Order

Michigan Supreme Court
Lansing, Michigan

January 4, 2022

Bridget M. McCormack,
Chief Justice

162378 & (48)(49)

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 162378
COA: 349339
Oakland CC: 2016-155982-AR

JOSEPH POWELL FEENEY,
Defendant-Appellant.

_____/

By order of July 9, 2021, the prosecuting attorney was directed to answer the application for leave to appeal the October 22, 2020 judgment of the Court of Appeals. In addition to filing an answer, the prosecuting attorney filed a joint motion with the defendant to remand the case to the trial court for purposes of entering a plea and sentencing agreement. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the 45-B District Court in accordance with the relief requested in the joint motion. The motion to delay ruling is DENIED as moot.

We do not retain jurisdiction.

s1220

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 4, 2022

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOSEPH POWELL FEENEY,

Defendant-Appellee.

UNPUBLISHED
October 22, 2020

No. 349339
Oakland Circuit Court
LC No. 2016-155982-AR

Before: GADOLA, P.J., and RONAYNE KRAUSE and O'BRIEN, JJ.

PER CURIAM.

The prosecution appeals by leave granted[1] the circuit court's order affirming the district court's suppression of evidence and dismissing the charge of driving while intoxicated, MCL 257.625(1)(c), against defendant. We reverse and remand.

I. BACKGROUND

On December 30, 2015, defendant was arrested after Michigan State Police (MSP) troopers witnessed him speeding in Oak Park, Michigan. The arresting trooper conducted a field sobriety test, and, with defendant's consent, conducted a preliminary breath test (PBT), which revealed that defendant had a blood alcohol level (BAC) of 0.22. Defendant was taken to a MSP post, where he was given two DataMaster breath tests. Both tests indicated .24 grams of alcohol per 210 liters of breath. Defendant was then released. He promptly retained counsel, who submitted a request to the MSP under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., for the post to produce and preserve any and all evidence related to defendant's arrest, including video recordings from the booking room in which the DataMaster test was administered.

Defendant's FOIA request was made on January 8, 2016. On January 15, 2016, the post responded, requesting an additional ten days allowed under the statute, informing counsel about

[1] *People v Feeney*, unpublished order of the Court of Appeals, entered September 18, 2019 (Docket No. 349339).

the cost of the request, and promising a response on or before February 1. At an evidentiary hearing in August 2017, Lieutenant Honey testified that in 2015 and 2016, videos on the post's system were preserved for 28 days. This means that the footage of defendant in the booking room would have been routinely purged on or about January 27, 2016, unless it had already been preserved.

On February 1, 2016, the post sent another letter to defense counsel requesting an additional 10 days after the receipt of payment. On February 16, 2016, defense counsel received a letter stating that the request for all video in possession of MSP was granted. Eventually, counsel received some of the requested evidence, which included the in-car footage of defendant being pulled over and taken to the post. Eventually, defendant's counsel physically visited the post, where Sergeant Robertson informed him that booking room video recordings did exist at the time of defendant's arrest. On March 9, 2016, Bethany Goodwin, Assistant FOIA Coordinator for the Michigan State Police in Lansing, was informed by defense counsel that the booking room video had not been produced.[2] Goodwin testified that neither she nor her FOIA unit had previously been aware that MSP posts had video capabilities in their booking rooms. Goodwin contacted Sergeant Robertson, who told her that he was unsure how the tapes were preserved or what their retention period was. Goodwin informed defense counsel on March 23, 2016, that no video recording of defendant's DataMaster test existed at that time, even if it had existed at an earlier date. It is undisputed that defendant never received a copy of the booking room video recording. On April 28, 2016, defendant was arraigned on a single count of operating a vehicle while intoxicated, MCL 257.625(1)(c).

Defendant filed a motion to suppress the DataMaster test results and dismissal of the charge, alleging the MSP acted in bad faith by failing to locate, preserve, and produce the booking room video, which violated defendant's due-process rights. After briefing and argument, the district court agreed with defendant, suppressed the DataMaster test results, and dismissed, without prejudice, the charge against defendant. The prosecution appealed the district court's opinion and order to the circuit court. More briefing and argument ensued, and the circuit court remanded the case to the district court for an evidentiary hearing to establish whether a video recording of defendant existed and whether the MSP acted in bad faith.

