

**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE**

**IN AND FOR SUSSEX COUNTY**

STATE OF DELAWARE : Case No. 1001001212  
v. :  
CURTIS D. WRIGHT :

**ORDER MOTION TO DISMISS/SUPPRESS**

The Defendant moves the Court to dismiss the criminal prosecution against him for Driving Under the Influence, 21 Del. C. § 4177(a)(1), or, in the alternative, to suppress the results of an intoxilyzer test. The Court must decide what the appropriate sanction is where the State deliberately destroyed potentially exculpatory evidence prior to the Defendant's discovery request.

A hearing on the Motion to Dismiss/Suppress was held on September 17, 2010. Thereafter, the parties were given an opportunity to submit case law or argument in writing to the Court. The Court reserved decision on the Motion until after trial which was heard on January 18, 2011. The Court issued a verbal ruling from the bench during the trial denying the Defendant's Motion to Dismiss but granting the Motion to Suppress the Intoxilyzer results. This is the Court's written decision summarizing its bench ruling.

For the reasons set forth herein, the Defendant's Motion to Dismiss is DENIED. The Defendant's Motion to Suppress is GRANTED.

**FACTUAL BACKGROUND**

The Dewey Beach Police arrested Defendant Curtis D. Wright ("Defendant") for suspicion of driving under the influence on January 3, 2010.

Following his arrest, the Defendant performed an intoxilyzer test in the Rehoboth Beach Police Department's intoxilyzer room. The State subsequently charged the Defendant with Driving Under the Influence in violation of 21 Del.C. §4177.

Upon entry of appearance, counsel for the Defendant filed a request under Court of Common Pleas Criminal Rule 16 for the production of "a copy of the videotape/recording device of the in-station security tape/recording, as well as the 20 minute observation period".<sup>1</sup> Defense counsel proffered that there "was not a 20-minute observation period and that the examining officer left the room during the observation period."<sup>2</sup> This observation period is required to properly lay the foundation for admissibility of the intoxilyzer test results at trial.<sup>3</sup>

The chief of the Rehoboth Beach Police Department, Chief Keith W. Banks ("Chief Banks"), responded to counsel's request on February 18, 2010:

Please be advised The Rehoboth Beach Police Department does not have a video tape of your client walking into the building or of the twenty minute observation period. This was confirmed today by having the recording device physically reviewed.<sup>4</sup>

According to the Defendant, this response is but the latest episode of a "continuous course of conduct" designed to conceal evidence discoverable under Court of Common Pleas Criminal Rule 16 ("Rule 16").<sup>5</sup> By "continuous course of conduct," the Defendant refers to a series of events concerning the Department's video surveillance security system and the Department's discovery policies which has spanned several years.

#### *The DVR System*

The Department replaced its VHS surveillance system in April 2004 with one that featured eight high resolution cameras and a digital video recorder ("DVR"). At the time of the grant application, the Department asserted that the

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<sup>1</sup> Motion Exhibit A.

<sup>2</sup> Motion Exhibit A.

<sup>3</sup> See *Clawson v. State*, 867 A.2d 187, 191 (Del. 2005).

<sup>4</sup> Motion Exhibit B.

<sup>5</sup> Motion, 4.

new system was necessary to facilitate officer safety and to respond to civilian complaints of officer impropriety.

Of the new system's many features, the most relevant in this case are the DVR's two record options: continuous record and motion record. On continuous record the DVR continuously records the subject matter before the field of view of the eight cameras. The manufacturer-compiled system specifications provide that on this setting the DVR can record up to 2.6 days' material before automatically recording over existing video. The motion record setting causes the DVR to record only 30 minutes before and 30 minutes after activity occurs within the field of view of the cameras in addition to the activity itself. The manufacturer specifications state that on motion record, the DVR can record at least 4.7 days' material before automatically recording over existing video if motion occurred 12 hours per day.

Testimony presented by the Department at the hearing, however, demonstrated that the manufacturer's specifications are incorrect. The Court heard testimony from the City of Rehoboth's Director of Information Technology, a Department dispatcher and Department Corporal Robert Whitman on this issue. Each witness testified that the DVR retained video for a longer duration than provided for in the manufacturer's specifications. Corporal Whitman, whom the Court finds most credible, testified that on several occasions he observed that the DVR retained video for a six-week period.

#### *Misleading Discovery Responses*

The Court finds that Chief Banks was aware that the DVR recorded for longer than the manufacturer's specified minimums. This fact is inferred from Chief Banks' conduct between 2006 and the time of this hearing in September 2010. In 2006, Chief Banks ordered a dispatcher to search the DVR for video evidence related to a citizen complaint of officer impropriety. Although the dispatcher did not find this video, it is manifest that Chief Banks learned that the DVR could retain video because he ordered officers to inspect the DVR for

evidence again in 2007 and in 2008. In 2008, officers found video evidence of an individual causing damage to a Department squad car. At Chief Banks' direction, the investigating officers sent a DVD of this video to the "high tech crimes unit."

