

[Cite as *State v. Tarleton*, 2003-Ohio-3492.]

STATE OF OHIO, HARRISON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

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| STATE OF OHIO, |) | |
| |) | |
| PLAINTIFF-APPELLEE, |) | |
| |) | CASE NO. 02-HA-541 |
| VS. |) | |
| |) | OPINION |
| DAVID ALLEN TARLETON, |) | |
| |) | |
| DEFENDANT-APPELLANT. |) | |

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| CHARACTER OF PROCEEDINGS: | Criminal Appeal from Common Pleas Court Case No. 01-338-CR |
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| JUDGMENT: | Affirmed |
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APPEARANCES:

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| For Plaintiff-Appellee: | Matthew P. Puskarich Prosecuting Attorney P.O. Box 248 111 West Warren Street Cadiz, Ohio 43907 |
| For Defendant-Appellant: | Attorney John L. Woodard 121 West 3rd Street, P.O. Box 584 Dover, Ohio 44622 |

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Hon. Mary DeGenaro

Dated: June 30, 2003

DONOFRIO, J.

{¶1} Defendant-appellant, David Allen Tarleton, appeals from a Harrison County Common Pleas Court decision overruling his motion to dismiss the indictment against him following his aggravated vehicular assault conviction.

{¶2} In the early morning hours of August 25, 2001, appellant struck Hollie Pabin with his motorcycle. Miss Pabin suffered serious injuries as a result. This accident occurred at a party in Athens Township, Ohio. Both appellant and the victim had been drinking. The first deputies arrived on the scene between 4:00 and 4:47 a.m. At approximately 7:30 or 8:00 a.m., Lieutenant Mark Touville arrived. He recorded the scene on a dashboard video camera in his cruiser. By this time, the scene had cleared out and the motorcycle had been moved from its original crash location.

{¶3} On October 5, 2001, a Harrison County Grand Jury indicted appellant on one count of aggravated vehicular assault in violation of R.C. 2903.08(A)(1). Appellant filed discovery requests on September 12, 2001 and again on October 22, 2001, requesting among other things, all evidence favorable to him and material to guilt or punishment, any photographs material to his defense, and the opportunity to inspect any tangible objects in appellee's possession, which could be material to his case. On December 21, 2001, appellant filed a motion for inspection of medical records and video of the scene. The motion stated that appellee had advised appellant that a deputy had taken a video of the scene and that it would be made available to him. However, appellee later informed appellant that the video had been erased and was not available. Appellant requested a hearing concerning the taking of the video, when the tape was erased, and the circumstances surrounding the erasing. Appellant stated that the video was important to determine the location and condition of his motorcycle and where the accident occurred.

{¶4} Appellant's motion came for hearing on January 14, 2002. In a January 16, 2002 judgment entry, the court found that it was not appellee's fault that a deputy had taped over the videotape, and that the tape was not exculpatory to appellant. Appellant subsequently filed two motions to dismiss his indictment stating that the videotape had been erased; therefore, appellee had violated his due process rights by failing to preserve exculpatory evidence. The trial court held a brief hearing on appellant's motions to dismiss just before trial and overruled them.

{¶5} On April 10, 2002, the case proceeded to a jury trial. The jury found appellant guilty as charged. On June 4, 2002, the court sentenced appellant to two years of incarceration, a \$500 fine, and ordered him to pay restitution to the victim. Appellant filed his timely notice of appeal on July 2, 2002.

{¶6} Appellant raises two assignments of error, which are quite similar. Thus, we will address them together. They state:

{¶7} "THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS WHEN IT DESTROYED A VIDEOTAPE THAT WAS MATERIAL TO THE ISSUE OF GUILT."

{¶8} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED THE APPELLANT'S MOTION TO DISMISS FOR FAILURE TO PRODUCE THE VIDEOTAPE."

{¶9} Appellant argues the trial court erred in failing to grant his motion to dismiss the indictment against him. He asserts the burden to show that the videotape was not exculpatory was on appellee. Citing, *State v. Benton* (2000), 136 Ohio App.3d 801; *Columbus v. Forest* (1987), 36 Ohio App.3d 169. He argues that appellee did not meet this burden; thus, his due process rights were violated when the videotape was destroyed. Appellant urges us to overturn his conviction for these reasons.