At the evidentiary hearing, the parties stipulated that a video recording had been made of defendant in the MSP post booking room during the observation period before administration of the DataMaster test, and that defendant had made a timely request for the video while the video still existed. Lieutenant Honey testified that he learned of the booking-room camera in 2013 or 2014. He explained that the camera recorded part of the booking room, including the fingerprint machine and part of the bench where those waiting for a DataMaster test are observed. He also recalled showing defense counsel the camera and informing counsel that the footage of defendant could not be played because it had already expired. He initially testified that he had informed Nancy Starks, a FOIA coordinator until her retirement in 2016, about the booking room's video

[2] Goodwin testified that she had been pulled away from her duties shortly after the production of the in-car video due to the Flint water crisis, but returned to her office after learning that defendant's counsel was trying to contact her.

capabilities before defendant's attorney visited the post, that Starks asked him to retrieve the recording of defendant, and that he attempted to do so but discovered that the recording had already been purged. However, he then testified that his discussion with Starks might not have been until early 2016. Honey testified that when he informed Starks about the booking room's video capabilities, he also told her she should provide those videos when they are asked for in FOIA requests. Honey testified that the video system was very old, retrieving videos was very difficult and time-consuming, and "[w]e had to do a lot of research just to determine how to get it off of there;" but retrieving footage *was* possible.

In contrast, Starks testified that whenever she received a request for booking room videos, she was always told by sergeants or lieutenants that the system was not functional. Starks testified that she had talked with Lieutenant Honey in particular about booking videos, and she did not recall him ever telling her that the system was working. She also noted that even if the video systems had been operational, she did not know how to retrieve videos. As a result, Starks only ever dealt with in-car videos when dealing with FOIA requests, and whenever the Lansing FOIA coordinator requested booking room videos from the post, Starks would respond that they did not have the videos because the system was not running. When the court inquired about the specific instance of the conversation Honey mentioned, she said "I don't know if it was in 2015. But, yes, I have discussed with him before about the booking videos . . . I wasn't told the system was working . . . I don't think I was told that the system was up and running." Starks denied that Honey was lying, just that she never did any booking room videos while she was employed at the post.

At the time of defendant's FOIA and preservation requests, Honey knew the booking room's video recording system was functional but that it was difficult to retrieve and copy the videos. Further, Honey contended he informed Starks that the booking room's video recording system was functional either in late 2015 or early 2016—but before defendant's request. Starks had no recollection of that conversation. Honey testified that none of the troopers from the post talked to him about what would have been in the video or told him that it showed anything compromising. Starks could not recall anything specific about this case other than the fact that she filled the FOIA request after it arrived. For whatever reason, it is certain that no steps were taken to produce or preserve the video recording of defendant in the booking room on the night of his arrest.

The district court again found the MSP acted in bad faith in failing to preserve the booking video recording. After further briefing and argument in the circuit court, the circuit court ultimately agreed with and adopted the district court's findings and affirmed the district court's order suppressing the DataMaster test results and dismissing the charge against defendant. The prosecution sought, and this Court granted, leave to appeal.

II. STANDARDS OF REVIEW

We review "for clear error a trial court's findings of fact in a suppression hearing but review de novo its ultimate decision on a motion to suppress." *People v Anthony*, 327 Mich App 24, 31; 932 NW2d 202 (2019) (quotation marks and citation omitted). "A finding of fact is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made." *Id*. (quotation marks and citation omitted). Similarly, the application

of a constitutional provision, such as defendant's due-process claim, to these facts is also reviewed de novo on appeal. *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171 (2011). Finally, questions of statutory interpretation are reviewed de novo. *People v Pinkney*, 501 Mich 259, 267; 912 NW2d 535 (2018).

III. SUPPRESSION OF EVIDENCE—STATUTORY VIOLATION (FOIA)

The prosecution first argues that suppression of the DataMaster test results was not an appropriate remedy for a violation of FOIA, because MCL 15.240b does not expressly provide for suppression of evidence as a remedy for violation of the statute. We agree.

Sanctions for a public body's willful and intentional failure to comply with FOIA is governed by MCL 15.240b, which states, in relevant part:

> If the court determines, in an action commenced under this act, that a public body willfully and intentionally failed to comply with this act or otherwise acted in bad faith, the court shall order the public body to pay, in addition to any other award or sanction, a civil fine of not less than $2,500.00 or more than $7,500.00 for each occurrence.

The FOIA does not provide for any further statutory penalties. The prosecution correctly contends that MCL 15.240b does not expressly provide for suppression of evidence as a remedy for violation of the statute. Our Supreme Court has stated "suppression of the evidence is not an appropriate remedy for a statutory violation where there is no indication in the statute that the Legislature intended such a remedy and no constitutional rights were violated." *People v Anstey*, 476 Mich 436, 442-443; 719 NW2d 579 (2006). Although *Anstey* permits the possibility that a FOIA violation may result in suppression of evidence *if* that violation causes a constitutional violation, suppression is not appropriate just because FOIA was violated.

IV. SUPPRESSION OF EVIDENCE—DUE PROCESS VIOLATION

The primary issue on appeal is whether the MSP's failure to preserve the booking room video after defendant made a timely FOIA request constituted a violation of defendant's due process rights. The record shows that the courts and the parties addressed this matter as a constitutional question, rather than a simple matter of a pure statutory violation. The prosecution argues that the district court incorrectly found that the MSP acted in bad faith when it failed to preserve the booking room video. We agree.

