State of Wisconsin
Court of Appeals
District 2
Appeal Case No. 2024AP000737 - CR
Circuit Court Case No. 19 CF 466

State of Wisconsin,
Plaintiff-Respondent,

v.

Jeffrey A. Roth,
Defendant-Appellant.

ON APPEAL FROM AN ORDER ENTERED IN WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE PAUL F. REILLY AND FREDERICK J. STRAMPE, PRESIDING.

REPLY BRIEF

Gregory Bates
Attorney for Respondent-Appellant
State Bar No. 1018846
PO Box 70
Kenosha, WI 53141
(262) 657-3082
Gbates1407@gmail.com

ARGUMENT

I. The trial court erred when it denied Roth's motion to dismiss.

A. Standard of Review

There is agreement on the standard of review in this case. (See State's Brief p. 11[1], alternative numbering p. 7[2].) That is whether action by the State constitutes a violation of due process is a question of law that is decided on appeal independent of the circuit court's determination. *State v. Luedtke*, 2015 WI 42, ¶37, 362 Wis. 2d 1, 863 N.W.2d 592. A circuit court's findings of historical fact will be upheld unless those findings are clearly erroneous. *Id.* A circuit court's findings of fact are clearly erroneous when those findings "are unsupported by the record." *Royster-Clark, Inc. v. Olsen's Mill, Inc.,*

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[1] The State's brief includes a false certification in that it claims compliance but does not comply with WIS. STAT. RULE 809.19(8)(bm), which addresses the pagination of appellate briefs. See RULE 809.19(8)(bm) (providing that, when paginating briefs, parties should use "Arabic numerals with sequential numbering starting at '1' on the cover"). This rule has recently been amended, see S. CT. ORDER 20-07, 2021 WI 37, 397 Wis. 2d xiii (eff. July 1, 2021), and the reason for the amendment is that briefs are now electronically filed in PDF format, and are electronically stamped with page numbers when they are accepted for efiling. As our supreme court explained when it amended the rule, the new pagination requirements ensure that the numbers on each page of a brief "will match … the page header applied by the eFiling system, avoiding the confusion of having two different page numbers" on every page of a brief. S. CT. ORDER 20-07 cmt. at xl.

[2] Additional references to the State's brief will be to the page number supplied by the eFiling system.

2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530. Whether facts satisfy a particular legal standard is a question of law. *Langlade County. v. D.J.W.,* 2020 WI 41, ¶47, 391 Wis. 2d 231, 942 N.W.2d 277.

To prevail, Roth must show that the evidence not preserved, lost or destroyed by the State 1) possessed an exculpatory value that was apparent before the evidence was lost or destroyed, and 2) be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *State v. Greenwold,* 189 Wis.2d 59, 67, 525 N.W.2d 294 (Ct.App.1994). *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

B. Under Wisconsin Law, Oconomowoc Police had a duty to preserve the body camera video and the squad camera video.

The State responds that Roth cannot show bad faith by the Oconomowoc Police for failure to preserve "*potentially exculpatory"* evidence because the lost videos were not "*apparently exculpatory*." This is essentially the argument made by the government in *State v. Huggett,* 2010 WI App 69, 324 Wis. 2d 786, 783 N.W.2d 675. There,

the question was whether the lost evidence was "apparently exculpatory," and if so, did its materiality rise above being potentially useful to "clearly exculpatory."

In the case at bar, there is no dispute that the Oconomowoc police failed to preserve the evidence in this case. (See State's brief p. 14.) The squad camera footage was not preserved for Roth's use at trial. The dispute is regarding the animus in the police's failure to preserve the evidence and whether having the ability to cross-examine the police officers about the lost or destroyed evidence is an adequate substitute.

State v. Huggett, 2010 WI App 69, 324 Wis. 2d 786, 783 N.W.2d 675, said that the government is required to preserve evidence in certain circumstances. It also creates an expectation of preservation and it becomes responsible for assuring that evidence was, in fact, preserved. *Id*. Wisconsin statute section 165.87 creates a duty to preserve the evidence. " [The police] knew, or should have known, that the [squad videos] would be automatically deleted […] at some point in time — this is common knowledge. Additionally, the department was in a better position to preserve the evidence given its

collective investigatory experience and access to necessary technical equipment." (See *State v. Huggett*, at ¶ 17.) Roth's due process rights are violated when the police fail to preserve the evidence in this case.