{¶10} The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a criminal defendant from being convicted of a crime

where the state either fails to preserve materially exculpatory evidence, *California v. Trombetta* (1984), 467 U.S. 479, 489, or destroys in bad faith potentially useful evidence, *Arizona v. Youngblood* (1988), 488 U.S. 51, 58. *Benton*, 136 Ohio App.3d at 805. "Evidence is materially exculpatory where: (1) the evidence possesses an exculpatory value that was apparent before the evidence was destroyed, and (2) is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means." *Id.*, citing *Trombetta*, 467 U.S. at 489. Generally, the burden of proof lies with the defendant to show both that the evidence is exculpatory and unique. *Forest*, 36 Ohio App.3d at 173, citing *Trombetta*, 467 U.S. at 489-90.

{¶11} In ruling on appellant's motion for inspection of medical records and video of the scene, the trial court noted that several witnesses testified and were questioned by the bench. The court found that:

{¶12} " * * * [T]he State had made reasonable efforts to secure the video tape for the Defendant and that is [sic.] was not the fault of the State that the video tape had been taped over by a Deputy. Further, the video tape was of dubious quality and value due to the motorcycle being moved from its original position before the video tape was created. Therefore, the video tape was not exculpatory to the Defendant." (January 16, 2002 Judgment Entry).

{¶13} Appellant then filed a motion to dismiss his indictment on January 31, 2002. The motion alleged that since appellee failed to preserve materially exculpatory evidence, the court must dismiss the indictment against appellant. There is no judgment entry ruling on this motion in the record. However, on April 9, 2002 and at trial, appellant renewed this motion; thus, we know that the court did not grant the January 31, 2002 motion. The trial court again overruled the renewed motion at trial but stated that appellant could comment on the erased videotape at trial.

{¶14} Appellant has failed to provide us with a transcript of the motion hearing where the court heard testimony regarding the content of the videotape and the circumstances surrounding a deputy either taping over or erasing it. It is appellant's

duty to provide us with a transcript or transcript substitute in accordance with App.R. 9. While a transcript of the motion hearing would be beneficial to this court in our review of appellant's alleged errors, the fact that appellant failed to include such transcript is not necessarily fatal to his case. Appellant is appealing from the trial court's decision that overruled his motion to dismiss the indictment. Thus, we shall consider the court's ruling on the day of trial overruling appellant's motion to dismiss.

{¶15} Appellant asserts that the burden of proof was on appellee to demonstrate the videotape was not exculpatory. He relies on three cases, *Benton*, 136 Ohio App.3d 801, *Forest*, 36 Ohio App.3d 169, and *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944. In *Forest*, the Tenth Appellate District held:

{¶16} "Where the state breaches its duty to respond in good faith to a defense request to preserve evidence and the evidence is destroyed in accordance with normal practice, the appropriate remedy is to shift to the state the burden of proof as to the exculpatory value of the evidence. If the state fails to carry its burden, the defense still must show that the evidence cannot be obtained via alternate channels." *Id.* at paragraph three of the syllabus.

{¶17} In *Forest*, the defendant was convicted of D.U.I. Before his arrest, several police officers chased the defendant, during which time the officers broadcasted radio transmissions of the events. A week after his arrest, the defendant's counsel made a written request on the state to preserve the tapes of the radio transmissions and certain phone calls. The state failed to respond to the request. Counsel subsequently filed a motion to preserve the tapes. When counsel learned the tapes had been erased in accord with normal procedure, he filed a motion to dismiss the case, which the trial court overruled.

{¶18} At issue on appeal was the state's constitutional duty to respond to a defendant's discovery requests and the remedies available upon breach of the state's duty. The court found that the state most likely did not act in good faith in failing to preserve the tapes despite the defendant's specific request, noting that the state did

not even respond to the request. The court held that at a minimum, fundamental fairness required that the state respond to defense requests to preserve evidence. Explaining the extent of its holding, the court noted that the state's duty to respond did not imply a right to have the evidence sought preserved, but that such a right was limited to evidence that was exculpatory and unique. The court found that in cases, where the state breached its duty to respond in good faith to a defense request to preserve evidence, the appropriate remedy was to shift the burden of proof to the state to show that the evidence was not exculpatory.

