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JANUARY 3, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff-Appellant,	)	**Supreme Court No.: 20190228**
	)	**District Court No.:**
v.	)	**18-2019-CR-00022**
	)	
	)	
Stanley James Kolstad,	)	
	)	
Defendant-Appellee.	)	

APPEAL FROM THE DISTRICT COURT ORALLY GRANTING MOTION TO DISMISS REGARDING COUNT II ON JUNE 27, 2019, HELD BEFORE THE HONORABLE DONALD HAGAR IN GRAND FORKS COUNTY, NORTH DAKOTA

BRIEF FOR APPELLEE

ORAL ARGUMENT REQUESTED

David D. Dusek
FOR: DUSEK LAW, P.C.
ND License No.: 05070
Post Office Box 14145
Grand Forks, ND 58208-4145
Telephone: (701) 746-4107
Facsimile: (218) 773-0013
E-mail: david@duseklaw.com
Service Address: duseklaw@duseklaw.com
ATTORNEY FOR DEFENDANT - APPELLEE

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TABLE OF AUTHORITIES

Federal Cases

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JURISDICTIONAL STATEMENT

[1] The Supreme Court does not have jurisdiction under N.D. Cent. Code § 29-28-07(1) to hear this appeal. The decision of the District Court was deemed an acquittal and the State does not have a right to appeal from an acquittal. State v. Bernsdorf, 2010 ND 123, ¶ 5, 784 N.W.2d 126.

STATEMENT OF THE ISSUES

I. Whether the District Court's dismissal of Count II-Refusal to Submit to a Chemical Breath Test is final and appealable.

II. Whether the District Court abused its discretion in dismissing Count II-Refusal to Submit to a Chemical Breath Test.

STATEMENT OF THE CASE

[2] Mr. Kolstad was arrested for Driving under the Influence and Refusal to Submit to a Chemical Test on December 22, 2018. On January 8, 2019, after the State brought formal charges, David D. Dusek filed a Notice of Appearance and a Rule 16 Discovery Request. The case was not resolved and proceeded to trial on June 27, 2019. On June 27, 2019, during the jury trial and after the jury had been empaneled and sworn-in, the district court entered an oral order on the record granting Mr. Kolstad's motion to dismiss regarding Count II. TH 144, 170-171. On June 28, 2019, the jury found Mr. Kolstad not guilty on Count 1-Driving under the Influence. On July 29, 2019, the district court signed an Order for Dismissal of Count II submitted by the State approximately one month after the Jury Trial. The State has appealed the decision of the district court and has timely filed its Notice of Appeal.

STATEMENT OF FACTS

[3] On December 22, 2018, Mr. Kolstad was stopped by Officer Hunter Nelson, of the UNDPD, for not having his headlights illuminated on 42nd Avenue in Grand Forks, North Dakota. TH 44-45. After detecting an odor of an alcoholic beverage and Mr. Kolstad's admission of consuming alcoholic beverages, Officer Nelson requested that Mr. Kolstad perform some field sobriety tests. TH 47-48, 88. Mr. Kolstad informed Officer Nelson that he has asthma. Officer Nelson also requested that Mr. Kolstad submit to a preliminary breath test. TH 57-59. Officer Nelson read the implied consent advisory for the screening test and Mr. Kolstad consented to the preliminary breath test. Id. Mr. Kolstad had trouble providing enough air for a breath sample. TR 104-106. Mr. Kolstad said again that he has asthma. Id.

Mr. Kolstad tried a few more times and still was not able to provide a breath sample. Id. The device Officer Nelson was using had the ability to manually capture a breath sample if a breath sample could not be obtained. Id. Officer Nelson manually captured a breath sample from Mr. Kolstad. Id. Mr. Kolstad was arrested for Driving under the Influence.

