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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2021 AP 1185 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

RORY DAVID REVELS,

Respondent-Respondent.

BRIEF OF RESPONDENT-RESPONDENT

Appeal from an Order Granting Motion to Dismiss
Entered In Sauk County Circuit Court
Honorable Patricia A. Barrett, Presiding
Circuit Court Case No. 2020 CF 49

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ISSUE PRESENTED

Where two police officers failed to preserve crucial evidence documenting the circumstances under which the defendant was stopped (and later arrested), which the Circuit Court determined was apparently exculpatory, in flagrant violation of department policies, and one of the officer required the evidence to prepare his report—because he could not testify to an independent recollection of the events—and there was no comparable evidence, did the Circuit Court err in dismissing the State’s prosecution with prejudice?

The Circuit Court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue raised in this appeal can be fully addressed by briefing, but if the Court has questions, Rory Revels welcomes the opportunity for oral argument. The decision of the Court should be published if the matter is decided by three judges, as is this Court’s practice. Publication is warranted under § 809.23(1)(a)2. or 3.

STATEMENT OF THE CASE

Nature of the Case. This is an appeal from an Order entered by the Circuit Court dismissing the case with prejudice following an evidentiary hearing and oral argument. *See* R39 & R42. At issue was the failure by two police officers to preserve video recordings of their contact with Rory Revels, in violation of at least two department policies. In total, three video recordings were not preserved. The video recordings were the best evidence that explained what police observed when they had initiated contact with Rory Revels during a traffic stop. No comparable evidence supporting the finding of reasonable suspicion existed. Even one of the officers, in writing his report about the contact, needed to review one of the video recordings, because he couldn't recall the facts relating to the contact with Revels. *See* R23.

The Circuit Court found that the video recordings were potentially exculpatory (in the case of squad camera recordings) and apparently exculpatory (in the case of one officer's body camera recording). R42:33. Indeed, Judge Barrett found that "[b]oth officers concurred that in fact they believed that [the video recordings] had at least potentially exculpatory information, if not apparent exculpatory information." *Id.* at 35.¹ The police officers had a duty preserve the video recordings "and maintain the evidence for the benefit of the defendant." *Id.* at 34. Their failure to preserve the evidence "does not protect the defendant's due process rights," *id.* at 35, and was "in flagrant violation of [police department] policy." *Id.*

¹ The District Attorney agreed that the video recordings were potentially exculpatory. R39:6 ("Oh, it's potentially exculpatory, I think it is ...").

This left the Court in “the position of protecting the defendant’s due process rights.” *Id.* After explaining how the failure to preserve the video recordings affected the ability to test the allegation, given that the officers’ could not recall details about their contact with Revels, Judge Barrett found it necessary and appropriate to “dismiss this matter for the failures that were made here in not properly protecting the defendant’s due process rights.” *Id.* at 36-37.

Procedural Status and Relevant Facts. Rory Revels was charged in Sauk County Circuit Court with violating WIS. STAT. § 346.63(1)(a), for operating a motor vehicle while impaired as a third offense. *See* R4. Revels moved to dismiss the charge because the police officers failed to preserve video recordings of their contact with him. R23. Revels asserted that the police officers’ failure to preserve the video recordings, in contravention of established and known department policies, violated his right to due process. *Id.*

On November 4, 2019, at about 12:30 a.m., Baraboo Police Officer Brendon Meyer observed a black Ford truck that was stopped at a traffic light. R39:44. Meyer claimed that the truck remained in place for “30-45 seconds” after the traffic light turned green. *Id.* at 45. Meyer pulled behind the truck and activated his squad car’s emergency lights; he thought the truck could be “disabled.” *Id.* at 47. But he made no observations about how or why the truck was disabled. *Id.* at 53. Meyer offered no information about seeing the truck (or other traffic) drive past his location, observing anything about the condition of the truck indicative of it being “disabled,” or observing the truck

being operated in a manner suggestive of the driver's impairment. *Id.* at 52-53.

Meyer spoke to the driver of the truck, who was later identified as Rory Revels. *Id.* at 48. Meyer asked "if everything was ok?" *Id.* Revels replied affirmatively. *Id.* Meyer continued to ask questions, mainly about where Revels was coming from and whether he had been drinking. *Id.* at 49.² Meyer claimed to observe various clues of intoxication during his contact with Revels. *Id.* These clues included an odor of intoxicants, slurred speech and glassy, watery and/or bloodshot eyes. *Id.* This led Meyer to extend the traffic stop into an investigation of whether Revels was operating while intoxicated.