C. The remedy should be to dismiss of this action.

It is irrelevant, however, whether the State affirmatively destroyed evidence or passively allowed it to be destroyed. See *State v. Hahn*, 132 Wis. 2d 351, 357-60, 392 N.W.2d 464 (Ct. App. 1986); *Greenwold II*, 189 Wis.2d at 67, 525 N.W.2d 294 (referring to "evidence not preserved, lost, or destroyed by the State"). In either event, the State failed in its duty to preserve evidence. Here, the State did not attempt to preserve the squad videos or body camera video, and they were unavailable to Roth.

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 voicemail messages left on two cell phones. *State v. Huggett*, 2010 WI App 69, 324 Wis. 2d 786, 783 N.W.2d 675.

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.

Here, the only witnesses to the events were Roth and the antagonist police officers, who had the motivation to protect their image under the circumstances of the arrest. Roth had requested the evidence, and the evidence was Roth's only hope for exoneration. "Simply put, there is no replacement for a live recording of the [action involving the arrest of Roth]." *Id.* at ¶ 23. The circuit court in *Huggett* recognized dismissal was "the most Draconian sanction possible" and indicated it was hesitant to grant it. Nevertheless, it was an appropriate "discretionary call for the Court." *Id.* at ¶ 27.

Also, *State v. Hahn*, 132 Wis. 2d 351, 392 N.W.2d 464 (Ct. App. 1986) compares favorably. *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). The Court of Appeals held that the Circuit Court did not abuse its discretion by dismissing the complaint. Id. at 363.

Roth did not have access to comparable evidence from police reports and testimony. In this case, three officers were dispatched to a call for a person sleeping in a car. (61:3) Roth was found sleeping in a car on arrival. (61:3) Captain Timm testified that this was too much of an emergency to conduct a pre-inspection check of the equipment or to mess around with that kind of stuff. (61:11) The incident resulted in the use of force by the police against Roth, and it required the perseveration of, at a minimum, the body camera videos of the officers involved under Wisconsin law. (61:29) The Oconomowoc Police Department has a policy that deletes video evidence contrary to Wisconsin law. (61:29-30) The videos were successfully uploaded at some point but were later deleted or became unavailable to Roth. (61:45)

The incident was clearly a "use of force" incident and required extra action to preserve available evidence. This case involved the use of a Taser against Roth and an additional vehicle transport of Roth to the Waukesha County Jail. (43:62) All this potentially exculpatory evidence was lost and unavailable to Roth and his defense against the charges in this case.

Quoting *Hahn*, the State acknowledges that "[w]hen the government has destroyed [or lost] criminal evidence, the imposition of a sanction is within the court's discretion." *Hahn*, 132 Wis.2d at 361, 392 N.W.2d 464.

Like in *State v. Hahn*, 132 Wis. 2d 351, 362, 392 N.W.2d 464, 468 (Ct. App. 1986), having found that the recordings were material to the defendant's case, the court here was left to consider the sanction in light of the flagrant violations of the law by failing to preserve evidence. "[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*, 13 Wis. 2d 351, 361, 392 N.W.2d 464, 468 (Ct. App. 1986). While dismissal may be proper where the State has acted in bad faith in failing to preserve exculpatory evidence with apparently exculpatory evidence, dismissal remains appropriate.

CONCLUSION

The circuit court erroneously denied the suppression motion. This case should be remanded for an order granting the suppression motion or for dismissal of the case.

Dated: October 7, 2024

Electronically signed by Gregory Bates
Attorney for Defendant-Appellant
State Bar No. 1018846

PO Box 70
Kenosha, WI 5314
(262) 657-3082
Gbates1407@gmail.com

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 1509 words.

A paper copy of this brief and certificate has been served on all non-electronic parties.

Dated: October 7, 2024

Electronically signed by Gregory Bates
Attorney for Respondent-Appellant
State Bar No. 1018846

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Kenosha, WI 53141
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Gbates1407@gmail.com