



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KLINE VALENTIN,	)	
	)	
Defendant Below-	)	
Appellant	)	
	)	
v.	)	No. 489, 2012
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE'S ANSWERING BRIEF

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DATE: January 22, 2013

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NATURE AND STAGE OF THE PROCEEDINGS

On February 4, 2012, Kline Valentin was arrested and later charged in a fourteen-count Information with failure to stop on the command of a police officer, two counts of possession of drug paraphernalia, possession of marijuana, endangering the welfare of a child, resisting arrest, reckless driving, failure to have his insurance card in his possession, speeding, two counts of failure to signal, failure to stop at a stop sign, failure to remain stopped, and entering after hours on Division of Natural Resources lands. Super. Ct. Docket Item ("DI") 3; Information. (B-1, 4-8). The allegations involve activities that took place on February 3, 2012 at the Horsey Pond Wildlife Area and surrounding areas. *Id.*

On August 10, 2012, Valentin filed a motion in limine to exclude the drug evidence, which was heard on the day of trial. The drug-related charges and resisting arrest were dismissed prior to trial. (DI 16; B-2). During trial, the charge for endangering the welfare of a child was dismissed, and the prosecutor entered a *nolle prosequi* for the charges of failure to have an insurance card and failure to remain stopped. (DI 17; B-2).

On August 14, 2012, a Sussex County jury found Valentin guilty of failure to stop on the command of police, reckless driving, speeding, failure to stop at a stop sign, and entering Division of Natural Resources land after hours. Valentin was acquitted of two counts of failure to signal. The Superior Court sentenced Valentin: (1) for failure to stop on the command of police, to two years at Level V, suspended for 15 months at Level II probation, a \$575 fine, zero

tolerance for drugs, zero tolerance for operating a motor vehicle for 15 months while on Level II probation; and (2) fines and surcharges for the remaining convictions. (B-65-66).

Valentin filed a direct appeal and Opening Brief in support thereof. This is the State's answering brief.

SUMMARY OF ARGUMENT

I. DENIED. Valentin's appeal must fail because his discovery request was not sufficiently specific to put the State on notice that he wanted the dispatch recordings. Had counsel specifically requested the recording, the prosecutor would have provided it, just as prosecutors do in any case involving a motor vehicle recording of a defendant's encounter with police. The trial judge did not abuse his discretion when he found that the dispatch recording was not a "statement" under Valentin's discovery request, Rule 26.2 or *Jencks*.

STATEMENT OF FACTS

On the evening of February 3, 2012, Department of Natural Resources ("DNREC"), Division of Fish and Wildlife Sergeant Nicholas Couch and Corporal Gavin Davis were patrolling for individuals in state parks after sunset, when the parks are closed. (B8-9, 10, 13, B-45-46). Among those parks is Horsey Pond Wildlife Area (the "park"), which is located south of Route 24, between Laurel town limits and the Laurel airport. (B-11). The park includes a relatively small paved parking lot, approximately 100-150 yards by 200 yards, a boat launching facility and a fishing area along the shoreline of Horsey Pond. (B-12). There is one way in the park and one way out-via Irene Avenue. (B-32). On the way into the park, along Irene Avenue, and once inside the area, there are large signs indicating it is a state wildlife area and closed from sunset to sunrise. (B-15-16, 22, 28; St. Ex. 3-4(photos of signs)).

At about 11:47 p.m. on February 3, 2012, Sergeant Couch and Corporal Davis entered Horsey Pond Wildlife Area in their patrol vehicle, which is a large, black, unmarked Ford F-250 crew cab pickup, with a black cap on the back. (B-13, 55). The vehicle has red and blue lights on the grill that blink back and forth when illuminated. (B-14, 55). There are yellow lights where the headlights are located and a strip of lights inside the vehicle, near the rear-view mirror, that illuminate red and blue when activated. (B-14, 55).

When they entered the Horsey Pond parking area, they saw a vehicle parked on the far side of the parking lot, backed in so that it was facing the parking lot. (B-15, 46). The lights on the vehicle

were off, and the windows were down. (B-15, 54). They headed essentially head-on toward the vehicle, activated their emergency lights and called dispatch to report a vehicle stop. (B-16-18). Sergeant Couch could see that the driver of the vehicle was laid back in his seat, looking around. (B-18). Couch told dispatch that he believed they were going to run. (B-18). Sergeant Couch saw two black males in the vehicle. Kline Valentin was the driver. (B-31, 33, 48). The passenger was a juvenile. (B-53). When the DNREC vehicle stopped, Corporal Davis briefly got out of the vehicle, wearing his DNREC uniform. (B-47).

