State of Wisconsin
SUPREME COURT
Appeal Case No. 2024AP000737 - CR

State of Wisconsin,
Plaintiff-Respondent-Respondent,

v.

Jeffrey A. Roth,
Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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

TABLE OF CONTENTS

AUTHORITY CITED

Cases

Statutes

ISSUE PRESENTED

I. Did the circuit court err when it denied the suppression motion in this case?

Treatment by trial court and Court of Appeals: The trial court answered "no" when it entered its findings and order in this matter. The Court of Appeals affirmed that decision.

CRITERIA FOR REVIEW

The issue involving ineffective assistance of counsel satisfies the criterion for review in Wis. Stat. § (Rule) 809.62(1r)(a) in that it presents a real and significant question of state and federal constitutional law, i.e. whether the defendant's right to counsel was violated and whether he was afforded due process at the trial in this case.

There is precedent for this court granting discretionary appellate review even where the only issue presented is the discretionary actions of the circuit court. *See State v. Grant,* 139 Wis. 2d 45, 406 N.W.2d 744 (1987) (single issue was whether court of appeals properly applied harmless-error rule to trial court's erroneous admission of other-acts evidence).

Given that this case involves an issue of constitutional significance, it would appear that this case may be worthy of review by this court.

STATEMENT OF CASE

On July 24, 2017, in Waukesha County Circuit Court case 19 CF 466, Jeffrey A. Roth was charged in a Criminal Complaint. (Record, 1:1) The charges were:

Count 1: Count 1: Threat to a Law Enforcement Officer
Count 2: Possession of Tetrahydrocannabinol (THC)
Count 3: Possession of Drug Paraphernalia
Count 4: Resisting an Officer
Count 5: Misdemeanor Bail Jumping

A summary of the criminal complaint follows:

Sergeant Timm's reports state that on April 1, 2019, at approximately 10:44 pm, he and Officer Resch were dispatched to Riverdale Drive and Grandview Avenue for a report of a suspicious male who was stumbling around the area. The caller, Sarah Sullivan, stated that the male subject was currently sitting in a vehicle in front of 1571 Riverdale Drive. Officers made contact with the area and observed a tan Mercury Sable with Wisconsin license plate 420YLV parked in front of 1571 Riverdale Drive. There was a male subject slumped down in the driver's seat sleeping. The vehicle was not running and the keys to the vehicle were on the passenger side. Outside of the

vehicle Sergeant Timm could smell the odor of marijuana. Sergeant Timm then opened the driver's side door to check on the driver's wellbeing and when the door was opened, an even stronger odor of marijuana was present in the vehicle. Contact was made with the male subject who was later identified via Wisconsin driver's license as Jeffrey A. Roth, hereinafter referred to as the defendant. Roth opened his eyes and was staring at the officer and stated that he was not getting out of his vehicle and that Sergeant Timm needed to close the door as he had no right to open it. The defendant was asked several times to exit the vehicle and the defendant did not comply. He was then told several times he needed to exit the vehicle and failure to cooperate would result in him being tased. By this time, Officer Resch had drawn out his taser and told the defendant to comply with the request or he would be tased. The defendant did not comply with officer's request and he was drive stun tased at which point the defendant was told to stop resisting and ultimately was taken into custody. After the defendant was taken into custody, his vehicle was searched and officers were able to locate numerous items related to possession of THC, specifically, a significant amount of marijuana

shake all over the vehicle that was ultimately gathered and field tested and tested positive for the presence of THC. Also in the vehicle inside of a backpack was a blue metal cylindrical device used for grinding marijuana that had bits of marijuana inside of it. There was also a small thin glass pipe used to inhale marijuana.

After the defendant was arrested for the possession of THC and for resisting officers, he was taken directly to the Waukesha County jail. Upon arrival at the jail, the defendant started complaining to Officer Resch about being tased and then he stated, "I'll kill you if you ever tase me again. I will put a bullet in your head if you try to tase me again." Officer Resch stated he did not give the defendant permission to make such threatening statements and Officer Resch stated that he did consider the threat to be serious and sincere.

