COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2486-CR **Cir. Ct. No. 2006CT1010**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DANIEL W. KOHEL,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Reversed and cause remanded with directions.*

¶1 NEUBAUER, J.[1] The State appeals from a judgment dismissing with prejudice its misdemeanor charge against Daniel W. Kohel for operating

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

while intoxicated (OWI), third offense. The trial court entered judgment based on its determination that the State's failure to produce a reliable copy of the video taken during the stop of Kohel's vehicle violated Kohel's right to discovery. While we agree with the State that this discovery violation does not support dismissal with prejudice pursuant to WIS. STAT. § 971.21(7m) (2007-08), we nevertheless conclude that grounds for dismissal may exist if there was a violation of Kohel's due process rights. We therefore reverse the judgment and remand for additional findings consistent with the analysis set forth in ***State v. Greenwold (Greenwold II)***, 189 Wis. 2d 59, 525 N.W.2d 294 (1994), as to the nature of the evidence and the nature of the police conduct in losing the evidence.

BACKGROUND

¶2 The facts underlying the issue on appeal are largely undisputed. On June 23, 2006, Kohel was stopped and arrested by Wind Point Officer Chad Schulman for OWI, third offense. The Racine county district attorney issued criminal charges against Kohel on July 19, 2006. On July 31, 2006, Kohel filed a discovery request which included, among other things, "any videotape of the defendant concerning the alleged offense." Kohel never received a response. Kohel also sent an open record request for any video recording directly to the Wind Point police department. Kohel received no response.

¶3 On January 9, 2008, the parties appeared for jury trial. While in court, Schulman advised that a videotape of Kohel's arrest existed. Trial was

adjourned.[2] On January 25, 2008, Kohel wrote a letter to the Racine county district attorney's office requesting a copy of the video.[3] The district attorney's office responded that the prosecution had received DVDs from the Wind Point police department, but they were blank.

¶4 On March 13, 2008, defense counsel received a VHS copy of the video of Kohel's arrest, which Kohel believed appeared "incomplete," because it does not show Kohel driving or his arrest. It is approximately twelve minutes in its entirety, beginning with Kohel's stopped vehicle and ending with his failed attempt to perform a preliminary breath test.

¶5 On March 31, 2008, the defense again wrote to the district attorney's office requesting confirmation or denial that a complete video of Kohel's stop and arrest exists. The State did not respond.

¶6 Kohel's counsel wrote again on June 23, 2008, with the same request. In a follow-up call the next day, Kohel's counsel was directed to leave a message on a specific attorney's voicemail, which he did. He again received no response. Finally, on August 11, 2008, Kohel's counsel spoke with Assistant District Attorney Marc Christopher, who advised he would investigate the matter.

[2] The State stipulates to Kohel's recitation of the history of the case as set forth in his motion to dismiss. Thus, while the motion to dismiss refers to facts or documents not otherwise included in the appellate record, we nevertheless include these uncontested facts in laying out the history of the case.

[3] As noted, the appellate record does not include a copy of this correspondence which the motion states was sent to Attorney Jeremy Arn and responded to by Attorney Ryan Wetzsteon. We presume that these attorneys were with the Racine county district attorney's office.

¶7 On August 13, 2008, the parties met before the court to determine the status of the search for the original video. Kohel's counsel advised that he was holding off on filing a motion to dismiss until the parties could get to the bottom of the status of the original tape. The State's attorney advised that the State "should be able to get it within a day or so," and suggested adjournment. The court and defense counsel discussed whether the tape was complete, or whether it had exculpatory evidence on it, and mused that it was unknown. The court set the matter over until August 15, 2008, to determine the status of the video. The trial was scheduled for one week later—on August 20, 2008. The court stated that it wanted answers at the Friday, August 15 hearing. Kohel's counsel indicated that he needed resolution by week end, in order to prepare for the following Wednesday trial.

¶8 On August 15, the parties again met before the court, and Assistant District Attorney Christopher appeared for the State. The State advised the court that it had been unable to find the original copy of the tape. The State did not know if it had been misplaced, but it could not be located where it was supposed to be. Defense counsel advised that he was moving to dismiss due to the State's failure to comply with discovery requests, and also for destruction of evidence. Christopher was provided with an opportunity to "say [anything] in addition to what hasn't already been said." He questioned whether the tape was incomplete—saying it was "a question."

¶9 Kohel's counsel faxed his motion, and the court issued its decision on August 15, 2008, without permitting the State time to respond to the motion. The court dismissed the charges with prejudice, noting that the proceeding had been pending for two years, the State had failed to disclose the video, its later

production of an apparently incomplete video, and the defendant's right to the "absolute production of the original video upon his discovery request."

¶10 The State appeals.

