2017 IL App (5th) 160461-U

NO. 5-16-0461

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Union County.
	)	
v.	)	No. 16-DT-34
	)	
LEE S. CARSON,	)	Honorable
	)	Charles C. Cavaness,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court's order rescinding statutory summary suspension as civil discovery sanction affirmed where the State failed to provide a sufficient record to show that a discovery violation did not take place and the circuit court did not abuse its discretion in rescinding the defendant's summary suspension as a sanction for State's discovery violation.

¶ 2 The plaintiff, the People of the State of Illinois, appeals from the order of the circuit court of Union County in favor of the defendant, Lee S. Carson, rescinding the defendant's statutory summary suspension (SSS). See 625 ILCS 5/2-118.1 (West 2016). For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 FACTS

¶ 4 On June 4, 2016, Carson was charged by complaint with driving under the influence (DUI). 625 ILCS 5/11-501(a)(2) (West 2016). The arresting officer's sworn statement states that on the evening of June 4, 2016, the officer observed that Carson's vehicle had only one headlight. The officer proceeded to follow her. While following Carson, the officer claims to have witnessed Carson's vehicle swerve over the center line multiple times. He then conducted a traffic stop. According to the officer's sworn statement, during the traffic stop, Carson admitted to having four drinks. However, she refused to submit to testing. Carson was then served with notice of the suspension of her driver's license based on her alleged refusal to comply with or to complete chemical testing. 625 ILCS 5/11-501.1 (West 2016).

¶ 5 On June 16, 2016, the complaint, charging Carson with DUI, was filed in the circuit court. On the same day, Carson filed a petition to rescind her SSS, as well as a written motion for misdemeanor discovery. The SSS hearing was set for July 7, 2016. On July 6, 2016, the State filed a certificate of compliance and proof of service certifying that its discovery disclosures to the defense had been provided. It is undisputed that the discovery material supplied by the State on July 6, specifically an electronic disk containing the requested discovery information, was defective. The record indicates that during the July 7 hearing, Carson pled not guilty to DUI and the SSS hearing was continued to July 14, 2016. It is undisputed that Carson requested this continuance due to the defective discovery material. Prior to the July 14 hearing, the State did provide Carson with a working disk containing discovery material. However, it is undisputed that

the disk still did not contain all requested material. The disk did not contain the officer's sworn report, nor did it contain the notice to the motorist.[1]

¶ 6 The record indicates that at the July 14 hearing, the circuit court entered an order to rescind the SSS. Neither the July 7 nor the July 14 hearing had a court reporter present. The State also did not submit a bystander report to create a record of what transpired at either hearing. See Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005). On July 14, 2016, after the hearing on the rescission of the SSS, and in accordance with section 2-118.1 of the Illinois Vehicle Code (625 ILCS 5/2-118.1 (West 2016)), the circuit clerk of Union County filed a form titled "Notice to the Secretary of State of Hearing Disposition." The form contains a section stating, "SUMMARY SUSPENSION/REVOCATION OF DRIVING PRIVILEGES RESCINDED due to." Within said section, there are seven choices as to why the recission was made. The seventh choice is "Other," in which case a blank space is left for clarification of other reasoning. The form filed by the circuit clerk after the July 14 hearing marks that the recission was due to "Other." Written in the subsequent blank is the words "State Confesses."[2] At oral argument, the State was unable

[1]625 ILCS 5/11-501.1 (West 2016) requires that notice of the SSS be provided to the motorist after the officer's sworn report is submitted. This material would be discoverable by defendants to ensure that the notice a defendant received upon issuance of the SSS matches the notice submitted by the officer to the Secretary of State.

[2]Though this document was only signed by the circuit clerk and not by the circuit court judge, this document leaves us with more uncertainty regarding what transpired during the July 7, 2016, and July 14, 2016, hearings.

to explain why the language "State Confesses" would have been written in the form. The State's only response was that there must have been some error by the circuit clerk when filling out the form.

¶ 7 Following rescission of the suspension, the State filed a motion to clarify the ruling and reconsider. The State's motion does not make clear what transpired at the July 14 hearing that led to the circuit court's decision to rescind the SSS. The motion states "as best as the State could discern," there were two reasons behind the circuit court's decision to rescind the SSS. The State's first assertion was that the suspension was rescinded because the arresting officer did not file his tickets in a timely manner to allow Carson to file her petition. The State's second assertion was that the rescission was due to the State's failure to have a hearing within 30 days of Carson's arrest. The motion further states "the statutory summary suspension was rescinded for either one or both of the reasons stated by the defense counsel, as [the] Judge[']s ruling was unclear." There was never any mention of a discovery violation in the State's motion to reconsider.

