COURT OF APPEALS DECISION DATED AND RELEASED

November 28, 1995

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. 95-1805-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY A. KASPAREC,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Burnett County: JAMES H. TAYLOR, Judge. *Affirmed in part and reversed in part.*

MYSE, J. Anthony Kasparec appeals a judgment of conviction for hit and run contrary to § 346.67(1), STATS., and orders denying his motions for postconviction relief. Kasparec raises four issues on appeal: (1) whether the State breached its duty to disclose exculpatory evidence to the defendant; (2) whether dismissal is warranted for the State's failure to preserve arguably exculpatory evidence; (3) whether he was denied his constitutional right to testify at trial; and (4) whether the trial court erroneously exercised its discretion by ordering his attorney to pay one-half of the costs demanded by witnesses subpoenaed by the defense to the motion hearing. This court rejects the first three arguments but agrees that the trial court erroneously exercised its

discretion in ordering his attorney to pay a portion of the costs demanded by witnesses. Therefore, this court affirms in part and reverses in part.

Charles Swenson was driving his pickup truck north on Highway 48 at approximately 3 p.m. when a trailer being towed by an approaching pickup truck became unattached and came into Swenson's lane of traffic. Swenson's vehicle collided with the trailer and went up over the top of it, causing extensive damage to his truck. The other truck never stopped and Swenson reported the accident to police.

A year later, formal charges were brought against Kasparec when Harvey Kempf gave a statement to police that Kasparec was driving the truck in question. At trial, Kempf testified that he accompanied Kasparec who was driving a truck towing a trailer owned by Roger Thompson. Kempf testified that the trailer became unattached while they were driving down the highway and collided with another vehicle. Kempf further testified that Kasparec fled the scene, telling Kempf that he did not have insurance.

Kasparec represented himself at trial and attempted to show that he was in South Dakota on the date in question. Immediately before the trial, Kasparec asked the district attorney if he knew what happened to the trailer and the district attorney replied that he had no idea. During the trial, the district attorney found out the location of the trailer but did not disclose it to Kasparec. The jury returned a verdict of guilty to misdemeanor fleeing the scene of an accident.

Following the guilty verdict, Kasparec secured counsel and located the trailer. Kasparec and Walter Raschick, an investigator, took measurements of the trailer showing that the height of the trailer hitch was 12.75 inches from a level surface and the trailer construction was straight from the tongue to the rear of the trailer. As a result, Kasparec claimed that while the trailer could have been hooked up to the truck with its hitch located at 28 inches, the steep incline of the trailer in such a position would leave only 1.1 inches of clearance at the rear of the trailer.

Kasparec filed a motion for a new trial claiming that the State had a duty to disclose arguably exculpatory evidence, namely the trailer, and that he was denied his right to testify at trial. Kasparec obtained a court order that required the trailer to be kept at a police officer's residence allowing Kasparec reasonable access to it. Kasparec also subpoenaed the trailer to the motion hearing. However, between the time Kasparec took measurements and the hearing, the owner retrieved the trailer and made significant alterations to it. The trial court denied the motion for a new trial and ordered the district attorney and Kasparec's attorney to each pay half of the costs demanded by two witnesses subpoenaed to the hearing. Kasparec then filed a motion to dismiss based on the alterations. The trial court denied the motion and Kasparec appeals.

Kasparec first contends that the State breached its duty to disclose exculpatory evidence to the defendant. Kasparec argues that the trailer was exculpatory evidence and the prosecutor should have provided him with the trailer. Suppression of evidence by the prosecution violates due process where the evidence is both favorable to the accused and material to either guilt or punishment. ***State v. Garrity***, 161 Wis.2d 842, 848, 469 N.W.2d 219, 221 (Ct. App. 1991). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***Id.*** at 847-48, 469 N.W.2d at 221. This test for materiality covers the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused. ***Id.*** at 847, 469 N.W.2d at 221.

