

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

OCTOBER 8, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0772-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY J. PAULSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Gregory Paulson appeals a judgment convicting him of delivering marijuana to a juvenile who, in turn, sold it to an undercover officer. Paulson argues that the police violated his due process rights when they destroyed a taperecording of a conversation between the officer and the juvenile that occurred several hours before Paulson sold the marijuana to the juvenile. We reject this argument and affirm the judgment.

The police have a duty to preserve evidence that "might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488-89 (1984). To meet this standard of "constitutional materiality," the evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Id.* Destruction or loss of evidence that may be "potentially useful," but not necessarily exculpatory, is measured by a different due process standard. See *Arizona v. Youngblood*, 488 U.S. 51, 56-58 (1988). Destruction of potentially useful evidence violates due process only if the defendant can establish bad faith on the part of the police. The presence or absence of bad faith necessarily turns on the police's knowledge of the evidence's exculpatory value at the time it was lost or destroyed.¹ *Id.*

Paulson has not established that the destroyed tape contained exculpatory or potentially useful evidence or that the police acted in bad faith when they destroyed it. The undercover officer recorded a conversation with the juvenile in which he asked her whether she could obtain marijuana for him. She stated she could and gave the names of several individuals from whom she thought she could purchase marijuana. She was unable to contact those individuals at that time. Gregory Paulson's name was not mentioned in that conversation, although other individuals named Paulson were mentioned. When the officer called the residence several hours later, the juvenile told him that she had been able to obtain marijuana for him. The officer went to her residence and gave her thirty-five dollars. He then observed her leaving the residence and getting into a black Trans Am. The automobile left the area for approximately three to four minutes and then returned. The juvenile then gave the officer a bag a marijuana. The juvenile testified that she bought the marijuana from Gregory Paulson, her cousin. The identity of Paulson as the

¹ The *Trombetta* and *Youngblood* tests were adopted by Wisconsin in *State v. Oinas*, 125 Wis.2d 487, 490, 373 N.W.2d 463, 465 (Ct. App. 1985) and *State v. Greenwold*, 189 Wis.2d 59, 67, 525 N.W.2d 294, 297 (Ct. App. 1994). Citing *State v. Amundson*, 69 Wis.2d 554, 230 N.W.2d 775 (1975), Paulson argues that he only needs to show that relevant and material evidence was destroyed. In *Amundson*, the tape that was destroyed was relevant because the defense alleged coercion and the tape would have made that defense more or less likely. Here, the only potential use of the tape was to challenge the identification of the marijuana seller. The facts alleged by the defense to be contained in the tape, if true, would not cast doubt on the identification. Therefore, even if the *Amundson* holding is correctly applied to this case, it provides no basis for relief on the facts presented here.

driver was further confirmed by an investigator who had the premises under surveillance, a videotape of the driver and a still photograph from which Gregory Paulson was identified. The vehicle registration also confirmed Paulson's identity.

Assuming the destroyed tape contained the information suggested by Paulson, it does not tend to negate the identification of Paulson as the source of the marijuana. There is no reason to believe that the juvenile gave the officer an exhaustive list of all of the people who might supply her with drugs. The fact that the juvenile knew other people who might supply her with drugs is neither exculpatory nor potentially useful to the defense. Because the tape had no obvious value to the defense, Paulson has not established bad faith by the police for their failure to recognize any potential value in this innocuous tape.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.