STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

Appeal No. 2021AP1185-CR
Circuit Court Case No. 20CT049

RORY D. REVELS,

Respondent-Respondent.

ON APPEAL FROM THE FINAL ORDER DISMSISING CASE WITH PREJUDICE DUE TO FAILURE TO PRESERVE EVIDENCE ENTERED IN THE SAUK COUNTY CIRCUIT COURT, THE HONORABLE PATRICIA A. BARRETT, PRESIDING.

BRIEF OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

Was Officer Meyer's body-worn camera video apparently exculpatory or potentially exculpatory?

The Circuit Court concluded that Officer Meyer's body-worn camera video was apparently exculpatory and dismissed the case, noting:

> Again, we don't have a clear recollection by Officer Meyer of when he even turned his body camera on, so we're not even certain whether this was two minutes, five minutes, seven minutes, we have no idea because again the report gives us no indication about any of that, but it was necessary for Officer Meyer to review it in order to write his report, and that in and of itself speaks to the fact that it was a particular piece of evidence that has the ability to be apparently exculpatory, but yet again we have no way of knowing. *Oral Ruling Tr.*, 34: 1-12; *App*. 236.

STATEMENT ON ORAL ARUGMENT AND PUBLICATION

The State is not requesting oral argument or publication.

STATEMENT OF FACTS

On November 4, 2019, at approximately 12:30am, Officer Brandon Meyer of the Baraboo Police Department was conducting stationary traffic enforcement in the Community First Bank parking lot on 8th Avenue, just east of Broadway in Baraboo, Wisconsin. *App.* 100. While observing traffic, he saw a black Ford F150 stopped at the intersection of 8th Avenue at Broadway Street facing westbound in the number two lane with the green traffic control light activated for 8th Avenue. *Id*. He watched the black Ford F150 stay stationary for a period of thirty to forty-five seconds without moving. *Id.* He pulled out of the parking lot, positioned his squad behind the F150, and activated his emergency lights. *Id.* It was believed by Officer Meyer that at about this time, he activated his body-worn camera. *Mot. Hrg. Tr.*, 48:17-23; *App*. 149. Officer Meyer made contact with the driver, who was identified as the defendant-respondent, Rory D. Revels. *App*. 100.

Officer Meyer interacted briefly with the Revels, asking him where he was coming from, going to, and whether he was okay. *Id.* Neither the exact number of

questions nor the exact order in which they were asked were recalled by Officer Meyer. *Mot. Hrg. Tr.*, 49:9-17; *App*. 150. Officer Meyer indicated that he observed several clues of intoxication, including: slow response time; slow movements; a strong odor of intoxicants; and glassy, watery, and bloodshot eyes. *Id*. at 49:18-25. Revels admitted to Officer Meyer that he drank several beers, this information was relayed to Officer Smith. *Criminal Complaint*, 2; *App*. 199. Due to end of shift and illness, Officer Smith was asked to take over this traffic investigation for OWI by Officer Meyer. *Mot. Hrg. Tr.*, 42:18 – 44:17; *App*. 143.

Officer Smith was made aware of the observations of Officer Meyer, and Officer Smith made contact with Revels while he was still seated in his vehicle. *Criminal Complaint,* 2; *App*. 199. Officer Smith reported that when he made contact with Revels in his vehicle, he "smelled a strong odor of an intoxicating beverage emitting from the vehicle." *Id*. He further reported that at that same time, he "shined [his] flashlight and … could see that [Revels] presented with glassy/watery and bloodshot eyes." *Id*. Officer Smith inquired as to whether Revels had been drinking, to which Revels replied that he had consumed "five beers." *Id*. Officer Smith then had Revels exit the vehicle, conducted standardized field sobriety testing (SFST), conduct a preliminary breath test (PBT – the result of which was 0.163 g/210 L of breath), and arrested Revels for operating while intoxicated. *Id*. Officer Smith's interaction with Revels was captured on this body worn camera. *Oral Ruling Tr.*, 30: 5-11; *App*. 232. After arrest, Officer Smith transported Revels to the Baraboo Police Department and a paramedic drew his blood. *Criminal Complaint*, p. 2; *App*. 199. This blood sample was sent to the Wisconsin State Laboratory of Hygiene and tested for the presence of ethanol. *Id.* The result of this testing was 0.172 g/100 mL. *Id.* and *Lab Report*, 1; *App*. 201.

