COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1969-CR **Cir. Ct. No. 2007CF81**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

GREGORY ALLEN GORDON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Bayfield County: JOHN P. ANDERSON, Judge. *Order reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The State appeals an order excluding testimony as a sanction for failing to preserve surveillance video at the Bayfield County Jail. The State argues that the circuit court erroneously exercised its discretion by

failing to apply the proper legal standard, and by reaching a conclusion not supported by facts in the record. We agree and therefore reverse the order.

BACKGROUND

¶2 In December 2007, Gregory Gordon was charged with operating while intoxicated, as an eighth offense, operating with a prohibited alcohol concentration, criminal damage to property and resisting an officer. The complaint alleged the following. Gordon backed his pickup truck into the side of a car when he was leaving a casino. Gordon was found by a responding police officer hiding on the side of the casino, and denied having driven his truck. Casino security informed the officer that a security videotape showed Gordon driving the truck when it hit the car. Gordon was ultimately arrested for OWI, and during his transport to a medical facility for a blood draw, Gordon kicked out the rear window on the squad car. His legs were consequently shackled. The subsequent blood draw showed a blood alcohol level of .226.

¶3 Gordon was transported to the jail and after exiting the squad car, an officer asked if Gordon was going to cooperate. Gordon responded that he was not sure and subsequently tried to pull away from the officers both outside and inside the building. Gordon physically resisted attempts to get him into a room for a search. Gordon continued to resist while officers moved him into the booking room. Gordon stated he would put on a jail uniform, but after the leg shackles and one of the handcuffs were removed, Gordon refused and started again to physically resist. As the officers attempted to put him into a cell, Gordon "kicked his feet out from under himself and fell to the floor." He refused to stand up, using "his dead weight to resist being raised up," and the officer ultimately dragged Gordon to the cell.

¶4 Gordon filed pro se motions to dismiss the resisting charge, alleging that he was too intoxicated to resist and the police and prosecutor failed to preserve surveillance video of his conduct at the jail. The court ultimately denied the dismissal motion, concluding that the allegations forming the basis for the resisting charge included conduct that occurred both outside and inside of the building. As a sanction for failing to preserve the video, however, the court ordered the exclusion of any testimony regarding Gordon's conduct once he entered the jail.[1] The State's appeal follows.

DISCUSSION

¶5 When the State fails to preserve evidence, a defendant's due process rights can be violated in either of two ways. ***State v. Greenwold (Greenwold II)***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994). 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). To satisfy this standard, the evidence must: (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) (emphasis added).

¶6 The second way is when the State, acting in bad faith, fails to preserve evidence that is "potentially" exculpatory. ***Arizona v. Youngblood***, 488 U.S. 51, 58 (1988). There is no bad faith, however, "when the police negligently

[1] For purposes of appeal, the court severed the resisting charge from the other pending charges.

fail to preserve evidence which is merely potentially exculpatory." ***Greenwold II***, 189 Wis. 2d at 68-69. A 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. ***Id.*** at 69.

¶7 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. Here, the court found that the video was "presumed to be exculpatory in nature," and expressed its belief that there is a blanket rule requiring the State to preserve such videos once in existence. The court further found that the State was aware of the video's potential exculpatory value and "acted with official animus or made a conscious effort to suppress exculpatory evidence by failing to recognize the significance of this particular arrest and preserve the tape in question." The record, however, does not support the court's determinations.[2]

¶8 Though not based on any sworn testimony, it appears to be undisputed that the surveillance video automatically records over itself after approximately thirty days. Gordon argued that all of his conduct upon arriving at the jail was recorded by various cameras located throughout the building; however, the prosecutor informed the court that only the camera in the booking room was operational. In any event, because there is no evidence that anybody ever viewed the video, the record does not establish that any of Gordon's conduct was successfully taped. Further, there is no evidence that Gordon requested the

[2] Although the court heard the parties' arguments at two separate hearings, neither sworn testimony nor other evidence relevant to this issue were presented at either hearing. Deciding Gordon's motion required findings of fact, which in turn requires evidence in the record.

video prior to the point at which it was erased and reused. Moreover, even Gordon acknowledged that any recording might not be exculpatory.

¶9 Applying the proper legal standard, we conclude that even if the camera was operational, the video's alleged exculpatory value is not "apparent" because we do not know what it would have shown. Moreover, this purported evidence offered only a very low probability of being exculpatory given the allegation that Gordon had forcibly kicked out the window of a squad car not long before arriving at the jail. The record therefore does not establish that the police failed to preserve "apparently" exculpatory evidence.

¶10 The record likewise fails to establish bad faith on the State's part. While Gordon's motion claimed the video might show he was too incapacitated to intentionally resist, Gordon fails to sufficiently develop any argument on appeal regarding the "potentially" exculpatory nature of the evidence. In fact, Gordon's brief does not address the State's arguments but, rather, argues issues that are not part of this appeal.[3] Even assuming the video was "potentially" exculpatory, the record fails to show either official animus or a conscious effort to suppress the video by the State. In the absence of a timely request to preserve the video, the cost-saving policy of re-using it does not support the court's bad faith finding. *See* ***State v. Tarwid***, 147 Wis. 2d 95, 105, 433 N.W.2d 255 (Ct. App. 1988) (no evidence of bad faith when evidence destroyed in accordance with police procedure). Because no basis exists to conclude that Gordon's due process rights were violated by the State's failure to preserve the surveillance video, we reverse

[3] Gordon argues the court erred by denying his motion to dismiss the resisting charge. Because Gordon's untimely notice of cross-appeal was stricken by this court, his challenge to the court's denial of his dismissal motion is not properly before this court.

the order and remand the matter with directions to vacate the sanction excluding testimony regarding Gordon's conduct during his arrival and booking at the Bayfield County Jail.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).