

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

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

REPLY BRIEF

ON APPEAL FROM ORDER GRANTING MOTION TO DISMISS
ENTERED ON JULY 29, 2019
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JUDGE HAGER, PRESIDING.

ORAL ARGUMENT REQUESTED

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ARGUMENT

[¶1] On page 8, ¶ 4, of the Brief of Appellee, Appellee states that Officer Nelson did not inform Corporal Waltz of Kolstad having asthma. However, that is not the case. Officer Nelson testified that he believed he mentioned to Corporal Waltz that Kolstad claimed to have asthma before the intoxilyzer test, but did not believe he specifically mentioned Kolstad's conduct during the preliminary breath test. Tr. p. 111.

[¶2] On page 9, ¶ 7, of the Brief of Appellee, Appellee states defense counsel argued Kolstad was highly prejudiced by the alleged discovery violation and that the district court agreed, which is why Count II was dismissed. However, defense counsel nor the district court ever mentioned anything about Kolstad being prejudiced. Tr. pp. 136-144.

[¶3] Also on page 9, ¶ 7, of the Brief of Appellee, Appellee states defense counsel argued that the videos contained the exact language of the implied consent that was read to Kolstad, as well as evidence of whether Kolstad refused to blow or was having difficulties providing a valid sample because of his asthma. However, that was not brought up in those terms. Defense counsel argued we don't know what is on the tape. Tr. p. 140. Defense counsel argued further that the tape "may lead us to some inside on him; the client told him he had asthma." Tr. p. 140. Defense counsel stated the tape has "some evidentiary value on it". Tr. p. 140.

[¶4] On page 10, ¶ 8, of the Brief of Appellee, Appellee states Corporal Waltz testified that he informed the State a week prior to trial of the problem with the videos, and that the testimony of Corporal Waltz contradicted the statement made by the State that they were not aware of the videos existence. Appellee is taking these facts out of context. During cross examination of Corporal Waltz, Corporal Waltz testified he had body camera footage that was

successfully uploaded to the server. Tr. p. 136. This led to the bench conference between counsel and the district court where the State truthfully told the district court they did not have a copy of the video nor knew of its existence. Tr. pp. 137, 141. The State was told a week prior to trial that there were some videos in this case that were purged due to an IT issue. Tr. p. 148. Therefore, the videos did not exist, it would have been impossible for the State to have them in their care, custody or control, and the testimony of Corporal Waltz did not contradict the State's statement.

[¶5] Also on page 10, ¶ 8, of the Brief of Appellee, Appellee states the district court upheld the dismissal citing that Kolstad was prejudiced by the State's actions and the issue of whether Kolstad was cooperative during the breath test. However, after review of the transcript, the district court did not cite a reason why they were upholding the dismissal. The district court said, "Court is going to deny the Motion to Reconsider. The second count of Refusal is dismissed, and exhibit 9 is withdrawn. We will proceed on the DUI charge." Tr. p. 156.

[¶6] On pages 10-11, ¶ 9, of the Brief of Appellee, Appellee states the State had control of the evidence as it was in the hands of law enforcement. That is not the case in this matter. The videos were not in the hands of law enforcement because they were inadvertently deleted. Thus, the State was not in control of the videos.

[¶7] On page 13, ¶ 14, of the Brief of Appellee, Appellee argues the district court dismissed the State's case as the State's evidence would be legally insufficient to sustain a conviction. In this case, the district court addressed the dismissal citing the basis as an alleged discovery violation, not based upon insufficient evidence. Tr. pp. 170-171. Since the dismissal was based upon an alleged discovery violation, and not based upon a resolution of some or all of the factual elements of the charged offense, the State may appeal the district court's dismissal.

[¶8] On page 13, ¶ 15, of the Brief of Appellee, Appellee again states there was evidence that was in the possession of the State and never communicated to him. Corporal Waltz testified the videos were deleted due to IT problems their department had been experiencing, and officers could not access the lost videos. Tr. pp. 145-146. Since the videos were inadvertently destroyed, law enforcement did not have them in their possession, and therefore nor did the State. With no video in existence, there was nothing to communicate.

[¶9] Also on page 13, ¶ 15, of the Brief of Appellee, Appellee eludes to the fact that the State did not want body camera videos when they said the State wanted the jury to only have the testimony of the officers to form their verdict. That is simply not the case. Evidence such as body camera videos are just as important to the State as it is to defense. Unfortunately, in this case, the videos were inadvertently deleted and neither side had the ability to view them. Just as in cases prior to the technological advances of body cameras, the parties relied upon the police report and the testimony of witnesses.

