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2014 IL App (3d) 120449-U

Order filed October 23, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0449
JANET HORBOWSKI,	)	Circuit No. 11-DT-1266
Defendant-Appellant.	)	Honorable Bennett J. Braun, Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justice Holdridge concurred in the judgment.  
Justice McDade dissented.

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**ORDER**

- ¶ 1 *Held:* The trial court properly denied defendant's motion to suppress the arresting officer's statements.
- ¶ 2 Following a bench trial, defendant, Janet Horbowski, was found guilty of driving under the influence of alcohol (DUI). 625 ILCS 5/11-501(a)(2) (West 2010). She was sentenced to 18 months of conditional discharge, with 90 days to be served in the Will County jail. Defendant

appeals, arguing she was denied a fair trial where the arresting officer was allowed to testify about a traffic stop that was not video recorded by the police. We affirm.

¶ 3

### FACTS

¶ 4

On August 31, 2011, defendant was charged by information with DUI. 625 ILCS 5/11-501(a)(2) (West 2010). The cause proceeded to a bench trial on April 25, 2012. At trial, the evidence indicated that on January 15, 2011, defendant was at the drive-through of a McDonald's in Bolingbrook. Defendant had difficulty placing her order and had mumbled speech. As defendant drove to the window to pay, she scraped a pole with her car. A McDonald's employee took defendant's money and gave her the food. He smelled an odor of alcohol coming from her car as he leaned out the drive-through window. As defendant left the McDonald's drive-through, she swerved, went in the wrong direction, and almost caused an accident. As a result, the McDonald's employee reported defendant's vehicle and license plate number to the police.

¶ 5

Bolingbrook police officer Armstrong later located defendant pulling into the driveway of the residence that her license plates were registered to. A second police car arrived shortly thereafter. As defendant exited her vehicle, she held a plastic cup containing an alcoholic beverage. Defendant also swayed and used her vehicle for support. Defendant admitted driving and being at McDonald's, but denied being in an accident there. Defendant also denied drinking. As Armstrong questioned defendant, he observed that defendant's speech was slurred and her eyes were red, watery, and glassed over. Armstrong determined that defendant appeared intoxicated. Armstrong performed the horizontal gaze nystagmus test, which confirmed that defendant had consumed alcohol. Defendant then refused two other field sobriety tests that were offered to her. Defendant was arrested and taken to the police station, where she refused to take a breathalyzer test.

¶ 6 It was revealed during Armstrong's testimony that his police car was not equipped with a video camera. The second police car was equipped with a video camera, but the encounter was not videotaped. At that point, defense counsel orally moved to suppress the arresting officer's testimony pursuant to *People v. Kladis*, 2011 IL 110920. The trial court denied defendant's motion, ruling that *Kladis* was not applicable and the fact that the incident was not videotaped was not sanctionable.

¶ 7 The trial court found defendant guilty of DUI and later denied defendant's motion for a new trial. Defendant was sentenced to 18 months of conditional discharge, with 90 days to be served in the Will County jail. Defendant appeals.

¶ 8 ANALYSIS

¶ 9 Defendant argues that she was denied a fair trial where the arresting officer was allowed to testify about the traffic stop that was not video recorded by the police, despite available video recording equipment. Specifically, defendant argues that pursuant to *Kladis*, 2011 IL 110920 and section 30 of the State Police Act (the Act) (20 ILCS 2610/30 (West 2010)), the police were obligated to use the available video recording equipment to record the stop and the ensuing encounter between the police and defendant. Defendant further asserts that the failure to record the encounter would render inadmissible any police testimony regarding incidents that could have been video recorded. Since defendant is arguing that the trial court should have granted her motion to suppress Armstrong's testimony relating to the DUI stop, the trial court's factual findings are reviewed for clear error, while the court's ultimate ruling is reviewed *de novo*. *People v. Nicholas*, 218 Ill. 2d 104 (2005).

¶ 10 We agree with the trial court that *Kladis* is inapplicable to the instant case. In *Kladis*, 2011 IL 110920, the defendant requested that the State produce a police vehicle's video

recording of the DUI stop. After being on notice of defendant's request, the State failed to preserve the videotape. *Id.* The supreme court concluded that the State committed a discovery violation and upheld the suppression of the arresting officer's testimony relating to the contents of the videotape. *Id.* Thus, under *Kladis*, the State can be barred from introducing testimony of the arresting officer regarding an incident that had been recorded and later destroyed. *Kladis* does not, however, provide a similar sanction for incidents that could have been video recorded but were not.

