

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 08 – 2487
 :
 -vs- : On Appeal from the Washington
 : County Court of Appeals,
 : Fourth Appellate District
 MICHAEL LUPARDUS, :
 :
 Defendant-Appellant : Court of Appeals
 : Case No. 08 CA 31
 :

MEMORANDUM IN RESPONSE OF APPELLEE

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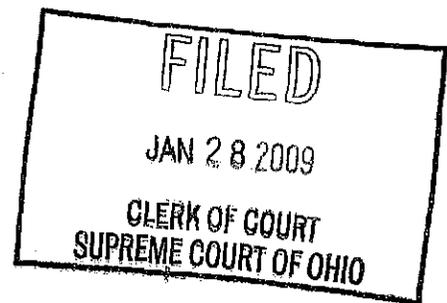


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STATEMENT OF THE CASE AND FACTS

Michael Lupardus was charged with operating a vehicle while intoxicated in violation of R.C. 4511.19(A)(1)(a). Lupardus was stopped at approximately 3:45 a.m. for a speeding violation by Trooper Forshey and a sergeant who was riding along with him. When Tpr. Forshey activated his lights, his in-car camera automatically began recording. A video of Lupardus' stop was made by the in-car recording system. The recording included audio of the conversation between the trooper and Lupardus, and also showed his performance on the One Legged Stand and the Walk and Turn tests. Tpr. Forshey removed the video from his car and reviewed it while filling out his report. He then placed the video into evidence at the highway patrol post.

Lupardus entered a plea of not guilty at arraignment and was appointed a public defender. His attorney filed a one-sentence general discovery request, asking for discovery to be provided in accordance with Criminal Rule 16. At Lupardus' first pretrial, the State informed defense counsel that a copy of the video of Lupardus' stop had not yet been obtained from the highway patrol. A continuance was agreed to by both parties to allow a copy to be made and to give them a chance to review it.

At the request of the state, the trooper attempted to make a copy of the video. Due to the number of requests they had been getting, the highway patrol had recently purchased a machine to copy the videotapes made by their in-car cameras onto DVDs. Tpr. Forshey had not used the machine before, so he asked his sergeant for help. The sergeant asked another trooper who had previously used the machine to make a few copies to show Tpr. Forshey how to use it.

Unfortunately, Tpr. Forshey did not use the machine properly. Instead of copying the videotape onto the blank DVD, he reversed the process and copied the blank DVD over the videotape. In other words, he had pressed the wrong button. During this process the entire recording of Lupardus' stop was destroyed. Upon realizing what had happened, Tpr. Forshey immediately sent a note to the trial court and informed the prosecutor. That information was passed on to defense counsel as soon as it was received. The videotape was a unique piece of evidence that was not otherwise obtainable through other means.

Lupardus then filed a motion to dismiss/suppress, arguing that the destruction of the videotape was a violation of his rights under the Due Process Clause. At the hearing, Lupardus disputed the testimony of Tpr. Forshey regarding his performance on the field sobriety tests. His fiancé also testified that she did not believe he was under the influence of alcohol.

The trial court held that Lupardus had the burden to prove that the videotape was either materially exculpatory, or was potentially useful and destroyed in bad faith. The court held that the video was inadvertently destroyed and that there was no bad faith on the part of the state. In addition, the court held that Lupardus' mere assertion that he passed the field sobriety tests was insufficient to fulfill his burden of showing that the video contained apparent exculpatory evidence.

Lupardus subsequently entered a no contest plea and was found guilty of violating R.C. 4511.19(A)(1)(a). He then appealed to the Fourth District Court of Appeals. The Fourth District upheld the decision of the trial court. Lupardus now appeals from that decision.

EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Although the Fourth District reached the proper conclusion in this case below, the State agrees with Lupardus that this case presents a substantial constitutional question. The general question is who has the burden of proof regarding the exculpatory value of lost or destroyed evidence? There is a factual distinction between this case and others, however, that may prevent this Court from reaching the substantial part of that question.

This case deals with the area loosely referred to as constitutionally guaranteed access to evidence. The U.S. Supreme Court has recognized that the denial of access to some evidence can rise to the level of a violation of the Due Process Clause in certain instances. *See, generally, Brady v. Maryland* (1963), 373 U.S. 83. One of two tests must be met to demonstrate that a violation has occurred. A defendant's rights under the Due Process Clause are violated if the state either fails to provide materially exculpatory evidence, *California v. Trombetta* (1984), 467 U.S. 479, or if the state fails to provide, in bad faith, potentially useful evidence, *Arizona v. Youngblood* (1988), 488 U.S. 51. The burden is generally placed on the defendant to prove the existence of one of these two tests. *State v. Jackson* (1991), 57 Ohio St.3d 29.