[4] Mr. Kolstad was transported to the UND police station. Officer Nelson read Mr. Kolstad the implied consent advisory and Mr. Kolstad consented to a breath test. Corporal Jayson Waltz performed the breath test on the Intoxilyzer 8000 as he was a certified operator. Before the Intoxilyzer test was conducted, Officer Nelson did not inform Cpl. Waltz of Mr. Kolstad having asthma or his inability to provide a valid sample on the preliminary breath test and that a sample had to be manually captured. TH 111. During the Intoxilyzer test, Mr. Kolstad had a problem providing a valid sample. Ultimately, Mr. Kolstad was cited for Refusal to Submit to a Chemical Test.

[5] At trial, the State called Officer Nelson as its first witness during its case in chief. Officer Nelson testified that he did not have his implied consent card with him and that he did not remember the exact wording he used while reading the implied consent advisory. TH 108-109. However, he did testify that he read the advisory from a card that is distributed to all UND police officers. Id. Officer Nelson also testified that his body camera was activated and that it would have recorded the exact words he read for the advisory. Officer Nelson was in a room next to the small room in which the Intoxilyzer test was being administered to Mr. Kolstad. His body camera should have picked up any audio and possibly some video of the Intoxilyzer test. Officer Nelson testified that his body camera was purged because of some

"technical stuff." TH 59, 70-71.

[6] The State called Cpl. Waltz as its second witness during its case in chief. Cpl. Waltz was not present during the reading of the implied consent advisory by Officer Nelson. TH 150. Cpl. Waltz testified that the implied consent advisory as listed on the implied consent card mentioned breath test only and did not say breath test and urine test as required by law. TH 149-150. Cpl. Waltz was also wearing a body camera, but testified that he only had the camera on for a short period of time. TH 135-136. He testified he turned his camera off once he noticed that Officer Nelson had his camera activated. TH 135. Cpl. Waltz testified that he saved the video and it was successfully uploaded to the server. TH 136.

[7] Defense Counsel requested both attorneys approach the bench for a conference. Counsel argued that he had made a request for discovery and that he did not have the body camera footage from both Officer Nelson and Cpl. Waltz. Counsel further argued that a discovery violation had occurred and that Mr. Kolstad was highly prejudiced. The State countered that they did not have a copy of the video and was not aware of its existence. Further, Counsel argued that the videos contained the exact language of the implied consent advisory as was read to Mr. Kolstad. The video also contained evidence of whether Mr. Kolstad refused to blow or was having difficulties providing a valid sample because of his asthma. The district court agreed with Counsel that the missing discovery was prejudicial and dismissed Count II. The district court also struck all of Cpl. Waltz's testimony and most of the State's exhibits, which included Exhibit 9-Intoxilyzer Test Record and Checklist.

[8] The State made a motion to reconsider because Cpl. Waltz was not allowed to

testify completely on what happened to the missing videos. The Court allowed Cpl. Waltz to testify outside the presence of the jury. Cpl. Waltz testified that the UNDPD was having problems retrieving videos that had been successfully downloaded onto the server. He further testified that the videos were downloaded to an off-site server and once the video was downloaded, the officer did not have access to replay the video, and the server would delete the video. TH 135-136. Cpl. Waltz stated the IT department was working on this problem and that problem had affected "hundreds of videos." TH 146. In addition, Cpl. Waltz testified that he had informed the State a week prior to trial of the problem with the videos. TH 148. This testimony contradicted the statement made by the State to the District Court that they were not aware of the videos existence. Counsel also argued that his computer forensic expert was in town, and if he had known about the issue, he could have had his forensic expert examine the server. TH 156. Counsel mentioned that there was a Rule 16 issue and a motion in limine issue because of the Vigen case. After further argument by both attorneys, the district court upheld the dismissal citing that Mr. Kolstad was prejudiced by the State's actions and the issue of whether Mr. Kolstad was cooperative during the breath test. TR 144, 155.

[9] The next day, the State requested that the court clarify its position on the dismissal. The district court stated the ruling to dismiss the charge was based upon discovery violations and not as a motion in limine to suppress. TH 171. Later, the district court elaborated on its decision to dismiss the charge. The court started by saying that it is starting to become an issue with these body cams. TH 184. The State had control of the evidence as it

was in the hands of law enforcement and it was known to the State a week before trial of the problems with the videos and the district court would have granted Counsel a continuance at that time to give him an opportunity to retrieve those body cams. Id. The district court concluded, "refusal behavior is pretty prejudicial if you can prove otherwise on a tape, especially if you are using a medical excuse for it." TH 185.