The car did flee. Corporal Davis instantly got back in the truck. (B-47). Valentin headed toward Route 24. (B-19). Sergeant Couch told dispatch they were going to be involved in a pursuit. (B-19). The suspect car was a silver-colored sedan. (B-19). By the time the DNREC officers turned their vehicle around, the car was turning from Irene Drive onto Route 24. (B-20). The driver of the silver vehicle did not stop at the stop sign at that intersection, nor did he use a turn signal. (B-20, 48-49). Sergeant Couch called dispatch to update them on status, while Corporal Davis kept his eyes on the fleeing vehicle. (B-20).

Valentin traveled west on Route 24 and the officers saw him turn left into the Hollywoods Park development, without using its turn signal. (B-21, 23, 49). The park consists of unmarked roadways, which dictates the speed limit is 25 miles per hour. (B-22). When the officers initially turned off of Route 24 to follow Valentin into the development, they did not have sight of him. (B-24). They

traveled through the development until they saw the car again. The roads in the development are narrow roads and there are several dead ends, with which Sergeant Couch is familiar because he lives there. (B-23, 25, 50). The DNREC officers next saw Valentin' vehicle when it was coming head on toward them. (B-26). They attempted to stop Valentin, but he drove into someone's yard in order to go around them. (B-26, 50-51). Corporal Davis commanded the driver to stop, but the vehicle kept going. (B-51).

The DNREC vehicle turned around, and caught up with the vehicle once again head on. (B-26, 52). The windows of both vehicles were down, and Corporal Davis was yelling, "Police. Stop. Police. Stop." (B-26, 51). To get around them, Valentin would have had to again drive through someone's yard. (B-26). Instead, this time he stopped. (B-26-27).

The DNREC officers never turned off their emergency lights during the chase, and their siren was activated from the time they turned from Irene Drive, for the duration of the pursuit. (B-27, 49). The entire incident lasted less than five minutes. (B-29). Sergeant Couch testified that both he and Valentin traveled in excess of the 25 mph speed limit while in the development. (B-30).

Valentin told Corporal Davis that he did not initially stop for them because he thought they were park police, and therefore would not pursue him. (B-53). Valentin testified at trial, admitted he was in the park at almost midnight, in a silver car with the juvenile (B-56-57), admitted that he ran the stop sign when he turned from the park onto Route 24 (B-59, 63), admitted that he was speeding while in the

Hollywoods development (B-61), admitted he veered around the police vehicle (B-58, 60, 64), and admitted that the lights and sirens on the police vehicle were turned on for at least part of the chase. (B-62). He otherwise contested the officers' version of events.

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE DISPATCH RECORDING IS NOT A "STATEMENT" AS CONTEMPLATED BY VALENTIN'S DISCOVERY REQUEST, RULE 26.2 OR JENCKS.

Question Presented

Whether Valentin's convictions should be reversed because the prosecutor did not produce a recording of the responding officer's interaction with KENTCOM dispatch, that was not specified in counsel's boilerplate discovery request?

Scope and Standard of Review

"This Court reviews a trial judge's application of the discovery rules for an abuse of discretion, and will reverse only 'if substantial rights of the accused are prejudicially affected.'"¹

"An abuse of discretion occurs when 'a court has . . . exceeded the bounds of reason in view of the circumstances,' [or] . . . so ignored recognized rules of law or practice . . . to produce injustice.'"²

"Violations of the *Jencks* rule are subject to a harmless error analysis."³ "In performing a harmless error analysis, the 'reviewing court must consider both the importance of the error and the strength of the other evidence presented at trial' to determine whether the error may have affected the judgment."⁴

¹ *Fuller v. State*, 2007 WL 812752 (Del. March 19, 2007).

² *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

³ *Lance v. State*, 600 A.2d 337, 342 (Del. 1991).

⁴ *Id.* at 344.

Argument

On appeal, Valentin argues that the State violated its discovery obligations under the Superior Court Criminal Rules and *Jencks*,⁵ and his trial rights were substantially prejudiced because the State did not produce the recording of DNREC Sergeant Couch's interaction with KENTCOM dispatch on the night Valentin was arrested. Valentin's appeal fails because: (1) as the Superior Court found, Valentin's boilerplate discovery request was not sufficiently specific to put the State on notice that defense counsel wanted the dispatch recording, and the recordings were not of the type contemplated by the discovery rules or *Jencks*; (2) Valentin's argument that his trial rights were substantially prejudiced is based on speculation and he has failed to establish any prejudice—he never sought to obtain the recording after trial; and (3) the recording, which the State has provided, does not, in fact, aid Valentin's defense; therefore, any error is harmless.

