

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD LEW BLAIN,

Defendant-Appellant.

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UNPUBLISHED

December 19, 1997

No. 191996

Kent Circuit Court

LC No. 94-063893 FH

Before: O'Connell, P.J., and White and C. F. Youngblood\*, JJ.

MEMORANDUM.

Defendant appeals by right his jury convictions of driving while under the influence of intoxicating liquor, third offense, enhanced by virtue of a third offender adjudication under MCL 769.11; MSA 28.1083. This case is being decided without oral argument pursuant to MCR 7.214(E).

The sole issue raised on appeal concerns defendant's claim that the prosecution destroyed crucial evidence concerning the credibility of the arresting officer's claim to having observed defendant drive a motor vehicle while intoxicated. The defense duly and timely repeatedly requested, before the tape was routinely destroyed for evidentiary purposes by the Grandville Police Department, that the prosecution preserved the tape for use as evidence. The trial court, after an extensive evidentiary hearing on the issue, concluded that the prosecutor had been negligent but had not acted in bad faith in allowing the tape to be reused by the police department. That finding of lack of bad faith is not clearly erroneous.

By way of remedy, the trial court precluded Police Officer Rick Neerken from testifying in the prosecution's case-in-chief. Neerken did subsequently testify in rebuttal for the prosecution. It is unclear from the record how this came about. Defendant's brief asserts that he objected, but the cited pages of transcript revealed no objection.

In any event, the key issue in this case was the credibility of the arresting officer's testimony that he saw defendant driving the vehicle immediately before defendant was stopped and arrested.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Numerous defense witnesses testified that defendant was not driving and that the arrest occurred only after defendant had been sitting in a parked car in the parking lot of a convenience store for 10 to 20 minutes. During opening statement, the prosecutor informed the jury that he was at fault for allowing the tape recording to become unavailable for use at trial. The defense freely was permitted to repeatedly emphasize this point. Similarly, during closing argument the prosecutor again accepted blame for loss of the tapes, while declining to speculate, as defense counsel had done, on what the tapes might have established. On this record, the jury as trier of fact was fully aware of the relevant facts concerning the tape recordings, and its resolution of the conflict in the testimonial evidence is not of questionable validity. Accordingly, any additional remedies beyond what defendant received in the trial court were not required and appellate relief is unwarranted. *People v Hardaway*, 67 Mich App 82, 86-87; 240 NW2d 276 (1976); *People v Leo*, 188 Mich App 417, 427; 470 NW2d 423 (1991); see also *People v Canter*, 197 Mich App 550, 569; 496 NW2d 336 (1992).

Affirmed.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Carole F. Youngblood