¶ 11 Additionally, defendant's argument regarding section 30 of the Act does not obligate police to use available video recording equipment during such stops. Section 30 of the Act provides:

"(b) By June 1, 2009, the Department shall install in-car video camera recording equipment in all patrol vehicles. \*\*\*

\* \* \*

(e) Any enforcement stop resulting from a suspected violation of the Illinois Vehicle Code shall be video and audio recorded." 20 ILCS 2610/30(b), (e) (West 2010).

¶ 12 Defendant argues that it makes little sense to require video cameras in squad cars, but determine that those cameras need not actually be used. Despite this section's use of the word "shall," we agree with the findings in *People v. Borys*, 2013 IL App (1st) 111629, that section 30(e) of the Act is directory, not mandatory. The court noted that language issuing a procedural command is presumed directory, unless overcome by showing either language prohibiting further action in the case of noncompliance or that the right protected by the provision would be harmed under a directory reading. *Id.* The court found that neither condition applied. *Id.* Although

*Borys* dealt with a police officer that did not have video equipment in his vehicle, we find the court's analysis of section 30 applicable to the instant case. As such, we see no reason to bar the State from introducing Armstrong's testimony where there has been no discovery violation. Had there been evidence presented that the failure to video record the stop violated the police department's policy, defendant may have had a stronger argument for barring the officer's testimony. However, under the circumstances of this case, we conclude that the trial court did not err in admitting the arresting officer's testimony into evidence.

¶ 13

### CONCLUSION

¶ 14

The judgment of the circuit court of Will County is affirmed.

¶ 15

Affirmed.

¶ 16

JUSTICE McDADE, dissenting.

¶ 17

The majority finds that the statute providing for the installation and use of in-car video recording cameras is directory rather than mandatory. It is on this basis that it affirms the decision of the trial court allowing the officer to testify about a traffic stop that was not video recorded. Because I do not agree, I respectfully dissent.

¶ 18

The statute is much more complex than the abbreviated quote in the majority decision would suggest. First it requires the installation of in-car video recording cameras, making equipment capable of recording for 10 hours or more "subject to appropriation," but allowing no such excuse for equipment incapable of recording for that extended period. 20 ILCS 2610/30(b) (West 2012).

¶ 19

Next, the statute specifies when recording should be done, both inside and outside of the patrol vehicle, when the equipment is incapable of recording for 10 hours or more. 20 ILCS 2610/30(c(1-3)) (West 2012).

¶ 20 By contrast, the general assembly has required the recording of activities "whenever a patrol vehicle is assigned to patrol duty" when the vehicle's equipment is capable of recording for 10 hours or more. 20 ILCS 2610/30(d) (West 2012).

¶ 21 In the context of this type of detailed scheme, subsection (e), quoted by the majority, assumes greater gravity. It requires both video and audio recording of "any enforcement stop resulting from a suspected violation of the Illinois Vehicle Code." 20 ILCS 2610/30(e) (West 2012).

¶ 22 Subsections (f), (g) and (h) provide for the retention and recycling, *intact* preservation and dissemination of the video (f), (g), and/or audio recordings (g), and the proper care and maintenance of the equipment (h). 20 ILCS 2610/30 (f-h) (West 2012).

¶ 23 It is not totally clear to me what subsection (i) is saying, but it *appears* to limit a department's ability to promulgate rules to only the extent necessary to mesh its existing rules and directives with those of the new Act. 20 ILCS 2610/30(i) (West 2012).

¶ 24 Incidentally, I see nothing in the statute requiring that only the officer who actually makes the traffic stop must make the recording if another officer is present on the scene with proper equipment.

¶ 25 Taken as a whole, this does not seem to me like a statute where the general assembly is suggesting it might be nice to have and use such equipment. This reads, again to me, like a carefully-crafted mandate. Accordingly, I would not agree with the decision to the contrary in *People v. Borys*, 2013 IL App (1<sup>st</sup>) 111629.

¶ 26 Finally, the majority finds *People v. Kladis*, IL 110920, inapplicable and affirms the trial court's finding to that effect. I agree that there is a clear difference between making a recording

and destroying it and choosing not to make the recording at all. I do not, however, believe that difference is dispositive.

¶ 27 As discussed above, the legislature requires the use of in-car video recording equipment, the tax payers provide that equipment, the department installs and maintains the equipment, and the trial court and this panel find that there should be no penalty if a law enforcement officer does not record a traffic stop because he, what?, does not feel like it. The purpose of the statute—presumably the protection of both driver and officer—is equally frustrated if the recording is made and destroyed or the officer deliberately does not make it even though the equipment is available on the scene and is operational.

¶ 28 For the foregoing reasons, I would reverse the decision of the trial court and, therefore, I dissent from the contrary result of the majority.