IN THE COURT OF APPEALS OF IOWA

No. 3-900 / 12-2280
Filed November 6, 2013

STATE OF IOWA,
Respondent-Appellee,

vs.

SONNY W. OXFORD,
Applicant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell G. McGhee II, District Associate Judge.

Sonny Oxford appeals from his conviction of operating while intoxicated (second offense). **AFFIRMED.**

Julia A. Ofenbakh of Ofenbakh Law Firm, P.L.L.C., Urbandale, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John Sarcone, County Attorney, and James Hathaway, Assistant County Attorney, for appellee State.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

POTTERFIELD, P.J.

Sonny Oxford appeals from his conviction of operating while intoxicated (second offense). He contends he was denied due process by his inability to review the audio recordings of the anonymous calls to police that led to the stop of his vehicle.

I. We review constitutional issues de novo. *State v*. *Kooima*, 833 N.W.2d 202, 205 (Iowa 2013).

II. The following police reports were attached to the trial information and minutes of testimony. Des Moines Police Officer Abbey Vannausdle reported that on July 20, 2012,

> A broadcast was put out for an OWI on a brown truck with a ladder rack on it at E29th/Walnut. The caller stated that the vehicle went through a stop sign, parked illegally, and was then drinking at the corner. A short time later another call came in for an OWI at 2833 E Walnut, this one stating that a WM wearing a red shirt and denim shorts associated with the brown truck had walked into this address. The caller stated that the male could barely walk. The male returned to the truck and left northbound on E 29th with a red car following it. I observed listed truck eastbound on E University from E 29th and it then turned north into the Walgreen's parking lot. The vehicle was being driven by a WM in a red shirt as the caller had described. I got behind the vehicle and stopped it in the 2900 Blk of State. A red car stopped behind me and the woman driver stated she was Oxford's girlfriend and had been following him to make sure he made it home.

Officer Ben Ihde's reported:

> Dispatch received a report of a white male in a red shirt and blue jean shorts that may have been intoxicated; he was associated with a brown Ford truck. The caller (unknown) reported that the subject could barely walk and that he blew a stop sign. The caller was following the vehicle until Officer Abbey Vannausdle (5037) located the vehicle at about the Walgreen's on East University. Vannausdle stopped the vehicle and made contact with Oxford. Oxford appeared to be intoxicated and admitted to drinking and

> currently being drunk. Vannausdle requested the assistance of a traffic officer.
>
> When I arrived, Oxford was in the back of Vannausdle's vehicle. He was not in handcuffs and he was not under arrest. I noted that there was an odor of alcohol. Oxford had only one good eye; it was watery and bloodshot. He swayed when he stood and staggered when he walked. Oxford admitted to drinking. He stated that he had been at Kelly's Little Nipper; he could not estimate as to when he got there. He stated that he had about six beers and then about twelve "Screwdriver" drinks. Oxford admitted to being drunk and that he should not have been driving. He stated that we were to disregard the field sobriety tests; just take the PBT and go to jail.

Oxford was arrested on July 20, 2012, and on July 21, he was charged by complaint with operating while under the influence. His initial appearance was on July 31. On August 19, pursuant to the Des Moines Police Department data retention policy, the recordings of the anonymous calls were deleted.

On August 24, the court approved a trial information and supplement charging Oxford with operating while intoxicated (second offense). He was arraigned on August 30, triggering the forty-day period during which Oxford was required to file motions. *See* Iowa R. Crim. P. 2.11(4). Oxford filed a motion to produce a "copy of any recordings of civilian statements made to dispatch . . . with respect to the case herein."

On October 9, Oxford filed a motion to suppress all evidence gained from the stop of his truck, asserting the "stop violated the Defendant's rights under the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Iowa Constitution." The defendant asserted Officer Vannausdle made no independent observations that indicated he was intoxicated to support the stop.

On November 9, Oxford filed a motion to dismiss. The motion noted that on September 27, he was informed that the recordings of the anonymous calls

into dispatch had been deleted pursuant to Des Moines Police Department policy that recordings be deleted thirty days after they are recorded. The defendant contended the policy was prejudicial and denied the defendant his right to due process under the United States and Iowa Constitutions. He asserted without the recordings he could not determine whether the calls had been sufficiently specific to give Officer Vannausdle reasonable suspicion to stop Oxford's truck. Citing Iowa Rule of Criminal Procedure 2.11(4) (stating pretrial motions must be filed no later than forty days after arraignment), Oxford complained that the police department's data retention policy circumvented his right to discovery and violated his due process rights because it resulted in the destruction of evidence before the expiration of the forty-day period within which he could ask for production of that evidence. Oxford also argued that deletion of the recordings constituted improper suppression of evidence that was material to guilt or punishment, in violation of *Brady v*. *Maryland*, 373 U.S. 83 (1963). Oxford asked the court to preclude testimony concerning the contents of the anonymous calls.