But, as Meyer was nearing the end of his shift, and was feeling under the weather, he asked Baraboo Police Officer Scott Smith, who had arrived as Meyer's back-up, to take over the investigation. *Id.* at 50. Smith recalled that Meyer told him that he saw the truck stop at the red light. *Id.* at 79. Further, Meyer told Smith that the truck remained at the green light for "approximately one minute." *Id.* at 80. Meyer informed Smith that the driver admitted to consuming three beers. *Id.* Meyer then handed the investigation over to Smith. *Id.* Meyer left and ended his shift. *Id.* at 55. Smith continued the investigation and, after he put Revels through field sobriety tests, Smith placed Revels under arrest. *Id.* at 81.

² At the evidentiary hearing officer Meyer could not recall what questions he asked Revels, how many questions he asked, or the order in which he asked them. *Id.* at 49.

Both officers were equipped with a body-worn cameras, and each squad car was equipped with a video recording system.³ The body-worn camera is to be activated by the officer after the emergency lights are activated and prior to making contact with a citizen. *Id.* at 47. This includes any contact that may lead to court action or in the case of a traffic stop. *Id.* at 48. The squad car video system is activated automatically whenever the emergency lights are activated. *Id.* at 12. The system saves and records the last 30 seconds before the lights were activated. *Id.*

Officer Meyer knew that the squad video system was recording when he activated the emergency lights. *Id.* at 46. Meyer thought it “possible” that the squad recording could have shown Revels’ truck when it was in motion. The recording, Meyer agreed, would have shown what the truck looked like, where it was stopped and other details of its operation. *Id.* at 50. Meyer agreed that the squad recording could have shown how long the truck was at the intersection; and the recording would have been more accurate than his estimate of how much time passed. *Id.* at 52.

Meyer knew that his contact with Revels was audio and video recorded, *id.* at 53, although Meyer did not recall when he activated his body-worn camera. *Id.* at 48. In any case, Meyer was certain that the camera was recording during his contact with Revels. *Id.* Meyer told Officer Smith that the recordings were evidence, and Meyer agreed that the video recordings could be important to both the prosecution and defense in determining

³ The squad car video recording system is sometimes referred to as the “MAV” system, which stands for mobile audio/video. *See* R39:11.

whether the traffic stop leading to Revel's arrest was lawful. *Id.*

Videos from both cameras are downloaded onto the Baraboo Police Department's server. The body-worn camera is downloaded when the officer removes the camera from his body and places it into the charger. R39:20-21. The data is then automatically saved to the server. *Id.* The data from the squad car video is automatically transferred to the server when the squad car is close enough to the police department for the data to be transferred by wi-fi. *Id.* at 67.

The video taken by Meyer's body-worn camera of the contact with Revels would have been downloaded automatically to the server when Meyer placed the camera into the charger at the end of his shift. *Id.* at 56. The squad video, Meyer believed, transferred automatically. *Id.* But Meyer did not take any steps to preserve either video by saving them onto a DVD or USB device. *Id.* Meyer relied on Smith to do so. *Id.* at 57.

Meyer wrote a one-page report about his contact with Revels almost two days later. *Id.* at 41. Prior to writing his report, he accessed and reviewed the video from his body-worn camera on the department server. *Id.* at 72. Meyer admitted that his one-page report failed to document that video from the squad and body-worn camera systems existed, contrary to department policy. *Id.* at 58.⁴

⁴ Even though he recalled having reviewed the body-worn camera video to prepare his report, Meyer could not remember when he activated the system. *Id.* at 72. Nor could he independently remember watching the video of body-worn camera. *Id.*

According to department policy, each officer was responsible for downloading *all* video recordings from the server onto a USB storage device. *Id.* at 17 & 20. Smith's report noted that his body-worn camera recording was added to the case file on the server. *Id.* at 81. Smith "overrode" the squad car camera so that it did not record his contact with Revels. *Id.* at 83. There's no mention of the squad car recording in his report. *Id.* at 81. Smith took responsibility for adding Meyer's video recordings to the case file. *Id.* Smith believed that he added Meyer's body-worn camera and squad camera recordings to the case file. *Id.* He knew that the video recordings contained evidence of a crime, *id.* at 82, and would be evaluated by the prosecution and defense. *Id.* Smith was "responsible [for] all the videos." *Id.* at 90.

Revels appeared in Court for an initial appearance a little more than four months after his arrest. R5. Through counsel, Revels made a timely request for copies of the videos taken by the officers' body and squad cameras. *See* R9; R23:2. The videos, Revels was informed, did not exist. *Id.* at 3.

While Officer Smith believed he saved all of the videos onto a USB drive, the video recordings were not properly saved. R39:88. Smith saved three copies of the video taken by his body-worn camera onto the USB. All other videos—specifically the videos recorded by Meyer's body-worn camera, Meyer's squad car, and Smith's

squad car during their contact with Revels – were lost.⁵
Id.