DISCUSSION

¶11 At the outset, we address the State's contention that the trial court lacked authority to dismiss the charge against Kohel based on a discovery violation. We agree that WIS. STAT. § 971.23(7m), governing sanctions for failure to comply with discovery in a criminal case, does not provide for dismissal.[4] Kohel concedes as much on appeal. Rather, Kohel's sole argument on appeal is that the State's failure to disclose the video recording and the subsequent loss of the video recording violated his due process rights. The State contends that if the trial court dismissed the case on due process grounds, it did so without making the requisite findings and remand is necessary for further fact finding.

¶12 The due process clause of the Fourteenth Amendment to the United States Constitution imposes a duty on the State to preserve exculpatory evidence.

[4] WISCONSIN STAT. § 971.23(7m) provides:

> SANCTIONS FOR FAILURE TO COMPLY. (a) The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance.
>
> (b) In addition to or in lieu of any sanction specified in par. (a), a court may, subject to sub. (3), advise the jury of any failure or refusal to disclose material or information required to be disclosed under sub. (1) or (2m), or of any untimely disclosure of material or information required to be disclosed under sub. (1) or (2m) ….

State v. Greenwold, 181 Wis. 2d 881, 885, 512 N.W.2d 237 (Ct. App. 1994) (***Greenwold I***). As to the loss of evidence, the due process analysis is two-pronged. ***Greenwold II***, 189 Wis. 2d at 67. A defendant's due process rights are violated if the police: (1) fail to preserve evidence that is apparently exculpatory, or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory. ***Id.***

¶13 The inquiry on the first prong is whether police failed to preserve evidence "that might be expected to play a significant role in the suspect's defense." ***State v. Oinas***, 125 Wis. 2d 487, 490, 373 N.W.2d 463 (Ct. App. 1985) (discussing ***California v. Trombetta***, 467 U.S. 479, 488 (1984)). To satisfy this standard of materiality, 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." ***Oinas***, 125 Wis. 2d at 490.

¶14 The inquiry on the second prong of the ***Greenwold II*** analysis is whether the State, acting in bad faith, failed to preserve evidence that is merely potentially useful. ***Greenwold I***, 181 Wis. 2d at 884-85 (adopting the analysis set forth in ***Arizona v. Youngblood***, 488 U.S. 51, 58 (1988)). If so, 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.

¶15 Kohel argues on appeal both that the evidence was "apparently exculpatory" and that if it was only "potentially exculpatory" then the police acted in bad faith in failing to preserve it despite Kohel's repeated requests for it. The

State cites to the following statement in the trial court's decision as its finding that the video was only potentially exculpatory: "[T]he defendant claims there is information on the original video that could be exculpatory; an answer to this question will never be known." However, the trial court did not examine the video evidence issue in the context of the analysis clarified in ***Greenwold II***. For example, on the preliminary question as to whether the State failed to preserve evidence, the court did not make any findings as to whether the video was incomplete. While the trial court commented in its decision that the video "appears to be incomplete," this inconclusive statement is not accompanied by any findings of fact.[5]

¶16 The trial court's application of a constitutional standard to the conduct of police officers in preserving evidence presents a question of law subject to de novo review. ***Id.*** at 66. "The reviewing court has the duty to apply constitutional principles to the facts as found in order to ensure that the scope of the constitutional protections does not vary from case to case." ***Id.*** at 66-67 (citation omitted). Given the lack of testimony from any officer involved in the original videotaping or the subsequent storing of the videotape and the lack of trial court findings based thereon, we are unable to apply this standard to the constitutional issue on appeal. We therefore reverse the trial court's judgment and

[5] Nor are we able to identify facts to support a conclusion one way or another as to whether the video provided was complete. The defendant asserts in his brief that the arresting officer informed the court at the January 9, 2008 trial as to the existence of "a video recording of Mr. Kohel's driving, stop and arrest." However, we have no record of that hearing. Similarly, while the trial court concludes that the defendant is entitled to absolute production of the original video, there are no factual findings as to whether or not the VHS version constitutes comparable evidence.

remand for further fact finding bearing in mind the standard set forth in ***Greenwold II***.[6]

By the Court.—Judgment reversed and cause remanded with directions.

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

[6] We note that, while Kohel argues that grounds exist to uphold the dismissal, he contends that if the record reflects that the trial court failed to make the appropriate findings of fact the matter should be remanded for further fact finding on Kohel's motion to dismiss. The State concedes that Kohel's request is appropriate. For example, the State observes with respect to the recording: "There is no indication in the record of what the procedures for the Wind Point Police Department are, nor is there any indication as to how their equipment works. These questions could only be answered through a fact-finding hearing." For the reasons stated above, we agree that further inquiry is necessary.