LAW AND ARGUMENT

I. Whether the District Court's dismissal of Count II-Refusal to Submit to a Chemical Breath Test is final and appealable.

[10] In a criminal action, the State's only right of appeal is that expressly granted by statute. Bernsdorf, 2010 ND 123, ¶ 5, 784 N.W.2d 126; State v. Erickson, 2011 ND 49, ¶ 6, 795 N.W.2d 375. "[I]t is well established that the State cannot appeal from an acquittal." Bernsdorf, at ¶ 5. However, the State may appeal an "order quashing an information or indictment or any count thereof." N.D. Cent. Code § 29-28-07(1).

[11] This Court has explained the differences between an acquittal and an order quashing an information:

> [T]o determine what constitutes an acquittal, as distinguished from a dismissal quashing the information, we look at the substance of the judge's ruling to determine whether it actually represents a resolution of some or all of the factual elements of the offense charged. If the trial court's decision is based upon legal conclusions rather than a resolution of some or all of the factual elements of the events charged, the rule amounts to a dismissal or a quashing of the information from which the State has a right to appeal.

Erickson, 2011 ND 49, ¶ 7, 795 N.W.2d 375 (internal citations omitted). Thus, if the district court's ruling is not based on a resolution of some or all of the factual elements of the

charged offense, the State may appeal from an order of dismissal of a criminal case. State v. Hammond, 498 N.W.2d 126, 127 (N.D. 1993). However, if the court's ruling represents the resolution of a factual element, then it is an acquittal which cannot be appealed due to the Double Jeopardy Clause of our federal and state constitutions. Id. at 127-28.

[12] The first question before this Court is whether the district court's order dismissing the action against Kolstad should be treated as an order quashing an information, which would be appealable, or a judgment of acquittal, which would not be appealable. In Deutscher, we explained the distinction:

> This question is not controlled by the form of the trial court's ruling. State v. Jackson, 2005 ND 137, ¶ 5, 701 N.W.2d 887 (citing State v. Flohr, 259 N.W.2d 293, 295 (N.D. 1977)). "Rather, to determine what constitutes an acquittal, as distinguished from a dismissal quashing the information, we look at the substance of the judge's ruling to determine whether it actually represents a resolution of some or all of the factual elements of the offense charged." Id. (citing State v. Meyer, 494 N.W.2d 364, 366 (N.D. 1992)). If the trial court's decision is based upon legal conclusions rather than a resolution of some or all of the factual elements of the events charged, the ruling amounts to a dismissal or a quashing of the information from which the State has a right to appeal. Id. (citing Wahpeton v. Desjarlais, 458 N.W.2d 330, 333 (N.D. 1990)).

Id. at ¶ 8.

[13] The district court must have a sufficient legal basis to dismiss a criminal charge." Id. at ¶ 7. "[W]hen the dismissal of a criminal count or entire complaint is silent whether it is with or without prejudice, it is ambiguous and examination of the parties and the district court's intent is required." State v. Greenshields, 2019 ND 229, ¶ 8, 32 N.W.2d 903, 906. As in Deutscher, "[t]he propriety of this appeal is contingent upon whether the trial court reached only legal conclusions or resolved factual elements." Greenshields, 2019 ND

229, ¶ 8, 32 N.W.2d at 906

[14] Here, the jury was empaneled and sworn and the State was in the middle of presenting its case in chief. The dismissal resolved a factual element of the offense charged. The district court carefully evaluated the evidence, the case law, the argument of the parties, and the prejudicial effect it had on Mr. Kolstad. Based upon careful consideration, the district court dismissed the State's case as the State's evidence would be legally insufficient to sustain a conviction.

