

County Criminal Court: CRIMINAL PROCEDURE—Dismissal. The evidence is insufficient to support a finding of bad faith in failing to video-record Appellee's field sobriety test, and therefore dismissal was not warranted as a sanction. Reversed and remanded for further proceedings. *State of Florida v. Dustin Funderburg*, No. 14-CF-1342-ES (Fla. 6th Cir. App. Ct. July 14, 2015).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

**STATE OF FLORIDA,
Appellant,**

v.

**DUSTIN FUNDERBURG,
Appellee.**

**UCN: 512014CF001342A000ES
Appeal No: CRC1401342CFAES
L.T. No: 11-1010-XGBT-ES**

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On appeal from County Court,

Honorable Robert P. Cole,

Matthew O. Parrish, Esq.,
Office of the State Attorney,
for Appellant,

Randall C. Grantham, Esq.,
for Appellee.

ORDER AND OPINION

The record in this case does not support a finding of bad faith by the arresting officer when failing to video-record Appellee's field sobriety test. It was therefore error dismiss the charges against Appellee for driving under the influence. The order is reversed and remanded for further proceedings.

STATEMENT OF THE CASE AND FACTS

This case is before the Court for the second time on appeal from an order of the trial court dismissing the charges against Appellee. Appellee was arrested for DUI in violation of § 316.193, Fla. Stat., on December 14, 2011. At the first trial had in the matter, the court denied Appellee's motion to suppress which challenged the basis for the traffic stop, but granted Appellee's motion to dismiss based on the failure to video-record the DUI investigation, which the Court found to be a violation of due process as having deprived Appellee of potentially exculpatory evidence, when it was the policy of the Sheriff's Office at the time to video-record field sobriety investigations, and the Deputy's reasons for not recording the investigation were insufficient. The State timely appealed the June 4, 2012 order of the trial court. This Court issued an Opinion on appeal on June 28, 2013, Case No. CRC-12-4377-ES, finding the trial court applied the incorrect legal standard when granting the motion to dismiss, and remanding the cause for further proceedings. On remand, the trial court again granted the motion to dismiss, finding the Deputy acted in bad faith by failing to record the field-sobriety test (FST), and finding dismissal of the charges to be an appropriate sanction. State appeals.

STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss pursuant to a de novo standard. *State v. Bennett*, 111 So. 3d 943, 944 (Fla. 2d DCA 2013). "When determining whether a defendant's due process rights have been violated by the State's destruction of or failure to preserve evidence, a court must first consider whether the missing evidence was 'materially exculpatory' or only 'potentially useful.'" *Id.* at 945. Failure to preserve evidence "that is merely 'potentially useful,' posing only some likelihood of exonerating a defendant," constitutes "a denial of due process only when law enforcement acts in bad faith." *Id.* (citing *California v. Trombetta*, 467 U.S. 479, 488 (1984); *Arizona v. Youngblood*, 488 U.S. 51, 56–58 (1988)). "The term 'bad faith' generally implies something more than bad judgment or negligence," and "imports a dishonest purpose, moral obliquity, conscious wrongdoing," or "breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud." *Bennett v. State*, 23 So. 3d 782, 793 (Fla. 2d DCA 2012).

LAW AND ANALYSIS

Appellant contends the record is insufficient to support a finding of bad faith by the Deputy when failing to video-record the FST, and therefore dismissal was inappropriate as a sanction. This Court previously remanded the cause to the trial court based on a lack of a finding of bad faith, which was necessary in order to find a violation of Appellee's due process rights to support dismissal of the charges in this case. After further proceedings, the trial court found the Deputy did not act with "evil intent," but did act in bad faith by failing to follow the known written policy of the Pasco Sheriff's Office at the time, when the Deputy had the ability to video-record the FST and failed to do so without sufficient justification. The trial court found the Deputy's actions resulted in a violation of Appellee's due process rights, and dismissed the charges on that basis. We find the record is legally insufficient to support of a finding of bad faith, and therefore dismissal of the charges was in error.

"The dismissal of a [criminal] charge is the most severe sanction a court can impose for the destruction of evidence; it is to be used with the greatest caution and deliberation." *State v. Gomez*, 915 So. 2d 698, 700 (Fla. 3d DCA 2005). When the evidence at issue is only "potentially useful," rather than "materially exculpatory" evidence,¹ "its loss or destruction constitutes a due process violation only upon a showing of bad faith on the part of the police or prosecution," and "bad faith exists only when police intentionally destroy evidence they believe would exonerate a defendant." *Id.* at 701 (citing *Youngblood*, 488 U.S. at 58). "Without a showing of bad faith on the part of the police or prosecution, the failure to preserve potentially useful evidence does not constitute a denial of due process." *Id.* See *Bennett v. State*, 23 So. 3d at 793; *State v. Buitrago*, 39 So. 3d 540, 542 (Fla. 2d DCA 2010).