After a preliminary hearing waiver, an Information was filed on May 29, 2019, and Roth was bound over for trial. (134:1, 10:1)

Motion to Suppress Evidence

On June 15, 2021, Roth filed a motion for dismissal due to the destruction of evidence (29:1-3). That motion was heard on March 21,

2022, May 27, 2022, and November 14, 2022. (44:1-50, 43:1-65, 61:1-80)

The motion stated:

Basic discovery was received and included police reports from Officer Resch and Sergeant Timm of the Oconomowoc Police Department.

Officer Resch states in his report that his squad camera was operating during the incident and that his "body camera would not activate at that time". Sargeant Timm also stated that his squad camera was activated, but that his "body camera audio was not functioning properly and didn't record any of the incident". Also present at the incident was Officer Karleski, but he had not prepare a report and no mention is made in the other reports regarding a squad camera or body camera operated by Officer Karleski.

To date, no digital discovery has been received on this case. An email was sent to the ADA in this matter requesting all digital discovery. The response was that there was no body camera footage available and there was one squad camera that was on, but did not capture the incident and did not have audio.

In addition, defense counsel has not received any discovery related to the alleged marijuana or paraphernalia, including no pictures or test results. The request for evidence was proper as it

might tend to negate the guilt of the defendant or affect the weight or credibility of the evidence against the defendant. (29:1-3)

At the motion hearings, it was testified that the officers did not comply with the Oconomowoc Police Department's pre-inspection check policy for their body and squad cameras. (61:11, 61:29) The officers' body cameras were presumably functioning during the incident, but there were inconsistencies in the testimonies regarding the activation and functioning of these cameras. The defense argued that the absence of video evidence from the incident violated Mr. Roth's rights and suggested bad faith on the part of the police department. (61:55)

The alleged threat made by Mr. Roth to Officer Resch was also a point of contention that would have been captured by the lost video (61:24). The defense argued that the context and tone of the alleged threat were unclear and that the entire interaction would have been captured on Officer Resch's squad cam video, which has since disappeared (61:27).

The trial court denied the defendant’s motion. (61:74-78) The court ruled that the Oconomowoc Police Department did not fail to

preserve exculpatory evidence and did not act in bad faith by failing to preserve potentially exculpatory evidence. (61:77-78) The court found no evidence of ill motive on the part of the police department. *Id*. The court attributed the failure to upload videos on April 1, 2019, to faulty equipment, not to any animus of the officers or the department. *Id*.

Trial and Sentencing

The case proceeded to trial on April 18, 2023, April 19, 2023, and April 20, 2023. (131:1, 135:1, 135:1) After testimony and deliberations, the jury returned verdicts of not guilty of on count 1 and count 5. (66:1-2) The court dismissed count 2, Possession of THC, on a motion. (135:10-11) The jury found Roth guilty on counts 3, Resisting an Officer and 4, Misdemeanor Bail Jumping. (67:1-2) The case was set for sentencing.

Roth was sentenced to a $100 fine on count 3 and 40 days in jail on count 4. (130:20, 94:1-3). Roth appealed.

In a decision dated December 11, 2024, the Court of Appeals affirmed the circuit court order. (Appendix.) Now comes this petition.

ARGUMENT

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

A. Standard of Review

Whether action by the State constitutes a violation of due process is a question of law that is decided on appeal independent of the determination of the circuit court. *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.,* 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 State (1) failed to preserve evidence that was apparently exculpatory, or (2) acted in bad faith by failing to preserve evidence that was potentially exculpatory. *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, Occonomowoc Police had a duty to preserve the body camera video and the squad camera video.

Wisconsin law provides that:

> **165.87 Body cameras and law enforcement.**
>
> **…**
>
> **(2)**
>
> **(a)** Except as provided in pars.(b),(c), and(d), all data from a body camera used on a law enforcement officer shall be retained for a minimum of 120 days after the date of recording.
>
> **(b)** Data from a body camera used on a law enforcement officer that record any of the following shall be retained until final disposition of any investigation, case, or complaint to which the data pertain, except as provided in pars.(c) and (d):
>
> **1.** An encounter that resulted in the death of any individual or actual or alleged physical injury to an individual.
>
> **2.** An encounter that resulted in a custodial arrest.
>
> **3.** A search during an authorized temporary questioning as provided in s. 968.25.
>
> **4.** An encounter that included the use of force by a law enforcement officer, unless the only use of force was the use of a firearm to dispatch an injured wild animal.