Despite knowledge that the DVR retained video, Chief Banks responded to discovery requests from defense attorneys that the DVR did not have any retention capability. Before 2009, Chief Banks responded to requests for intoxilyzer room video as follows:

Please be advised that The Rehoboth Beach Police Department does not have a video tape of your client walking into the building or of the twenty minute observation period. We have a surveillance camera that is used for security purposes monitored by our Dispatch Center. *This device records for immediate playback only. There is no retention of these recordings.*<sup>6</sup>

The Court heard testimony from two witnesses concerning these responses. The first witness, a local defense attorney, testified that he had received similar discovery responses in unrelated cases and understood the final two sentences to mean that the Department did not have the technological capability to retain video recordings. The second witness, a deputy attorney general for the State of Delaware, testified that he had seen these responses in the past and, given his later understanding of the Department's DVR system, believed the responses from Chief Banks to be misleading.

In the fall of 2009, defense counsel confronted Corporal Whitman with the suspicion that the Department secretly recorded and retained video of the 20-minute observation period. In response, Corporal Whitman examined the DVR and confirmed his previous finding that the DVR retained up to six weeks' of intoxilyzer room activity. Subsequently, Corporal Whitman alerted the Department of Justice ("DOJ") and defense counsel that Chief Banks' discovery responses were inconsistent with Department practice or the true capability of retention of video material.

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<sup>6</sup> Motion Exhibit C (emphasis added).

In response to DOJ inquiries, Chief Banks ordered his dispatchers to set the DVR to retain the least amount of video retention time possible. Moreover, Chief Banks' changed his form response to requests for intoxilyzer room video as follows:

Please be advised that The Rehoboth Beach Police Department does not have a video tape of your client walking into the building or of the twenty minute observation period. We have a surveillance camera that is used for security purposes monitored by our Dispatch Center. This device records for immediate playback, after 2.6 days the system automatically records over existing coverage.<sup>7</sup>

### ANALYSIS

#### *Willful Discovery Violation*

The Defendant now argues that the State, through the conduct of the Rehoboth Beach Police Department, willfully violated Rule 16 by not producing potentially exculpatory evidence in the form of intoxilyzer room video. The Court agrees.

As is almost always the case, intent must be inferred from conduct. A pattern of violations may supply a basis for implying deliberate recklessness or willfulness to a particular case, provided that the injury complained-of is closely related to the nature of the past violations.<sup>8</sup> The Court finds that the Rehoboth Beach Police Department's discovery policies constitute entrenched, flagrant misconduct. Between 2006 and 2009, Chief Banks repeatedly distributed incorrect discovery responses to defense attorneys despite his knowledge that these responses were misleading and incorrect.

Chief Banks also knew that the 20-minute observation is extremely important foundational evidence for admission of the intoxilyzer test result. It is generally accepted that intoxilyzer test results are often conclusive of impairment and are, therefore, frequently used in court. As a result, it is standard operating

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<sup>7</sup> Motion Exhibit D.

<sup>8</sup> See generally *Sample v. Diecks*, 885 F.2d 1099, 1117 (3d Cir. 1989).

and part of the manufacturer's specifications that officers maintain an observation of an individual for at least twenty minutes prior to obtaining a breathe sample through the intoxilyzer. The twenty minute observation period enables the officer to note any incidents of vomiting, belching, or any other activity that might call into question the reliability of the test. The Defendant further demonstrated that Chief Banks himself received numerous requests per week for the intoxilyzer room video with the same proffer: Rehoboth Beach Police officers left the room during the required observation period. Thus, it is inferred that Chief Banks understood the importance of this evidence to the Defendant.

Finally, the Court finds that the willful nature of the Department's discovery violations affects the Defendant in this case. Between 2006 and 2009, the Department routinely gathered video evidence of the intoxilyzer room and failed to disclose it in response to discovery requests. In 2009, the Department of Justice learned of this conduct and alerted Chief Banks of the problem. Instead of making the gathered evidence available for the Defendant, Chief Banks directed officers to allow the evidence to be destroyed before, or in response, to these requests. Indeed, this is perhaps the most egregious example of the Department's misconduct.

Accordingly, the Court is convinced that the conduct of the Rehoboth Beach Police Department, attributable to the State, is sufficiently reckless, if not intentional, so as to be considered willful misconduct.

*Suppression is the Appropriate Sanction*

The Court must now decide what sanction is most appropriate here. Generally, the trial courts of this state "enjoy broad discretion in determining the appropriate sanction for a discovery violation."<sup>9</sup> In exercising this discretion, a

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<sup>9</sup> *DeJesus v. State*, 655 A.2d 1180, 1207 (Del. 1995).

court weighs all of the relevant factors, including the reason for the discovery violation and the actual prejudice incurred as a result therefrom.<sup>10</sup>

