SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: CRIMINAL TERM, PART 16
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THE PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER[1]

- against -

Indictment No.
3115-2013

RUDOLPH RAMRUP,
Defendant.
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RICHARD LEE PRICE, J.:

I. Background and Procedural History

Defendant was arrested on December 29, 2012, for operating a motor vehicle while under the influence of alcohol. By indictment filed October 11, 2013, the defendant was charged with four counts of operating a motor vehicle while under the influence of alcohol (Vehicle and Traffic Law § 1192 [2] and [3], as both "E" felonies and misdemeanors).

By letter dated January 6, 2013, defendant notified the People to preserve all videotape footage at or near the Whitestone Bridge span leading up to the toll plaza where he was stopped and arrested. On January 30, 2013, the People were directed to issue a grand jury subpoena to effect such preservation (Yearwood, J.).

[1] This court gratefully acknowledges the assistance of Samuel Goldfine, a student at Brooklyn Law School, and Michael Lombardi, a student at New York University's School of Law, both chambers interns, in preparing this decision.

By motion submitted March 14, 2014, defendant moved for omnibus relief seeking, among other things, an order compelling discovery pursuant to Criminal Procedure Law § 240.20 for material that the People fail to disclose. By decision and order dated March 27, 2014, defendant's motion was denied with leave to renew any discovery demand he contends the People improperly refused (Boyle, J.).

By letter dated April 16, 2014, defendant renewed his demand that pursuant to CPL 240.20, the People disclose and produce: (1) any and all Triborough Bridge and Tunnel Authority (TBTA) videotape surveillance footage recordings at or near the Whitestone Bridge span leading up to the toll plaza and station; (2) all records from December 29, 2011, through June 29, 2013, relating to the maintenance, calibration, inspection, check and/or other tests performed on the Intoxilyzer 5000EN that was utilized (one year prior to and six months following defendant's arrest); (3) certification certificate of the Intoxilyzer 5000EN operator; and, (4) any and all documents relating to the preparation and testing of the simulator solution, the forensic method utilized in the production of the simulator solution, the standard operating procedures for the production of all simulator solutions utilized in defendant's testing, and the actual chromatograms of the headspace gas chromatography. In that demand, the defendant also moved to preclude the use of such evidence based upon the People's willful failure and refusal to comply.

On April 17, 2014, the People disclosed an initial discovery package including but not limited to the Intoxilyzer 5000 EN driver examination report, technician test report, intoxilyzer-alcohol analyzer, certificate of calibration (dated September

14, 2012), filed unit inspection report (dated January 2, 2013, and December 20, 2012), 0.10% simulator solution record (lot number 12110, dated August 20, 2012), and, 0.10% simulator solution record (lot number 12080, dated June 13, 2012).

On May 5, 2014, the People further disclosed video surveillance footage recording from the Whitestone Bridge. While the People implicitly acknowledge that the additional surveillance recordings defendant demands "is not available to the People," they fail to specify the basis of such unavailability. They did, however, carefully note that "the proper subpoena was sent requesting all video surveillance from the date of defendant's arrest . . . all that was provided is what has been turned over to the defendant" (see People's Affirmation in Opposition, unnumbered final two pages and footnote 1).

Given such disclosure, the People oppose defendant's demand for the specified material arguing that they have fully complied with the mandates of CPL 240.20 (1) (k), and that defendant's demand falls outside its parameters.

On August 7, 2014, this court heard oral argument on this issue, after which the parties filed supplemental memoranda of law with regard to their respective positions (People's Opposition, September 8, 2014; Defendant's Reply, September 29, 2014). After review of the motion papers, papers on file with the court, and prior court proceedings, defendant's motion is granted as indicated.

II. Discussion

1. Videotape Surveillance Recordings

Regarding the videotape surveillance recordings in the possession of the TBTA, the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police" (*Kyles v Whitley*, 514 US 419, 437 [1995]). In a recent decision applying *Kyles,* the court "charged the People with knowledge of exculpatory information in the possession of the local police, notwithstanding the trial prosecutor's own lack of knowledge" (*People v Santorelli*, 95 NY2d 412, 421 [2000]; *see People v Wright, 86 NY2d 591, 598 [1995]*).

New York has observed, as have many federal courts, that the People may be in "constructive" possession of information known to government officials who "engaged in a joint or cooperative investigation" of the defendant's case *(Santorelli, 95 NY2d at 421; see e.g. United States v Paternina-Vergara*, 749 F2d 993, 997-98 [2d Cir 1984]). The rationale for the imputation of knowledge is that, when police and other government agents investigate or provide information with the goal of prosecuting a defendant, they act as "an arm of the prosecution," and the knowledge they gather may reasonably be imputed to the prosecutor under *Brady (see United States v Stewart*, 443 F3d 273, 298 [2d Cir 2006] [noting that "the propriety of imputing knowledge to the prosecution . . . does not turn on the *status* of the person with actual knowledge" but what that person "*did*" to aid the prosecution]; *e.g. United States v Morell*, 524 F2d 550 [2d Cir 1975] [imputing law

enforcement agent's knowledge of confidential file to prosecutors where agent supervised the witness, participated actively in the investigation and frequently sat at counsel table throughout the trial])" (*People v. Garrett*, --NE3d--, *5, 2014 NY Slip Op 04876 [June 30, 2014]).