Whether Officer Meyer had reasonable suspicion to conduct a traffic stop based on the fact that he “estimated” Revels to have been stopped at the traffic light for “30-45 seconds” after the light turned green is a determinative issue. Any evidence showing what Meyer observed in the time before he activated his emergency lights, and what he observed as he approached Revels, as well as during his initial contact with Revels is critical to the assessment of this issue. If the recordings showed that Meyer lacked reasonable suspicion, then the stop was unlawful and all evidence derived from the unlawful stop would have to be suppressed. *See* R23.

At the evidentiary hearing Chief Mark Schauf of the Baraboo Police Department testified about the department’s procedures and policies relating to the preservation of evidence.⁶ R39:9; *see generally*, R35 & 36. Every officer, Chief Schauf testified, is trained on and required to understand and follow the department’s procedures and policies. *Id.* at 10.

⁵ In a report explaining why the case file did not contain the necessary video recordings, officer Smith explained that the failure to preserve the video recordings was the result of a simple mistake that he and Officer Meyer made the morning after the traffic stop. R39:90. But Smith could not explain why he referenced Meyer in this report, as he did not recall having contact with Meyer, because Meyer went home sick after his shift. *Id.* Nor could he explain what role Meyer played in Smith’s failure to properly preserve all of the video recordings. *Id.*

⁶ The District Attorney stipulated to the admission of the Baraboo Police Department Policies, and that both policies were in effect on November 4, 2019. R39:7.

Policy 421 pertains to squad car video recordings. *Id.* at 11; *see* R35. Chief Schauf explained that the policy sets forth how the video recording system is to be used and the officer's responsibilities in preserving the evidence. *Id.* Specifically, 421.3 requires each officer to assure that any necessary video has been uploaded to the department's server. *Id.* When the recording system is to be activated is covered by 421.4, and generally provides that the system is to record whenever the squad car's emergency lights are activated. *Id.* at 12. (The system is configured to record beginning 30 seconds before the lights are activated. *Id.*) The policy requires the squad car system be activated for traffic stops, including instances of assisting stranded motorists. *Id.* at 13. Under the policy an officer is required to document use of the recording in their report. *Id.* And if the recording has evidentiary value, the officer is required to download a copy of the recording and place it into evidence in order to preserve it. *Id.* at 14.

The squad video system automatically downloads any video of "evidentiary value," *id.* at 15, to the server through a wireless network. Once on the server, the video recordings are retained for at least 120 days. *Id.* The officer is then responsible for downloading the video onto a DVD or USB drive, particularly if the contact turns into a criminal case. *Id.* at 16.

Policy 706 relates to body-worn cameras. *Id.* at 17; *see* R36. Chief Schauf explained that the policy allows "the department to improve its ability to review probable cause to arrest, officer/suspect interaction, and evidence for prosecutorial purposes." *Id.* at 19, citing to 706.3(a)(2).

Similar to the policy relating to the use of squad car video recordings, the officer is required to document the use of a body-worn camera in his report. *Id.* at 19-20. The recordings made by the body-worn camera are downloaded no later than the end of the officer's shift. *Id.* at 20. It's the officer's responsibility to download the recording. *Id.* If the recording has evidentiary value, the officer must then copy the recording onto a DVD or USB drive. *Id.* at 21. Like other video recordings, the body-worn camera recording is stored on the server for at least 120 days. *Id.* at 22.

After reviewing the motion filed by Revels, hearing testimony and reviewing the exhibits received at the motion hearing and following the parties' oral argument, Judge Barrett found that, while the testimony about what would have been on Meyer's squad car video was "unclear at best," *id.* at 31, she was concerned about what it would show, when it would have shown it and "the timing of what exactly was seen that Officer Meyer believes prompted his action may or may not have been shown by the [squad] recording, and it's that ambiguity that helps none of us." *Id.* at 32.

Judge Barrett noted that the Baraboo Police Department's policies recognize that video recordings are important pieces of evidence that are to be preserved. *See id.* at 33. Of importance to Judge Barrett was the fact that the procedures and policies, when followed by officers

protect a defendant's due process rights by having evidence of the interaction. And it's very clear that in this case the lack of clarity

that exists in regards to the officers themselves, certainly given the body cam and the [squad car] recordings, could certainly assist in making a clear understanding of what actually occurred. I think the argument is that it could be properly tested against the actual video themselves.

Id. at 32-33.

Meyer's squad car video, Judge Barrett found, was potentially exculpatory. *Id.* at 33. While the body-worn camera video

fits under the apparently exculpatory category, and that is based on the testimony of both officers, as well as the lack of consistency between what Officer Smith believed Officer Meyer told him and what Officer Meyer believed his testimony would be, and in order to have the clarity, even the prosecution admits we just will never know. And that's exactly the problem, we just will never know.

