



Electronic Discovery Law

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Court Imposes Strict Sanctions for Loss of Video Resulting from City's Reckless Failure to Ensure Preservation

Peschel v. City of Missoula, 2009 WL 3364460 (D. Mont. Oct. 15, 2009)

In this case arising from defendant's claims that he was wrongfully arrested and that the officers used excessive force, among other things, defendant sought sanctions for the city's failure to preserve the video of the arrest that was recorded by a camera in one of the officer's cars. Finding that the video was lost as a result of the city's recklessness, the court granted defendant's motion for sanctions and "designat[ed], for purposes of the case, that the arresting officers used unreasonable force to effect the arrest of [defendant]."

Defendant (a doctor) was arrested in April 2007 for the misdemeanor offense of obstructing a peace officer following his refusal to move away from the car of a person threatening to commit suicide. The arrest was recorded by a camera in the car of one of the responding officers. The video was eventually uploaded to the hard drive of a police department computer and viewed by several officers. At "some point" however, the video (along with numerous others) was "lost" and could not be retrieved.

The city explained that the video was lost accidentally as the result of "glitches in its newly installed digital video system." Additionally, as the court noted, "the department failed to have any type of back-up system in place to ensure the preservation of the video recordings."

Addressing the motion for sanctions, the court first laid out the controlling law, including the five factors identified by the Ninth Circuit to be considered when imposing dispositive sanctions:

- (1) the existence of certain extraordinary circumstances;
- (2) the presence of willfulness, bad faith, or fault by the offending party;
- (3) the efficacy of lesser sanctions;
- (4) the relationship or nexus between the misconduct and the matters in controversy; and,
- as an optional consideration where appropriate, (5) the prejudice to the party victim of the misconduct.

Turning to the alleged spoliation, the court found that the city had a duty to preserve the video, even following defendant's acquittal, because it was reasonably foreseeable that civil litigation would ensue. Accordingly, sanctions were warranted. Rejecting the request for default judgment, the court instead "designat[ed], for purposes of the case, that the arresting officers used unreasonable force to effect the arrest of [the defendant]."

The court then supported its decision, addressing each of the Ninth Circuit's factors in turn. As to the question of willfulness or bad faith by the offending party, the court rejected the city's attempt to minimize its fault by

arguing the loss was accidental. Specifically, the court pointed out that the city “utterly failed to have any controls in place to ensure the video recordings from police vehicles were adequately preserved” and reasoned that “[i]n view of the importance of the video recordings, it went beyond mere negligence for the department not to have adequate safeguards in place for protection for the recordings.” The court therefore concluded that the loss of the video was a result of recklessness.

As to the remaining factors, the court found they weighed in favor of sanctions, particularly in light of the prejudice to defendant.

Finally, before imposing its chosen sanctions, the court addressed the question of whether a less drastic sanction was warranted. Specifically contemplating the effectiveness of a possible adverse inference instruction, the court found such an instruction insufficient and unable to adequately cure the loss of defendant’s best evidence.

Accordingly, the court imposed the sanction of designating that the officers had used unreasonable force, but left the remaining issues of whether a taser had been used and whether the officers acted with malice for the jury.

A copy of the full opinion is [available here](#).

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