Upon handing-off the investigation to Officer Smith, Officer Meyer returned to the Baraboo Police Department, where his squad car video would have uploaded automatically to the Department's servers and his body-worn camera video would have uploaded once he placed it in its USB charging cradle (which he did). *Mot.*

Hrg. Tr., 55: 25 – 56: 18; *App*. 156. Officer Meyer did not save either his squad or body-worn camera video to DVD or permanent media. *Id*. at 56:6-23; *App*. 157. Officer Meyer expected Officer Smith to complete this task. *Id*. at 56:24 – 57:1; *App*. 157.

Chief Schauf testified at the motion hearing that while Officer Meyer not personally saving his video was inconsistent with the departmental written policy, Officer Meyer's assumption that Officer Smith would save all case-related video was in keeping with departmental practice (wherein the primary or lead officer is often responsible for permanently saving case-related media). *Id*. at 31:10 – 32:13; *App*. 132-33. Chief Schauf also testified about the functioning of the squad video system. *Mot. Hrg. Tr.*, 27:5-14.; *App*. 128. He explained that while squad video cameras are always running/recording, that video is constantly being over-written. *Id.* Once activated, the system saves only 30 seconds prior to activation. *Id.*

Officer Meyer testified that while his squad video may have captured Revels's vehicle parked at the traffic light, it also may not have ("it depends on the angle of what my squad, or my patrol vehicle[,] was pointed."). *Id*. at 50:24-25; *App*. 151. He also testified that from the time he noticed Revels's vehicle stopped at the traffic light until he drove up behind it, parked, and activated his squad video would have taken between fifteen and thirty seconds. *Id*. at 64:19-25; *App*. 165. Based on this math, Officer Meyer agreed that his squad camera would have recorded either nothing but his squad in motion or perhaps about 15 seconds before his squad was in motion. *Id*. at 65:10-25; *App*. 166.

Officer Smith testified that he believed he had followed standard departmental practice (though, he agreed, not policy) and saved Officer Meyer's relevant videos (from his squad and body-worn camera) as well as his own video to a permeant storage device. *Id*. at 86:4 – 90:20; *App*. 187-90. Officer Smith explained how he believed he had saved three distinct videos (having reviewed them when he saved them onto the desktop of the computer in his squad room), but instead accidentally saved three copies of the same video to the permanent storage media.

Id. at 91:3 – 92:19; *App*. 192-93. Officer Smith testified that despite believing he had done the correct thing, he had made an inadvertent mistake causing Officer Meyer's body-worn camera and squad car videos to be lost. *Id*. at 92:16-19; *App*. 193.

Both Officers Meyer and Smith testified that they believed the video evidence could be "important to" or "significant to" "the prosecution and defense." *Id*. at 54:3-19 and 82:12-14, respectively; *App*. 155 and 183.

The Circuit Court ruled that Officer Meyer's squad (or "MAV") video was potentially exculpatory; however, made no finding of bad faith on the part of the Officers. *Oral Ruling Tr.*, 33:4-16; *App*. 235. Concerning Officer Meyer's body-worn camera video, the Circuit Court noted that since Officer Meyer could not remember the exact moment when he activated his body-worn camera, the video "has the ability to be apparently exculpatory, but yet again we have no way of knowing." *Id.* at 34:1-12; *App*. 236. The Circuit Court also noted that both Officers Smith and Meyer had violated departmental policy, but again made no bad faith finding. *Id.* at 35:8-9, 14-15; *App*. 237. The Circuit Court then stated and ruled,

> The nature of this offense at some point would have been shown through I believe Officer Smith's body camera of exactly what condition Mr. Revels was in, but was some point in time where the entire matter was handed off to him by Officer Meyer. And what would have prompted Officer Meyer to hand that off to Officer Smith is unknown, it's untested, and we have no way of actually determining whether that was proper at that point in time.
>
> I am going to dismiss this matter for the failures that were made here in not properly protecting the defendant's due process rights.

