

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2004AP3346-CR

Cir. Ct. No. 2003CF5077

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAVIER BAUTISTA-SANCHEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Javier Bautista-Sanchez appeals a judgment convicting him of two counts of possession with intent to deliver THC, as well as an order denying his motion for postconviction relief. Bautista-Sanchez argues the destruction of an officer's contemporaneous notes taken when Bautista-Sanchez

consented to a search of his vehicle and home violated his due process rights. Accordingly, he contends the circuit court erred when it denied his motion to suppress evidence obtained in those searches. We conclude the officer's notes were neither potentially exculpatory nor destroyed in bad faith and therefore affirm.

BACKGROUND

¶2 On September 3, 2003, Bautista-Sanchez was stopped and arrested by Timothy Burch, an officer assigned to the Milwaukee Metropolitan Drug Enforcement Group. Burch advised Bautista-Sanchez of his *Miranda*¹ rights. Bautista-Sanchez waived his rights and spoke with Burch. Burch took contemporaneous notes of this conversation. Bautista-Sanchez eventually signed a consent to search form for his vehicle and home. Burch's conversation with Bautista-Sanchez and the consent form were in English.

¶3 Large quantities of marijuana were seized in the searches of Bautista-Sanchez's vehicle and home. Bautista-Sanchez was transported to the police station, where he was again advised of his *Miranda* rights in English. Burch used his notes to draft a written statement, which he read to Bautista-Sanchez. Bautista-Sanchez signed and dated the statement. Burch then destroyed his notes.

¶4 Bautista-Sanchez was charged with two counts of possession with intent to deliver marijuana. He moved to suppress the evidence obtained from the searches of his vehicle and home. He claimed he did not understand English and,

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

therefore, he could not knowingly and voluntarily waive his *Miranda* rights or consent to the searches. The circuit court denied the motion to suppress. Bautista-Sanchez subsequently pled guilty to both charges and was sentenced.

¶5 Bautista-Sanchez then moved for postconviction relief, asking the court to reconsider its ruling on his motion to suppress. He argued his due process rights were violated when Burch destroyed his notes, which were potentially exculpatory evidence. Burch testified that he used the notes to write the statement Bautista-Sanchez eventually signed and, after Bautista-Sanchez signed the statement, Burch destroyed the original notes. The court found the notes had no exculpatory value, nor had the officer destroyed them in bad faith. Accordingly, it denied the postconviction motion.

STANDARD OF REVIEW

¶6 Whether Burch's destruction of his notes violated Bautista-Sanchez's due process rights raises a question of constitutional fact. We uphold the circuit court's findings of historical fact unless clearly erroneous. *State v. Martwick*, 2000 WI 5, ¶18, 231 Wis. 2d 801, 604 N.W.2d 552. However, we review the application of historical facts to the constitutional principles independently. *Id.*

DISCUSSION

¶7 Evidence destruction by the State constitutes a due process violation if either of the following tests are met: (1) the State failed to preserve evidence that is apparently exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means; or (2) the State acted in bad faith by failing to preserve evidence that is potentially

exculpatory. *See State v. Greenwold*, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994).

¶8 Bautista-Sanchez contends the second test has been met, asserting that the notes were potentially exculpatory evidence and that Burch acted in bad faith when he destroyed the notes. First, Bautista-Sanchez argues that the notes were potentially exculpatory evidence because they were the “best contemporaneous evidence” of what he said to Burch. He asserts that the notes could have been compared to the written statement and revealed inconsistencies.

¶9 However, Bautista-Sanchez fails to explain what inconsistencies might exist or what other potentially exculpatory value the notes might have. Regarding the search of his vehicle, Bautista-Sanchez testified at the postconviction motion hearing that he consented to that search. While Bautista-Sanchez posits that the notes might reflect that he “did not agree to the search of the home or did not respond, or appeared not to fully understand,” we agree with the circuit court’s assessment of the potential evidentiary value of the notes:

[T]he defendant’s position was that he had no knowledge of the consent he had purportedly given allowing officers to search his home because he didn’t understand enough English. ... Defendant never testified that he told the officer that he did not understand that he was also consenting to a search to his home, so what other exculpatory information could one expect to recover from a reading of the scratch notes? It is highly unlikely, given defendant’s claim that he did not understand what Officer Burch told him, that such information would have appeared in the officer’s scratch notes, and therefore, it is highly doubtful that anything in his notes would have corroborated defendant’s alleged lack of understanding in this regard. In order [for the defendant] to succeed in this motion, the court would have to find that the officer made a note of something that was never sufficiently communicated to him or never communicated to him at all.

Accordingly, we agree with the circuit court that Bautista-Sanchez has failed to demonstrate that Burch's notes were potentially exculpatory evidence.

¶10 We likewise reject Bautista-Sanchez's argument that Burch destroyed the notes in bad faith. Bad faith is shown if: (1) Burch was aware of the potentially exculpatory value or usefulness of the notes he destroyed; and (2) Burch acted with official animus or made a conscious effort to suppress exculpatory evidence. *See id.* at 69. Bautista-Sanchez cites this two-prong test, but fails to explain how the facts meet the test. Instead, he merely asserts bad faith exists because Burch did not explain why he destroyed the notes and the destruction "was obviously done intentionally."

¶11 However, Burch testified regarding his intentions as follows:

[PROSECUTOR]: Well, when you took that statement from [Bautista-Sanchez] in the squad car did you make any notes?

[BURCH]: Yes.

[PROSECUTOR]: Where are those notes?

[BURCH]: After I wrote the statement up, had the defendant, Mr. Sanchez review the statement along with myself[,] I destroyed the notes.

[PROSECUTOR]: You destroyed that evidence?

[BURCH]: The evidence became my statement that I wrote up.

[PROSECUTOR]: Okay. But we can't check if that's what you wrote because it's gone now; is that right?

[BURCH]: The defendant reviewed my statement and signed that.

Burch's testimony reveals that, while he intentionally destroyed the notes, he did not consciously suppress exculpatory evidence or act with "official animus." *See*

id. Burch believed he preserved the “evidence” contained in the notes by using them to create the statement that Bautista-Sanchez signed. Bautista-Sanchez has failed to demonstrate that the notes had potentially exculpatory value or were destroyed in bad faith by Burch. Accordingly, his due process rights were not violated by the notes’ destruction.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