On November 30, at the hearing on his motion, Oxford withdrew his October 9 motion to suppress[1] and relied only on the November 9 motion to dismiss. He repeated his claim that the Des Moines Police Department's policy prevented him from conducting thorough discovery, seeking exculpatory evidence, and preparing his case, in violation of his right to due process under

[1] The defendant withdrew his motion to suppress, relying upon his motion to dismiss. He does not contend the police officer's rendition of the tip (1) does *not* provide an accurate description of the vehicle, including its location, so police could identify the vehicle; (2) does *not* contain personal observations consistent with drunk driving to the dispatcher; and (3) does *not* describe specific examples of traffic violations. These aspects of the anonymous tip provide reasonable suspicion to support the vehicle stop. *See Kooima*, 833 N.W.2d at 208-09.

the United States and Iowa Constitutions. Oxford argued that, without listening to the anonymous calls, he could not know exactly what the caller said to the dispatcher and could not judge whether Officer Vannausdle had reasonable suspicion justifying the stop of the truck.

The court denied the motion to dismiss, and Oxford appeals.

III. The question before us is whether the defendant was denied due process by the Des Moines Police Department's destruction—pursuant to internal policy—of the audio recording of an anonymous tipster's call, which tip resulted in the stop of the defendant's vehicle. The defendant provides no authority to support his due process claim. *See* Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."). We have found just one court that addressed a similar claim; that court concluded there was no due process violation. *See U.S. v. Robinson*, 855 F. Supp. 2d 419, 423 (E.D. Penn. 2012) (applying *Arizona v. Youngblood*, 488 U.S. 51 (1988), and *California v. Trombetta,* 467 U.S. 479 (1984), which require a defendant to show the prosecution's bad faith in ordering or permitting the destruction of evidence to prove a due process violation, and rejecting a due process claim where a 911 recording was destroyed after thirty days pursuant to the department policy).

We adopt the district court's ruling:

> Under Federal and Iowa State Law, the duty to preserve evidence has been described as limited to evidence that might be expected to play a significant role in the suspect's defense. The evidence must be both exculpatory valuable and the State must have this knowledge before the evidence is destroyed. If the value of the exculpatory evidence is unknown, the criminal defendant must show bad faith on the part of the police in their failure to

preserve the evidence. *Trombetta*, 467 U.S. at 485. It has been held that the failure to preserve potentially useful evidence does not constitute a denial of due process of law if there is no showing of bad faith. No evidence was presented by the Defendant to establish that the destruction of the evidence in this case was done in bad faith. The destruction of the evidence was pursuant to the policy of the Des Moines Police Department. [*See*] *State v*. *Dulaney*, 493 N.W.2d 787, [791] (Iowa 1992) [(ruling destruction of blood sample according to lab procedure did not violate defendant's due process rights; "In the present case, there is no evidence the State intentionally destroyed the sample in an effort to deprive Dulaney of evidence, as required by *Trombetta* and *Youngblood*.")]. This Court finds that destroying evidence before the statutory date of production has been exhausted is seemingly unwise, "chilling" and against the interest of the Defendant. However this Court could find no Federal or Iowa Court that had found it to be a violation of due process, and therefore, neither does this Court.

As to the *Brady* issue, there is no present evidence in the record to establish that the information in the undiscovered police report that the defendant sought would be exculpatory. In fact a review of the evidence probably would establish that the statements of the citizen informant would be admissible against the defendant. (State's Exhibit # 1). Nevertheless, the appropriate remedy for a *Brady* violation is a new trial or remedies less than dismissal. Also, the Defendant in this case had more than enough time to depose the witness on the evidence after it was discovered. This Court can find no prejudice based on the timing of the disclosure. [*See*] *DeSimone v*. *State*, 803 N.W.2d [97, 105] (Iowa 2011) [("Due process is only denied when the favorable, suppressed evidence is material to the issue of guilt. The Supreme Court stated evidence is material when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.")].

AFFIRMED.