As the trial judge correctly found, Valentin's "boilerplate generic" discovery request did not put the State on notice that Valentin wanted the dispatch recording. Further, Valentin did not pursue obtaining the recording prior to trial, though it had not been produced. At trial, counsel attempted to argue that she "didn't know [the officer] called it in at all on dispatch" and therefore was unaware of the recording. (B-34). The trial judge found this argument unpersuasive:

COURT: You are defense counsel. You know that every police officer in the State cannot get out of the vehicle unless they

⁵ *Jencks v. United States*, 353 U.S. 657 (1957). This Court adopted *Jencks* in *Hooks v. State*, 416 A.2d 189 (Del. 1980).

have called in where they are and what's going on for safety purposes. That is what they do.

DEFENSE COUNSEL: That's fine if it is one report. He's saying he was making it in real time. "We are doing this. We are doing that. This is going on, that is going on."

PROSECUTOR: The State didn't request the . . . dispatch transmissions. It was a four-minute, three- to five-minute encounter that was blow by blow in the police reports. The State didn't request them. Defense counsel didn't ask us to request them. There's no mention that they were on their radios in the police report, but [defense counsel] does a fair amount of criminal work. If she was interested in those, she could have subpoenaed them or asked me to subpoena them for her.

THE COURT: If there is a vehicle pursuit, it is standard operating procedure that communications take place.

DEFENSE COUNSEL: It's maintained by the State.

THE COURT: You cannot ask for it? You can ask for anything you want.

DEFENSE COUNSEL: Your Honor, we filed discovery and asked for, essentially, everything under the sun.

THE COURT: Show me when you come back where you asked for those reports. . . .

[AFTER RECESS]

DEFENSE COUNSEL: . . . Under Nos. 19 and 20 of my request . . .
.....⁶

⁶ Paragraphs 19 and 20 of Valentin's discovery request are as follows:

19. Disclosure of statements, interviews, reports or other information relating to the credibility of any prosecution witness, including but not limited to inconsistent statements, reports or prior testimony.

20. An opportunity pursuant to *Jencks v. U.S.*, 353 U.S. 657 (1957) and Superior Court Civil Rule 26.2 to review reports and statements, whether oral, written or recorded, made by persons who will testify at trial, regardless of whether the individual used the statements or report to prepare for examination.

PROSECUTOR: Your Honor, the State provided the reports drafted by both of the officers regarding the incident. There was no specific request made regarding the [KENTCOM] communications. The State didn't request the [KENTCOM] communications nor does the State request [them] in every case that comes through the office unless specifically requested or warranted in the particular case.

(B-34-38). The trial judge asked about the procedure followed when defense counsel seeks an "MVR," or motor vehicle recording, which is a video recording taken by equipment mounted in a patrol vehicle (the DNREC officer's F-250 does not have an MVR). (B-38, 41). The State replied that defense counsel specifically asks for MVR's and they are provided. (B-38-39). The trial judge later contrasted Valentin's generic requests in paragraphs 19 and 20 of his discovery letter with his specific request, in paragraph 7, for "a copy of all . . . videotape, or DVD recording made of the offense and/or Defendant during, prior to, or after arrest on the charges including in-car camera and 20 minute intoxilizer observation period." (B-5, 41). The trial judge declined to rule that the recordings were "statements" within the paragraphs 19 and 20 of Valentin's general discovery request, explaining:

I am not ruling they have a duty on that because what you would basically be asking me to do is create case law that says in every single police officer stop that prosecutor will have the duty to go and listen to the dispatcher's report on every speeding ticket and anything of that nature to see whether or not there is anything inconsistent in what is in his report versus on the tape.

(B-41-42). The trial judge further explained that Valentin's discovery request was a "boilerplate generic request for discovery," (B-41), "casting a huge net," that counsel "us[es] in every single case regardless of the case. Whether it's a DUI, a speeding, a

shoplifting, or whatever." (B-43). The trial judge found that the discovery request was not sufficiently specific to put the State on notice that Valentin wanted the dispatch recordings (B-41, 43), stating "I'm not faulting you with that. But when you go with a general generic and there are specific things, you ought to make specific things." (B-44). The Superior Court also correctly found that a "reasonable person" would not expect the dispatch recording to fall under *Jencks*. (B-39-40).