[15] Mr. Kolstad was unfairly surprised to learn that there was evidence that was in the possession of the State and never communicated to him. Also, the evidence that was missing went directly to an element of the crime of Refusal. Evidence that Mr. Kolstad possibly refused a chemical breath test cannot be brought unless Mr. Kolstad was read the correct implied consent. Testimony revealed that the wrong implied consent was read and evidence of the refusal would have not been able to be presented to the jury. The State also entered Exhibit 9, the Intoxilyzer Test Record, into evidence. Exhibit 9 was stricken from the record once the dismissal was ordered. Exhibit 9 would not have been allowed to be entered based upon the Vigen case. State v. Vigen, 2019 ND 134, 977 N.W.2d 430. In addition, Mr. Kolstad lost out on the ability to cross examine the veracity of the witnesses concerning if Mr. Kolstad "did" not blow or "could" not blow because of his asthma. The body cams were very important to an element of the Refusal case. The State's actions did not allow Mr. Kolstad the ability to try to retrieve the information, but wanted the jury to only have the testimony of the officers to form their verdict. The State lied to the district court saying that

they were not aware of any videos. However, Cpl. Waltz had notified them a week prior to trial there were problems retrieving a copy of the videos. All of this information went into the district court's decision to dismiss the case.

[16] The district court's oral ruling left no doubt that it made its determination on the basis of the "testimony" the State presented. The dismissal did not only take into a procedural problem, but also went directly to one of the elements of the Refusal charge that was dismissed.

[17] This ruling was not a dismissal based solely on procedural grounds "unrelated to factual guilt or innocence," but rather it was a determination that the State had failed to prove its case and that Mr. Kolstad was acquitted on that charge.

[18] The United States Supreme Court holds that the Fifth Amendment guarantee against double jeopardy bars retrial when the evidence is found legally insufficient by an appellate court. Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 2150-51, 57 (1978), L.Ed.2d 1 (1978). The constitutional prohibition against double jeopardy is fully applicable to state criminal proceedings. Greene v. Massey, 437 U.S. 19, 98 S. Ct. 2151, 57 L. Ed. 2d 15 (1978). See also State v. McMorrow, 286 N.W.2d 284 (N.D. 1979). In addition, Article 1, Section 12 of the North Dakota Constitution commands protection against double jeopardy for the same offense.

[19] Acquittal by the trial court for lack of evidence also bars retrial, even when that acquittal is based on erroneous evidentiary rulings. Sanabria v. United States, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). See also Finch v. United States, 433 U.S. 676, 97 S.

Ct. 2909, 53 L. Ed. 2d 1048 (1977).

[20] The question of what constitutes an acquittal, as distinguished from a dismissal, is not controlled by the trial court's characterization of the ruling. State v. Melin, 428 N.W.2d 227 (N.D. 1988). Rather, one must look at the substance of the judge's ruling, whatever its label, and determine whether it actually represents a resolution of some or all of the factual elements of the offense charged." Id. at 229 (quoting State v. Flohr, 259 N.W.2d 293, 295 (N.D. 1977)). Thus, we assess the substance of the trial court's ruling to determine whether it actually represents a resolution of a factual element of the charged offense.

[21] The double jeopardy provisions of the federal and state constitutions, and state law, prohibit successive prosecutions and punishments for the same criminal offense." State v. Voigt, 2007 ND 100, ¶ 11, 734 N.W.2d 787. It is well established that jeopardy attaches in a jury trial when the jury is empaneled and sworn. Id. "Each case in which a double jeopardy violation is asserted must turn upon its own facts." Voigt, 2007 ND 100, ¶ 13, 734 N.W.2d 787,

[22] Double jeopardy bars re-prosecution after judicial termination of a trial by directed acquittal, regardless of whether the judicial determination as to the insufficiency of the evidence was "based on its complete absence, its total lack of persuasiveness, its failure 'as a matter of law' due to the substantive content of the offense in question, or an erroneous decision to exclude essential proof." 6 Wayne R. LaFave et al., Criminal Procedure & 25.3© (3d ed.2014).

[23] The United States Supreme Court discussed double jeopardy in Evans v.