Id. She noted that "[b]oth officers concurred that in fact they believed that they had at least potential exculpatory information, if not apparent exculpatory information." *Id.* at 35.

Importantly, Judge Barrett found that Meyer's report was not comparable evidence to the video recordings. Indeed, Meyer used the body camera recording for the purposes of writing his report. "The report is a quick summary, certainly not to the extent of whatever that

body camera video would have shown.” *Id.* at 33. Judge Barrett explained that, for example, Meyer’s summary report doesn’t indicate when he even turned his body camera on. “[T]hat in and of itself speaks to the fact that it was a particular piece of evidence that has the ability to be apparently exculpatory.” *Id.* at 35. “It was not complicated” for Meyer to follow procedure and assure that the evidence was preserved: “save it himself to just be sure that it was done, or confirm that the evidence that had been saved by Officer Smith did include his body camera and his [squad car video], but he did neither, in flagrant violation of the policy.” *Id.*

About Officer Smith, who believed himself to be responsible for preserving all of the videos, Judge Barrett noted that: “[I]n his efforts to ensure that the evidence was actually properly saved ... [he] downloaded exactly one thing, his own body cam. And that too would have been in violation of the policies.” *Id.*

Judge Barrett concluded that “there has been sufficient evidence presented here that does support the request here being made by the defense. And I do not do that lightly.” *Id.* at 36. She explained that:

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 that was after 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. Judge Barrett orally granted Revels' motion to dismiss. R42:36. A written order followed. R43. The State timely filed a Notice of Appeal. R44.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT RORY REVELS' RIGHT TO DUE PROCESS WAS VIOLATED WHEN BARABOO POLICE FAILED TO FOLLOW DEPARTMENT POLICIES TO ENSURE THE PRESERVATION OF THE BEST EVIDENCE OF THE CIRCUMSTANCES LEADING TO HIS ARREST AND THAT DISMISSAL WITH PREJUDICE WAS THE APPROPRIATE SANCTION FOR THE FLAGRANT VIOLATION OF DEPARTMENT POLICIES.

A. Standard of Review

When the State destroys evidence in a criminal case in violation of a defendant's right to due process, determining the proper remedy for that violation is within the circuit court's discretion. *State v. Huggett*, 2010 WI App 69, ¶ 25, 324 Wis. 2d 786, 783 N.W.2d 675. In reviewing the circuit court's discretionary decision, the question is not whether the court's decision was "right" or "wrong." *State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995). Rather, the Court of Appeals will uphold the circuit court's exercise of discretion "unless it can be said that no reasonable judge, acting on

the same facts and underlying law, could reach the same conclusion." *Id.*

Independent review of a discretionary decision occurs only when a circuit court fails to set forth its reasoning in support of its decision. *See State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). Discretionary rulings are to be affirmed if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstratively rational process, reached a conclusion that a reasonable judge could reach. *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999).

B. Legal Principles.

The government is required to preserve evidence only in certain circumstances. But when it creates an expectation of preservation, it becomes responsible for assuring that evidence was, in fact, preserved. *State v. Huggett*, 2010 WI App 69, 324 Wis. 2d 786, 783 N.W.2d 675.

The duty to preserve evidence is limited to evidence expected to be material to the defense. *California v. Trombetta*, 467 U.S. 479, 488 (1984). To be material, the "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." *Id.* at 489. This criteria was adopted in *State v. Oinas*, 125 Wis. 2d 487, 490, 373 N.W.2d 463, 465, (Ct. App. 1985).

The defendant's due process rights are violated when the evidence was "apparently exculpatory" or the evidence was "potentially exculpatory," but the police acted "in bad faith" in failing to preserve it. *See State v. Greenwold*, 189 Wis. 2d 59, 67-68, 525 N.W.2d 294 (Ct. App. 1994) (*Greenwold II*) (citing *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988); *State v. Greenwold*, 181 Wis. 2d 881, 885-86, 512 N.W.2d 237 (Ct. App. 1994) (*Greenwold I*)). Bad faith applies only to potentially exculpatory evidence. *State v. Huggett*, 2010 WI App 69, ¶ 12, 324 Wis. 2d 786, 783 N.W.2d 675.

