

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 8, 2012

v

RICKY CARMICHAEL WILCHER,

Defendant-Appellant.

No. 301487
Wayne Circuit Court
LC No. 10-006562-FH

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

The trial court convicted defendant Ricky Carmichael Wilcher of various weapons offenses based on two Detroit police officers' testimony that defendant discarded a handgun while fleeing the scene of an investigation. Defendant presented a very different version of events. Well before trial, he sought production of video footage recorded by the dashboard cameras on the two police squad cars at the scene. Defendant insisted that the video would either support his story, or would discredit the prosecutor's evidence. A circuit judge ordered production of the video.

The investigating officer provided inaccurate information to the police department's record keeper and the error was not recognized until after the department's database had automatically purged the video footage. In considering defendant's motion to dismiss based on the destruction of this evidence, the trial court found that the police had been negligent, but not grossly negligent, and had not intentionally failed to preserve the evidence. Based on this finding, we affirm.

I. BACKGROUND

At approximately 6:10 p.m. on June 6, 2010, defendant stood with his bicycle at the intersection of Second and Peterboro Streets in the city of Detroit, talking to Terry Lawrence Crawford. Detroit Police Sergeant Michael Jackson drove up in a semi-marked squad car. Detroit Police Officers Richard Whitehead and Lavon Howell drove up in a second vehicle. The officers were all assigned to the Detroit Police Department (DPD) Gang Enforcement Section and were in the area investigating possible narcotics trafficking. Jackson claimed that when he arrived on the scene, defendant and Crawford parted ways. Jackson averred that defendant rode his bicycle quickly down the street, pulled a small, dark object from the pocket of his black hooded jacket, and disposed of the object under a gray Lincoln Continental parked nearby.

Officer Whitehead testified that he did not see defendant remove an object from his jacket or dispose of it under the car. On Jackson's direction, Whitehead searched under the Continental and discovered a loaded handgun. Defendant denied ever possessing a weapon. He asserted that when the officers arrived, Officer Howell immediately conducted a pat-down search of his person and allowed him to leave the scene. The officers arrested defendant approximately ten minutes later while he rode his bicycle down the center of a neighboring street.¹

Defendant was bound over for trial and was arraigned on June 28, 2010. At the arraignment, Wayne Circuit Court Judge Brian R. Sullivan issued an order directing the prosecution to produce the videos taken by the patrol cars' dashboard cameras. At a July 13, 2010 conference, Judge Sullivan queried whether the video-production order had been submitted to the DPD. The prosecution responded that the order had been forwarded to the department and that the officer in charge of the investigation had informed her that the request had been submitted through the proper channels. The court advised the prosecution to follow through with the request to ensure the video was provided well in advance of trial. Judge Sullivan was adamant that the video not be withheld until the eve of trial. However, on September 14, 2010, the day before the scheduled start of trial, defense counsel reported that the video had not been produced.

Between the July 13 conference and the October 19 rescheduled trial date, information regarding the whereabouts of the requested patrol car videos slowly emerged. We know that the prosecution presented the court's June 28 order to Detroit Police Officer David Salazar, the officer in charge of the investigation, at some point in early July 2010. Officer Salazar reviewed the arrest reports filed by Sergeant Jackson and Officers Whitehead and Howell. Unfortunately, the officers did not include their patrol car numbers on their reports. Salazar then contacted the Gang Enforcement Section officer tasked with handling the group's paperwork. That officer provided two patrol car numbers allegedly assigned to Jackson, Whitehead and Howell on June 6. Salazar submitted a request to the Technical Services Bureau for the dashboard camera video footage from those vehicles but the request was returned, apparently because the patrol car numbers were erroneous.

Officer Salazar tracked down Jackson and spoke to him in person. Jackson provided two patrol car numbers—013713 and 062619. Salazar used those numbers to submit a renewed request to the Technical Services Bureau for the patrol car videos. Sergeant David Jones was tasked with searching for the requested footage. He conducted a search of the DPD's video database and found no video footage for either vehicle from June 6, 2010. When questioned at an October 18 hearing, Sergeant Jones testified that he realized while testifying that patrol car 013713 was a 2010 vehicle with an updated video recording system that had to be searched by

¹ When the officers arrived on the scene, Crawford indiscreetly attempted to discard a small bag by tossing it onto the sidewalk. The officers suspected that the bag contained a controlled substance and immediately arrested Crawford. The officers admitted that they paid little attention to defendant at the scene because of Crawford's actions. Crawford later pleaded guilty to possession of less than 25 grams of cocaine in violation of MCL 333.7403(2)(a).

alternative methods. During a break in the proceeding, he contacted an officer in the Technical Services Bureau and was informed that car 013713 was actually a 2001 vehicle that did not have a video recording system. Sergeant Jones was unable to locate video evidence from that car because it did not exist.