That the TBTA videotape recordings are deemed to be within the control of the District Attorney is axiomatic. This court notes, however, that to date, the People have yet to document the specific efforts made to preserve, obtain and produce all such recordings generated between the hours of 5:00 a.m. and 8:00 a.m. on December 29, 2012. All the People have done is represent that at least one recording is not available without specifying the circumstances of such unavailability. They also represent without specificity that a proper subpoena was sent in an effort to obtain it.

Obviously, the People are obligated to produce discoverable material, but they are also required to preserve such evidence and ensure it is not destroyed (*People v Martinez*, 71 NY2d 937 [1988]; *People v Parker*, 157 AD2d 519 [1st Dept 1990]). When discoverable evidence is lost or destroyed by the prosecution or its agents, the People have the burden of demonstrating that good faith efforts were made to prevent such loss (*People v Kelly*, 62 NY2d 516, 520 [1984]). The People must also establish that the defendant suffered little or no prejudice as a result (*People v Diaz*, 47 AD3d 500 [1st Dept 2008]). Still, "[p]reclusion of evidence is a severe sanction, not to be employed unless any potential prejudice arising from the

failure to disclose cannot be cured by a lesser sanction" (*People v Jenkins*, 98 NY2d 280, 284 [2002]).

Specifically, courts have held that such destruction is unreasonable when the defendant makes a timely demand for its preservation and production (*see People v Burch,* 247 AD2d 546, 547 [2d Dept 1998]). Here, the defendant made a timely demand of the People that they take measures to preserve and produce any and all video surveillance recordings of the Whitestone Bridge span and toll plaza. Defendant further sought the issuance of a grand jury subpoena, petitioned for judicial intervention to compel such preservation, and used several letters demanding their production. The People, however, have made no showing of their efforts to determine the number of videotape recordings generated, the measures they took to ensure their preservation, and the extent to which, if at all, they complied with judicial directives to do so.

Regarding prejudice, courts primarily consider the purpose and manner in which defense counsel would have used the destroyed tape (*Diaz*, 47 AD3d at 500 [Defendant's claim that the recording would have assisted in his defense was merely speculative]). Accordingly, denial of defendant's application for sanction was proper. Where, however, the purpose for which defendant seeks the recording relates to an issue in the case or the employment of his defense, the defendant may indeed be prejudiced by its destruction (*Burch,* 247 AD2d at 546).

Here, due to the People's dearth of specificity as to what efforts, if any, they undertook to preserve and produce any and all demanded videotape surveillance

recordings, this court is simply unable to determine whether they satisfied their obligation to do so. Accordingly, defendant's motion to preclude the use of such videotape recordings is deferred to the trial court for a hearing on this issue.

2. Criminal Procedure Law § 240.20

The people correctly note that discovery in a criminal case is entirely governed by statute (*People v Colavito*, 87 NY2d 423 [1996]). While strictly construed, the claim that only the items expressly listed in CPL 240.20 (1) (k) are discoverable is patently false. In fact, anything "constitutionally or otherwise mandated" is indeed discoverable, regardless of whether it is specifically enumerated CPL 240.20 (*Colavito* at 427). Documents not expressly listed but recognized as discoverable include: records indicating that a machine may not have been operating properly (*Constantine v Leto*, 157 AD2d 376 [3d Dept 1990]), documents relating to ampoule analysis and simulator solution analysis (*People v Erickson*, 156 AD2d 760 [3d Dept 1989]), and breathalyzer operator's permit and weekly test record (*People v DiLorenzo*, 134 Misc 2d 1000 [Nassau County Ct 1987]). Moreover, "defendant may not be denied discovery which prevents him from challenging the reliability and accuracy of the machine" (*People v Corley*, 124 AD2d 390 [3d Dept 1986]). The analysis of what is discoverable in a DWI case has been expressly endorsed, almost verbatim by the Second Department in *People v Robinson* (53 AD3d 63 [2d Dept 2008]).

Given such authority, this court sharply rejects the People's myopic view that the defendant is limited to the documents it deems discoverable. The People's case against the defendant heavily relies upon the use of the Intoxilyzer 5000EN. Whether constitutionally required, or otherwise mandated, this court believes the defendant is entitled to the documents he seeks. Such demand is neither overbroad nor extensively burdensome. Rather, it is specific, reasonable, and entirely related to the operation of the Intoxilyzer used in this case.

Accordingly, defendant's motion to compel the People to produce hard copy reports and corresponding documentation for the following is granted: all records from December 29, 2011, through June 29, 2013, relating to the maintenance, calibration, inspection, check and/or other tests performed on the Intoxilyzer 5000EN that was utilized (one year prior to and six months following defendant's arrest); certification certificate of the Intoxilyzer 5000EN operator; and, any and all documents relating to the preparation and testing of the simulator solution, the forensic method utilized in the production of the simulator solution, the standard operating procedures for the production of all simulator solutions utilized in defendant's testing, and the actual chromatograms of the headspace gas chromatography. Should the People fail or refuse to do so, the defendant is granted

leave to seek the appropriate sanction of the trial court.

This shall constitute the decision and order of this court.

Dated: December 15, 2014

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Richard Lee Price, J.S.C.