[¶10] Additionally on page 13, ¶ 15, of the Brief of Appellee, Appellee alleges the State lied to the district court saying that they were not aware of any videos. The State never lied to the district court. As outlined above in paragraph 4, the State truthfully told the district court they did not have a copy of the video nor knew of its existence. Tr. pp. 137, 141. The State was told a week prior to trial that there were some videos in this case that were purged due to an IT issue. Tr. p. 148. Since the videos were purged, they did not exist and it would be impossible for the State to have a copy of them.

[¶11] In ¶¶ 17-25, of the Brief of Appellee, Appellee argues Kolstad was acquitted on Count II- Refusal to Submit to Chemical Test. Kolstad was acquitted of Count 1- Driving under the Influence, not of Count II-Refusal to Submit to Chemical Test. Tr. p. 227. The district court

dismissed Count II-Refusal to Submit to Chemical Test. Tr. pp. 144, 170-171; Appellant's Appendix pg. 18. The dismissal was based upon an alleged discovery violation, and not based upon a resolution of some or all of the factual elements of the charged offense. Tr. pp. 170-171. Therefore, the State may appeal the district court's dismissal in this case.

[¶12] On page 16, ¶ 24, of the Brief of Appellee, Appellee states 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. However, defense counsel never raised this issue with the district court. This Court has repeatedly held that issues not raised or considered in the district court cannot be raised for the first time on appeal, and this Court should not address issues raised for the first time. Moe v. State, 2015 ND 93, ¶ 11, 862 N.W.2d 510, 513.

[¶13] On page 17, ¶ 27, of the Brief of Appellee, Appellee states the State violated Rule 16 by failing to inform Kolstad that the requested video tapes were saved and in the possession of the police a week prior to trial when the information became known to the State. As stated multiple times previously, there were no videos. Corporal Waltz testified that the University of North Dakota Police Department was having IT problems regarding uploading videos. Tr. p. 146. Videos would record onto the body camera; officers would plug their camera into a network-connected dock; videos would be downloaded from the camera to an off-site server; and then as soon as it uploaded to the off-site server, the system would delete the video. Tr. p. 146. Officers could not access these lost videos. Tr. p. 146. Because the videos were inadvertently deleted in this case, the videos did not exist making it impossible for the police or the State to possess them.

[¶14] In ¶¶ 28-32, of the Brief of Appellee, Appellee reviews the four factors the defendant must show to establish a Brady violation. The first factor is the government possessed

evidence favorable to the defendant. State v. Goulet, 1999 ND 80, ¶ 15, 593 N.W.2d 345. As stated numerous times already, the videos did not exist. Therefore, the State did not possess evidence favorable to Appellee. Appellee fails to establish the first factor. The second factor is the defendant did not possess the evidence and could not have obtained it with reasonable diligence. Id. It is true the Appellee did not possess the evidence and could not have obtained with reasonable diligence, but neither could law enforcement nor the State since the videos were inadvertently deleted. The third factor is the prosecution suppressed the evidence. Id. The State cannot suppress evidence that does not exist. Appellee fails to establish the third factor. The fourth factor is a reasonable probability exists that the outcome of the proceedings would have been different if the evidence had been disclosed. Id. Again, there were no videos, so there was no evidence to disclose. Additionally, Appellee argued that they could not show that the outcome of the proceedings would have been different. According to this analysis, Appellee has failed to establish a Brady violation.

[¶15] On page 20, ¶ 34, of the Brief of Appellee, Appellee states the State tried to cover up the videos by claiming they were unaware of their existence. The State never tried to cover anything up. The videos simply do not exist.

CONCLUSION

[¶16] Therefore, based upon the foregoing argument, the State of North Dakota respectfully requests this Court reverse the judgment of the district court and remand for further proceedings.

DATED this 16th day of January, 2020.

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**CERTIFICATE OF COMPLIANCE
SA#149646**

[¶1] The State of North Dakota, by and through Assistant State's Attorney Megan Jo Kvasager Essig 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 9 number of pages.

Dated this 16th day of January, 2020.

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STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 16th day of January, 2020, she served true copies of the following documents:

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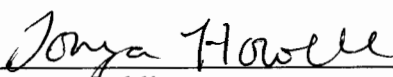
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States Attorney's Office

Subscribed and sworn to before me this 16th day of January, 2020.



Notary Public

dj

