SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4776-15T1

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

WILLIAM GRAHAM, III,

Defendant-Respondent.

Submitted May 3, 2017 – Decided June 29, 2017

Before Judges Manahan and Lisa.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 15-01-0023.

Sean F. Dalton, Gloucester County Prosecutor, attorney for appellant (Douglas B. Pagenkopf, Assistant Prosecutor, on the brief).

Respondent has not filed a brief.

PER CURIAM

By leave granted, the State appeals from an order suppressing evidence after a finding by the Law Division that the State engaged in bad faith for failure to provide requested discovery. We reverse and remand.

On July 2, 2014, defendant William Graham, III, was stopped by Woodbury City police pursuant to an investigation of alleged controlled dangerous substances (CDS) distribution. Defendant was not arrested, but his car was impounded in the secured, locked rear garage behind the Woodbury City Police Department (WCPD). The WCPD station, including the garage, was monitored by a 24-hour surveillance system. Although no camera was installed inside the garage, the outside of the garage was monitored. Once defendant's vehicle was secured in the garage, both the vehicle and the garage were locked and the ignition key was placed inside a secured evidence mailbox.

The next day, the police applied for a search warrant, which was issued.[1] The search of the vehicle yielded a CDS, which formed the basis for defendant's subsequent arrest. During the arrest process, defendant accused the police of planting drugs in his car while it was impounded.

Defendant was charged in Indictment 15-01-0023 with third-degree possession of heroin, N.J.S.A. 2C:35-10A(1) (count one); third-degree possession with intent to distribute heroin in a quantity less than one-half ounce, N.J.S.A. 2C:35-5B(3) (count

[1] The record does not reveal the basis for the issuance of the search warrant. Defendant did not challenge the search pursuant to the warrant.

two); third-degree possession with intent to distribute heroin while within 1000 feet of a school zone, N.J.S.A. 2C:35-5(a), N.J.S.A. 2C35-7 (count three); and fourth-degree throwing bodily fluid at a police officer while in the performance of his or her duties, N.J.S.A. 2C:12-13 (count four).

On March 15, 2015, defendant made a request for discovery. Specifically, defendant requested video surveillance of the garage for the period when his car was impounded. Two weeks later, the State responded to defendant's request noting that no video surveillance footage was available for the relevant time period.

On January 8, 2016, defendant made a second request for discovery demonstrating whether the surveillance system used by the WCPD had been repaired or replaced. A month later, the State provided a police report prepared by Sergeant Erik Lokaj that noted several attempts to copy the surveillance footage. However, the attempts were unsuccessful due to an unidentified issue with the system.

Defendant filed a motion to compel discovery on March 14, 2016. During the hearing, Lokaj testified that a request for a copy of the video footage was made to Captain Thomas Ryan (now Chief Ryan), who was the primary officer responsible for accessing video surveillance.

Ryan testified that he was unable to recall if he received the request, but did recall attempts to recover the video. The chief stated that the WCPD did not have any standard operating procedures requiring recording or preservation of video surveillance of impounded vehicles and, despite numerous attempts to recover the footage, the video was no longer available. Ryan further testified that the system used was "antiquated and old," and that the system would record new footage over existing footage approximately every two months.

On May 31, 2016, the judge placed his decision on the record. The judge found that Ryan's testimony regarding the automatic re-looping was at odds with Lokaj's report. Specifically, the judge noted the initial reason given by the police for its failure to provide the surveillance was a system malfunction. Additionally, the judge pointed to Ryan's testimony that explained when an arrestee accuses the police of planting evidence in an impounded car, the police "100%" should preserve the footage. The judge held that because the police did not follow their own procedures and protocol for preserving video evidence, the WCPD acted in "bad faith." The judge granted defendant's motion to compel discovery and, as a sanction for the State's inability to comply, suppressed the evidence found in the truck. This appeal followed.

The State raises the following points on appeal:

POINT I

THE TRIAL COURT ERRONEOUSLY DETERMINED A BRADY V. MARYLAND[2] VIOLATION ON BEHALF OF THE PROSECUTION FOR FAILING TO PROVIDE VIDEO SURVEILLANCE WHEN THERE WAS NO WRITTEN POLICY FOR OBTAINING THE VIDEO, NUMEROUS TECHNICAL ISSUES WITH THE VIDEO SYSTEM AND AN AUTOMATIC RELOOPING OF THE VIDEO SYSTEM MONTHS BEFORE THE REQUEST WAS MADE BY DEFENDANT-RESPONDENT.

A. The [p]rosecutor and [p]olice did not act in bad faith because there was no written policy or procedure for the recording of video surveillance of the rear garage for the Woodbury City Police Department, the video system was constantly broken and the video system automatically recycled over itself within sixty-seven (67) to seventy-six (76) days after [d]efendant-[r]espondent's arrest.