C. *The Circuit Court examined relevant facts, applied a proper standard of law, and used a rational process to determine that dismissal with prejudice was a reasonable sanction.*

The Baraboo Police Department established policies that require all of its officers to document and preserve video recordings of their interactions with citizens when, such as in this case, an officer performs a traffic stop or assists a citizen whose vehicle is disabled. The purpose of the policy is clear, and couched in terms of fundamental fairness and due process. Chief Schauf explained that the policies allows "the department to improve its ability to review probable cause to arrest, officer/suspect interaction, and evidence for prosecutorial purposes." R39:19. Judge Barrett explained that the policies recognize that the

recordings are important pieces of evidence that are to in fact be preserved, and there is a complete policy and protocol for that preservation. It is done for a variety of

reasons, not the least of which is to protect a defendant's due process rights by having evidence of the interaction.

R42:32. That's because the video recordings contain information that may not be present in a report about the same police/citizen contact. And the details may be critical and singular when evaluating whether the police's actions were lawful.

Technology makes the preservation of evidence simple. The recordings are automatically downloaded onto the department server when the squad car comes into contact with the department's wireless network. And, in the case of the body-worn camera, the recording is automatically downloaded when the camera is placed into its charging stand at the end of the officer's shift. All the officer has to do is save the relevant videos to storage media so that they are preserved for use in legal cases.

The department's policies create an expectation that the video recordings will be saved and available when a legal challenge to a traffic stop and investigation is raised. It's an expectation that the police officers are trained on and aware of.⁷ No testimony was offered by Chief Schauf that compliance with the relevant policies was discretionary.

⁷ Rory Revels had no opportunity to preserve the video recordings. He filed a discovery demand two days after he was charged, but it was already too late. The officers were in the best (and only) position to preserve the evidence. An expectation of preservation arises from the fact that police created the evidence, collected it, stored it, and also had a written policy detailing their obligation to document, collect and preserve the evidence.

When, in this case, the officers violated department policies and failed to document and preserve the best evidence relating to the circumstances leading to Rory Revels' arrest—three video recordings of the police officers' interactions with him—they violated his right to due process. They eliminated the best evidence of the circumstances leading to his arrest. This evidence was particularly important given the officers' inability to recall details as well as their differing accounts of the circumstances leading to their contact with Revels. The video recordings were, at least as to Officer Meyer's body-worn camera, apparently exculpatory. But even the other videos were potentially exculpatory. The failure to preserve the video recordings clearly affected Revels' ability to challenge, in a meaningful way, the events leading to his arrest. The circumstances under which the police failed to preserve the key evidence to allow Rory Revels to test the truth of the officers' claim met the bad faith standard: the officers' violation of department policies was flagrant, according to Judge Barrett.

The circuit court's decision, based on the evidentiary record developed in this case, should be affirmed. The remedy ordered, is squarely within the Circuit Court's discretion. *Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.*, 177 Wis. 2d 523, 529, 502 N.W.2d 881 (Ct. App. 1993). "A circuit court has a 'broad canvass upon which to paint in determining what sanctions are necessary' in a spoliation case." *American Family Mut. Ins. Co. v. Golke*, 2009 WI 81, ¶ 71, 319 Wis. 2d 397, 768 N.W.2d 729 (Abrahamson, C.J., dissenting). The record shows that the circuit court examined the relevant facts, applied a proper standard of law, and used a rational process to reached a conclusion that a reasonable.

Rory Revels' right to due process was violated when police failed to preserve the recording that was apparently exculpatory, Meyer's body-worn camera recording. And police acted in bad faith by failing to preserve evidence that was potentially exculpatory, Meyer's and Smith's squad camera recording. *State v. Greenwold*, 189 Wis. 2d 59, 68, 525 N.W.2d 294, 297 (Ct. App. 1994). "[T]here is no replacement for a live recording." *State v. Huggett*, 2010 WI App 69, ¶ 23, 324 Wis. 2d 786, 783 N.W.2d 675. The evidence that the officers' failed to preserve is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at ¶ 21. (internal citation omitted). On the facts of this case, the materiality of the body-worn camera video rises above being potentially useful, as does Meyer's squad video. Moreover, the record demonstrates why the video recordings are important and that no comparable evidence exists.

1. The Missing Video Recording from Officer Meyer's Body-Worn Camera Was Apparently Exculpatory.

In assessing whether Officer Meyer had reasonable suspicion to initiate a traffic stop of Revels' truck, the circumstances of the stop must be evaluated. This includes information about drew Officer Meyer's attention to the truck, and includes his first contact with Revels. This information was recorded on Meyer's body-worn camera; it was created when Meyer turned on the camera as he activated his squad's emergency lights – as the department's policy requires.