In Ohio, some courts of appeals have shifted the burden of proof regarding the exculpatory nature of the lost/destroyed evidence to the state. The burden-shifting method generally works as follows: (1) the defendant specifically requests a piece of evidence to be preserved or disclosed in discovery, (2) said evidence is lost or destroyed, so (3) rather than requiring the defendant to prove that the evidence was materially exculpatory, the burden is placed on the state to demonstrate that it was not.

This burden-shifting method has not been applied uniformly by those courts that employ it. All of the courts have required the initial step of a specific request for the evidence to be preserved or provided in discovery. *See, e.g., Columbus v. Forest* (1987), 36 Ohio App.3d 169; *State v. Benton* (2000), 136 Ohio App.3d 801; *State v. Benson* (2003) 152 Ohio App.3d 495. In step two, most have required a finding of bad faith on the part of the state when the evidence was lost or destroyed. Some have shifted the burden before finding bad faith, but noted that it was present, *Benson*, supra, while others have found bad faith to be completely irrelevant, *State v. Anderson* (2006), 2006-Ohio-1568 (Ohio App. 1 Dist.). In the final step, courts have shifted different burdens to the state. Some require the state to prove that the evidence was *not* materially exculpatory, *Forest*, supra; *Benton*, supra, while others required proof that the evidence was solely inculpatory, *Anderson*, supra.

In this case the primary question is whether the burden was properly left on Lupardus to prove one of the two tests. It presents an opportunity to address how the burden-shifting method should be employed, and even if it should be used at all. This case gets closer to the question than *State v. Geeslin* (2007), 116 Ohio St.3d 252, since here the entire tape of Lupardus' stop was destroyed rather than just the portion that this Court determined was only potentially useful. There is, however, a factual distinction that might prevent this Court from addressing the substance of the burden-shifting method.

Unlike other cases applying the burden-shifting method, Lupardus only filed a one-sentence general discovery request asking for discovery pursuant to Criminal Rule 16, rather than specifically requesting the evidence at issue. The Fourth District Court of

Appeals relied on this distinction in denying the motion to certify a conflict. It held that Lupardus' general discovery request did not shift the burden because it did not provide sufficient notice to the State that he wished to review the video. This is an argument the State cannot credibly make, has not made at any point during the lengthy pendency of this case, and will not begin to make now.

Lupardus' case was initially set for a pretrial following his arraignment and the appointment of a public defender to his case. The State had not received a copy of the video of Lupardus' traffic stop before that date. At the pretrial, a continuance was agreed to in order to allow the State to obtain a copy of the video for both the prosecutor and defense counsel to review. The State then requested that the highway patrol make a copy of the video for that purpose. In responding to that request, the entire recording was inadvertently destroyed. Although there was nothing formally filed, the State knew Lupardus wanted a copy of the video.

However, if this Court finds that the lack of a specific and formal request for the video to be dispositive, then the real substance of the burden-shifting method will not be addressed. The split among courts of appeals is in whether bad faith is necessary to shift the burden and what specific burden is shifted; not in what must be filed to trigger the burden-shifting method in the first place. So while the State agrees with Lupardus that this case presents a substantial constitutional question, and would welcome review of the burden-shifting method, this case may not be the proper vehicle through which to address that question.

ARGUMENT

First Proposition of Law:

The burden was properly left on Lupardus to show that the State either (1) destroyed materially exculpatory evidence or (2) destroyed, in bad faith, potentially useful evidence.

