

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS C. TIEDT,

Defendant-Appellant.

UNPUBLISHED

August 30, 2005

No. 254111

Oakland Circuit Court

LC No. 03-DA8022-AR

Before: Zahra, PJ, and Cavanagh and Owens, JJ

PER CURIAM.

After an evidentiary hearing, the district court suppressed two DataMaster breathalyzer tests administered to defendant. The circuit court reversed that decision. Defendant appeals by leave granted, challenging the circuit court's decision to allow the DataMaster breathalyzer tests into evidence. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

As a result of a traffic accident, defendant was arrested for OUIL/UBAL. A videotape was made of the arrest by a camera installed in the patrol car. Defendant was taken to the Novi Police Department after his arrest where two BAC DataMaster breath tests were administered. On August 26, 2002, a discovery order was issued by the district court requiring among other things, that defense counsel be allowed to examine "[a]ny video tapes or audio recordings made of the stop, investigation, arrest and post arrest activity" At some point following the August 2002 discovery order, there was a phone message from the police station to the assistant prosecutor stating that the tape was at the front desk of the police station waiting for defense counsel. The assistant prosecutor claimed to have never received that message and, therefore, did not relay the information to defense counsel. The videotape was destroyed in February 2003.

On July 30, 2003, a hearing was held in district court concerning defendant's motion to suppress the DataMaster tests. The court granted that motion based on defendant's argument and due to the direct violation of the district court's order. The district court's decision concerning suppression of the evidence was appealed by both parties to the Oakland Circuit Court. The circuit court denied defendant's appeal on the ground that there was no constitutional due process violation. The circuit court granted the prosecution's appeal, and found that suppression of the DataMaster evidence was too harsh. The circuit court reversed the district court's order and remanded the case to the district court. This Court granted defendant's leave to appeal, limited to the issue raised in the application, i.e., "[w]hether the Circuit Court properly failed to

impose any sanction when, after being served with a discovery order, the police destroyed material evidence of constitutional import.”

Whether defendant’s due process rights were violated is a question of law that is reviewed de novo on appeal. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). The Michigan Supreme Court has stated that “[t]here is no general constitutional right to discovery in a criminal case.” *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), citing *People v Stanaway*, 446 Mich 643, 664; 521 NW2d 557 (1994). Accordingly a violation of MCR 2.601 is nonconstitutional in nature. *Elston, supra* at 765-766. Despite that lack of a constitutional right to discovery, a criminal defendant does have a due process right to obtain evidence if it is favorable to him and material to guilt or punishment. *Stanaway, supra* at 664-666. Nevertheless, failure to preserve exculpatory evidence does not deny a defendant due process unless the defendant can demonstrate bad faith on the part of the police. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). The facts here show that a discovery order was served on the police in August 2002, and that a copy of the tape was made but, when it was not picked up by defense counsel, it was destroyed in February 2003. From our review of the lower court record, there has not been a showing of bad faith or a showing that the videotape would have been exculpatory. Accordingly, defendant has not been denied due process.

Michigan Court Rules state that when a party fails to comply with discovery procedures in criminal cases, “the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy.” MCR 6.201(J). Therefore, a trial court’s decision regarding the appropriate remedy for noncompliance with a discovery order is reviewed for an abuse of discretion. *People v Davie*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). Although an abuse of discretion is a high standard that is difficult to overcome, see *People v Ackerman*, 257 Mich App 434, 437-438; 669 NW2d 818 (2003), otherwise admissible evidence should only be excluded in the most egregious cases, *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987). When determining an appropriate remedy, a court must balance the interests of the courts, the public, and the parties, and must inquire into all relevant circumstances, including the reasons behind noncompliance and whether the objecting party was actually prejudiced. *Davie, supra* at 598. Moreover, the sanction for noncompliance should not place the party seeking sanctions in a better position than the party would have been in had the discovery order been complied with. *Taylor, supra* at 487.

As previously indicated, defendant has failed to demonstrate actual prejudice or bad faith on the part of the prosecutor or police. Given the contents of the police report, there is no indication that the evidence on the tape would have been favorable to defendant. The fact that police made a copy of the tape and held it for approximately six months indicated the police department’s intent to comply with the discovery order. The prosecutor’s failure to notify defense counsel appeared inadvertent, or, at most, negligent, which is insufficient to establish bad faith. See *People v Brown*, 126 Mich App 282, 289-290; 336 NW2d 908 (1983). “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), citing *People v Burwick*, 450 Mich 281, 294; 537 NW2d 813 (1995).

Furthermore, the district court essentially found that the reasons behind noncompliance were irrelevant. Therefore, the court failed to consider the surrounding circumstances as required by *Davie, supra* at 598. Had the discovery order been complied with, defense counsel

would have been provided the videotape, which may or may not have reflected the detailed contents of the police report. However, the tape was not the only evidence to support admission of the DataMaster breathalyzer test results; the preliminary breath test defendant consented to on the scene, as well as the testimony of the arresting officer, would have supported the administration of the DataMaster breathalyzer tests. By excluding the DataMaster breathalyzer test results, the district court placed defendant in a better position than he would have been in had the discovery order been complied with. *Taylor, supra* at 487. Therefore, exclusion was an abuse of discretion, and the circuit court properly reversed the district court's order.

Defendant's second issue raised in this appeal was not previously raised at the trial court or in defendant's application for leave to appeal. As a general rule, issues not addressed by the trial court will not be addressed on appeal. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). This appeal was granted limited to those issues raised in the application for appeal. Accordingly, defendant's second issue has not been preserved and will not be addressed.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens