

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2008-2487
Plaintiff-Appellee,	:	
	:	On Appeal from the Washington
vs.	:	County Court of Appeals
	:	Fourth Appellate District
MICHAEL LUPARDUS,	:	
	:	Case No. 08 CA 31
Defendant-Appellant.	:	

MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT MICHAEL LUPARDUS

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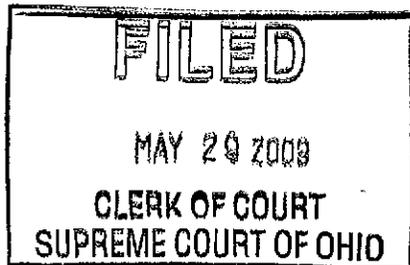


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STATEMENT OF THE CASE AND FACTS

Amicus respectfully defers to the Statement of the Case and Statement of Facts as recited in the Brief of Defendant-Appellant and incorporates the same as if fully written here.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Criminal Defense Lawyers (OACDL) is a statewide association of over seven hundred (700) public defenders and private attorneys who practice primarily in the field of criminal defense. The Association was formed for charitable, educational, legislative and scientific purposes with the goal of advancing the interests of society and protecting the rights of citizens and other persons accused of crimes under the laws of the State of Ohio and the United States. The organization has an interest in protecting the integrity of the judicial system and ensuring fair and equal treatment under the law. The foregoing interest compels Amicus to support Defendant-Appellant in this matter.

APPELLANT'S PROPOSITION OF LAW

If the State destroys evidence after the defendant has made a discovery request, the burden of proof shifts to the State to prove the evidence was not materially exculpatory. If the State fails to meet its burden, the case must be dismissed. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution.

How Important are Videotapes in OVI Cases?

There are basically two types of OVI offenses; the "OVI - Under the Influence" offense (RC 4511.19(A)(1)(a)) and the "OVI - Per Se" offenses (RC 4511.19(A)(1)(b)-(j) and 4511.19(B)). The Per Se offenses criminalize having a specified level of alcohol or specific drugs in ones system while driving a vehicle and, in large part, are prosecuted and proved via scientific chemical test evidence. However, the "Under the Influence" or "traditional" DUI offense is not, for the most part, proved via scientific evidence. The evidence submitted in an "under the influence" case is almost exclusively opinion evidence and testimony aimed at supporting that opinion.

More specifically, the evidence submitted against a person accused of the traditional driving under the influence offense charge consists almost entirely of opinion evidence given by a lay witness (a police officer) that the accused was under the influence, and testimony by that witness purporting to set forth observations, made by the witness many months before, which support his opinion. It is a given that human memory of factual events can be affected or shaded by a person's vested interests or his conclusion and, moreover, our justice system acknowledges that "ferreting out crime" is "often a competitive enterprise."¹

¹ *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367 (1948).

Reflecting these realities our evidence rules prohibit the introduction, by the prosecution, of reports compiled by officers engaged in this competitive enterprise where the reports purport to set forth the “observations” of officers so engaged. (See Evid.R. 803(8)). The reason for this rule is simple; we can not expect a person who is engaged in such a competitive enterprise to record the events in a completely unbiased manner and certainly can not expect that person to record facts he considers irrelevant or facts that do not support his theory or conclusion.

In the context of an OVI case it is axiomatic that an officer who arrests someone for driving under the influence believes, at the time of arrest, that at the least, it is “probable” that the accused was under the influence of alcohol or drugs. Moreover, experience tells us that, in almost every case, by the time a trial occurs the officer will be absolutely certain of that judgment. This is not only typical, it is human nature.

While Evidence Rule 803(8) reflects skepticism of the ability of an individual to be completely unbiased while engaged in an investigation, especially when the investigation has focused upon a “suspect,” there is little basis in human experience to expect that an the individual’s view of the facts will become *more neutral and less biased* once he has arrested the suspect. In the context of a DUI case, an officer is called upon to give his testimony many months after the date on which the offense allegedly took place, at which time the officer is called upon to try to remember everything that happened from the moment the accused (or the accused’s vehicle) first came to the officer’s attention until the time, hours later, when the officer relinquished custody of the accused. This, at best, is a very difficult task.

When there is no videotape even the most honest, most forthcoming, and most stalwart officer can only search his notes – the very notes that cannot be admitted into evidence due to inherent bias – to attempt to present an account of what occurred during that broad expanse of

time those many months ago. It is a given that facts and details most likely to be lost are facts that, when reviewed by a neutral party, may benefit the accused or tend to exculpate the accused, or which may be inconsistent with the conclusion the officer formed.

None of the above is meant to infer that officers typically give testimony that they know is false, but is merely meant to point out the realities of what occurs in an OVI case when there is no videotape for the trier of fact to review. The defendant and the trier of fact are required to rely upon the memory of the defendant's primary accuser for a "neutral" account of the events that occurred.

Because the evidence in a driving under the influence case consists of an officer's opinion as to the accused's intoxication and the officer's recitation of the "observations" made months earlier that support that opinion, where it exists, videotape evidence documenting those events is extremely critical evidence to a defendant attempting to defend himself against such charges.

Such videotape can also be of a great benefit to the prosecution as, where the officer is able to provide a truthful, mostly unbiased and reasonably thorough account of the events and his testimony makes a strong case for conviction of the defendant, the videotape will bolster the officer's testimony.