Id. at 36:12 – 37:1; *App*. 238.

ARGUMENT

The State believes that the Circuit Court erred in ruling that the body-worn camera video of Officer Meyer was apparently exculpatory rather than potentially exculpatory. Thus the Court erred in dismissing the case absent a finding a bad faith

on the part of the police. In police loss of evidence cases, the burden is on the defendant to show that the police either 1) failed to preserve evidence which was apparently exculpatory or 2) engaged in bad faith in failing to preserve potentially exculpatory evidence. *See, e.g., State v. Luedtke*, 2014 WI App 79, ¶ 21, 355 Wis. 2d 436, 449-450, 851 N.W.2d 837, 843. The record in this case contains no evidence that the body-worn camera video of Officer Meyer contained any apparently exculpatory evidence. As such, the State respectfully requests that the Court of Appeals find that the Circuit Court erred in holding that the body-worn camera video of Officer Meyer was "apparently exculpatory," reverse the Circuit Court's ruling on that issue and the subsequent dismissal, and remand the case for further proceedings.

STANDARD OF REVIEW

A Circuit Court's factual determinations are reviewed under a clearly erroneous standard; however, whether destruction of evidence by a law enforcement officer constitutes a due process violation involves the application of a legal standard to historical facts, and it is thus a question that the Court of Appeals reviews de novo. *State v. Hahn*, 132 Wis. 2d 351, 356-57, 392 N.W.2d 464, 466 (Ct. App. 1986).

I. The Body-Worn Camera Video of Officer Meyer was Potentially Exculpatory, Therefore a Bad Faith Showing/Finding is Required to Constitute a Due Process Violation.

In *California v. Trombetta*, 467 U.S. 479 (1984), the U.S. Supreme Court held that in order to show a violation of a defendant's due process rights due to the failure of police to preserve evidence, a defendant had to show that the evidence "might be expected to play a significant role in the defense." *State v. Weissinger*, 2014 WI App 73, ¶ 13 n. 5, 355 Wis. 2d 546, 851 N.W.2d 780. As noted by the Wisconsin courts in *Weissiner* (*id.*), *Greenwold I* (*State v. Greenwold* (181 Wis. 2d

881, 512 N.W.2d 237 (Ct. App. 1994)), and *Greenwold II* (*State v. Greenwold* (189 Wis. 2d 59, 525 N.W.2d 294 (Ct. App. 1994)), "[t]he *Trombetta* rule was 'refined' by [*Arizona v.*] *Youngblood*," (488 U.S. 51 (1988)), and remains the current binding precedent on the subject. *State v. Weissinger*, 2014 WI App 73, ¶ 13 n. 5. The current iteration of the rule points out that while

> [d]ue process requires that the prosecution turn over material exculpatory evidence... the United States Supreme Court has been unwilling to impose 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. To prevail on a due process challenge regarding the destruction of potentially exculpatory evidence, the defendant must show that the evidence was apparently exculpatory at the time it was destroyed or that it was destroyed in bad faith. Bad faith can only be shown if (1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; *and* (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence.

State v. Luedtke, 2014 WI App 79, ¶ 21, *citing Arizona v. Youngblood*, 488 U.S. 51 (1988), *State v. Greenwold*, 181 Wis. 2d 881 (Ct. App. 1994) (*Greenwold I*), *and State v. Greenwold*, 189 Wis. 2d 59 (Ct. App. 1994) (*Greenwold II*) (internal quotations omitted and emphasis in the original).

As noted above, the U.S. Supreme Court refined the *Trombetta* rule in *Youngblood*. The State believes that comparing the facts, circumstances, and legal analysis of *Youngblood* to the case at bar may prove instructive. In *Youngblood*,

> [t]he victim, a 10–year–old boy, was molested and sodomized by a middle-aged man for 1½ hours. After the assault, the boy was taken to a hospital where a physician used a swab from a sexual assault kit to collect semen samples from the boy's rectum. The police also collected the boy's clothing, which they failed to refrigerate. A police criminologist later performed some tests on the rectal swab and the boy's clothing, but he was unable to obtain information about the identity of the boy's assailant. At trial, expert witnesses testified that respondent might have been completely exonerated by timely performance of tests on properly preserved semen samples. Respondent was convicted of child molestation, sexual assault, and kidnapping in an Arizona state court. The Arizona Court of Appeals reversed the conviction on the ground that the State had breached a constitutional duty to preserve the semen samples from the victim's body and clothing.