Sergeant Jones also testified that no video footage was discovered for patrol car 062619. During his mid-proceeding call to the Technical Services Bureau, Sergeant Jones learned that no patrol car was assigned that number. The September 9 database search had been conducted based on the erroneous patrol car number provided by Officer Salazar, which Salazar had in turn procured from Sergeant Jackson. The Technical Services officer contacted by Jones conducted a search of an intra-department database which tracks the patrol cars assigned to department officers on any given day. From that database, the officer was able to discern that the correct patrol car number was 063619. The DPD's video database maintains footage for only 90 days. On the 91st day, the system automatically purges the video unless a hold is placed on the file. Footage from the scene of defendant's June 6, 2010 arrest, if it existed, was therefore automatically purged on September 5, 2009, four days before Jones conducted his database search. Because of the database's design, Sergeant Jones would have been unable to discern whether the footage had existed but had been deleted or simply had not existed in the first place. Accordingly, even on the date of his original search, Officer Jones would not have been able to determine whether relevant video footage had ever existed from patrol car 063619 or whether it could have exculpated defendant.

Defendant ultimately filed a motion to dismiss the charges against him based on the destruction of and failure to produce the patrol car video footage. Before defendant filed his motion, the case was reassigned to Judge Robert Brzcinski. Judge Brzcinski declined to rule on the matter without further information and ordered an evidentiary hearing. By the October 18 evidentiary hearing, the case had again been reassigned to Judge Lawrence Talon.

Judge Talon declined to dismiss the charges against defendant or to infer that the missing video evidence would have been exculpatory. At the conclusion of the evidentiary hearing, Judge Talon ruled:

I don't think there's any argument that the police acted in bad faith because what we're essentially talking about is that you believe the police's actions were grossly negligent.

. . . [A]s to the 2006 car [car number 063619], when [sic] they had the right scout-car number, or not, they didn't receive that request, I'm going to assume that the police didn't receive it, until shortly before Sergeant Jones filed it on September 9th of 2010. We know that an order was signed in June of 2010 and that had the police received that order earlier they may or may not have discovered that they had the wrong scout-car number and may or may not have been able to find video of that car before the 91st day when the video for that car would have been purged so the question is, if there was video? We know that it was purged for the '06 car after the defense requested it. It might have been before. The police might not have received the request but we know there was an order signed by the Court. We don't know what that video may or may not have shown, all right.

After taking additional testimony from Officer Salazar, the court continued:

One problem is we don't know whether or not any video actually existed for the '06 car or not. We could have had - - and I suppose things could have been done earlier. It certainly would help if the officers in the Department had better records for when different things were done but I think the issue for me is to whether or not this is simply negligence or gross negligence and I think it may be negligence but I don't think it's gross negligence. I think that it's carelessness. I don't think there's any indication that the officers intentionally disregarded the result to others that might follow from their failure to act or not act in this particular case. I think that certainly is an issue that the defense may be able to raise in trial but I don't think that it's gross negligence and for that reason I'm going to deny the defendant's motion to dismiss.

The court later convicted defendant as charged of felon in possession of a firearm in violation of MCL 750.224f, carrying a concealed weapon without a permit in violation of MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm) in violation of MCL 750.227b.

II. FAILURE TO PRODUCE AND DESTRUCTION OF THE EVIDENCE

Defendant challenges the trial court's refusal to dismiss the charges against him or to employ a negative inference based on the DPD's destruction of and failure to produce patrol car 063619's video footage. We review a trial court's ruling on a motion to dismiss for discovery violations for an abuse of discretion. *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). Pursuant to MCR 6.201(B)(1), the prosecution must produce "any exculpatory information or evidence" requested by the defense. If the prosecution violates that duty, the court has the discretion to "order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances." MCR 6.201(J). The defendant bears the burden to show that the evidence was potentially exculpatory and was actually withheld by the prosecution. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992); *People v Calloway*, 169 Mich App 810, 820-821; 427 NW2d 194 (1988), vac on other grounds 432 Mich 904 (1989). We review for an abuse of discretion the trial court's choice of remedy for a discovery violation. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). We review the trial court's underlying factual determinations for clear error. *People v Tracey*, 221 Mich App 321, 323; 561 NW2d 133 (1997); MCR 2.613(C). "Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 281 (2011).

"A defendant is entitled to have produced at trial all evidence bearing on guilt or innocence that is within the prosecutor's control." *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). The prosecution clearly violated the trial court's discovery order. The court ordered the prosecution to produce the video footage recorded by the dashboard cameras on the

two squad cars involved in this situation. The prosecution failed to produce any video from car 063619. This case would be simple if we knew the video's content would match defendant's version of events. "[T]he suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution." *Arizona v Youngblood*, 488 US 51, 55; 109 S Ct 333; 102 L Ed 2d 281 (1988), quoting *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

As no one has seen the subject video footage, defendant can only theorize that its contents would exculpate him. The failure to preserve evidence that is only potentially exculpatory does not automatically constitute a due process violation. *Youngblood*, 488 US at 57. To warrant relief, the defendant must show that the officers acted in bad faith.

Part of the reason for the difference in treatment is found in the observation made by the Court in [*California v Trombetta*, 467 US 479, 486; 104 S Ct 2528; 81 L Ed 2d 413 (1984);] that "[w]henver potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause . . . as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. [*Id.* at 57-58 (second citation omitted).]