Meyer knew that his contact with Revels was audio and video recorded. R39:53. Meyer was certain that the camera was recording during his contact with Revels. *Id.* Meyer told Officer Smith that the recordings were evidence, and Meyer agreed that the video recordings could be important to both the prosecution and defense in determining whether the traffic stop leading to Revel's arrest was lawful. *Id.*

Meyer wrote a one-page report about his contact with Revels almost two days later. *Id.* at 41. Prior to writing his report, he accessed and reviewed the video from his body-worn camera on the department server. *Id.* at 72. Meyer admitted that his one-page report failed to document that video from the squad and body-worn camera systems existed, contrary to department policy. *Id.* at 58. Even though he recalled having reviewed the body-worn camera video to prepare his report, Meyer could not remember when he activated the system. *Id.* at 72. Nor could he independently remember watching the video of body-worn camera. *Id.*

Any evidence showing what Meyer observed in the time before he activated his emergency lights, and what he observed as he approached Revels, as well as during his initial contact with Revels is critical to the assessment of this issue. If the recordings showed that Meyer lacked reasonable suspicion, then the stop was unlawful and all evidence derived from the unlawful stop would have to be suppressed. *See* R23.

But unlike his one-page report, Meyer's body-worn camera recording would provide an accurate and

objective picture of what he observed in the moments leading up to and after he activated his emergency lights and while in making contact with the driver. Details the body-worn camera recording captured would include what lights were illuminated on the truck, whether parking or brake lights were on, whether the truck's hazard lights were on, what the driver was doing, and whether there were mechanical issues or other signs that the truck was disabled. *See* R39:52-53. None of these observations were contained in Meyer's one-page report.

Everything about the nature of the contact with Revels underscores that it was apparent to the officers that video recordings would play a significant role in a court case. Indeed, Officer Meyer recognized the central role of the recordings: "I believe that it would have had some value." *Id.* at 54. The importance of the video recording is underscored by the frailty of the officer's memory and the lack of specificity contained in his report: both do not provide the needed details of what Meyer observed.

Officer Meyer's memory of what occurred lacks the critical details about what he observed leading to his contact with Revels. He could not recall what evidence was on the recording, though he reviewed it in order to write his report almost two days after he stopped Revels. Meyer did not recall whether he saw the truck in motion. He did not recall how the truck was operated, what lights were on, or what the motor sounded like. And he could not state with certainty how long the truck was stopped at the green light. Significant inconsistencies between the officers' testimony further show that their memories of what occurred during the traffic stop were not reliable:

was the vehicle in motion or not when Meyer first observed it; how long was it at the traffic light.

The body-worn camera video, Judge Barrett determined was apparently exculpatory. R42:33. She explained that the recording fit into this category

based on the testimony of both officers, as well as the lack of consistency between what Officer Smith believed Officer Meyer told him and what Officer Meyer believed his testimony would be, and in order to have the clarity, even the prosecution admits we just will never know. And that's exactly the problem, we just will never know.

Id.

On facts similar to those here, the Court of Appeals affirmed a circuit court's order dismissing, with prejudice, a single charge of second-degree intentional homicide because the State failed to preserve apparently exculpatory evidence consisting of threatening voice mail messages left on two cell phones. *State v. Huggett*, 2010 WI App 69, 324 Wis. 2d 786, 783 N.W.2d 675.

In *Huggett*, the defendant raised perfect self-defense and defense of others. The lost voice mail messages were from the victim, who broke into the defendant's home. The court explained that:

[b]y creating an expectation of preservation [of data, including text and voice mail messages], the State became responsible for ensuring that it occurred . . . It would be

fundamentally unfair for the State to induce reliance and then place the responsibility on [the defendant] for failing to seek and preserve the evidence prior to ever being charged.

Id., 2010 WI App 69, ¶ 18. Regardless of whether the State (or another party) had failed to preserve the evidence, lost the evidence, or destroyed the evidence:

the State failed in its duty to preserve evidence. Here, the State made no attempt to record the messages, much less listen to and contemporaneously document their content, until over two and one-half months after the incident. Even then, no attempt was made to access [the defendant's] voice mail messages.

Id.

The *Huggett* court rejected the argument that, even though the relevant (and material) voicemail messages had not been preserved, the defendant still had access to comparable evidence through witness testimony and the preserved text messages. *Huggett*, 2010 WI App 69, ¶ 22. While witnesses were able to generally recall that the voicemails were threatening, neither could sufficiently recall the precise language used. *Id.* One witness was unable to recall any of the words used in either message, and did not listen to the entire message left on Huggett's phone. The defendant only remembered some of the language, consisting of two phrases. When an officer listened to part of the message, she came away with the perception that the message should be preserved. The court held that "mere descriptions of the messages"

couldn't adequately convey the assailant's tone. *Id.* "Simply put, there is no replacement for a live recording of the threats screamed at Huggett shortly before Peach broke down the door to Huggett's home." *Id.* at ¶ 23.

The circuit court in Hugget recognized dismissal was "the most Draconian sanction possible," and indicated it was hesitant to grant it. Nevertheless, it was "a discretionary call for the Court." *Id.* at ¶ 27.