It is undisputed that the video recording of defendant in the MSP post booking room would have been, at the most, only *potentially* exculpatory. Indeed, the camera would not have captured the actual administration of the DataMaster test, and because it did not view the entire waiting bench, it might not even have shown defendant at all while he awaited the test. "When the evidence is only 'potentially useful,' a failure to preserve the evidence does not amount to a due-process violation unless a defendant establishes bad faith." *People v Dickinson*, 321 Mich App 1, 16; 909 NW2d 24 (2017), quoting *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281

(1988).[3] Further, it is defendant's burden to demonstrate that law enforcement acted in bad faith. *Dickinson*, 321 Mich App at 16. The United States Supreme Court explained that it was unwilling to require police to hoard anything and everything that might conceivably have evidentiary significance; the bad-faith requirement would strike a balance limiting "the extent of the police's obligation to preserve evidence to reasonable bounds . . . i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Youngblood*, 488 US at 58. Negligence does not establish bad faith. *Id*.

It is well established that, in the absence of a specific request to preserve certain evidence, routine destruction of police recordings pursuant to policy rather than an intent to destroy evidence in anticipation of trial does not establish bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). However, case law is largely silent as to the issue before us here, where the failure to preserve evidence was pursuant to policy but occurred *after* a defendant's timely request for preservation.

We therefore begin from first principles. "Bad faith" has been defined as excluding "honest errors of judgment," instead requiring "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty." *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 136-137; 393 NW2d 161 (1986). "Further, claims of bad faith cannot be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment." *Id*. at 137. The Sixth Circuit[4] has laid out a useful three-part test for assessing whether routine destruction of evidence after receipt of a timely preservation request constitutes a due process violation:

> In such a case, the defendant must show: (1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before its destruction; and (3) that the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other reasonably available means.
>
> * * *
>
> The first two elements of this tripartite test are inter-related. The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. To establish bad faith, then, a defendant must prove official animus or a conscious effort to suppress exculpatory evidence.

[3] This is markedly different from the due-process analysis established in *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), where suppression of *exculpatory evidence* irrespective of the prosecution's intent constitutes a due-process violation.

[4] "Opinions of the lower federal courts and foreign jurisdictions are not binding but may be considered persuasive." *People v Patton*, 325 Mich App 425, 434 n 1; 925 NW2d 901 (2018).

[*United States v Jobson*, 102 F3d 214, 218 (CA 6, 1996) (quotation marks and citations omitted).]

Thus, a due process violation is clearly not established merely because a recording was destroyed after timely notice was given requesting its preservation. Bad faith also turns "on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood*, 488 US at 56-57 n *.

Defendant argues that the MSP nevertheless acted in bad faith because someone should have realized that his footage was valuable, and because similar destruction of evidence was a regular and systematic occurrence to numerous other defendants. Defendant relies particularly on Starks's misapprehension that any booking room videos had ever been available, and that such misinformation was seemingly given out as a matter of course. We would not find it unreasonable to argue that the evidence tends to suggest negligence, confusion, or a disappointing lack of internal communication. However, as discussed above, neither negligence nor honest incompetence establish bad faith. *Youngblood*, 488 US at 58; *Commercial Union Ins Co*, 426 Mich at 136-137.

The evidence does not show that any MSP members were aware that the video had any evidentiary value, let alone exculpatory value. The video would not have recorded the administration of the DataMaster test and only *maybe* recorded defendant while he awaited the test. Honey was unaware of anything that had occurred during the observation period before the DataMaster test, and none of the other troopers or employees at the post informed him of anything compromising on the video. Starks testified that she knew nothing specific about defendant's case, and she never discussed the facts of cases for which she handled FOIA requests unless she had a question. Interestingly, the events of this case apparently induced the MSP to swiftly upgrade its video recording system to be easier to use and improve its training to ensure that videos are preserved instead of prematurely destroyed. Furthermore, there was clearly a miscommunication between Starks and Honey, rather than collusion. The evidence therefore shows that the police had no idea that the video was valuable, and they have undertaken to avert repetition of the mistakes that occurred in this matter. These facts clearly conflict with any finding of bad faith or that the MSP engaged in a "conscious effort to destroy exculpatory evidence." *Jobson*, 102 F3d at 218 (quotation omitted).

Although the evidence could allow a finder of fact to infer incompetence on the part of the official actors in this case, there is no evidence of official animus on the part of the MSP post or the MSP's Freedom of Information Unit. Problems undoubtedly existed, but negligence such as that shown by the record here does not create a due-process violation, and defendant has failed in meeting his burden to prove bad faith.

V. CONCLUSION

The district court erred in suppressing the DataMaster test results and dismissing the criminal charge against defendant on the basis of bad faith; and the circuit court erred in affirming

the district court's decision. We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Amy Ronayne Krause
/s/ Colleen A. O'Brien