Preservation of Videotape in an OVI Case

Constitutional jurisprudence has long recognized that favorable evidence, which is material to either guilt or punishment, must be disclosed by the State upon request.² Going a step further, due process commands the State to produce materially exculpatory evidence, with

² *Brady v. Maryland* (1963), 373 U.S. 83, 87.

or without a request by an accused.³ The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects the accused in a criminal case from being convicted of a crime where the State either fails to preserve the materially exculpatory evidence⁴; or, in bad faith, destroys potentially useful evidence.⁵

Because videotape evidence is so critical in an OVI case to the ability of a finder of fact to make a fair judgment based upon unbiased and complete evidence a substantial body of case law has developed in the Ohio appellate courts relating to the preservation and non-preservation of videotape evidence.

The case law in the appellate courts in Ohio is relatively uniform and in agreement that, in an OVI case, when the accused serves upon the prosecutor's office a specific request to preserve or disclose audio and/or videotape evidence the State's duty of care relative such evidence is different than the duty of care where no such request has been made.

Nonfeasance

Ohio courts have been relatively uniform in holding that in the face of a specific request to preserve or disclose specified videotape evidence the prosecution can not simply sit on its hands and allow the tapes to be destroyed "in the normal course of business," as may be the case with videotapes maintained by a police agency that are not likely to be used as evidence in a criminal case or which have not been the subject of such a specific request.⁶

³ *United States v. Agurs* (1976), 427 U.S. 97, 112.

⁴ *California v. Trombetta* (1984), 467 U.S. 479, 489, 81 L.Ed.2d 413, 104 S.Ct. 2528

⁵ *Arizona v. Youngblood* (1988), 388 U.S. 1051, 102 L.Ed.2d 1007, 109 S.Ct. 885

Malfeasance

Given that Ohio courts have held that prosecutors can not simply do nothing in the face of a specific request to preserve, disclose or produce videotape evidence it should come as no surprise that our courts have disapproved of situations where an officer actually makes a decision to erase, destroy, or not secure a videotape because, in his judgment, it contains no relevant, material or exculpatory evidence.⁷

Misfeasance

The instant case does not involve malfeasance or nonfeasance but rather the actions in this case are more appropriately viewed as acts of misfeasance. In the instant case, the defendant made a general written request for discovery and thereafter orally requested a copy of the videotape. However, the officer who was directed to copy the tape had not been trained how to properly do so. Moreover simple precautions, such as removing the plastic tabs from the back of the tape cassette that would have prevented erasure of its contents, were not taken.

In reviewing the duties of a prosecutor and her agents relative to video tapes one Ohio court has likened the State's responsibility to that of an insurer or common carrier –where the defendant has specifically requested the videotape be preserved, disclosed or produced.⁸

Amicus would suggest that such a comparison is apt. Where there is evidence as important to a case as the videotape is in an OVI case, and the defendant has taken affirmative steps to advise the prosecution that the evidence is important to the defense, and further requests

⁶ See *Columbus v. Forest* (1987), 36 Ohio App.3d 169, 173, 522 N.E.2d 52; *State v. Benton* (2000), 136 Ohio App.3d 801, 805-07, 737 N.E.2d 1046; *State v. Anderson*, 1st Dist. No. C-050382, 2006-Ohio-1568.

⁷ See *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693.

⁸ *State v. Williams*, 126 Ohio Misc.2d 47, 2003-Ohio-7294 at ¶20.

that the prosecution preserve, disclose, or produce a specific video, it would seem appropriate that the prosecution bear responsibility for the failure to do so.

[S]uch official, and his obligation has been held to be as broad as is the obligation of a common carrier of freight received for shipment; that is to say, that when he comes to account for the money received, it must be accounted for and paid over, unless payment is prevented by an act of God or a public enemy; and burglary and larceny and the destruction by fire, or any other such reason, have not been accepted by the courts as a defense against the claim for the lost money.⁹

Acts of God, etc.

Just as public officials entrusted with monies or valuables are not responsible when there is a loss thereof due to an “act of God” or a public enemy; and burglary and larceny and the destruction by fire, or any other such reason beyond his control, the occurrence of events or acts that the prosecutor and his agents had no control over and thus could not have prevented should not result in the burden shifting employed in the cases cited herein. Indeed, at least one Ohio court has had occasion to address a case where a videotape was destroyed through what would be described as an act of God and that Court drew such a distinction.¹⁰

CONCLUSION

Amicus would submit that in a driving under the influence case a videotape that would either confirm or dispute the officer’s observations and opinions relative to whether the defendant appeared impaired is critical and integral to the preparation of a defense. This Court should hold the State to at least the same standard of care common carriers are entrusted to apply to tangible goods. An individual’s liberty should at least be as necessary to protect.

⁹ 1993 Op. Att’y Gen. No. 93-004 (citing *Seward v. National Surety Co.* (1929), 120 Ohio St. 47, 49-50).

¹⁰ *State v. Woods*, 4th Dist. No. 08CA3014, 2008-Ohio-4327.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by regular U.S. mail, this 16th day of June, 2009, upon the following to Mark Sleeper, Assistant Law Director, 301 Putnam Street, Marietta, Ohio 45750.


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