

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY LEE COX,

Defendant-Appellant.

UNPUBLISHED

December 21, 2001

No. 226084

St. Clair Circuit Court

LC No. 98-001680-FH

Before: Murphy, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for possession of a controlled substance with intent to deliver less than fifty grams, MCL 333.7401(2)(a)(iv), and maintaining a drug house, MCL 333.7405(1)(d). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to three to thirty years' imprisonment on the drug possession conviction, and one to fifteen years' imprisonment on the drug house conviction. Defendant contends that the police failed to preserve evidence in violation of due process, that his counsel should have been allowed to withdraw under the Sixth Amendment, and that his conviction violated the corpus delicti rule. We disagree and affirm.

First, defendant argues that the police should have preserved written notes of defendant's alleged confession and the tennis shoe in which they found the cocaine. At trial, an officer testified that he destroyed his notes of his on-scene interview with defendant; however, the officer had prepared a police report based on the notes, and another officer, who was standing nearby when defendant made his confession, heard defendant's statements and corroborated the interviewing officer's account. The officers also testified that because defendant confessed, they saw no need to preserve the tennis shoe, and that it must have been sold after forfeiture proceedings at a police auction. In the proceedings below, defense counsel did not request to see either piece of evidence. Further, defendant did not object to the lack of preservation of the evidence or the testimony referring to it. Thus, the issue is forfeited. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). However, this unpreserved issue may still be reviewed by this Court under the plain error standard. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A defendant must show: (1) that an error occurred; (2) that the error was plain; and (3) that the plain error affected substantial rights. *Id.* at 763. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome in the trial court. *Id.* Reversal is warranted only when the plain, forfeited error results in a conviction of an innocent

defendant or when the error seriously affects the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

The United States Supreme Court has addressed "the extent to which the Due Process Clause . . . requires the State to preserve evidentiary material that might be useful to a criminal defendant." *Arizona v Youngblood*, 488 US 51, 52; 109 S Ct 333; 102 L Ed 2d 281 (1988). In pertinent part, the Supreme Court stated that the withholding of materially exculpatory evidence unquestionably violates the Due Process Clause regardless of good or bad faith. *Id.* at 57. However, "when . . . no more can be said than that [the evidence] could have been subjected to tests, the results of which might have exonerated the defendant," the analysis is different. *Id.* The Supreme Court held "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. Loss of physical evidence that occurs before a defendant makes a request for its production does not require reversal absent the intentional suppression of evidence or a showing of bad faith. *People v Adams*, 232 Mich App 128, 138-139 n 10; 591 NW2d 44 (1998).

Because the officer's notes and the tennis shoe were not clearly exculpatory on plain sight, the usefulness of the evidence to defendant was indeed "speculative," thereby requiring proof of the officers' bad faith. In *Youngblood*, *supra* at 58, the Supreme Court noted that bad faith can be found in those cases where the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. Here, the bad faith determination depends on whether the police had reason to preserve the interview notes or investigate other possible owners of the tennis shoe.

With regard to the notes, we find not only was the exculpatory value "speculative," it was likely that the notes would have corroborated what two officers testified to twice, which was that at the scene, defendant confessed to possessing the cocaine with intent to sell it. The interviewing officer testified that after his notes were transcribed in the police report, he discarded them. We cannot say that the officer's conduct, in the context of the factual circumstances, indicated that the notes contained exculpatory evidence; therefore, the destruction of the notes did not constitute an action premised on bad faith. This Court in *People v Leo*, 188 Mich App 417, 427; 470 NW2d 423 (1991), addressing an issue regarding the destruction of witness interview notes after they were summarized and typed in the form of an investigation report, held that the fact that the notes were summarized in the report, which was available to the defendant, established that the defendant's right to a fair trial was not denied, and, additionally, the defendant failed to show that the notes were exculpatory in nature and that the police acted in bad faith. Here, as to the notes, we also find that defendant was not denied a fair trial.