The Deputy's justifications for his actions were that when he first observed Appellee, it appeared Appellee was involved in a domestic dispute and may have been trying to hit an individual with his car. The Deputy testified that he parked his car on the side of the road to guide traffic away from the scene, and that he conducted the FST

¹ To be materially exculpatory, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 486-87.

near the back of the parking lot where Appellee's vehicle was parked. It appears from the record that another officer was on the scene and detained the other individual involved in the incident. The Deputy testified that his reason for not conducting the investigation where it could be video-recorded by his vehicle was to keep Appellee away from the other individual in order to prevent any escalation of what the Deputy perceived to be a domestic violence incident.

Appellee responds that the trial court correctly dismissed the cause based on the actions of the Deputy, which were in clear violation of the express policy of the Sheriff's Office, and were not otherwise justified by the circumstances of the case. Appellee contends dismissal was appropriate based on the ability to record the FST and the express policy requiring a video-recording.

In *State v. Powers*, 555 So. 2d 888, 890 (Fla. 2d DCA 1990), the Court recognized the distinction between "the failure to preserve evidence," and "the failure to gather and preserve evidence in a particular manner," and held that "[i]f we were to require the state in every case, in its investigation of a crime, to leave no stone unturned and preserve the evidence obtained in a manner satisfactorily only to the accused, it would shift the line of fairness between the rights of an accused and the rights of society totally to one side." *Id.* at 890. The Court further held that "[l]aw enforcement does not have a constitutional duty to perform any particular tests." *Id.* (citing *Arizona v. Youngblood*, 488 U.S. 51 (1988)). Further, any duty law enforcement may have to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." *Id.* at 891. "To meet this standard of constitutional materiality, evidence must both possess an exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* See *Trombetta*, 467 U.S. 479. The Court re-evaluated the *Powers* opinion in *Bennett*, 23 So. 3d at 784, holding that while "it is obvious that a recording of the field sobriety test would be very relevant to a material fact at a trial on the charge of DUI, it is usually very difficult to determine whether this evidence would have been inculpatory, exculpatory, or inconclusive."

The trial court found that Appellee's performance on two parts of the FST would be considered exculpatory evidence. This appears to be based on the Deputy's testimony on cross-examination that although Appellee exhibited signs of impairment based on his performance of four of the elements of the FST, Appellee performed well on two of the elements of the FST, and therefore a video-recording of the FST would be considered exculpatory evidence. However, the record is insufficient to support a finding that a video-recording of Appellee's FST would meet the standard of constitutional materiality. See *Trombetta*, 467 U.S. at 486-87. Therefore it is necessary that the trial court find bad faith action by the Deputy in failing to video-record the FST in order to justify dismissal of the charges.

Appellee relies on *State v. Schiedenhelm*, No. 2009-CF-6627-WS (Fla. 6th Cir. App. Ct. March 4, 2011) in which the Court held that once "a law enforcement agency establishes a policy regarding the gathering of evidence, it has a duty to comply with that policy." This Court found that the officer in *Schiedenhelm* "made no attempt to record the field sobriety exercises and purposefully parked his cruiser in a position that could not capture the investigation." *Schiedenhelm* is distinguishable from the case at hand, which lacks evidence of any specific actions by the Deputy which were done in bad faith. Rather, the trial court held that the Deputy did not have "evil intent," but knew about the Sheriff's express policy, had the ability to videotape the FST, and "just didn't do it."

While the Deputy could have waited to conduct the FST until the potential domestic violence situation had dissipated, there is no evidence the Deputy purposefully avoided making a video-recording. Although it appears at least one other deputy was present at the scene when the Deputy performed Appellee's FST, the record does not support a finding that the Deputy acted in bad faith in not recording the test. Bad faith involves "a flagrant and deliberate act done . . . with the intention of prejudicing the defense." *State v. Bennett*, 111 So. 3d at 945 (citing *Powers*, 555 So. 2d at 890). Mere negligence or inadvertence is insufficient to support a finding of bad faith which warrants dismissal. See *Bennett v. State*, 23 So. 3d at 793; *State v. Thomas*, 826 So. 2d 1048, 1049-50 (Fla. 2d DCA 2002).

CONCLUSION

The record in this case is insufficient to support a finding of bad faith, and therefore dismissal was not warranted as a sanction for the officer's failure to video-record the field-sobriety test. The cause is reversed and remanded for further proceedings.

It is ORDERED AND ADJUDGED that the order of the trial court is REVERSED AND REMANDED for further proceedings consistent with this Opinion.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 14th day of July, 2015.

Original order entered on July 14, 2015, by Circuit Judges Daniel D. Diskey, Linda Babb and Shawn Crane.