In ***State v. Ruiz***, 118 Wis.2d 177, 194, 347 N.W.2d 352, 360 (1984), our supreme court stressed the importance of the trial court's evaluation of the newly discovered evidence. Here, the trial court determined that the evidence was not exculpatory and was consistent with the State's theory that the trailer became unattached when it hit a bump. The trial court further stated "if he produces that trailer, shows that to the jury, there's absolutely no escape." Accordingly, the trial court determined at least implicitly that there was no reasonable probability of a different result if the evidence would have been disclosed. Although Kasparec argues that it would have been impossible for him to be driving at the speed alleged with the minimal clearance, this court agrees with the trial court. According to the measurements, there was some minimal clearance and such an angle would be consistent with the trailer becoming unattached. Accordingly, this court concludes that viewed in light of

the entire record, the trailer was not sufficient to raise a reasonable doubt which did not otherwise exist. Therefore, the prosecutor did not breach his duty to disclose exculpatory evidence.

Next, Kasparec contends that the action against him should be dismissed because the State committed misconduct when it failed to preserve arguably exculpatory evidence in direct violation of a court order. Kasparec contends that the best evidence he could present at the hearing for a new trial was the actual trailer joined to the truck. Because the owner retrieved the trailer and made substantial alterations to it, it was useless for evidentiary purposes.

Due process imposes a duty on the State to preserve exculpatory evidence. ***State v. Hahn***, 132 Wis.2d 351, 355-56, 392 N.W.2d 464, 466 (Ct. App. 1986). However, if the evidence is only potentially useful evidence, the defendant has the burden of proving bad faith on the part of the State. ***State v. Greenwold***, 189 Wis.2d 59, 69, 525 N.W.2d 294, 298 (Ct. App. 1994). Bad faith can only be shown if the State was aware of the potentially exculpatory value of the evidence and the State acted with official animus or made a conscious effort to suppress exculpatory evidence. ***Id.***

This court concludes that Kasparec failed to meet his burden of proving bad faith. There is no evidence that the State acted with animus or made a cognizant effort to suppress potentially exculpatory evidence. The owner retrieved the trailer and made substantial alterations. There is no evidence that the State had anything to do with the owner either taking the trailer or making the alterations. In addition, Kasparec had already obtained comparable evidence in the form of the measurements. *See* ***id.*** at 67, 525 N.W.2d at 297. Accordingly, this court concludes that dismissal is not warranted for the failure to preserve the trailer in its original condition.

Third, Kasparec argues that he was denied his constitutional right to testify at trial and the trial court erred when it did not allow Kasparec to testify at the motion hearing regarding his wishes to testify at trial. Appellate review of constitutional questions is de novo. ***State v. Woods***, 117 Wis.2d 701, 712, 345 N.W.2d 457, 463 (1984). The record must demonstrate a knowing and voluntary waiver of the defendant's right to testify. ***State v. Wilson***, 179 Wis.2d 660, 672, 508 N.W.2d 44, 48 (Ct. App. 1993). However, the trial court is not

required to conduct a colloquy on the record concerning the defendant's right to testify. ***Id.*** at 672 n.3, 508 N.W.2d at 48 n.3.

Although Kasparec never specifically told the court that he did not wish to testify, this court is persuaded that the record presents sufficient evidence that Kasparec knowingly and voluntarily waived his right to testify on his own behalf. At the jury instruction conference, the trial court told Kasparec that it could advise the jury that he has an absolute constitutional right not to testify and that his decision not to testify must not be considered by the jury in any way and must not influence their verdict in any manner. The court asked Kasparec whether he wanted this jury instruction and Kasparec said "I'll take it." In addition to explaining the consequences of his not testifying, the trial court gave Kasparec an opportunity to present evidence in his case in chief and gave him an opportunity to reopen evidence after he rested. At none of these stages did Kasparec express the desire to testify or seek to present his own testimony. Because the record provides sufficient evidence that Kasparec knew of his right to testify and was given an opportunity to testify, this court concludes Kasparec knowingly and voluntarily waived his right to testify. Therefore, Kasparec was not denied his constitutional right to testify and there was no need for Kasparec to testify at the motion hearing.

Finally, Kasparec argues that the trial court erroneously exercised its discretion by ordering his attorney to pay one-half of the costs demanded by witnesses who were subpoenaed by the defense at the motion hearing. This court can find no authority for the trial court to order the defendant's attorney to pay these costs and the State agrees. In fact, the trial court reversed its decision regarding the half paid by the district attorney. A misapplication of the law is an erroneous exercise of discretion. ***State v. Martinez***, 150 Wis.2d 62, 71, 440 N.W.2d 783, 789 (1989). Therefore, that portion of the order requiring Kasparec's attorney to pay costs is reversed.

By the Court.—Judgment and orders affirmed in part and reversed in part.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.