¶ 8 The hearing on the motion to reconsider was held on October 6, 2016. A transcript of this proceeding has been provided in the record. The State's first argument during this hearing was there was no violation of the State's obligation to file the defendant's ticket in a timely manner and thus no resultant failure on the part of the State to meet the 30-day hearing requirement of section 2-118.1 of the Illinois Vehicle Code. 625 ILCS 5/2-118.1 (West 2016). After the State presented this first argument, Carson's attorney answered by stating:

> "I don't mean to be rude ***, but that was not my argument. It was not the 30 days. *** But my argument, *** what we argued back on 14th. Paragraph 17 of the Defense's Motion to Reconsider, they state that I continued [the hearing] and this is why the Court rescinded it in the first place: because of discovery violations."

Carson's attorney went on to explain that he had requested discovery, the State had given him a disk supposedly containing the requested material, and the disk he had received was blank. Carson's attorney then explained that when he finally did receive the disk, the disk still did not contain all of the information requested. Thereafter, the circuit judge asked the State, "is that the factual statements, do you agree with those? I understand you probably disagree with the argument. Do you disagree with the factual statements?" The State answered, "I have no—I agree with the facts."

¶ 9 The State's second argument at the hearing on its motion to reconsider was that there could be no discovery violation because the defendant was provided the documents that were missing from the disk on the night of her arrest. The State's third argument was there was no formal civil discovery request filed, and so there could be no discovery violation. The circuit court responded stating, "are you saying that if you file a motion for discovery, if someone files a motion for discovery, they have to actually file the same thing twice[;] one under the Traffic code or Criminal Code and the second under the Code of civil procedure?" The State responded that it believed that the defendant should have to file both.

¶ 10 After the hearing, the circuit court denied the State's motion to reconsider, rejecting all arguments advanced by the State. The circuit court's docket entry cited the reason for denial as "a violation of civil discovery." After the circuit court's denial of the State's motion to reconsider, the State filed a timely notice of appeal.

¶ 11 ANALYSIS

¶ 12 On appeal, there are two issues. The first issue is whether the circuit court erred in finding that the State committed a civil discovery violation. The second issue is whether, assuming the State committed a discovery violation, the sanction of dismissal was appropriate. The question of whether a discovery violation took place is reviewed *de novo*. *In re Marriage of Veile*, 2015 IL App (5th) 130499, ¶ 16 (citing *Dalan/Jupiter, Inc. v. Draper & Kramer, Inc.*, 372 Ill. App. 3d, 362, 369-70 (2007)). The question of whether a sanction was appropriate is reviewed under the abuse of discretion standard. *Id.*

¶ 13 1. *Whether a Discovery Violation Occurred*

¶ 14 The State's first argument on appeal is that a discovery violation should not have been found because Carson only filed a motion for misdemeanor discovery rather than a separate formal civil discovery request. SSS hearings "shall proceed in the court in the same manner as in other civil proceedings." 625 ILCS 5/2-118.1(b) (West 2016). The rules of civil procedure apply to both the manner of the hearing and to discovery. *People v. McClure*, 218 Ill. 2d 375, 385 (2006).

¶ 15 Illinois Supreme Court Rule 201(b)(1) addresses the scope of pretrial discovery, providing that, unless otherwise stated in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter of the pending action,

whether it relates to a claim or defense. Ill. S. Ct. R. 201(b)(1) (eff. July 1, 2014). This court has held that trial courts are granted wide latitude in determining the scope of discovery. *Manns v. Briell*, 349 Ill. App. 3d 358, 361 (2004). Furthermore, Illinois Supreme Court Rule 201(a) explains "[d]uplication of discovery methods to obtain the same information and discovery requests that are disproportionate in terms of burden or expense should be avoided." Ill. S. Ct. R. 201(a) (eff. July 1, 2014).

¶ 16 Illinois Supreme Court Rule 214(a) addresses the discovery of documents, stating "[a]ny party may by written request direct any other party to produce for inspection *** electronically stored information as defined under Rule 201(b)(4), objects or tangible things." Ill. S. Ct. R. 214(a) (eff. July 1, 2014). The State does not argue that the items requested in the motion for misdemeanor discovery would fail to fall within the scope of Rule 201. This is likely because the scope of what can be discovered under civil discovery rules is much broader than that which can be discovered in criminal discovery. *People v. Tsiamas*, 2015 IL App (2d) 140859, ¶ 15.