The Defendant argues that the Court may impose a pre-trial dismissal for a Rule 16 violation *solely* because the State's conduct in committing the violation is exceedingly flagrant and deliberate. Implicit in this argument is the premise that an analysis of actual prejudice is immaterial if the State's conduct is sufficiently egregious. The Defendant's argument relies on the notion that there is a direct relationship between the misconduct and the actual prejudice incurred. In actuality, the prejudice flows from the importance of the missing exculpatory evidence and the lack of an opportunity for a defendant to use it in his or her defense. In this sense, prejudice is a variable dependent on the materiality of the missing evidence rather than the degree of misconduct that caused it to be missing in the first place. This is true whether the State acted negligently, recklessly, or even deliberately. To reward a defendant with dismissal *solely* for the egregious conduct of the State would "grant[] a windfall to the unprejudiced defendant."<sup>11</sup>

The importance that the Court places on the prejudice factor is justified in light of the precedent of this State. In *Deberry v. State*,<sup>12</sup> the defendant challenged a trial court conviction for rape on the grounds that the State destroyed important physical evidence that, if available for scientific testing, would have been exculpatory. On appeal, the Court ruled that the State had breached its duty to preserve exculpatory evidence under *Brady v. Maryland*<sup>13</sup> and Superior Court Criminal Rule 16. The Court further held that the breach of this duty caused substantial prejudice to the defendant and, therefore, reversed his conviction.<sup>14</sup>

In making this determination, the Court articulated a three-step framework with which a court can determine "what should be done when the State takes possession of exculpatory (or potentially exculpatory) evidence and then loses or

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<sup>10</sup> *Id.*

<sup>11</sup> *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

<sup>12</sup> *Deberry v. State*, 457 A.2d 744, 749 (Del. 1983).

<sup>13</sup> 373 U.S. 83 (1963).

<sup>14</sup> *Deberry v. State*, 457 A.2d 744 (Del. 1983).

destroys it before or in response to the defendant's discovery requests."<sup>15</sup> This framework requires a court to determine the extent of actual prejudice by balancing the centrality of the missing physical evidence to the elements of the crime against the probative value of the State's secondary or substitute evidence.<sup>16</sup> Although the Court has yet to hear the State's secondary evidence at this pre-trial stage and consequently cannot apply the *Deberry* framework, the emphasis the Court placed on the actual prejudice requirement must not be ignored.

Other jurisdictions have placed similar weight to a finding of actual prejudice. In *The Government of the Virgin Islands v. Fahie*,<sup>17</sup> The Third Circuit Court of Appeals considered at length whether a pre-trial dismissal was an appropriate sanction for a discovery violation. In determining that dismissal was inappropriate, the court discussed several United States Supreme Court decisions involving willful constitutional violations and observed that none of them resulted in dismissal where the violation failed to cause demonstrable prejudice to the defendant.<sup>18</sup>

This result appears to be consistent with existing Delaware case law. In *State v. Harris*,<sup>19</sup> the Delaware Supreme Court discussed whether dismissal was an appropriate sanction for a violation of Super. Ct. Crim. R. 48(b). After finding that the defendant did not suffer any substantial prejudice from an alleged speedy trial violation, the Court observed that it has "consistently confined its affirmance of the dismissal of a prosecution by the trial courts to those cases in which the culpable conduct precipitating the dismissal was attributable to the State ... and found 'to work some definable or measurable prejudice to the defendant.'"<sup>20</sup>

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<sup>15</sup> *Id.* at 749.

<sup>16</sup> *Id.* at 752 (quoting *United States v. Nighthawk*, 628 F.2d 1139, 1152 (9<sup>th</sup> Cir. 1979) (Kennedy, J., concurring)).

<sup>17</sup> 419 F.3d 249 (3d Cir. 2005) (wherein, the court affirmed the district court's reversal of a St. Thomas trial court's decision to dismiss an indictment against the accused because the defendant failed to show that the government willfully violated discovery rules).

<sup>18</sup> *Id.* at 252-54.

<sup>19</sup> 616 A.2d 288 (Del. 1992).

<sup>20</sup> *Id.* at 291 (quoting *State v. McElroy*, 561 A.2d 154, 157 (Del. 1989)).



In light of the foregoing, the Court will impose the ultimate sanction of dismissal for a Rule 16 violation if it is found that the State engaged in willful misconduct and that the Defendant has suffered substantial prejudice from the missing evidence.

As discussed earlier in this order, the State's conduct concerning its video surveillance system constitutes entrenched and egregious misconduct. The Court recognizes that a harsh sanction could potentially deter future discovery violations. However, the Court will not impose such a sanction here because the Defendant has failed to demonstrate the significant prejudice required.

The prejudice suffered by the Defendant due to the missing intoxilyzer room video is limited solely to the intoxilyzer results. Despite the routine use of intoxilyzer results by the State in recent years to show impairment, 21 *Del. C.* § 4177 provides many other avenues by which the State can prove impairment beyond a reasonable doubt. Thus, the intoxilyzer test results are not the only evidence central to the elements of the crime. At trial, the State could instead use the observations of the arresting officers, field test results, or any other circumstantial indicia of impairment should such evidence exist.

The prejudice incurred to the Defendant through his inability to attack the reliability of the intoxilyzer results is best cured by suppression of said results.

SO ORDERED this \_\_\_\_\_ day of February, 2011.

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JUDGE ROSEMARY B. BEAUREGARD