Michigan, 568 U.S. 313 (2013). The Court noted, "[a] mistaken acquittal is an acquittal nonetheless, and we have long held that a verdict of acquittal could not be reviewed, on error or otherwise, without putting a defendant twice in jeopardy, and thereby violating the Constitution." Id. at 1074. An acquittal has been defined "to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense;" thus, an "acquittal" includes a ruling by the court that there is insufficient evidence to convict. Id. at 1074-75.

[24] The ruling by the district court resolved some of the issues in the Refusal charge. The decision acted as an acquittal of the Refusal charge and the State cannot appeal the acquittal. Further, Mr. Kolstad has already been acquitted of Driving under the Influence and any trial would be barred by double jeopardy. Even if the case would be remanded, the Refusal charge would still be dismissed as it was not read correctly at that time. Should a remand occur, the State would possibly get a second chance at a conviction for a charge that had already been decided by a jury. Further, it is unknown if the legislature intended for a person to be convicted of both a DUI and Refusal for the same action or incident.

[25] The district court did not abuse its discretion when it ordered the dismissal of the Refusal charge. The decision also disposed of one of the elements of the crime and the State cannot appeal an acquittal.

II. Whether the District Court abused its discretion in dismissing Count II-Refusal to Submit to Chemical Breath Test.

[26] Rule 16 is not a constitutional mandate, but is an evidentiary discovery rule

designed to further the interests of fairness. State v. Rasmussen, 365 N.W.2d 481, 483 (N.D. 1985). When apprised of a discovery violation, a trial court is authorized by Rule 16(d) (2) to use various remedies, but should impose the least severe sanction, that will rectify the prejudice, if any, to the opposing party. State v. Thomas, 420 N.W.2d 747, 752 (N.D. 1988). The court's decision on a discovery violation is reversible error only if the defendant was denied a substantial right. State v. Ramstad, 2003 ND 41, ¶ 42, 658 N.W.2d 731. A substantial right has not been denied unless the defendant was significantly prejudiced by the violation. Id. If the defendant does not show he was significantly prejudiced by a discovery violation, a court's failure to exclude evidence or impose other sanctions under Rule 16 (d) (2) does not constitute an abuse of discretion. Id. at ¶ 26.

[27] The State violated Rule 16 by failing to inform Mr. Kolstad that the requested video tapes were saved and in the possession of the police a week prior to trial when that information became known to the State. Instead, Mr. Kolstad found out about the videos during trial from one of the State's witnesses during its case in chief. The State did not make the video available to copy or inspect which is what Rule 16 requires. N.D. Crim. P. Rule 16 (2017). The requested information was exculpatory or could have been used to impeach the accuracy of the breath analyzer and arresting officer, and the State's failure to disclose the existence of those videos violated Mr. Kolstad's due process rights under Brady v. Maryland, 373 U.S. 83 (1963).

[28] In Brady, the United States Supreme Court held that suppression by the prosecution of evidence favorable to an accused violates due process if the evidence is

material to guilt or punishment. Id. at 87; State v. Sievers, 543 N.W.2d 491, 495 (N.D. 1996). To establish a Brady violation, the burden is upon the defendant to show: (1) the government possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the evidence; and (4) a reasonable probability exists that the outcome of the proceedings would have been different if the evidence had been disclosed. State v. Goulet, 1999 ND 80, ¶ 15, 593 N.W.2d 345.

[29] The initial inquiry is whether the undisclosed material was favorable to the defendant. The evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). In this case, the district court ruled that the material was favorable to Mr. Kolstad for impeachment purposes of the breath analyzer and arresting officer and goes directly to the issue of refusal.

[30] Next, the defendant must show that he could have obtained the undisclosed evidence with reasonable diligence. The videos in this case were in the sole possession of the State, and Mr. Kolstad did not have access to them nor was their existence brought to the attention of Mr. Kolstad. By not disclosing their existence, the State denied Mr. Kolstad access to the evidence which severely prejudiced Mr. Kolstad's case.

