902(b) and that the record in the matter be preserved. On November 7, 2003, the State filed its Notice of Appeal along with a letter to the Court Clerk advising that since no testimony was taken below the State did not need to file a transcript of

the May 13, 2003 proceedings. The State also represented that the tape of the legal argument on May 13, 2003 is unavailable for transcription.

Defendant argues that because there is no transcript of the arguments made on the record on May 13, 2003, this Court cannot perform its appellate role in determining whether the Court below erred in its ruling regarding lost evidence. The defense also argues that it was the burden of the State to present evidence as to the circumstances of the destruction of the tape and without a transcript of the legal arguments, or a record of facts, this Court's appellate review of the Magistrate's decision suppressing evidence is impossible.

The State argues that the Defendant accepted the State's proffer that the tape had been inadvertently taped over and since there was no issue as to those facts a hearing was not required. The State points to the fact that the Defendant did not request to question the officer at the suppression hearing and utilized the State's proffer in its arguments in briefing requesting the Court to find negligence and order suppression.

This Court has reviewed the record of the Court below which included Rule 16 Discovery Request, the State's letter dated May 9, 2003 to Defendant advising of the circumstances regarding the destruction of the tape, the Defendant and State's briefs on the issue of lost evidence and the Magistrate's written decision.

The issue on appeal is whether the Magistrate erred as a matter of law in its application of *Deberry, Supra.*, to the facts argued in the parties' briefs. In short, is the record presented sufficient to give the appellate Court a fair and accurate account of the context in which the claim of error occurred? (*Slater v. State*, 606 A2d 1334(Del Supr., Holland J. (1992)).

The Court holds that the record is sufficient to review the claimed error. After reviewing the briefs submitted to the Magistrate and the Magistrate's written ruling, the lack of a typewritten transcript of the legal arguments verbally presented to the Court on May 13, 2003 are not critical for appellate review. Both parties agree that there was no request for testimony by the officer once the State's proffer was made. Arguments presented by both parties in briefing below utilize the fact pattern proffered by the State in forming their argument for suppression. Since the conduct of the parties below demonstrate that there was no real question of fact at issue, the Magistrate's utilization of the stipulated facts in his written decision was appropriate.

Since the record below gives this Court an accurate account in which the claim of legal error occurred, appellate review may be conducted.

IT IS SO ORDERED this _____ day of February 2004

Judge Rosemary Betts Beauregard