As to the tennis shoe, the officers did not exercise bad faith in failing to preserve the shoe for prosecution under both the drug possession and the maintaining a drug house charges. Defendant's houseguest testified that he was living with defendant and the cocaine was his, not defendant's. He did *not* testify that *the tennis shoe* containing the cocaine was his. The tennis shoe was only potentially useful evidence given that had the shoe not belonged to defendant, it would not establish that defendant was not guilty of the drug house charge, where the cocaine was present in defendant's house, and where other evidence indicated that the house was frequented by drug purchasers. Additionally, if the shoe had not belonged to defendant, it would not establish that he had not possessed the cocaine, where possession, which includes joint possession, is defined as either actual, current, and physical control over the substance, or the

right to control it if one chooses to exercise control, and not necessarily ownership, and where the shoe was found lying near a sofa in the living room of defendant's house.¹ Given the confession and factual circumstances, it was reasonable for the police to not take steps to preserve the tennis shoe containing the cocaine for an extended period of time; therefore, there was no bad faith. The introduction of testimony concerning defendant's alleged confession and the tennis shoe, after the loss of the interview notes and the shoe, was not plain error.

Defendant next argues that the court below should have granted his trial counsel's motion to withdraw as defendant's attorney made the day before and the morning of trial. We review a trial court's decision regarding a motion to withdraw for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368-369; 592 NW2d 737 (1999). The *Echavarria* panel stated:

When reviewing a trial court's decision to deny a defense attorney's motion to withdraw and a defendant's motion for a continuance to obtain another attorney, we consider the following factors: (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*Id.* at 369 (citation omitted).]

Only the first factor weighs in favor of defendant because he is asserting a right to counsel. Regarding the second factor, it is not apparent that defendant had a legitimate reason for asserting this right, i.e., an irreconcilable bona fide dispute. Mere nonpayment of a fee, which issue was raised by defense counsel in the present case, is not sufficient reason alone for an attorney to withdraw. *State Bar of Michigan v Daggs*, 384 Mich 729, 732; 187 NW2d 227 (1971). The other reasons the defense advanced for withdrawal – culminating in a claim of being unprepared – are a result of defendant's failure to even attempt communication with his attorney more than twice for nearly a year and a half.

Regarding the third factor, defendant's actions could be considered negligent, where he attempted to reach his attorney only twice in a year and a half period, and where defendant failed to appear for previous court dates. We also question the timeliness of the motion, which apparently could have been made much earlier than the day before trial. Regarding the fourth factor, the record suggests that defendant was merely attempting to delay trial as evidenced by his previous failures to appear in court, including an earlier trial date, which led to the issuance of a bench warrant for defendant's arrest. Finally, regarding the fifth factor, defendant did not demonstrate prejudice resulting from the trial court's decision to deny the motion to withdraw, where the court allowed a *Walker* hearing to be conducted before trial concerning defendant's statements, and where the court allowed defense counsel time to speak with defendant's houseguest who was, in essence, the only witness to testify on defendant's behalf. The trial court's denial of the motion to withdraw was not an abuse of discretion.

¹ The jury was instructed on these possession definitions.

Defendant's final argument on appeal is that his conviction violated the corpus delicti rule, which argument was also forfeited by failure to object but still reviewable for plain error. *Carines, supra* at 763-764. In *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995), our Supreme Court, discussing the corpus delicti rule in the context of a drug possession case, stated:

[T]he rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury . . . and (2) some criminal agency as the source of the injury.

The Legislature has established that no person may legally possess cocaine unless that person falls within a statutory exception We have no common-law authority to redefine the body of this crime. Therefore, the corpus delicti was satisfied by evidence independent of defendant's confession that the cocaine existed and was possessed by someone. . . . The defendant's contention that proof of the corpus delicti requires evidence that the cocaine was constructively possessed *by the defendant* is incorrect. "Proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti." It is sufficient to show that the crime was committed *by someone*. [Emphasis in original; citations omitted.]

According to the record in the present case, (1) the cocaine did exist, and (2) it was illegally possessed by "someone." Therefore, there was proof of the corpus delicti concerning the drug possession charge. As to the drug house charge, there was evidence presented, independent of defendant's statements, that there were drugs in defendant's house, that controlled substances were sold out of the house, and that defendant was aware of the drug sales. MCL 333.7405(1)(d). This evidence clearly established that there was no violation of the corpus delicti rule; therefore, defendant's confession was properly admitted. Consequently, there was no plain error.

Affirmed.

/s/ William B. Murphy

/s/ Janet T. Neff

/s/ Joel P. Hoekstra