Arizona v. Youngblood, 488 U.S. at 51.

Despite those facts, and that the "respondent might have been completely exonerated by timely performance of tests on properly preserved semen samples," the Supreme Court held that due process "did not require the State to preserve the

semen samples even though the samples might have been useful to respondent." *Id.* The Court went on to say, in comparing that case to cases where police fail to preserve apparently exculpatory evidence,

> the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in that whenever 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.

Id. at 57-58.

In comparing the facts in the case at bar to those in *Youngblood*, it seems clear to the State that if the lost semen samples in *Youngblood* (which could have completely exonerated the respondent) were only potentially exculpatory, then Officer Meyer's body-worn camera video can, at most, be said to be only potentially exculpatory. As outlined in the facts section (*supra*), it is likely that Officer Meyer's body-worn camera video would have shown him exit his squad car after pulling up behind Revels's vehicle, approach Revels's vehicle, and briefly talk to Revels before leaving and handing-off the investigation to Officer Smith.[1] During that contact, Officer Meyer reported that Revels had slow response times; slow movements; a strong odor of intoxicants coming from him; glassy, watery, and bloodshot eyes; and admitted that he drank several beers. In all likelihood, Officer Meyer's body-worn camera video would have *inculpated*, not exculpated, Revels. As noted in the criminal complaint, Revels's PBT result was a 0.163 g/210 L (of breath) after Officer Smith had him complete SFSTs. The blood-ethanol result (which was collected approximately two hours after law enforcement first made contact with Revels and also listed on the criminal complaint) was 0.172 g/100 mL.

[1] Officer Meyer's body-worn camera video would likely not have shown anything prior to Officer Meyer exiting his squad, as it is standard practice to turn the video on upon exiting a squad.

Given what is commonly known about the effects of alcohol on human beings, the reported observations of Officer Meyer make sense. In the State's opinion, it is hard to conceive of a situation wherein Officer Meyer's body-worn camera video (limited though it would be due to the short duration of the contact) would have possessed *any* exculpatory information, let alone apparently exculpatory information.

The video would have definitively shown the questions asked by Officer Meyer and the order in which they were asked; however, the fact that an officer's report or testimony doesn't recall the exact order in which interview questions were asked is not exculpatory. At most, it could be said to support the claim that most officers do not have a photographic, identic, or perfect memory. This is not exculpatory and certainly not apparently exculpatory. The video would not have shown Revels's vehicle stopped at the traffic light before Officer Meyer moved his squad behind it, nor would it have captured the odor of intoxicants coming from this defendant's vehicle. It would have captured Revels's responses to Officer Meyer's questions, but these answers would have likely inculpated Revels. Additionally, those questions were repeated by Officer Smith while Revels was still in his vehicle (and this interaction *was* recorded). Ultimately, if the Circuit Court's ruling is taken to its logical conclusion, it would seem that the police's inadvertent loss of *any* body-worn camera video (even primarily containing inculpatory evidence, such as the video at-issue here) would necessitate a dismissal. This, simply put, is not the correct legal standard; and it does not follow the rule as promulgated by the U.S. Supreme Court in *Youngblood*.

Further, none of the information presented at the motion hearing or arguments made by Revels at the adjourned hearing show that the video was actually exculpatory. Those arguments were, succinctly: the police failed to follow policy, the video may be significant in the case, Officer Meyer's memory of the incident is not as perfectly clear as the video would be, the Officers cannot recall "the precise language" of quotes, there's no video pre-stop, a report written 40 hours after an incident is not as good as one written immediately, and that the officer got to watch

the video to write his report and Revels does not and this is unfair. Revels is correct in some of the arguments and factual assertions made, but none of these lead to the legal conclusion that the video was actually exculpatory. Indeed, the claim that the video may be significant to in the case is undoubtedly true—it likely would have supported the prosecution of Revels for intoxicated driving.