¶ 17 The State only claims that Carson failed to meet the procedural requirements of a civil discovery request to produce. Ill. S. Ct. R. 214(a) (eff. July 1, 2014). We cannot accept the State's procedural argument. Carson made a written request via her motion for misdemeanor discovery. The State was put on notice when Carson filed the motion and served it upon the State. Even more telling, the State attempted to comply with the request when it sent the empty disk to Carson's attorney. Finally, finding that Carson's motion for misdemeanor discovery is sufficient to meet the standards of civil discovery is fully within the purpose of Rule 201(a). Rule 201(a) seeks to avoid the duplication of

discovery devices and, as the circuit court stated, it is not practical to require that a party refile for discovery in a summary suspension case. Given the standards for civil discovery are less stringent than those of criminal discovery, it is unreasonable that Carson be required to submit a second request for discovery because all the items requested within her motion for misdemeanor discovery fall within the scope of civil discovery. Therefore, we reject the State's argument that there was no discovery violation due to Carson's failure to submit a separate written civil discovery request.

¶ 18 The State's second argument claims that, even if the misdemeanor discovery motion was sufficient in the civil rescission matter, the recission of the SSS was unwarranted because the State claims it did not commit any civil discovery violations. There is insufficient evidence in the record to support the State's argument. The Illinois Supreme Court has long held that in order to support a claim of error on appeal, the appellant has the burden to present a sufficiently complete record. *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). In fact, "[f]rom the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant." (Internal quotation marks omitted.) *Id.* Absent such adequate record, "it [is] presumed that the order entered by the trial court [is] in conformity with the law and had a sufficient factual basis." (Internal quotation marks omitted.) *Id.* Moreover, any doubt arising from the incompleteness of the record will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392.

¶ 19 In this case, as previously mentioned, there is no record or transcript of the hearings held on July 7 or July 14. We do not know what was said between the parties at either of these hearings or whether the judge ordered the State to complete the discovery by the time the hearing was held on July 14. If, for example, during the July 7 hearing, at which time the State admits that the disk it provided did not contain the adequate discovery information, the circuit court judge granted the continuance on the grounds that the State provide the items requested prior to the hearing, and the State did not provide all such materials prior to July 14, then the State would have committed a discovery violation. However, because we do not know what took place during the July 7 hearing, it is impossible to say a discovery violation did not take place. The fact that the form sent to the Secretary of State contains the language that the "State Confesses" could even lead to the conclusion that the State admitted to a discovery violation during the hearing held on July 14. Without a record of those proceedings, we simply cannot know.

¶ 20 The hearing on the motion to reconsider also fails to sufficiently show evidence that a discovery violation did not take place. The State's motion to reconsider does not even mention the term discovery violation, and the hearing confirms that the parties did not agree about what the real issue was during the July 14 hearing. All that is clear from the hearing on the motion to reconsider is that the State did not fully comply with the discovery request after the July 7 hearing.

¶ 21 The burden is on the State to provide an adequate record showing the trial court erred in finding a discovery violation. The transcript of the hearing on the motion to reconsider does not provide sufficient evidence as to what occurred during the July 7 and

July 14 hearings, nor does the transcript of the hearing on the motion to reconsider provide enough evidence to show that the circuit court made an error of law by finding a discovery violation. Given the inadequate record, we cannot say, as a matter of law, that the State did not commit a discovery violation.[3] Therefore, because any doubt in the record must be resolved against the appellant, we cannot find that the circuit court erred in finding a discovery violation.[4]

¶ 22 2. *Whether Dismissal was an Appropriate Sanction*

¶ 23 The State's second argument claims that assuming the State did violate discovery, the circuit court abused its discretion in choosing rescission as the appropriate sanction. Illinois Supreme Court Rule 219(c) authorizes the circuit court to impose a sanction, including dismissal of the cause of action, upon any party who fails to comply with any provisions of the court's discovery rules or any order entered pursuant to these rules. Ill. S. Ct. R. 219(c) (eff. July 1, 2002). The reversal of the circuit court's order to sanction is only justified when the record establishes a clear abuse of discretion. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123-24 (1998) (citing *Boatmen's National Bank of Belleville v. Martin*, 155 Ill. 2d 305, 314 (1993)). A trial court abuses its discretion where no reasonable person would take the view adopted by the court. *Lake*

[3]Illinois Supreme Court Rule 323(c) (eff. Dec. 13, 2005) gives the appellant 28 days from the notice of appeal to obtain a bystander's report. The State chose not to obtain such report.