The trial judge was correct that the recording of Sergeant Couch speaking with dispatch is not a "statement" as contemplated in Valentin's discovery request, under Superior Court Civil Rule 26.2, or under *Jencks*. First, the trial judge correctly found that Valentin's boilerplate, generic discovery request did not contemplate disclosure of the dispatch recordings. Valentin's counsel admitted that this language was not drafted to specifically request the dispatch recording when she argued that she was not aware the dispatch recording existed prior to trial. The State was not on notice that counsel sought the dispatch recordings.

Valentin's reference to Superior Court Civil Rule 26.2 in the above discovery letter does not support his argument that the State was on notice. Superior Court Criminal Rule 26.2 provides:

(a) Motion for production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness shall order the attorney general . . . to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified. . . . [A] law enforcement officer shall be deemed a witness called by the State.

. . . .

(f) Definition. As used by this rule, a "statement" of a witness means:

- (1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;
- (2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or
- (3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

When he considered Rule 26.2, the trial judge found:

I would not think of that as a statement. I would think of a statement as an investigative statement when you are talking to somebody, and they say, "Mr. X, what did you see when the person came into the bank," and things of that nature.

(B-40). As the trial judge also noted, officers in this state contact dispatch on a regular basis to advise of their whereabouts and activities, for safety purposes. See B-34. The conversation this officer had with dispatch was to advise others, for safety purposes, that he was about to conduct a stop of an individual, and later to obtain backup when the individual ran. Officers have these radio conversations numerous times throughout their shift in the normal performance of their duties, not to create a record for them to later refer to in creating their reports, nor for disclosure in future litigation. Further, the conversations officers have with dispatch are not intended to be a complete, blow-by-blow description of the officer's interaction during the stop—they only provide dispatch information that is necessary for its purposes. As a result, the dispatch transmissions here, and likely in most cases, are incomplete and therefore not reliable to fully discern what took place during the encounter. In this case, which is not factually complicated, the

dispatch recording is almost 24 minutes, the vast majority of which was silent. During that time, there are few discernible statements that are of any consequence in this matter (none of which are inconsistent with the officer's testimony or police reports). For all these reasons, the trial judge did not abuse his discretion when he found that the dispatch recordings are not "statements" under Rule 26.2, which codifies *Jencks*.

Further, were the State required to review and produce every dispatch conversation in every case, in complicated cases such as murder cases, or even in less complicated cases, there would be hundreds of minutes of recordings where officers informed dispatch they were going to "x" address to execute a search warrant, or were going to "y" address to interview a subject. The identification of the timing of each of those recordings, obtaining them pursuant to an Attorney General subpoena (which KENTCOM required in this case), and review of them by the prosecutor would cause delay and clog the system, particularly if required for every moving violation as contemplated by the trial judge.

Finally, *Jencks* itself does not require disclosure of the dispatch recording. In *Jencks*, the United States Supreme Court stated:

The necessary essentials of a foundation . . . are that the "demand was for production of . . . *specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up.*"⁷

⁷ *Jencks*, 353 U.S. at 666-67.

Unlike *Jencks*, Valentin's discovery request is a fishing expedition, with a view toward having the charges dismissed solely based on an alleged discovery violation. In *Jencks*, the value of the reports sought was apparent because the witnesses testified they could not remember what they memorialized in their reports prepared two to three years prior to trial. Here, the officer's conversation with dispatch occurred approximately six months prior to trial, the officer wrote a report within days of the events that described what happened, and he did not indicate any memory loss regarding events that made the recordings important.

In *United States v. Robles* the United States District Court for the District of Kansas found that dispatch tapes of transmissions made during a traffic stop are not "statements" covered by *Jencks*.⁸ The *Robles* court relied in part on *United States v. Bobadilla-Lopez*, a case in which the Ninth Circuit Court of Appeals held that a border patrol agent's radio transmissions of his surveillance observations to other patrol agents were not *Jencks* material.⁹ In that case, the court reasoned that:

Both the history of the statute and the decisions interpreting it have stressed that for production to be required, the materials should not only reflect the witness' own words, but should also be in the nature of a

⁸ 1996 WL 250676 (D. Kan. Apr. 23, 1996); *United States v. Butler*, 2000 WL 134697, *3 (D. Kan. Jan 21, 2000) (denying defendant's motion to compel retention of "all tape recordings of radio transmissions, dispatches and/or telephone calls relating to his detention"); see *United States v. Hill*, 2010 WL 4365521 (W.D. Kan. Oct. 27, 2010) (denying defendant's motion to inspect and copy all dispatch tapes). But see *United States v. Johnson*, 2008 WL 474078 (E.D. Mich. Feb. 15, 2008) (ordering government to provide dispatch logs to defendant if they exist); *United States v. Florack*, 155 F.R.D. 49, 55, n.2 (W.D. N.Y. 1994) (declining to follow *Bobdilla-Lopez*).

