COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2296-CR **Cir. Ct. No. 2004CF1133**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MELVIN PRIDE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed*.

Before Curley, P.J., Wedemeyer[1] and Fine, JJ.

[1] This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 PER CURIAM. Melvin Pride appeals from a judgment convicting him of possessing cocaine with intent to deliver as a second or subsequent offense, and from an order denying his postconviction motion. Pride claims that the police destroyed apparently exculpatory evidence, thereby violating his right to due process of law. Because we conclude that the police destroyed evidence that was no more than potentially useful to the defense, we reject Pride's contentions and affirm.

Background

¶2 Pride was arrested on an outstanding warrant during a traffic stop. Officers patted him down before transporting him to the police station and found no contraband.

¶3 Police Officers Christian Osell and Patrick Fuhrman brought Pride to the booking room for processing. During the booking process, the officers found chunky material in a baggie on the floor near Pride. This material was tested and determined to be cocaine base. The officers' discovery of cocaine in the booking room gave rise to the charge in this case. Pride demanded a jury trial.

¶4 At trial, Officer Osell testified that he walked through the booking area prior to Pride's entry and observed nothing on the floor. During the course of the booking process, Officer Osell observed Pride reach into his waistband with his left hand, pull out his arm, and open his fist. Officer Osell did not see anything fall, but when he looked down he saw a baggie on the floor about a foot away from Pride containing individually packaged amounts of an off-white chunky substance.

¶5 Officer Fuhrman testified that the booking room is equipped with a video camera. He told the jury that the prosecuting attorney asked for a copy of Pride's booking tape, and Officer Fuhrman attempted to comply by submitting an interdepartmental request. When Officer Fuhrman made his request, however, the recording had already been destroyed in accord with standard police department procedure of taping over booking videos after thirty days. Officer Fuhrman testified that he did not try to expedite his request because he had never previously been involved in a case that required a videotape, and he was unaware of the thirty-day deadline for securing the evidence. No one ever reviewed the tape.

¶6 Pride did not present a defense beyond cross-examining the State's witnesses. The jury returned a guilty verdict.

¶7 Pride filed a postconviction motion to vacate the judgment and dismiss the case on the ground that destruction of the videotape violated his constitutional right to due process. *See* U.S. CONST. amend. XIV, § 1.[2] The circuit court denied the motion, and this appeal followed.

Discussion

¶8 When the police destroy evidence, the defendant's right to due process is violated in either of two circumstances. In one, the police fail to preserve evidence "that might be expected to play a significant role in the suspect's defense." ***California v. Trombetta***, 467 U.S. 479, 488 (1984). Wisconsin adopted this due process standard in ***State v. Oinas***, 125 Wis. 2d 487,

[2] The Wisconsin Constitution also guarantees a defendant due process of law. *See* WIS. CONST. art. I, § 8. Pride did not argue in the circuit court, and does not argue on appeal, that his claim should be separately considered under the State Constitution.

490, 373 N.W.2d 463, 465 (Ct. App. 1985). To satisfy the standard, the destroyed evidence must both: (1) "possess an *exculpatory value* that was *apparent* to those who had custody of the evidence … before the evidence was destroyed, *and* (2) … be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." ***Ibid.*** (emphasis in original). The defendant has the burden to demonstrate that the evidence was apparently exculpatory and that no comparable evidence is available. *See* ***State v. Noble***, 2001 WI App 145, ¶18, 246 Wis. 2d 533, 548, 629 N.W.2d 317, 323, *rev'd on other grounds*, 2002 WI 64, ¶13, 253 Wis. 2d 206, 217–218, 646 N.W.2d 38, 43–44.

¶9 In the second circumstance, the police act in bad faith by failing to preserve evidence that is potentially exculpatory. ***Arizona v. Youngblood***, 488 U.S. 51, 58 (1988). Wisconsin adopted this due process standard in ***State v. Greenwold***, 181 Wis. 2d 881, 884–885, 512 N.W.2d 237, 238–239 (Ct. App. 1994) (***Greenwold I***). The defendant has the burden of proving bad faith. ***State v. Greenwold***, 189 Wis. 2d 59, 70, 525 N.W.2d 294, 298 (Ct. App. 1994) (***Greenwold II***).

¶10 Pride concedes the absence of bad faith in this case. We are not bound by a party's concession. ***State v. Annina***, 2006 WI App 202, ¶11 n.4, 296 Wis. 2d 599, 605 n.4, 723 N.W.2d 708, 711 n.4. We accept Pride's concession here, however, because nothing in the record supports a conclusion that the evidence was destroyed as a result of either "official animus" or "a conscious effort to suppress exculpatory evidence." *See* ***Greenwold II***, 189 Wis. 2d at 69, 525 N.W.2d at 298. Thus, to prove a violation of his due process rights, Pride must satisfy the standard adopted in ***Oinas***.

¶11 The first prong of the ***Oinas*** analysis requires Pride to demonstrate that the videotape had "exculpatory value" that was "apparent" to the police who had the tape in their custody. *See* ***Oinas***, 125 Wis. 2d at 490, 373 N.W.2d at 465. He has not done so. Pride argues that the videotape "would have shown explicitly whether the defendant did or did not commit a crime." Pride's contention reflects no more than a possibility that the evidence might have been exculpatory if it had been preserved. This is insufficient to constitute the requisite showing. *See* ***Youngblood***, 488 U.S. at 56 n.* (possibility that semen samples could have exonerated the accused if preserved or tested insufficient to show samples were apparently exculpatory). Evidence that might as easily incriminate as exonerate the defendant is not "apparently exculpatory." It is, at best, potentially useful. The State does not violate the defendant's due process rights by destroying evidence that is only potentially exculpatory or useful unless the officers acted in bad faith. ***Greenwold II***, 189 Wis. 2d at 67, 525 N.W.2d at 297.

¶12 Further, Pride offers nothing to demonstrate that the custodians of the evidence, that is, the police, perceived any exculpatory value in the videotape. *See* ***Oinas***, 125 Wis. 2d at 490–491, 373 N.W.2d at 465. Officer Osell observed Pride reaching into his waistband and opening his fist. The officer then found cocaine on a previously bare floor. From Officer Osell's perspective, the videotape was potentially corroborative of his observation that Pride dropped cocaine in the booking room. Thus, the first ***Oinas*** prong is not satisfied here.

¶13 Pride contends that he has satisfied the second prong of the ***Oinas*** analysis because he cannot obtain evidence comparable to the destroyed videotape. *See* ***ibid.*** We do not address that contention because Pride failed to demonstrate that the videotape had an apparently exculpatory value. Pride's

failure to make that showing obviates the need for us to inquire any further. *See* ***id.***, 125 Wis. 2d at 491, 373 N.W.2d at 465.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).