State v. Huggett, 2010 WI App 69, 324 Wis. 2d 786, 783 N.W.2d 675, says 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.

The duty to preserve evidence extends 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. See also *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 is "apparently exculpatory" or "potentially exculpatory" but the police act "in bad faith" in failing to preserve it. *State v. Huggett*, 2010 WI App 69, ¶ 12, 324 Wis. 2d 786, 783 N.W.2d 675.

C. The failure to preserve evidence violated Roth's due process rights and the remedy should be to dismiss this action.

here, we held: "A defendant's due process rights are violated if the police: (1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory." See *Greenwold II*, 189 Wis.2d at 67-68, 525 N.W.2d 294 (citing *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)); *State v. Greenwold*, 181 Wis.2d 881, 885-86, 512 N.W.2d 237 (Ct. App.1994) (*Greenwold I*).

Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) suggests that if the materiality of the evidence rises above being potentially useful to clearly exculpatory, a bad faith analysis need not be evoked; the defendant's due process rights are violated because of the apparently exculpatory nature of the evidence not preserved. *State v. Greenwold*, 189 Wis. 2d 59, 67-68, 525 N.W.2d 294 (Ct. App. 1994) (*Greenwold II*).

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.

In order to rise to the level of a due process violation, the lost evidence "must ... be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Greenwold II*, 189 Wis.2d at 67,525 N.W.2d 294 (quoting *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). "In Trombetta, the Court focused its analysis on the defendant's right to fundamental fairness by giving the defendant a chance to present a complete defense." *Id*. (citing *Trombetta*, 467 U.S. at 485, 104 S.Ct. 2528).

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.

In *Huggett*, the defendant raised perfect self-defense and defense of others. In *Huggett*, Peach broke into the house of Huggett and Kerbel, and Peach was shot to death by Huggett. *Huggett*, 324 Wis. 2d 786, ¶3. Huggett was later charged with second-degree intentional homicide, but immediately after the incident, Huggett claimed that he acted in self-defense and defense of others. *Id.*, ¶1. Also, shortly after Huggett shot Peach, Huggett and Kerbel brought to law enforcement's attention threatening voicemail messages sent to Huggett and Kerbel from Peach. *Id.*, ¶¶4-7. Law enforcement "immediately realized" the evidentiary value and seized Kerbel's and Huggett's phones. *Id.*, ¶¶4-5. While in the possession of law enforcement, the State did not preserve the voicemail messages and those were automatically deleted with no chance of recovery. *Id* ¶10. In those circumstances, in which the State was immediately aware of the clearly exculpatory evidence, took the phones that belonged to

Huggett and Peach, and then allowed the voicemails to be deleted, there may be a place for an "expectation" consideration because the *Huggett* court was discussing "exclusive control" of the evidence. *Id.*, ¶¶16-18.

Here, the State did not 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 Huggett's voicemail 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.

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 vehicle was salvaged before the defendant's expert could examine it, and the relevant examination could not be performed. The circuit court determined that once the truck was destroyed, the defendant "lost his one and sole statutory defense." This was Hahn's one opportunity to defend himself in that 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 truck's destruction made it impossible for the

defendant to obtain other comparable evidence because none existed." *Id.* The court concluded that 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.

It cannot be said that Roth had 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. There, we cited federal cases "which held that the determination of the sanction depends on a balancing of the quality of the government's conduct and the degree of prejudice to the accused." *Id*. at 362, 392 N.W.2d 464. Hahn, however, preceded Greenwold I and II, which established the government's good or bad faith as irrelevant to whether a due process violation occurred in cases involving apparently exculpatory evidence. Dismissal was the proper remedy in this case.

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 Roth'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 on for an order granting the suppression motion.

Dated: December 21, 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 3742 words.

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

Dated: December 21, 2024

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

PO Box 70
Kenosha, WI 53141
(262) 657-3082
Gbates1407@gmail.com