The court reached a similar result in *State v. Hahn*, 132 Wis. 2d 351, 392 N.W.2d 464 (Ct. App. 1986). *Hahn* involved an appeal from an order dismissing with prejudice a complaint for homicide by intoxicated use of a vehicle. The issue was whether the failure to preserve exculpatory evidence justified dismissal. At issue was whether the vehicle operated by the defendant was defective and the accident would have occurred regardless of the defendant's intoxication. *See* § 940.09(2).

Before the defendant's expert could examine the vehicle, it was salvaged, and the relevant examination could not be performed. The defense expert testified that examining the vehicle "in its dismantled state would make it very difficult, if not impossible, to tell whether or not there was a defect in the vehicle which caused or somehow contributed to the accident." 132 Wis. 2d at 359. The expert conceded that "it was conceivable that he could find a defect from examination and testing of the truck's remaining parts." *Id.*

The circuit court concluded that once the truck was gone, the defendant "lost his one and sole statutory defense.

His one opportunity to defend himself in this action.” *Id.* at 359-360. The circuit court explained that the “truck had an apparent exculpatory value which the state recognized, evidenced by its impoundment of the vehicle. The destruction of the truck made it impossible for defendant to obtain other comparable evidence, because none existed.” *Id.* The court concluded that as the state violated its duty to preserve the evidence. The Court of Appeals held that the Circuit Court did not abuse its discretion by dismissing the complaint. *Id.* at 363.

Hahn and *Huggett* are controlling.⁸ Here, both police officers knew about the importance of preserving the video recordings. They were trained on the department’s policy. But both failed to document that video recordings existed, and Meyer failed to download both recordings, including the body-worn camera that would have provided the best evidence of the circumstances of the traffic stop and expansion of the stop. It is undisputed that Meyer was aware that the recordings would be used to evaluate whether a criminal case would be brought and that the recordings were evidence that would be used in a court case. Like in *Hahn* and *Huggett* the loss of the evidence affected the defendant’s ability to defend the case.

In neither *Hahn* nor *Huggett* was the defendant required to show the exact details of what the evidence that was not preserved would have shown. “And that’s exactly the problem, we just will never know.” R42:33. Because

⁸ That the State’s brief does not address *State v. Huggett* is a telling omission; *State v. Hahn* receives only passing mention.

the recording was lost, “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.” *Id.* at 36.

Because Officer Meyer did not recall many details of the encounter with Revels (even after refreshing his recollection by viewing the body-worn camera recording two days after the contact), there was no comparable evidence available to Rory Revels. The body-worn camera recording was the best evidence of what the officer perceived. Meyer’s one-page report couldn’t replace the details available in the recording. “The report is a quick summary, certainly not to the extent of whatever that body camera video would have shown.” R42:33. Judge Barrett explained that, for example, Meyer’s summary report doesn’t indicate when he even turned his body camera on. “[T]hat in and of itself speaks to the fact that it was a particular piece of evidence that has the ability to be apparently exculpatory.” *Id.* at 35. “It was not complicated” for Meyer to follow procedure and assure that the evidence was preserved: “save it himself to just be sure that it was done, or confirm that the evidence that had been saved by Officer Smith did include his body camera and his [squad car video], but he did neither, in flagrant violation of the policy.” *Id.*

The Circuit Court properly found that the materiality of Officer Meyer’s the body-worn camera video was more than potentially useful; she explained why the recording was important and that no comparable evidence exists.

2. The Missing Video Recordings From The Squad Cars Were Potentially Exculpatory (A Fact The State Did Not Contest) But The Flagrant Violation Of Department Policies Warranted Dismissal With Prejudice.

As it relates to the squad car videos, “[b]oth officers concurred that in fact they believed that they had at least potential exculpatory information, if not apparent exculpatory information.” R39:35. The District Attorney agreed. *Id.* at 6.

Officer Meyer knew that the squad video system was recording when he activated the emergency lights, *id.* and he thought it “possible” that the recording could have shown Revels’ truck when it was in motion. The recording, Meyer agreed, would have shown what the truck looked like, where it was stopped and other details of its operation. *Id.* at 50. Meyer agreed that the squad recording could have shown how long the truck was at the intersection; and the recording would have been more accurate than his estimate of how much time passed. *Id.* at 52. The recording would have shown when Meyer pulled up behind the truck, and what occurred in the 30 seconds previous what Meyer believes prompted his action may have been shown by the squad recording.

Because the recording was lost, questions about what Officer Meyer observed could not be answered. Judge Barrett noted “the timing of what exactly was seen that Officer Meyer believes prompted his action may or may not have been shown by the [squad] recording, and it’s that ambiguity that helps none of us.” R42:32. The

situation affects Rory Revels' ability to defend against the charge. The failure to preserve this evidence does not "comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984).