B. The [t]rial [c]ourt erred in analyzing whether a due process violation existed by failing to address the two additional Hollander factors.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SUPPRESSING ALL EVIDENCE OBTAINED IN THE SEARCH OF DEFENDANT-RESPONDENT'S VEHICLE AS A REMEDY FOR THE LOST VIDEO SURVEILLANCE. []

Our standard of review for an order to suppress evidence by a trial court is limited. State v. Gamble, 218 N.J. 412, 424-25

[2] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

(2014). We give "deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Johnson, 42 N.J. 146, 161 (1964). If we are satisfied that the trial court's factual findings could reasonably have been reached on sufficient, credible evidence present in the record, those findings are binding on appeal. Gamble, supra, 218 N.J. at 424. Our review of the trial court's application of the law to the facts, of course, is plenary. State v. Hubbard, 222 N.J. 249, 263 (2015).

The State first argues that the failure to preserve the surveillance evidence requested by defendant was due to a system malfunction and the automatic re-loop of the video. As such, there was no bad faith on the part of the WCPD. Additionally, the State argues that since the WCPD had no written policy for preserving surveillance video, the judge's basis for suppressing the evidence, i.e., failure of the police to follow that policy, was erroneous. Finally, the State argues defendant was not prejudiced because there was no apparent exculpatory value to the surveillance footage.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2141, 2146, 90 L. Ed. 2d

636, 645 (1986) (internal citations omitted). The withholding of material evidence favorable to a defendant is a denial of due process and the right to a fair trial, regardless of the good faith or bad faith of the prosecution. Brady, supra, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215. Accordingly, the prosecutor is constitutionally required to disclose information within the custody or control of the prosecutor that is exculpatory and material to the issue of guilt or punishment. Ibid.

Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286, 301 (1999) (citing United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. at 3383, 87 L. Ed. 2d at 494); see also N.J.R.E. 401 (defining "relevant" evidence as "[e]vidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action"). A "reasonable probability" is one "sufficient to undermine confidence in the outcome." Bagley, supra, 473 U.S. at 682, 105 S. Ct. at 3383, 87 L. Ed. 2d at 494.

Thus, in order to establish a Brady violation, the defendant must show: the prosecutor failed to disclose the evidence, the evidence was of a favorable character to the defendant, and the evidence was material. State v. Parsons, 341 N.J. Super. 448, 454

(App. Div. 2001) (internal citations omitted). A Brady violation therefore occurs even where the evidence is not directly exculpatory, but rather "upon the suppression of evidence which is reasonably calculated to lead to evidence impugning the credibility of the State's witnesses." State v. Laganella, 144 N.J. Super. 268, 282 (App. Div. 1976) (citing State v. Taylor, 49 N.J. 440, 447-48 (1967); State v. Blue, 124 N.J. Super. 276 (App. Div. 1973)).

In order to establish a violation of due process when evidence is no longer available, a defendant must show that the evidence had "an exculpatory value that was apparent before [it] was destroyed" and that "the defendant would be unable to obtain comparable evidence by other reasonably available means." Cal. v. Trombetta, 467 U.S. 479, 489, 104 S. Ct. 2528, 2534, 81 L. Ed. 2d 413, 422 (1984). If a defendant cannot establish that the lost evidence had "apparent" exculpatory value and can show only that the evidence was "potentially" useful or exculpatory, then the defendant can show a due process violation by establishing that the evidence was destroyed in bad faith. Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988); see State v. Reynolds, 124 N.J. 559, 569 (1991) (rejecting Brady claim because the destroyed tapes in issue "did not possess

any apparent exculpatory value, and because their destruction did not involve bad faith.").

Prosecutors have a duty to preserve potentially exculpatory evidence on behalf of criminal defendants. Trombetta, supra, 467 U.S. at 486-87, 104 S. Ct. at 2532-33, 81 L. Ed. 2d at 420-21. The State's duty to preserve evidence is limited to evidence that "might be expected to play a significant role in the suspect's defense. . . . [E]vidence 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 488-89, 104 S. Ct. at 2534-35, 81 L. Ed. 2d at 422-23. In Youngblood, supra, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281, the Supreme Court expressly limited "the extent of the police's obligation to preserve evidence to reasonable bounds and confine[d] it to cases in which the police themselves by their conduct indicate[d] that the evidence could form a basis for exonerating the defendant." Id. at 58, 109 S. Ct. at 337, 102 L. Ed. 2d at 289.

This court has drawn the distinction between potentially useful evidence and exculpatory evidence. George v. City of Newark, 384 N.J. Super. 232, 243 (App. Div. 2006) (quoting Youngblood, supra, 488 U.S. at 57, 109 S. Ct. at 337, 102 L. Ed.

2d at 289). In George, we held that "a failure to preserve potentially useful evidence" requires a finding of bad faith on the part of the State. Ibid.