Interestingly, the Circuit Court's reasoning concerning why Officer Meyer handed off the investigation to Officer Smith ("[a]nd what would have prompted Officer Meyer to hand that off to Officer Smith is unknown, it's *untested,* and we have no way of actually determining whether that was proper at that point in time." – *Oral Ruling Tr.*, 36:18-22; *App*. 238 - emphasis added) seems to correspond to the language in *Youngblood* ("… evidentiary material of which no more can be said than that it could have been *subjected to tests,* the results of which might have exonerated the defendant." – *Youngblood*, 488 U.S. at 57, emphasis added) which actually defines evidence that is potentially exculpatory. Seemingly, the Circuit Court was describing the evidence as potentially exculpatory, despite then finding it apparently exculpatory.

Perhaps most instructive are the words that the Court used in coming to the conclusion that the video was apparently exculpatory:

> Again, we don't have a clear recollection by Officer Meyer of when he even turned his body camera on, so we're not even certain whether this was two minutes, five minutes, seven minutes, we have no idea because again the report gives us no indication about any of that, but it was necessary for Officer Meyer to review it in order to write his report, and that in and of itself speaks to the fact that it was a particular piece of evidence that has the ability to be apparently exculpatory, but yet again we have no way of knowing. *Oral Ruling Tr.*, 34: 1-12; *App*. 236.

The wording of the above sentence: "we're not even certain," "we have no idea," "has *the ability to be* apparently exculpatory, but yet again *we have no way of knowing,*" (*id.*, emphasis added) all seem to support the conclusion that while the video could have been exculpatory, we do not know whether it was or not. Logically, if the Circuit Court was able only to say that we are not sure what was on the video and that it had "the ability to be apparently exculpatory, … but we have

no way of knowing,"[2] then the video could not have been apparently exculpatory and could only, at most, have been potentially exculpatory.

The State believes that based on the above analysis, it is clear that Officer Meyer's body worn camera video should be deemed potentially exculpatory, not apparently exculpatory. Accordingly, before granting a dismissal for failure to preserve the video, the defendant must show and the Circuit Court must find that the police acted in bad faith, or made a "conscious effort to suppress [the] exculpatory evidence." *State v. Luedtke*, 2014 WI App 79, ¶ 21. The State does not believe that the Circuit Court can make such a finding based upon the factual record presented; however, the ruling of the Circuit Court concerning the body-worn camera video obviated the need to make a bad faith finding. Thus, the State believes it appropriate for the Court of Appeals to find that Officer Meyer's body-worn camera video was potentially exculpatory and return this matter to the Circuit Court to rule on whether the police acted in bad faith.

CONCLUSION

For the reasons as outlined above, the State respectfully requests that the Court of Appeals find that Officer Meyer's body-worn camera video was potentially exculpatory and remand this case for further proceedings consistent with that ruling.

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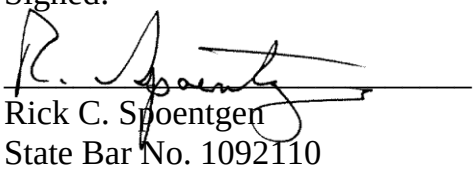
[2] The definition of apparent is "clearly visible or understood, obvious." Defn. of Apparent. Oxford Dictionary.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,173 words.

Signed:



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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that an electronic copy of this brief complies with the requirement of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

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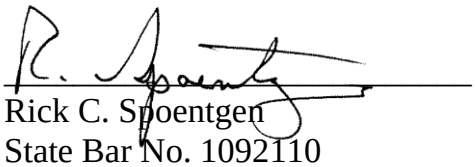

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8g)(b)

I hereby certify that filed with this brief, in a separate document, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. §§ 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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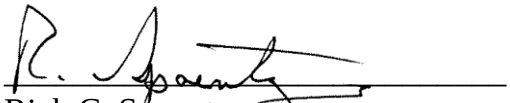

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