A. The burden-shifting method should be rejected as it has outlived its usefulness.

The burden-shifting method was first adopted by the Tenth District Court of Appeals in *Columbus v. Forest* (1987), 36 Ohio App.3d 169. In *Forest*, the defendant was arrested for OVI following a chase by city police S.W.A.T. officers. *Id.* During the chase the officers communicated with each other via radio. *Id.* at 170. A week after the incident, the defendant requested that the city prosecutor provide a copy of the radio communications between the S.W.A.T. officers. *Id.* When the state failed to respond for five weeks, the defendant filed a motion to preserve the evidence. *Id.* The state finally responded that the tapes had been destroyed, so the defendant filed a motion to dismiss based on the destruction of evidence. *Id.* The trial court denied the motion, holding that the defendant had failed to establish the exculpatory value of the tapes. *Id.*

On appeal, the Tenth District reasoned that the burden of proving the exculpatory value of the evidence should have been placed on the state. “Where, as here, the state breaches its duty to respond in good faith to a defense request to preserve evidence, we believe the appropriate remedy is to shift to the state the burden of proof as to the exculpatory value of the evidence.” *Id.* at 173. The legal foundation for that approach was a footnote in a supplement to a criminal procedure handbook. *Id.*

It should be noted that *Forest* was decided before *Youngblood*. That means that at the time the only way a defendant could prove a Due Process violation was by showing

that the lost or destroyed evidence was materially exculpatory. Whatever the merits of the legal foundation of the opinion, the Tenth District correctly believed that there ought to be a different standard when the state lost or destroyed the evidence in bad faith. After *Youngblood*, a defendant that demonstrates bad faith need only show that the evidence was potentially useful, a significantly easier burden to meet than proving that it was materially exculpatory. In other words, a court confronted with a situation like the one in *Forest* now has a means to hold the state to a higher standard without applying the burden-shifting method.

Furthermore, eliminating this approach would not render motions to preserve or specific discovery motions useless. The Third District reasoned that “the only way of proving bad faith is establishing that the evidence was destroyed after a specific request by the defendant to preserve the evidence in question.” *State v. Geeslin* (2006), 2006-Ohio-1261 (Ohio App. 3 Dist.). Although the State respectfully disagrees that it should always be sufficient proof by itself, the destruction of evidence after such a motion had been filed is certainly some evidence of bad faith.

As it stands now, the burden-shifting method has completely upset the balance in some cases. The First District held that “where the defendant moves to have the evidence preserved, and the state destroys the evidence, the burden shifts to the state to show the solely inculpatory value of the evidence.” *State v. Anderson* (2006), 2006-Ohio-1568, paragraph 11. The burden was shifted without any analysis of whether there was bad faith on the part of the state or whether the evidence was, in fact, material (i.e. a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed). In other words, the accidental destruction of a specifically

requested piece of evidence that had little to do with the case could require the dismissal of charges against a defendant if the state could not prove that evidence was solely inculpatory, even in the face of other overwhelming evidence of guilt. This seems to be too high a price to pay for the accidental destruction of a potentially useful piece of evidence.

Rejecting the burden-shifting method would restore uniformity to Ohio courts and simplify how cases involving lost or destroyed evidence are decided. It would also properly limit the scope of what evidence must be preserved. As the United States Supreme Court held in *Youngblood*:

We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

B. The burden was properly left on Lupardus because he failed to demonstrate bad faith.

Even if this Court believes that the burden-shifting method is appropriate in some circumstances, the burden was still properly left on Lupardus. The majority of courts that have addressed the burden-shifting method have required a defendant to first demonstrate bad faith on the part of the state in failing to disclose the evidence before shifting the burden. In fact, the Tenth District later limited its holding in *Forest* recognizing that it was applied where the state failed to respond in good faith to a request to preserve evidence. *State v. Groce* (1991), 72 Ohio App.3d 399, 402.

Bad faith generally implies something more than bad judgment or negligence. "It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known

duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.” (internal quotation marks and citation omitted) *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 276.

This Court addressed the issue of bad faith in the destruction of a portion of a video in *State v. Geeslin* (2007), 116 Ohio St.3d 252. The recording system used by the arresting officer in *Geeslin* had a feature that automatically fast-forwarded the videotape to a blank spot so that nothing is recorded over. *Id.* at 253. The arresting officer was relatively new, and was not aware that the automatic fast-forward feature did not work once a tape had been removed from the machine. *Id.* As a result, a portion of the defendant’s stop was recorded over the next time the tape was used. *Id.* This Court affirmed the decision of the trial court finding that the partial destruction of the tape was accidental and not in bad faith. *Id.* at 255.