We conclude the nature of the evidence in the matter before us, a video of the exterior of the garage in which the vehicle was stored, does not constitute evidence that possessed an apparent exculpatory value. State v. Mustaro, 411 N.J. Super. 91, 102 (App. Div. 2009) (quoting Trombetta, supra, 467 U.S. at 489, 104 S. Ct. at 2534). The video would have presumably depicted whether anyone entered and exited the garage without depiction of what may have occurred inside the garage. At best, the video would have been of potential use to defendant rather than evidence that, had it been available, would have had a material impact on the case's outcome. See State v. Robertson, 438 N.J. Super. 47, 67 (App. Div. 2014). Thus, bad faith must be established to sustain a due process violation.

The defendant bears the burden of proving bad faith. Youngblood, supra, 488 U.S. at 58, 109 S. Ct. at 337, 102 L. Ed. 2d at 289. We have suggested that "bad faith" might apply to destruction that occurred: "in a calculated effort to circumvent the disclosure requirements," as in Brady, supra, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218; when there was an "allegation of official animus towards" the defendant; or when

there was "a conscious effort to suppress exculpatory evidence." State v. Serret, 198 N.J. Super. 21, 26, (App. Div. 1984) (quoting Trombetta, supra, 467 U.S. at 488, 104 S. Ct. at 2533, 81 L. Ed. 2d at 421-22).

In State v. Carter, 185 N.J. Super. 576 (App. Div. 1982), a case involving the suppression of exculpatory evidence, we concluded that even if actual intent to deceive was not present, "egregious carelessness" would warrant suppression. Id. at 580. We defined "egregious" as "conspicuously bad, flagrant." Id. at 581.

Here, the judge found that the police failed to adhere to their own policy by ensuring the video system was in operating order and preserving the video. The judge held that the police conduct in not following "the guidelines and protocols in making a copy of the video[,]" though not "necessarily with knowledge[,]" was "a mistake" that constituted a "show of bad faith."

The State, as noted, argues that the judge erroneously concluded that there was a "policy" relative to the recordation and preservation of the garage video system. We reject that argument. While there may not have been a "written" policy in existence, there was a pattern and practice employed by the WCPD of preserving the videos of the lobby of the police department employed for internal affairs investigations. The lobby video

system was the same as the garage video system. The chief further conceded that when an allegation such as that made by defendant was brought to the attention of the police, the video should have been preserved. However, while we agree with the finding on the "policy" score, we disagree that the circumstances which gave rise to the unavailability of the video sustain a finding of bad faith as a matter of law.

Notably, as the judge concluded, there was no evidence of malice or intentional efforts by the WCPD to destroy evidence. Serret, supra, 198 N.J. Super. at 26. Also, there was no evidence that the unavailability of the video was premised on "egregious carelessness." Carter, supra, 185 N.J. Super. at 581. To the point, the judge found that the loss or destruction of the evidence sought by defendant was the product of a "mistake" by the WCPD; conduct that is not consonant with "bad faith" as the term is commonly defined by federal and state decisions.

In sum, we discern no due process violation. Defendant has not established that the video, if recorded and preserved, would have had "apparent" exculpatory value. Reynolds, supra, 124 N.J. at 569. Nor has defendant met his burden to demonstrate bad faith. Youngblood, supra, 488 U.S. at 58, 109 S.Ct. at 337, 102 L. Ed. 2d at 289.

Notwithstanding our rejection of a due process violation, we next address the issue of the failure of the State to provide requested discovery. Rule 3:13-3 imposes obligations upon the State to preserve and produce evidence to a defendant. Consistent with that Rule, the State was obligated to respond to defendant's requests for the video by preserving the video or by informing defendant that there was no video available. Although it is unclear from the record whether there was an available video, the State exercised custody and control of the video surveillance system and the failure to respond to or comply with defendant's request must subject it to an appropriate sanction.

Rule 3:13-3(f) provides for sanctions for non-compliance:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, it may order such party to permit the discovery of materials not previously disclosed, grant a continuance or delay during trial, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate.

The judge concluded the State violated its discovery obligation; the sanction for which was suppression of the evidence seized from the motor vehicle. We hold the suppression of the evidence obtained pursuant to an unchallenged search warrant, with its cloak of presumed validity, State v. Kasabucki, 52 N.J. 110,

122-23 (1968), is a remedy unsuited for the discovery violation in this case.

We are informed by our Supreme Court's decision in State v. Dabas, 215 N.J. 114 (2013), which involved a post-indictment discovery violation by destruction of interrogation notes. The Court held that an adverse-inference charge was the appropriate remedy for the destruction. Id. at 140. The Court noted that "balancing the scales required the court to instruct the jury that the State had a duty to produce" the notes and that the jury "was permitted to draw an inference that the contents of the notes were unfavorable to the State." Id. at 141.

In accord with Dabas, upon remand and upon request from defendant, the court should instruct the jurors that they may draw an adverse-inference relative to the discovery violation.

Reversed and remanded. We do not retain jurisdiction.