The squad car video was potentially exculpatory. But the fact that the video was lost due to flagrant violations of department policy manifested bad faith and made the sanction appropriate. Meyer failed to document that two recordings were relevant to his contact with Revels. And he did not take the necessary steps to preserve the recordings. Smith in overriding the recording of the squad video also violated department policy. More importantly, with regard to Officer Smith, however, though he deemed himself responsible for all of the recordings, he failed to save the necessary recordings (other than his own body-worn camera), again, in violation of department policy.

When both officers failed to take the necessary steps to preserve evidence in a case that would lead to the filing of criminal charges, they showed "knowing disregard of the judicial process" which supports the Circuit Court's decision to sanction the State for its failure to preserve evidence. *Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.*, 177 Wis. 2d 523, 533, 502 N.W.2d 881 (Ct. App. 1993).

In her decision, Judge Barrett fairly characterized the failure to preserve the evidence. She called the failure to preserve the evidence a "flagrant violation of the policy." R42:34-35. As a result, Judge Barrett stated, "The Court is left with figuring out how to properly protect Mr. Revels' due process rights. *Id.* at 36. Determination of the

sanction depends on a balancing of the quality of the police officer's conduct and the degree of prejudice to the accused. *State v. Hahn*, 132 Wis. 2d 351, 362, 392 N.W.2d 464, 468 (Ct. App. 1986) (internal citations omitted). Having found that the recordings were material to Revels' case, the Court was left to consider the sanction in light of the flagrant violation of department policies. Because the loss of evidence impacted Revels' right to due process the Court felt compelled to dismiss the case.

3. The Circuit Court Properly Weighed The Impact That The Missing Recordings Had And The Officer's Culpability When Determining The Appropriate Sanction.

The Circuit Court acknowledged that dismissing the case with prejudice was the most serious remedy. "I do believe that there has been sufficient evidence presented here that does support the request here being made by the defense. And I do not do that lightly." R42:36.

"[W]hen evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing . . . the State's most probative evidence." *Trombetta*, 467 U.S. at 487. One of the sanctions available to the Circuit Court, and within its discretion, for the loss of apparently exculpatory evidence in a criminal case is dismissal. *State v. Hahn*, 132 Wis. 2d 351, 361, 392 N.W.2d 464, 468 (Ct. App. 1986).

When determining whether dismissal is warranted as a sanction for the State's destruction of evidence, a court should consider: (1) the degree of negligence or bad faith by the government; (2) the importance of the evidence

lost; and (3) the other evidence of the defendant's guilt adduced at trial. *State v. Amundson*, 69 Wis. 2d 554, 579-80, 230 N.W.2d 775 (1975), *overruled on other grounds by Wayerski*, 2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468. Here, the circuit court's decision addressed each factor in reaching the discretionary decision that dismissal was the appropriate remedy for violating Rory Revels' right to due process.

As to the degree of negligence or bad faith by the government, Judge Barrett noted that the violations of the department's policies, that are intended to preserve material evidence, were "flagrant." R42:35. It was clear that both officers had a duty to preserve the video recordings. *Id.* at 34. The failure to preserve material evidence showed disregard for judicial process where the police officers knew that the recording would be used in a court proceeding.

Addressing the importance of the evidence lost Judge Barrett determined that the body-worn camera recording was apparently exculpatory. *Id.* at 33. This categorization is underscored by "the lack of consistency between what Officer Smith believed Officer Meyer told him and what Officer Meyer believed his testimony would be." *Id.* Moreover, Officer Meyer needed the recording "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." *Id.* at 34. "Simply put, there is no replacement for a live recording." *Huggett*, 2010 WI App 69, ¶ 23.

Finally, turning to other evidence, Judge Barrett noted that “we have no way of actually determining whether that was proper at that point in time.” *Id.* at 36.

Taking all of these points into consideration, the Circuit Court properly exercised its discretion when it imposed the sanction of dismissal: it reasoned that Revels lost his opportunity to defend himself. “This view of the destroyed evidence, though not the only view a court could take, is not unreasonable.” *Hahn*, 132 Wis. 2d at 363-363.

CONCLUSION

For the reasons he offers here, because the Circuit Court demonstrated a reasonable basis for its decision to dismiss with prejudice for the police officers’ flagrant violation of department policy which lead to the loss of critical evidence that was apparently exculpatory, Rory Revels respectfully requests that this Court **AFFIRM** the judgment of the Sauk County Circuit Court.

Dated at Madison, Wisconsin, September 8, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. §§ 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,346.

Electronically signed by Marcus J. Berghahn

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