

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN M. POMA,

Defendant-Appellant.

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UNPUBLISHED

July 18, 1997

No. 195842

Oakland Circuit Court

LC No. 96-145602-FH

Before: Hood, P.J., and McDonald and Young, JJ.

MEMORANDUM.

Defendant appeals by leave granted from the trial court's order denying his motion to dismiss the charge of operating a vehicle while under the influence of liquor (OUIL), third offense, MCL 257.625(1); MSA 9.2325(1); MCL 257.625(7)(d); MSA 9.2325(7)(d), a felony. We affirm.

The instant charge arose after defendant was arrested in Keego Harbor for operating a vehicle under the influence of alcohol. The arresting officer made a videotape of the entire incident, including defendant's driving, appearance, speech, performance of field sobriety tests and his willingness to take a breathalyzer test. The charge against defendant was originally written as a city ordinance violation, but it was then dismissed so that a state law warrant could be issued. According to the Keego Harbor chief of police, Jack Beach, he returned the videotape to service after learning that the municipal charge had been dismissed. Chief Beach stated in a letter to the trial court that he was unaware that the municipal charge had been dismissed because a state law warrant had been issued. In any event, the videotape was subsequently taped over. Defense counsel's motion to dismiss the case was denied. This appeal followed.

Defendant argues that that he was coerced into taking a breathalyzer contrary to his rights and that his behavior and driving on the night in question were exemplary. Defendant contends that the videotape taken by the police would reveal the coercion, as well as his driving and behavior, and rebut the arresting officer's testimony to the contrary. Defendant claims that because the video tape was deliberately destroyed by the police, the law mandates that his case be dismissed without regard to the good or bad faith of the police. We disagree.

Failure to preserve potentially useful evidence does not constitute a denial of due process unless bad faith on the part of the police is shown. *Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988); see also *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993); *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Only when evidence is undeniably exculpatory is the good or bad faith of the State irrelevant. See *Brady v Maryland*, 373 US 83; 83 Ct 1194; 10 L Ed 2d 215 (1963).

In the case at bar, the exculpatory nature of the videotape is disputed; therefore, whether the police acted in good or bad faith is relevant. *Youngblood, supra*. Defendant does not dispute that the videotape was “negligently destroyed” by the police and does not allege that the police acted in bad faith. Accordingly, the court did not err in denying defendant’s motion to dismiss. *Id.*

Affirmed.

/s/ Harold Hood

/s/ Gary R. McDonald

/s/ Robert P. Young, Jr.