COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP451-CR **Cir. Ct. No. 2006CT1363**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL G. WOLF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Daniel Wolf appeals a judgment of conviction for operating a vehicle while intoxicated, fourth offense. Wolf contends the circuit

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

court erroneously denied his motion to dismiss based on the State's failure to preserve exculpatory evidence. We disagree and affirm.

BACKGROUND

¶2 State trooper Lewis Judge testified he was driving on Highway 41 around 1:30 a.m. on September 2, 2006, when he observed Daniel Wolf's motorcycle weave within its lane quite a distance ahead. After he caught up to the motorcycle, Judge observed it travel six inches over the fog line and then swerve abruptly back to the center line before easing back to the middle of the lane. Judge followed Wolf about one-half mile when Wolf exited the highway and stopped at a red light. As he stopped, Wolf almost tipped the motorcycle on its side. Wolf waited until the light turned green before proceeding, even though no traffic prevented him from making the right turn. Judge followed Wolf through the intersection and activated his emergency lights to effect a traffic stop. After Wolf stated he could not finish the walk-and-turn test and refused to complete the rest of the field sobriety tests, Judge arrested him. Testing indicated his blood alcohol concentration was .289%.

¶3 Judge's vehicle was equipped with a video camera, which automatically begins recording when the emergency lights are turned on. The camera could also be turned on manually, but Judge had "pretty rare[ly]" done so in the past. His normal practice was to let the video come on when he activated his emergency lights. Judge testified that his initial observations of Wolf's driving would therefore not be recorded. He stated it was the Wisconsin State Patrol's written policy that troopers maintain their own videotapes for three months. No storage records are kept.

¶4 Wolf requested a copy of the videotape from the State on April 27, 2007. Judge testified he searched the filing cabinet where he stores his videotapes and was unable to find the tape. He had no idea what happened to it.

¶5 Wolf filed both a motion to suppress, claiming there was no reasonable suspicion for the traffic stop, and a motion to dismiss based on the State's loss of the videotape. A joint motion hearing was held, at which time the circuit court denied the motion to suppress. After further briefing, the court also denied the motion to dismiss. Wolf pled guilty and this appeal follows.

DISCUSSION

¶6 Wolf does not challenge the denial of the motion to suppress. Rather, he contends the circuit court erroneously denied his motion to dismiss because the State failed to preserve exculpatory evidence that could have conclusively demonstrated Judge did not have reasonable suspicion for the traffic stop.[2]

¶7 When the State fails to preserve evidence, the defendant's right to due process can be violated in either of two ways. ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994) (***Greenwold II***). The first is when police fail 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 (1984).

[2] "A guilty plea, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea." ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). Nonetheless, the guilty-plea-waiver rule is a rule of administration and not of power. ***State v. Riekkoff***, 112 Wis. 2d 119, 124, 332 N.W.2d 744 (1983). Because the State did not argue waiver and instead addressed the merits of Wolf's evidence destruction claim, we elect to also reach the merits.

To satisfy this standard, the evidence must both: (1) "possess an *exculpatory value* that was *apparent* to those who had custody of the evidence ... before the evidence was destroyed, *and* (2) ... be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." ***State v. Oinas***, 125 Wis. 2d 487, 490, 373 N.W.2d 463 (Ct. App. 1985).

¶8 The second way is when the State, acting in bad faith, fails to preserve evidence that is merely potentially useful. ***Arizona v. Youngblood***, 488 U.S. 51, 58 (1988); ***State v. Greenwold***, 181 Wis. 2d 881, 884-85, 512 N.W.2d 237 (Ct. App. 1994) (***Greenwold I***) (adopting the federal ***Youngblood*** analysis). The defendant has the burden of proving bad faith, by showing the State acted with official animus or made a conscious effort to suppress the evidence. ***Greenwold II***, 189 Wis. 2d at 69-70.

¶9 When reviewing a claim that evidence was lost or destroyed in violation of due process, we independently apply the constitutional standard to the facts as found by the circuit court. ***Id.*** at 66-67. At the circuit court level, Wolf conceded the videotape was not apparently exculpatory, arguing only that he met the potentially useful test. On appeal, Wolf contends he satisfied his burden under both the apparently exculpatory and potentially useful standards.[3]

¶10 First, as to the apparently exculpatory standard, Wolf disputes what the tape would have shown if the video recorder was running prior to initiation of

[3] The circuit court concurred with Wolf's initial position, concluding "there is nothing known of any real or actual exculpatory value in this tape …." The State has briefed the issue of whether the videotape constituted apparently exculpatory evidence. Therefore, because the circuit court considered the issue, we also address it despite Wolf's earlier concession. Further, the initial determination of whether the evidence was apparently exculpatory or merely potentially useful is a component of the broader due process analysis.

the traffic stop. However, the circuit court accepted Judge's testimony that the video camera did not commence recording until he turned on the vehicle's emergency lights. Given that finding, Wolf cannot show the tape had any exculpatory value that would have been apparent to Judge prior to the tape's loss or destruction. In essence, regarding the pertinent timeframe, no video ever existed.

¶11 Further, even if the tape did include the earlier events, Judge's testimony indicated the tape would have been inculpatory—not exculpatory. Again, the circuit court accepted that testimony as truthful. In response, Wolf complains it is impossible to meet the apparently exculpatory standard in the context of a missing videotape.

¶12 In a case cited by the State, our supreme court recognized the impossibility of proving the precise contents of a destroyed audiotape and held it was unnecessary for a defendant to demonstrate a tape's contents were exculpatory. ***State v. Amundson***, 69 Wis. 2d 554, 577-78, 230 N.W.2d 775 (1975). But, foreshadowing the federal ***Youngblood*** ruling, the court held it was

then necessary to assess the good or bad faith of the State in such a circumstance. ***Amundson***, 69 Wis. 2d at 577-80.[4]

¶13 Turning to the potentially useful standard, Wolf acknowledges there is no evidence indicating the State intentionally misplaced or destroyed the tape in an attempt to suppress evidence. Instead, Wolf argues the State's lack of good faith to preserve the tape constitutes bad faith under ***Greenwold I***. That contention was explicitly rejected in ***Greenwold II***, 189 Wis. 2d at 68-69 ("[T]here is no bad faith when the police negligently fail to preserve evidence which is merely potentially exculpatory."). Therefore, Wolf also failed to satisfy the standard for potentially useful evidence. While the State was unable to explain what ultimately happened to the videotape, Wolf did not make a specific request for it until nearly eight months after the incident. Judge was only required by State Patrol guidelines to maintain the tape for three months.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[4] However, in contrast to the federal standard later adopted by this court in ***Greenwold I***, ***Amundson*** applied a totality of the circumstances test, holding it was necessary to take into consideration the degree of negligence or bad faith by the government, the importance of the evidence lost, and the other evidence of guilt adduced at trial. ***State v. Amundson***, 69 Wis. 2d 554, 577-80, 230 N.W.2d 775 (1975); ***State v. Greenwold***, 181 Wis. 2d 881, 512 N.W.2d 237 (Ct. App. 1994) (***Greenwold I***). The parties here do not address the differing standards set forth in those cases. While ***Greenwold II*** observed that our state due process clause is the substantial equivalent of the federal version, neither ***Greenwold*** case mentioned the earlier ***Amundson*** opinion. ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994) (***Greenwold II***). Our independent research did not reveal any case by our supreme court endorsing the holding in ***Greenwold I***. Nonetheless, the matter is not dispositive in this case, as we would reach the same result under either standard. We apply the ***Greenwold I*** standard, because that is the approach utilized by both parties.