[31] Third, the defendant must show the State suppressed the evidence. It is obvious that the State suppressed the existence of the tapes. The State argued to the district court that they were not aware that the tapes existed. The State's argument backfired when Cpl. Waltz testified that the State was aware of the tapes a week before trial. The State

purposely did not notify Mr. Kolstad of their existence and tried to get around their disclosure by arguing to the court that they were not aware of them. In addition, the State argues that the tapes were not in their possession and they did not have to disclose them. Rule 16 requires the prosecution to also disclose requested documents in the possession of other governmental agencies which participated in the investigation of the defendant or have cooperated with the prosecution. City of Grand Forks v. Ramstad, 2003 ND 41, ¶ 19. Limiting application of Rule 16 to materials in the actual possession of the prosecution "unfairly allows the prosecution access to documents without making them available to the defense." Id. These actions demonstrate bad faith on the part of the State and the loss or destruction of evidence is nonetheless so critical to Mr. Kolstad's defense as to make a criminal trail fundamentally unfair. See Ariz. v. Youngblood, 488 U.S. 51 (1988).

[32] Finally, a defendant must show that a reasonable probability exists that the outcome of the proceedings would have been different if the evidence had been disclosed. This is basically impossible in this case, as the defendant had that charged dismissed. However, the ultimate outcome would still be dismissal no matter what happens. The discovery during trial of the reading of the incorrect implied consent will warrant suppression of the evidence of the refusal. Either way, a motion in limine or a suppression motion will have the same effect as affirming the district court's ruling in this matter.

[33] The decision whether to admit evidence the State has failed to disclose before trial in violation of Rule 16 is of broad discretion resting with the trial court. The district court's dismissal of Mr. Kolstad's case shall be reviewed under the abuse-of-discretion

standard. See State v. Ferrie, 2008 ND 170, ¶ 6, 755 N.W.2d 890 (applying the abuse-of-discretion standard where the district court dismissed a criminal case with prejudice); see also 21 Am.Jur.2d Criminal Law & 728 ("The trial court's decision [to dismiss a criminal complaint] is reviewed under an abuse of discretion standard"). A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. Ferrie, at ¶ 6. The party seeking relief must show more than the district court made a poor decision, but that it possibly abused the discretion it has under the rule. Nesvig v. Nesvig, 2006 ND 66, ¶ 12; Nesvig v. Nesvig, 712 N.W.2d 299 (N.D. 2006). This court should not overturn the district court's decision merely because it is not the decision this Court may have made if it were deciding the motion. Nesvig, 712 N.W.2d 299

[34] Although the State learned of the existence of the tapes a week before trial, they did not act expeditiously to provide that information to Mr. Kolstad. They chose instead to try and cover it up by claiming they were unaware of its existence. Fortunately, for Mr. Kolstad, Cpl. Waltz informed the district court of the existence of the tapes and when the State became aware of their existence. It is obvious that Mr. Kolstad's rights were substantially prejudiced as he was not offered an adequate opportunity for cross examination.

ORAL ARGUMENT REQUESTED

[35] This Court shall allow oral argument in this case as it would be beneficial in deciding the issues.

CONCLUSION

[36] The right to cross examination is a constitutional right. Chambers v. Miss., 410 U.S. 284 (1973).

> The right of cross examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps the "accuracy of the truth-determining process." [Citations omitted.] It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

Id. at 295.

[37] The right of confrontation guaranteed by the Sixth Amendment means more than being allowed to confront the witness physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418 (1965), quoted in Davis v. Alaska, 415 U.S. 308 (1974). Denial of the right of effective cross examination is "constitutional error of the first magnitude and no amount of showing of want of prejudice can cure it." Id.

[38] The right to cross examine is more than a right to introduce conflicting evidence, it is the right to confront a witness face to face and test his veracity and his accuracy by probing questions which compel direct answers. Mr. Kolstad was denied that right.

Also as stated in Ramstad,

> Our opinion in this case places all prosecutors on notice that N.D. R. Crim. P. 16 does not allow them to shift the burden of obtaining materials in the hands of other governmental agencies to the defendant. We further caution that, although showing of prejudice is generally required before reversing a criminal conviction for a discovery violation, reversal for conduct which is merely potentially prejudicial may be warranted as a sanction for institutional noncompliance and systematic disregard of the law if the conduct is commonplace. See State v. Zimmerman, 516 N.W.2d 638, 641 (N.D. 1994);

> Madison v. N.D. Dep't of Transp., 503 N.W.2d 243, 246 (N.D. 1993); State v. Steffes, 500 N.W.2d 608, 613-14 n.5 (N.D. 1993).