⁹ 954 F.2d 519, 520-21 (9th Cir. 1992).

complete recital that eliminates the possibility of portions being selected out of context.¹⁰

The court declined to find the radio transmissions were *Jencks* material because "they were never intended to provide a complete description of events that could serve as a basis for impeachment."¹¹ Finally, the court noted that, "[i]t is apparent that the purpose of the production request in this case was never to use the tape for impeachment purposes, but to prevent the agent who made the recording from being able to testify as to his observations on the day in question. The *Jencks* Act is not an appropriate tool for achieving that end."¹² For all these same reasons, the dispatch recording in this case also falls outside of *Jencks* and Rule 26.2.

Valentin's argument that he was substantially prejudiced by the State's alleged discovery violation fails because that argument is based solely on speculation. Valentin has asserted no facts to support his argument. The existence of the recording alone is not sufficient. Two officers were present and testified to Valentin's efforts to evade them, and Valentin testified on his own behalf. The dispatch recordings are not material given that they are not designed to provide a full description of the events, and given the other evidence against Valentin.

Although Valentin has not specifically stated what relief he seeks on appeal, it appears he seeks to have his convictions reversed. This appeal must fail because it is an attempt to "have it both ways." First, Valentin argues that he was substantially prejudiced by an

¹⁰ 954 F.2d at 522.

¹¹ *Id.*

¹² *Id.* at 523.

alleged discovery violation for an item that he never specifically sought to obtain either before trial or in preparation for this appeal. He then argues that the State cannot assert harmless error because:

a review of the statement itself is necessary to conduct this analysis. However, the statement was not produced by the State so not reviewed by the trial court. So, . . . this Court can not speculate on how the unknown, non-disclosed statement could have been used by Defense counsel at trial in order to complete the required analysis.

Op. Br. at 9. To the extent this language is an attempt by Valentin, relying on *Lance v. State*,¹³ to block the State from arguing harmless error, or prevent the Court from conducting a harmless error analysis, that reliance is misplaced. In *Lance*, it was the State's position that disclosure of the information sought was not required; therefore, the State affirmatively did not produce it prior to, during or after trial.¹⁴ Here, at trial, the prosecutor stated he would have provided Valentin the dispatch recording, had he known Valentin's counsel wanted it. (B-35). Valentin did not pursue obtaining the recording. Once the Opening Brief was filed and the claim was clear, in the interests of justice, undersigned counsel obtained the recording, and provided it to Valentin. With this Answering Brief, the State filed a motion to expand the record to include the recording and the associated "Detail Call for Service Report" that was also produced by KENTCOM. Valentin objects to the State's motion. The State should not be barred from making a harmless error argument where it is clear Valentin did not truly want to know the contents of the recording.

¹³ 600 A.2d 337 (Del. 1991).

¹⁴ 600 A.2d at 341.

In *Lance*, this Court remanded the matter so that the trial court could "examine the witness' pretrial statement and determine the degree of prejudice, if any, which the unavailability of that statement may have caused to the fundamental fairness of Lance's trial."¹⁵ The Court found that "it would be unjust to either affirm or reverse Lance's conviction without any judicial examination of [the witness's] pretrial statement to police."¹⁶ In this case, should the Court grant the motion to expand the record to include the recording and associated Detail Call for Service Report, this Court can make that determination. At most, however, the case should be remanded to the Superior Court for this purpose.

Reversal is not warranted based on the content of the recording. The recording lasts approximately 24 minutes, and the vast majority of the time the recording is silent. Undersigned counsel is unable to identify any statement on the recording that is materially inconsistent with the DNREC officers' testimony. Valentin's trial rights were not substantially prejudiced by not having this recording, and any error is harmless.

Valentin's appeal must fail because his discovery request was not sufficiently specific to put the State on notice that he wanted the dispatch recordings. Had counsel specifically requested the recording, the prosecutor would have provided it, just as prosecutors do in any case involving a motor vehicle recording ("MVR") of a defendant's encounter with police. The trial judge did not abuse his

¹⁵ 600 A.2d at 338.

¹⁶ *Id.* at 343.

discretion when he found that the dispatch recording was not a
"statement" under Valentin's discovery request, Rule 26.2 or *Jencks*.

CONCLUSION

The judgment of the Superior Court should be affirmed.



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