[4]We note that the State's assertion that the defendant was provided the missing discovery materials on the night of her arrest is not supported by any evidence in the record, but rather is only stated in argument by counsel. Accordingly, the record is also inadequate to address this argument.

Environmental, Inc. v. Arnold, 2015 IL 118110, ¶ 16. In determining whether the circuit court abused its discretion by imposing a sanction, the reviewing court must look to the same factors that the trial court was to consider in deciding an appropriate sanction. *Id.*

¶ 24 Generally, the factors a trial court is to use in determining whether sanctions are appropriate include: (1) surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the witness's testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) whether the adverse party timely objected to the discovery violation; and (6) the good faith of the party offering evidence. *Shimanovsky*, 181 Ill. 2d at 123-24 (citing *Boatmen's National Bank of Belleville*, 155 Ill. 2d at 314). No one factor is determinative when analyzing the violation. *Id.* However, each case presents a unique factual situation which is to be considered in determining whether a sanction is to be imposed. *Boatmen's National Bank of Belleville*, 155 Ill. 2d at 314. Furthermore, an appellate court is to focus on whether the record provides an adequate basis for upholding the decision to sanction. *Lake Environmental*, 2015 IL 118110, ¶ 16.

¶ 25 In the current case, because the State has provided us with an inadequate record regarding the discovery violation, it is impossible for this court to review the unique factual situation upon which the circuit court based its sanction. Without knowing what transpired at the July 7 and July 14 hearings, coupled with the State's lack of clarity in the subsequent record, we are unable to find that the circuit court clearly abused its discretion in this case by rescinding the SSS. The State cites *Shimanovsky* heavily in its brief for the proposition that the factors above were not met in this case. However, the

State fails to recognize that the *Shimanovksy* court was presented with a full and complete record of the previous proceedings, something not present in the current case.

¶ 26 Furthermore, upon review of what record has been presented, and the application of the factors above, we cannot find a clear abuse of discretion. To overturn the circuit court's sanction, the record must show that no reasonable person could have determined the recission was appropriate. First, in assessing whether the State's discovery violation surprised Carson, we find it reasonable to conclude that receiving documents just minutes before a hearing could certainly lead to the surprise of Carson. The State was given extra time to present sufficient discovery and it is reasonable to think that Carson and the circuit court expected all of the documentation to be present. Second, it is not difficult to imagine how such surprise, coupled with the inability to review the documents prior to the hearing, could negatively impact, and therefore prejudice, Carson's defense. Third, the nature of the officer's sworn report and the warning to the motorist are certainly important. These documents are essential to the State's ability to prosecute an SSS as well as Carson's petition to rescind the suspension.

¶ 27 Factors four and five clearly weigh in Carson's favor. It is undisputed that Carson's attorney made multiple attempts to obtain discovery, including requesting a continuance so the necessary documents could be obtained. Also, the State's motion to reconsider specifically states that Carson made an oral motion to rescind the SSS, which was thereafter granted. Finally, it does not appear and Carson does not claim that the State acted in bad faith. However, as *Shimanovsky* explains, no one factor is determinative. 181 Ill. 2d at 124. Therefore, because we find the circuit court could have

reasonably determined that the first five factors weighed in favor of Carson, we cannot say the circuit court abused its discretion in rescinding the summary suspension.

¶ 28 The State's final argument on appeal claims that recission was "simply too harsh of a sanction." However, we do not find the recission of the SSS was too harsh. Had the documents at issue been excluded as evidence at the hearing, the SSS would certainly have been rescinded. This fact, in conjunction with the time requirements for holding a hearing on the SSS, makes it difficult to conceive an alternative sanction that would have been more appropriate. For all of these reasons, given the record presented, we find no abuse of discretion in the circuit court's rescission of Carson's SSS as a sanction for a discovery violation.

¶ 29 CONCLUSION

¶ 30 Overall, because of the failure of the State to present a sufficient record and the deferential standard of review of discovery sanctions, we hold that the circuit court did not abuse its discretion by rescinding Carson's SSS due to the State's discovery violation. Therefore, we affirm the circuit court's order rescinding Carson's SSS.

¶ 31 Affirmed.