{¶19} In *Benton*, the defendant was charged with D.U.I. Apparently, it is a policy of the State Highway Patrol to video and audio tape all traffic stops. Knowing this, defense counsel sought discovery from the state of a videotape of the defendant's traffic stop. The state never produced the tape. The defendant learned that the tape, if one ever existed, had been erased and reused. The defendant filed a motion to dismiss due to the state's failure to preserve the tape. The trial court overruled the motion, presuming the tape had existed, and held that since the defendant had not demonstrated the tape was exculpatory or that the evidence on the tape was not obtainable by other means, he would have to show the tape was destroyed in bad faith.

{¶20} Relying on *Forest*, the Sixth District Court of Appeals held that the state had the burden of showing the tape was not exculpatory. The court noted that this burden shifting applied in limited circumstances. It also noted that in this case the defendant specifically requested discovery of the tape and the state did not respond in good faith.

{¶21} Finally, in *Benson*, which appellant raised in his motion to "add citation," the defendant was convicted of D.U.I. In reversing Benson's conviction, the First District Court of Appeals found that the arresting officer acted in bad faith because (1) he was dishonest with the prosecution about whether a videotape of the traffic stop existed; (2) he surmised that if a tape existed, it probably did not contain evidence of

the sobriety tests; and (3) he failed to turn over the tape to the prosecution when the prosecution requested that he look for it, and instead, destroyed it.

{¶22} The present case is distinguishable from *Forest*, *Benton*, and *Benson* in several respects. First, in *Forest* and *Benton*, the defendants made specific almost immediate requests for the tapes at issue. And in *Benson*, the defendant made a specific request one month after his arrest. In the present case, appellant initially made only a general discovery request. He did not make a specific request until several months had passed. Second, there is no indication in this case that appellee acted in bad faith, as did the state in the other cases. In those cases, the state ignored the defendants' specific requests to preserve and for discovery of the tapes. In this case, the trial court found appellee had made reasonable efforts to secure the videotape for appellant. Finally, the tape's value in the case sub judice is questionable. In *Forest*, the audiotape was recorded as the police chased the defendant and relayed the events of the chase as they occurred. In *Benton* and *Benson*, the tapes were of the traffic stops themselves. Thus, they would have contained conversations between the arresting officers and the defendants, showing how the defendants acted, and relaying their performance on any field sobriety tests. Hence, there is a good chance these tapes were exceedingly relevant to the crimes charged. But in the present case, the videotape in question was not recorded until several hours after the accident. It did not show appellant's motorcycle striking the victim, nor did it show the motorcycle's original location after the accident. At trial, Deputy Robert Toker testified that the video was taken at least three hours after he arrived on the scene. (Tr. 62). He also testified that at that time, only he and two other deputies remained at the scene. (Tr. 57). Additionally, the trial court found that the videotape was of dubious quality and value due to the motorcycle being moved from its original position before the tape was created.

{¶23} The Second Appellate District has also factually distinguished cases from *Forest* and *Benton*. See *State v. Fuller*, 2d Dist. No. 18994, 2002-Ohio-2055; *State v. Martina*, 2d Dist. No. 18905, 2001-Ohio-7085. In *Fuller*, the court reasoned:

{¶24} “However, in both cases [*Forest* and *Benton*], the court placed the burden on the state because *the state had destroyed evidence following a request by the defendant that the evidence be preserved*. Here, there was no such request. Therefore, *Benton* and *Forest* do not apply, and we will not extend their reasoning to place the burden on the state in the case before us, where evidence was destroyed before any request for it was made and pursuant to the normal procedures of the police department.” (Emphasis added.) Id. at ¶15.

{¶25} The court went on to find that the evidence at issue was not materially exculpatory and that the state did not act in bad faith. In *Martina*, the court distinguished *Forest* and *Benton* on the basis “that in both instances the defendant made almost immediate, specific requests for discovery of the tapes in question, requests which the state ignored.”

{¶26} As in *Fuller* and *Martina*, in this case appellant did not make a specific, immediate request for the tape nor is there any evidence that appellee acted in bad faith. Thus, the burden remained on appellant to demonstrate that the videotape was exculpatory and unique. Since appellant has failed to provide us with a transcript of the motion hearing or any other evidence from which we can conclude that the tape was exculpatory and unique, we cannot say that the trial court erred in overruling appellant’s motion to dismiss. In addition, evidence adduced at trial indicates that the videotape was not exculpatory. Accordingly, appellant’s assignments of error are without merit.

{¶27} For the reasons stated above, the trial court’s decision is hereby affirmed.

Judgment affirmed.

Vukovich and DeGenaro, JJ., concur.