Examples from the courts of appeals also help define bad faith in this context. The Seventh District found no bad faith when an officer accidentally taped over the recording of the defendant’s stop. *State v. Wolf* (2003), 154 Ohio App.3d 293. The arresting officer testified that he had shown the tape to two fellow officers later on the day of the stop, and that he believed the tape had automatically rewound to the beginning when put back in his cruiser. *Id.* at 296. The Fifth District reached a similar conclusion in a case where a tape of an OVI stop was not properly fast-forwarded to a blank spot, resulting in the recording of the defendant’s stop being inadvertently taped over by the next day’s traffic stops. *State v. Canter* (2002), 2002-Ohio-3473 (Ohio App. 5 Dist.).

These cases stand in stark contrast to cases in which bad faith was found. *See, e.g., State v. Benson* (2003), 152 Ohio App.3d 495. After being arrested and charged

with OVI, Benson filed a motion to disclose any videotape recording of his stop and to preserve any such video. *Id.* at 497. Benson was informed that no video existed. *Id.* During a hearing on an unrelated motion to suppress, Benson learned through the officer's testimony that a videotape had existed at one time. The officer testified that he knew the video had been requested, but that "he had not looked for the tape when asked to do so by the prosecutor." *Id.* Rather than being the result of an unfortunate accident, the tape in *Benson* was destroyed because of the officer's complete failure to take any steps to preserve it.

In this case, Lupardus has failed to demonstrate bad faith. At the time the evidence was destroyed, the arresting officer was attempting to make a copy of the video for the prosecutor. Due to the number of requests they had been getting, the highway patrol had recently purchased a machine to copy the videotapes recorded by their in-car cameras onto DVDs. While attempting to make a copy, the officer accidentally reversed the process, copying the blank DVD over the videotape rather than copying the tape onto the DVD. He simply pressed the wrong button. After he realized what had happened, the officer immediately informed the prosecutor and the trial court. The fact that the video had been destroyed was immediately passed on to Lupardus' attorney. The facts of this case are similar to those in *Geeslin*, *Wolf*, and *Canter* in which no bad faith was found.

The trial court's finding that there was no bad faith is supported by competent, credible evidence. As a result, this Court should hold that the burden was properly left on Lupardus and affirm the trial court's ruling.

Second Proposition of Law:

Lupardus was not denied effective assistance of counsel when his attorney failed to file a motion to preserve the evidence because such a motion would not have affected the outcome.

There is a good chance that Lupardus' second proposition of law will be rendered moot by the resolution of the first proposition of law. The only way this argument is reached is if this Court determines that the burden would have shifted but for the lack of a motion to preserve being filed. If, for example, this Court determines that the burden was properly left on Lupardus because of the lack of bad faith on the part of the State, then the failure to file a motion to preserve the video is inconsequential.

Assuming that this Court does rule that the burden would have shifted had such a motion been filed, that does not end the inquiry. In order for Lupardus to show ineffective assistance of counsel, he must demonstrate that the prejudice resulting from counsel's deficient performance is so serious as to bring the outcome of the proceeding into question. *Strickland v. Washington* (1984), 466 U.S. 668, 687.

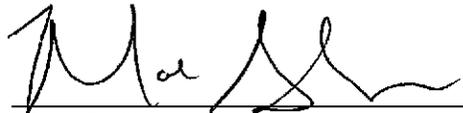
Even if the burden had shifted to the State to prove that the video was not materially exculpatory, Lupardus would not have prevailed. In order for evidence to be deemed material there must be a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *State v. Johnston* (1988), 39 Ohio St.3d 48, paragraph five of the syllabus. In this case there is substantial evidence upon which Lupardus could have been found guilty of R.C. 4511.19(A)(1)(a) apart from what would have been shown on the video. The testimony of the arresting officers indicated that Lupardus was speeding, had glassy/bloodshot eyes, had a strong odor of alcohol on his breath, scored six out of six clues on the Horizontal Gaze Nystagmus test,

and tested a .100 on the BAC DataMaster. Because of this additional evidence, the State has met the burden of proving that the video was not materially exculpatory. Lupardus' counsel was not deficient for failing to file a motion to preserve the evidence, because such a motion would not have changed the outcome of this case.

CONCLUSION

For the reasons explained above, the Court should grant discretionary review in this case if it finds that the lack of a specific and formal request for the video is not dispositive.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Sleeper', written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief of Appellee was served on Sarah H. Schregardus, Attorney for Appellant, by U.S. mail this 27th day of January, 2009.

A handwritten signature in black ink, appearing to read 'Mark C. Sleeper', written over a horizontal line.

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