This Court has provided similar direction to determine whether the prosecution's suppression or failure to preserve evidence warrants relief. The court must consider whether the action was deliberate; whether the defendant actually requested the evidence; and whether, when considered in hindsight, the defendant "could have put the evidence to not insignificant use." *People v Petrella*, 124 Mich App 745, 752; 336 NW2d 761 (1983). See also *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993).

Defendant requested the subject video footage 22 days after it was recorded and 68 days before it was due to be purged by the DPD's video database. Defendant claimed that the footage would show Officer Howell conducting a pat-down search of defendant without discovering a handgun in defendant's jacket pocket and only then excusing defendant from the scene. If the video's content comported with defendant's description of events, defendant could have used it to impeach Sergeant Jackson's testimony—the only evidence linking him to the handgun discovered under the Lincoln Continental. The prosecution contends that defendant's request for relief must fail as he cannot prove that the video footage from patrol car 063619 ever existed. We will not punish defendant when the DPD's conduct is the sole reason defendant cannot prove

whether the subject video footage was ever available in the department's database. See, e.g., *Petrella*, 124 Mich App at 752 (refusing to hold the defendant responsible for his inability to prove the subject notes would have been exculpatory where the notes "were destroyed soon after they were made and were never shown to defendant").

However, the record evidence supports the trial court's finding that Officer Salazar and Sergeant Jones acted carelessly, but not with bad faith. Sergeant Jones exhibited confusion on the stand, but he merely searched a DPD database for footage connected with patrol car numbers provided by the investigating officer. Sergeant Jones's passive act of allowing the subject footage to automatically delete was not improper. Standing alone, such automatic procedures to clear police department storage space do not evidence bad faith. See *Johnson*, 197 Mich App at 365; *People v Albert*, 89 Mich App 350, 352; 280 NW2d 523 (1979). Moreover, it does not appear that Officer Salazar had any motive to destroy the video evidence. Officer Salazar was not involved in defendant's arrest and appears to have been named officer-in-charge simply due to Crawford's drug charge. Officer Salazar could have ensured the accuracy of the information provided to Sergeant Jones by cross referencing the patrol car number provided by Sergeant Jackson against the intra-department database later used by the Technical Services officer on October 18, 2010. But no evidence suggests that Officer Salazar's failure to do so was the product of bad faith.

Whether Sergeant Jackson acted in bad faith presents a more difficult question. The record reveals that the prosecution quickly provided the court order for production of the dashboard camera footage to Officer Salazar. Officer Salazar asked the Gang Enforcement Section record keeper for the relevant patrol car numbers, but was given inaccurate information by that unnamed officer. Officer Salazar experienced difficulty tracking down Sergeant Jackson to obtain the correct patrol car numbers. When Officer Salazar finally spoke to Jackson, Jackson misidentified the patrol car he had piloted on June 6. The Gang Enforcement officers were unable to readily provide accurate information because they maintained incomplete records and had not produced "run sheets" describing their activities on June 6. Had the officers in the Gang Enforcement Section provided the correct patrol car numbers when originally asked, Officer Salazar could have presented the video request to the Technology Services Bureau within the 90-day window.

The circuit court concluded that Sergeant Jackson's conduct amounted to negligence but not bad faith. Bad faith "is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." *Black's Law Dictionary* (6th ed), p 139. "When the government is negligent, or even grossly negligent, in failing to preserve potentially exculpatory evidence, bad faith is not established." *Monzo v Edwards*, 281 F3d 568, 580 (CA 6, 2002). It potentially could be inferred from the record that Sergeant Jackson's and the Gang Enforcement officers' actions were calculated. However, the circuit court viewed the witness testimony first-hand and rejected that inference. We may not interfere with the trial court's credibility evaluation. See MCR 2.613(C) ("[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."). And no evidence supports that the DPD's routine destruction of the video footage occurred despite knowledge of the evidence's exculpatory value. That the evidence was

destroyed in the course of a routine purge also militates against a bad faith finding. We therefore discern no clear error in the trial court's ruling.

III. ADDITIONAL APPELLATE CLAIMS

Defendant's additional arguments lack merit.

First, contrary to defendant's claims, it is settled that the use of felon-in-possession as the underlying felony for a felony-firearm conviction does not implicate the double jeopardy prohibition against multiple punishments for a single offense. See *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001).

Second, defendant erroneously concludes that the handgun discovered by Officer Whitehead cannot support his convictions because the forensics team could find no comparable fingerprints. A defendant's conviction can be supported by circumstantial evidence and reasonable inferences arising therefrom without any direct physical evidence linking him or her to the crime. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). If believed, Sergeant Jackson's testimony that he witnessed defendant remove a small, dark object from his pocket and discard it under the Lincoln Continental and Officer Whitehead's testimony that no other objects were found under the car could support defendant's convictions.

Finally, defendant waived his claim that the prosecution violated his right to confrontation by submitting the handgun fingerprint analysis report without presenting the expert testimony of the report's preparer. Defense counsel stipulated to the admission of the report without additional testimony and thereby waived any claim of error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Affirmed.

/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher