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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. OTIS VANN, Jr., Defendant and Appellant.	2d Crim. No. B233769 (Super. Ct. No. BA351183) (Los Angeles County)

Otis Vann, Jr. appeals from the judgment entered after his conviction by a jury of assault with a deadly weapon (Pen. Code, § 245, subd. (a))[1] and threatening to commit a crime that would result in death or great bodily injury. (§ 422, subd. (a).) As to the assault count, the jury found true an allegation that appellant had personally inflicted great bodily injury. (§ 12022.7, subd. (a).) As to the threat count, the jury found true an allegation that appellant had been armed with a deadly weapon (a knife). (§ 12022, subd. (b)(1).) Appellant was sentenced to prison for five years.

Appellant contends that his federal due process rights were violated because the police failed to extract a surveillance video from a hard drive that was in the possession of a third party. We disagree and affirm.

[1] All statutory references are to the Penal Code.

Facts

At approximately 1:00 a.m. on December 31, 2008, Cedric Fisher was selling hot dogs in front of the entrance to an apartment building on Main Street in Los Angeles (apartment building). Fisher saw appellant "put his chin" on a woman's shoulder and heard him call her "a dirty, white, trailer-park trash bitch."

Fisher continued selling hot dogs until he "heard a commotion." He saw appellant "walking toward [the woman] aggressively with an outstretched hand with a knife in it." Fisher grabbed a metal bar and put himself between appellant and the woman. In an "attempt . . . to dislodge the knife from [appellant's] hand," Fisher struck his hand with the bar. Appellant did not let go of the knife, and Fisher struck appellant in the head with the bar. Appellant stabbed Fisher in the stomach.

Anthony Rodriguez was a security guard at the apartment building. He was inside the building when he heard arguing outside. Rodriguez exited the building through the front door. He saw Fisher "holding his side." Fisher said, "[H]e got me."

Rodriguez saw appellant holding a knife. Rodriguez, who was unarmed, ordered appellant to drop it. Appellant pointed the knife at Rodriguez and said, " 'What? What? I'll kill you too, mother fucker.' " Appellant then ran away.

Appellant testified that, without any provocation, Fisher called him a "bum," rushed toward him, and hit him in the head with a tire iron. As a "reflexive action," appellant pulled out a knife and stabbed Fisher. Appellant claimed that he had no contact with Rodriguez.

Surveillance Video

The apartment building had surveillance cameras that recorded information on a hard drive. Christian Amrod, the manager of the apartment building, testified that the hard drive normally held about six months of information. When the hard drive was full, "it just record[ed] over itself." The cameras were on all the time, but they did not record information unless there was motion in front of the building.

Defense counsel asked Amrod to provide a surveillance video of the incident in question. Amrod was unable to find a "company that could come in and work with the

system." Ten private vendors tried and failed to extract the surveillance video from the hard drive.

On September 11, 2009, defense counsel complained in open court that she had "tried everything [she] could think of to try to get this surveillance video." Counsel said that the Los Angeles County Sheriff's Department had informed her that the Los Angeles Police Department (LAPD) had "the technology" to extract the video from the hard drive. The court replied that it had signed an order requiring LAPD to try to extract the video. The court's minutes for September 11, 2009 state: "Order for extraction of evidence is signed and filed this date." But the record on appeal contains no such order.

The only order in the record on appeal is an order signed and filed on December 18, 2009. The order required LAPD to extract the surveillance video. In response to this order, in early January 2010, Detective Kenneth Hoerricks went to the apartment building and examined the surveillance system. Hoerricks testified that the system "retained information for approximately six months, but the date requested [December 31, 2008] had long since passed. So the software showed it [the surveillance video for that date] as not being present."

Appellant did not move to dismiss the case on the ground that the police's failure to extract the surveillance video had denied him due process of law. But the trial court stated that it would not grant such a motion: "It would never be a [due process] issue. [The hard drive] resides in a third-party possession, and the law doesn't . . . permit me to dismiss an action because a third party erased something, and it is clear that the software, the hard drive issue is in the hands of a third party. . . . So it would be a frivolous motion under the Rules of Court. So, no, I would not grant that."[2]

[2] The trial court's statement made clear that it would have been futile for defense counsel to move to dismiss the case on due process grounds. We therefore reject the People's contention that appellant forfeited the due process issue by failing to raise it below. (See *People v. Brown* (2003) 31 Cal.4th 518, 553.)

Discussion

Appellant contends: "Law enforcement's failure to timely respond to the court's order [of September 11, 2009] to inspect the surveillance system and extract the video deprived appellant of material evidence . . . . As ample evidence established that the police did not make a good faith effort to obtain the evidence, the case should have been dismissed as a violation of Due Process."

"Due process requires the state preserve evidence in its possession where it is reasonable to expect the evidence would play a significant role in the defense. [Citation.]" (*People v. Alexander* (2010) 49 Cal.4th 846, 878.) "[A] defendant claiming a due process violation based on the failure to preserve evidence must show the exculpatory value of the evidence at issue was apparent before it was destroyed, and that the defendant could not obtain comparable evidence by other reasonable means. [Citation.] The defendant must also show bad faith on the part of the police in failing to preserve potentially useful evidence. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 943, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The reason for the bad faith requirement is that when " '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.' " (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57-58 [109 S.Ct. 333, 102 L.Ed.2d 281].) On the other hand, there is no bad faith requirement if the police failed to preserve material evidence that is known to be exculpatory, rather than merely "potentially exculpatory." (***Ibid***.)

Here, the alleged due process violation does not arise from the police's failure to preserve evidence in its possession. The alleged violation arises from the police's failure to collect evidence – a surveillance video – that was supposedly on a hard drive in the possession of the owner of the apartment building. "It is not entirely clear that the failure to obtain evidence falls within ' "what might loosely be called the area of constitutionally guaranteed access to evidence." ' [Citation.] Although [our Supreme Court] has suggested that there might be cases in which the failure to collect or obtain evidence would justify sanctions against the prosecution at trial, [our Supreme Court has]

continued to recognize that, as a general matter, due process does not require the police to collect particular items of evidence. [Citations.]" (*People v. Frye*, *supra*, 18 Cal.4th at p. 943.)

Appellant "concedes that, prior to September 11, 2009, neither the police nor the prosecution were [*sic*] under any duty to obtain or preserve the video." But appellant argues that everything changed on September 11, 2009, when the trial court signed an order requiring the police to try to extract the video from the hard drive. At that point, appellant argues, the police had a duty to comply with the order in a timely manner.

Assuming, without deciding, that the police did not timely comply with the court's order of September 11, 2009, appellant has nevertheless failed to establish a denial of due process. Based on the trial testimony of Officer Tan Trinh, appellant has failed to show that the "exculpatory value" of the surveillance video "was apparent." (*People v. Frye, supra,* 18 Cal.4th at p. 943.) Officer Trinh testified that he went to the apartment building immediately after the stabbing. In Trinh's presence, the building security guard (Andrew Rodriguez) played back the surveillance video. The video did not show the incident in question. Trinh testified: "[B]ecause of the angle of the camera, what I observed was several individuals on the sidewalk walking back and forth. There were two standing near one another. But that's all I observed." Trinh asked if there were other cameras that would better depict what was happening on the sidewalk in front of the building. He "was told 'No.' "

Even if the surveillance video had depicted the incident, appellant would still have failed to establish a denial of due process. Appellant has not shown that the police could have extracted the video if they had promptly complied with the order of September 11, 2009. Christian Amrod, the manager of the building, testified that 10 different private vendors had tried and failed to extract the video from the hard drive. (2ART 910, 913) It is speculative whether the police would have been more successful than the private vendors. According to Amrod and Detective Hoerricks, the hard drive normally retained information for about six months. On September 11, 2009, more than eight months had elapsed since the stabbing.

Assuming, for purposes of discussion, that the surveillance video depicted the incident and that the police could have extracted the video from the hard drive, the video was no more than "potentially useful evidence." (*People v. Frye*, *supra*, 18 Cal.4th at p. 943.) Instead of exonerating appellant, the video may have inculpated him. Appellant recognized this fact. When the court asked appellant whether he had said that the video would exonerate him, he replied, "Exonerate me or convict me." Moreover, the video may not have depicted the incident clearly enough to be of use. The video may have been blurred or grainy. Since the incident occurred at approximately 1:00 a.m., the lighting may have been inadequate. The security guard testified that "there needs to be environment lighting for [the surveillance cameras] to work correctly." The security guard noted that there are lights on the apartment building, but the area in front of the building "tends to be dark" because of "trees underneath the lighting." "[T]here's no light reflection coming from inside the building."

Because the surveillance video was no more than potentially useful evidence, to establish a violation of due process appellant was required to show that the police had acted in bad faith. (*Arizona v. Youngblood*, *supra*, 488 U.S. at p. 58.) The trial court impliedly found that appellant had not met his burden. We review its finding for substantial evidence. (*People v. Memro* (1995) 11 Cal.4th 786, 831.)

Substantial evidence supports the court's implied finding. Appellant cites no evidence showing that the written order of September 11, 2009, requiring the police to try to extract the video, was properly issued. Appellant acknowledges that "the only written order in the Clerk's Transcript has a filing date of December 18, 2009. This second order was signed the same date it was filed. Appellant states, "Why a second order was necessary is not clear from the record." Defense counsel's declaration in support of the second order did not even mention the September 2009 first order.

It is reasonable to infer that the second order was necessary because the first order had not been properly issued. The December 2009 second order required the LAPD "Scientific Investi[g]ation Division Electronics" to "inspect, physically handle and extract and retain any video taped surveillance which is of eviden[t]iary value." If the September

2009 first order had been properly issued, there would have been no need for the December 2009 second order. Appellant would have sought to enforce the earlier September order. Thus, noncompliance with the September order may have been due to a defect in the order rather than bad faith by the police.

Assuming, for purposes of discussion, that the September 2009 order was properly issued, appellant has failed to show that noncompliance was due to bad faith instead of inadvertence or the perceived need to give priority to other projects. The police timely responded to the December 2009 second order. In early January 2010 Detective Hoerricks went to the apartment building and examined its surveillance system. He determined that the surveillance video could not be retrieved. In view of the police's timely response to the December 2009 order, a reasonable trier of fact could find that the police had not acted in bad faith. .[3]

Disposition

The judgment is affirmed

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

[3] In a petition for writ of habeas corpus filed by appellant in propria persona, he claims inter alia that the police's failure to extract the video resulted in a denial of due process. By separate order filed concurrently with the filing of this opinion, we deny the habeas corpus petition.

Barbara R. Johnson, Judge

Superior Court County of Los Angeles

Alan E. Spears, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Kathy S. Pomerantz, Deputy Attorney General, for Plaintiff and Respondent.