COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP398-CR **Cir. Ct. No. 2005CF21**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHANE C. MCCARTHY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR. and DANIEL L. KONKOL, Judges. *Affirmed*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Shane McCarthy appeals a judgment of conviction and order denying his postconviction motion. We affirm.

¶2 McCarthy was charged with several crimes from a single course of conduct. The allegation, in brief, was that he solicited a person he thought was a prostitute, but was actually a police officer, and then when police attempted to arrest him, he fled in his vehicle, causing a serious collision.

¶3 McCarthy argues that the circuit court erroneously denied his motion to dismiss certain charges based on the destruction of evidence. Specifically, he argues that relief should be granted due to the destruction of the car he was driving at the time of the crimes. That car was badly damaged in the accident, towed to a city lot, and later destroyed. McCarthy argued to the circuit court that he wanted to be able to test the brakes on the car to develop evidence to support a defense that they had failed.

¶4 The due process analysis is two-pronged: a defendant's due process rights are violated if the police: (1) failed to preserve evidence that is apparently exculpatory; or (2) failed to preserve evidence which is potentially exculpatory, and did so in bad faith. ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994). In this case, the circuit court concluded before trial that the wrecked car had no apparent exculpatory value. As to the second prong, the pretrial circuit court does not appear to have specifically addressed whether there was bad faith. However, it does appear that the circuit court before trial found that proper procedures were followed in the destruction of the vehicle, and that the postconviction court found that no bad faith was shown.

¶5 On appeal, McCarthy argues that the vehicle was apparently exculpatory, but we disagree. There is nothing in the record showing that a brake problem was apparent from the wrecked car or the facts of the crime. Clearly, the vehicle is *potentially* exculpatory evidence that had the potential to be tested and

show brake failure, but the record shows no basis to conclude that there was bad faith. Therefore, no due process violation occurred.

¶6 McCarthy next argues that error occurred at trial in connection with jury instructions and his affirmative defense. He argues that error was present in both the instructions themselves and in the court's response to a jury question. Both of these issues appear to have been waived because McCarthy's defense counsel did not object to either the instruction or the court's response. However, even if we were to address the issues, we see no merit in the arguments, as we understand them.

¶7 As to the instruction itself, McCarthy appears to argue that the instruction should have informed the jury that his affirmative defense was the brake failure that he claimed occurred. Without this connection being described in the instruction, McCarthy asserts, the jury was unable to consider his defense. We do not agree that it was necessary for the instruction to specifically identify the factual basis for his defense. It was clear enough from defense counsel's argument what the factual basis for the defense was.

¶8 As to the court's response to the jury's question, McCarthy appears to argue that the jury's question shows that it agreed with his defense that the brakes failed, but the court's response of giving the jury the same instruction already given had the effect of preventing the jury from finding in his favor. We disagree with McCarthy's assertion that the jury's question shows agreement with his defense. The jury was simply asking at which parts of the analysis it should consider the possibility that the brakes failed. And, we see nothing about repeating the earlier instruction that would have prevented the jury from finding in McCarthy's favor if it believed his claim.

¶9 McCarthy next argues that two of the State's police witnesses created a "fabricated exhibit" that was entered into the record. He asserts that one of the State's rebuttal witnesses met with another police witness in the hallway to obtain a photograph that would show a certain police car with a "Kojak light" on it. He argues that the court should have declared a mistrial. We reject this argument for two reasons. First, the record does not support any finding that events occurred in the manner McCarthy suggests. The rebuttal officer was asked on the stand about his courthouse contact with the other officer, and he said their conversation was about specific personal matters. While the officer agreed that he had looked at certain photographs that day, he said he did so to refresh his memory. Second, no party moved for a mistrial. McCarthy is raising this issue for the first time on appeal, and we do not usually address such arguments. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

¶10 McCarthy next argues that at sentencing the court improperly considered him to be guilty on count one, even though the jury acquitted him on that count. While it is true that the transcript shows the court referring at one point to a guilty finding on count one, elsewhere in the transcript it is clear that the court understood there was a split verdict, with acquittal on count one. Other than that one statement by the court, McCarthy does not point to any other indication that the court misunderstood the posture of the case, or that the sentence was affected.

By the Court.—Judgment and order affirmed.

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