STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 14, 2013
V	No. 307338 Wayne Circuit Court
DESHAWN RANDELL GANT, Defendant-Appellant.	LC No. 11-005657-FH

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of carrying a concealed weapon (CCW), MCL 750.227, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f.[1] He appeals by right, and we affirm.

On April 15, 2011, Detroit police officers assigned to a tactical unit designed to patrol high crime areas for narcotics and firearms encountered defendant. Defendant was leaning into a vehicle that was parked on the wrong side of the street. The officers believed that a drug transaction might be occurring, stopped rear bumper to rear bumper with the parked vehicle, and flashed a light into the vehicle. According to the officers, defendant took off running and the officer in the passenger seat began a foot pursuit. The officer in the driver's seat called for emergency backup because of the foot pursuit and detained the driver of the parked vehicle. Defendant ran around a home and reached at his waistband. The pursuing officer saw defendant run directly toward his partner and alerted his partner. According to the officers, defendant attempted a side to side evasive maneuver, but fell and injured his mouth on cement. The police officers called for a supervisor to investigate defendant's injury in accordance with police policy. An audiotape of the radio traffic, including calling for emergency backup and later a supervisor to the scene, was admitted and played for the jury.

[1] Defendant was sentenced to two years' imprisonment for the felony-firearm conviction and twelve months' probation for the CCW and felon in possession convictions. He does not challenge his sentences on appeal.

Defendant testified that he was in a bad neighborhood when a vehicle pulled up and stopped. He fled because he did not know who was in the car. After reaching the back of a home, he saw blue and red lights. Defendant came out from behind the home with his hands up. However, one of the officers struck defendant in the face with a pistol. He further testified that four officers stood over him and attacked him. Defendant's friend, a firefighter with an outstanding traffic warrant, also testified to witnessing defendant being struck in the face on one occasion. However, the firefighter did not see any additional assaults because he was moved away from the area and threatened.

On June 7, 2011, in district court, an order was entered to preserve any and all scout car video. On July, 8, 2011, a motion hearing was held addressing discovery of an internal affairs investigation to learn the identity of other officers at the scene. Curiously, the issue of any scout car video was never raised by the defense. The trial court held that it would issue a subpoena to the internal affairs division for production of any file generated, and that the information would be submitted for an in camera inspection. The trial court stated that it would determine if there was an investigation and what the officers knew before it granted a discovery request regarding other officers present at the scene.

On August 12, 2011, the trial court held a hearing regarding the discovery request. The court noted that a hand delivered packet was submitted, and it was read. The report did not support any claim of police misconduct. The trial court denied defendant's request to view the report.

On October 3, 2011, the first day of trial, defense counsel noted that a scout car videotape was active on the day of defendant's arrest, but it was not preserved. He further recognized that, according to the prepared investigative report, the officers' version of what transpired was substantiated. Despite the results of the investigation, nonetheless, the defense requested, "short of a dismissal I'd be asking for some latitude in my cross examination of the witnesses." The prosecutor noted that defendant did not raise this issue of the outstanding videotape despite prior discovery motions and exchanges. The force investigation unit did examine the video from the incident, but there was no indication that it contained exculpatory material. The video was deleted after ninety days in accordance with standard procedure. Moreover, an audiotape of the radio traffic was preserved and given to the defense. The trial court granted defendant's request for latitude in cross-examining the witnesses.[2] At the conclusion of trial, defense counsel did not request an adverse inference instruction and expressed satisfaction with the jury instructions. Despite the contradictory testimony between the police officers and defense witnesses, including defendant, the jury convicted defendant as charged.

On appeal, defendant contends that he was deprived of due process of law because the exculpatory videotape was destroyed and the failure to provide an adverse inference instruction

[2] A formal motion for dismissal was filed on August 22, 2011, the day trial was scheduled to commence. The trial was adjourned. There is no indication that defendant raised the motion between August 22, 2011, and October 3, 2011, the first day of trial. On the first day of trial, defense counsel did not argue the motion, but gave a limited statement delineated above.

because of the destruction. We disagree. Defendant's contention that he was deprived due process of law presents a constitutional question subject to review de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). Reversal premised on a claimed due process violation requires a defendant to prove that the missing evidence was exculpatory or that law enforcement officials acted in bad faith. *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). "Failure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown." *Id*. (citations omitted).

In the present case, defendant failed to present any evidence that the missing videotape was exculpatory or that the videotape was destroyed in bad faith. Officer Ahmed Morsy testified that the video camera recorded straight in front of the vehicle, not what transpired behind the vehicle. Defendant's firefighter friend, Bruce Irving, testified that the police vehicle stopped "almost past my vehicle." Therefore, the videotape would not have contained exculpatory evidence because it would not have recorded what occurred behind the police vehicle. Moreover, there was no evidence that the videotape was destroyed in bad faith. Despite the production of the audiotape and motion hearings to address discovery, there is no indication that the defense noted the outstanding discovery of any videotape from the scout car. Thus, the videotape was destroyed in ninety days in accordance with standard police procedure. Although the force investigation unit viewed the videotape and found that it did not substantiate the defendant's assertions, it did not preserve a copy of the videotape. There is no evidence that the failure to preserve the videotape occurred in bad faith. Accordingly, reversal is not required. *Hanks*, 276 Mich App at 95. Furthermore, there was no error in failing to provide or request the adverse inference instruction by the trial court or defense counsel. See MCL 768.29; *People v Carines*, 460 Mich 750, 766-767, 597 NW2d 130 (1999).

Lastly, defendant contends that the cumulative convictions and sentences for felon in possession and felony-firearm violate double jeopardy, but acknowledges that this claim was rejected in *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). Our role as an intermediate appellate court is limited, and we cannot disregard clear Supreme Court precedent. *Tait v Ross*, 37 Mich App 205, 207; 194 NW2d 554 (1971). Accordingly, defendant must direct his argument to the Supreme Court.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Karen M. Fort Hood