Ramstad, at ¶29.

[39] It is the State's duty to zealously protect evidence in its possession. Arizona v. Youngblood, supra. The State believing the evidence has no value does not justify withholding its existence from Mr. Kolstad when doing so prejudiced his case. This haphazard handling of the evidence, which actions were deemed prejudicial to Mr. Kolstad, may warrant different rules if the destruction of evidence is commonplace. The district court found it is starting to become an issue with these body cams. Further, Cpl. Waltz testified that there are hundreds of videos affected; but yet, the State ignored its obligation and did not inform Mr. Kolstad of its existence. These actions demonstrate a systematic disregard for the law and this Court should affirm the decision of the district court.

Respectively submitted on January 3rd, 2020.

/s/ David D. Dusek
By: David D. Dusek
ND License No.: 05070
FOR: DUSEK LAW, P.C.
Post Office Box 14145
Grand Forks, ND 58208-4145
Telephone: (701) 746-4107
Facsimile: (218) 793-0013
Email: david@duseklaw.com
Service Address: duseklaw@duseklaw.com
ATTORNEY FOR THE DEFENDANT - APPELLEE

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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	)	
vs.	)	District Court No.:
	)	18-2019-CR-00022
Stanley James Kolstad,	)	
	)	
Defendant/Appellee.	)	

CERTIFICATE OF COMPLIANCE

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[1] The Defendant, by and through his Attorney David D. Dusek hereby certifies that the attached brief complies with the page limitation as set forth in Rule 32 of the North Dakota Rules of Appellate Procedure. The electronically filed brief contains 22 number of pages.

Dated this 3rd day of January, 2020.

/s/ David D. Dusek
By: David D. Dusek
ND License No.: 05070
FOR: DUSEK LAW, P.C.
Post Office Box 14145
Grand Forks, ND 58208-4145
Telephone: (701) 746-4107
Facsimile: (218) 793-0013
Email: david@duseklaw.com
Service Address: duseklaw@duseklaw.com
ATTORNEY FOR THE
DEFENDANT/APPELLEE

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	)	
Defendant/Appellee.	)	

CERTIFICATE OF SERVICE

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[1] I, **David D. Dusek**, do hereby certify that on the 3rd day of January, 2020, the following documents were filed with the North Dakota Supreme Court Clerk of Court:

1. **Appellee's Brief**
2. **Certificate of Compliance**

[2] A copy of these documents were served electronically to Appellant's attorney Ms. Megan Essig at sasupportstaff@gfcounty.org & megan.essig@gfcounty.org.

Dated this 3rd day of January, 2020.

/s/ David D. Dusek
By: David D. Dusek
ND License No.: 05070
FOR: DUSEK LAW, P.C.
Post Office Box 14145
Grand Forks, ND 58208-4145
Telephone: (701) 746-4107
Facsimile: (218) 793-0013
Email: david@duseklaw.com
Service Address: duseklaw@duseklaw.com
ATTORNEY FOR THE DEFENDANT/APPELLEE

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[1] I, **David D. Dusek**, do hereby certify that on the 9th day of January, 2020, the following document was filed with the North Dakota Supreme Court Clerk of Court:

Appellee's Brief

[2] A copy of this document was served electronically to Appellant's attorney Ms. Megan Essig at sasupportstaff@gfcounty.org & megan.essig@gfcounty.org.

Dated this 9th day of January, 2020.

/s/ David D. Dusek
By: David D. Dusek
ND License No.: 05070
FOR: DUSEK LAW, P.C.
Post Office Box 14145
Grand Forks, ND 58208-4145
Telephone: (701) 746-4107
Facsimile: (218) 793-0013
Email: david@duseklaw.com
Service Address: duseklaw@duseklaw.com
ATTORNEY FOR THE DEFENDANT/APPELLEE