COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2668-CR **Cir. Ct. No. 2008CF206**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

THOMAS R. MCESSEY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Reversed and cause remanded for further proceedings.*

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 BLANCHARD, J. The State appeals an order dismissing this criminal prosecution in its entirety in advance of trial, based on the circuit court's conclusion that police negligently lost potentially exculpatory evidence and that, as a result, the court lacked confidence that a fair trial could be held without the

lost evidence. For the following reasons, we conclude that the court applied an incorrect legal test to address the failure of police to preserve potentially exculpatory evidence. Accordingly, we reverse the order and remand to the circuit court for further proceedings.

BACKGROUND

The Charges

¶2 The Criminal Complaint alleged that an adult male, the alleged victim in this case, reported to police that he had been sexually assaulted early in the morning on the prior day. More specifically, the victim reported that he had joined others, including McEssey, at a cabin. After socializing with the group, the victim went to sleep on a bed in one room of the cabin. He was in a sleeping bag, wearing clothing that included blue jeans, with a belt, over boxer underwear. At approximately 12:30 or 1:00 a.m., the victim awoke to find McEssey, kneeling next to the bed and sucking on the victim's penis. The victim yelled, "What the hell are you doing?" McEssey replied, "Where am I?" McEssey then stood up and left the room, while pulling up his pants and donning a shirt.

¶3 The complaint further alleged that, approximately five months later, McEssey was interviewed by police regarding this incident. At that time, he admitted that he had taken the victim's penis into his mouth while the victim slept, and that the victim had awoken and asked McEssey what he was doing. McEssey told police that, at the time, he was very intoxicated and believed the victim to be different man, whom McEssey knew.

¶4 The Criminal Information charged McEssey with second-degree sexual assault, in violation of WIS. STAT. § 940.225(2)(d) (2009-10),[1] third-degree sexual assault, in violation of § 940.225(3), and disorderly conduct, in violation of WIS. STAT. § 947.01.

First Motion To Dismiss: Lost Audio Recording

¶5 In July 2009, McEssey filed a motion to dismiss the case in its entirety, on the grounds that, as part of the investigation, police had recorded a phone call between the victim and McEssey, but that when defense counsel sought a copy of the audio recording from the State, the State informed counsel that the audio recording had been "deleted." McEssey argued, in part, "The [audio] recording is critical to the defense and would have been exculpatory. The [recording] undoubtedly contains denial of criminal activity. Further the [audio] recording documents the alleged victim's lies in an attempt to obtain a confession."

¶6 At a July 2009 evidentiary hearing held to address McEssey's motion, a deputy sheriff involved in the investigation testified in substance as follows. As part of the investigation, the victim came to the sheriff's department and from there had a phone conversation with McEssey that the deputy recorded on a digital recorder.[2] The deputy testified that, after the call, the deputy listened

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The deputy did not testify to a date on which the recorded conversation occurred but, as discussed in ¶13 below, a notation on evidence subsequently rediscovered by police revealed that it occurred in April 2008.

to the recording and determined that both sides of the conversation had been successfully recorded. However, a few days later, when the deputy tried to transfer, or download, the recording from the digital recorder onto a compact disc, the recording was "lost," and could not be recovered from either the recorder or the compact disc. Subsequent efforts by the prosecutor to have the audio recording recovered were unsuccessful.

¶7 The deputy testified briefly in summarizing his memory of what was said by the victim and McEssey during the recorded conversation, but we pass over that summary because, as discussed below, the deputy later testified in considerably more detail on this topic.

¶8 In February 2010, the court scheduled an additional evidentiary hearing on the motion to dismiss, in order to hear further testimony about what was said in the recorded conversation. The court explained that it hoped that this additional evidence would allow the court to better assess the argument made by McEssey that dismissal of the case was merited because the recording contained exculpatory material.

¶9 At the continued evidentiary hearing, in April 2010, the deputy testified in substance as follows. In advance of the call to McEssey, police did not give the victim specific directions regarding what he should say during the call, and the deputy did not recall any coaching of the victim during the course of the recorded conversation. The victim "wanted to understand what happened [on the night of the alleged offense], and I [told the victim] to ask [McEssey] what happened and help him understand why it happened."

¶10 The deputy further testified that, during the course of the conversation, the following was said. During an early part of the conversation,

McEssey denied that he had sexually assaulted the victim. At various times, McEssey said that he could not remember events from that night and also said that he "had about seven, eight drinks" that night. He said that he was not thinking clearly that night. The victim asserted that McEssey was unclothed while McEssey sucked on the victim's penis, and then challenged McEssey with words to the effect of, "How can you not remember something like that?" McEssey responded that he would never do anything intentional to hurt the victim. However, later, when pressed by the victim with repeated questions to the effect of, "How could you do it to me?," McEssey responded with words to the effect of, "Yes, I did that." McEssey also said that he was sorry, although in saying that he was sorry he did not specifically say what he was sorry for doing. McEssey also spoke of mistaking the sleeping victim "for somebody [whom McEssey] had met either the night or a couple nights before in Madison."

¶11 At a subsequent hearing in May 2010, the court denied the motion to dismiss. The court concluded from the evidence presented at the two-part evidentiary hearing that "merely potentially exculpatory evidence—not apparently exculpatory evidence"—in possession of police had been lost through "an understandable error of technology or [not] knowing how to use the equipment," without any bad faith on the part of police.

Second Motion To Dismiss: Rediscovered Audio-Video Disc

¶12 In October 2010, approximately one week before a scheduled trial date, the State informed defense counsel that the same deputy who testified about the lost audio recording, as discussed above, had alerted the prosecutor that the deputy had recently rediscovered a separate piece of digital evidence related to the phone call discussed above, namely, a disc containing an audio and video

recording of the victim's half of his recorded conversation with McEssey. Based on this development, McEssey again moved for dismissal of the case, asserting, among other things, bad faith by the police.

¶13 The court postponed the trial date and in December 2010 held a hearing on the second motion to dismiss. At this hearing, the same deputy testified in relevant part as follows. As the October trial date had approached, the deputy found, or rediscovered, the audio-video disc in the garage of his personal residence. The deputy testified that he had originally taken possession of the disc when he received it from a sheriff's detective soon after the recorded conversation. A notation on the disc indicated that the recorded conversation occurred in April 2008. The deputy testified that, beginning sometime after he received the disc, he had forgotten that he had it or that it existed. He testified that he did not recall that he had the disc at the time he gave testimony on the first motion to dismiss. On a related point, he further testified that he did not hide the disc from the prosecutor or defense "on purpose."

¶14 Also testifying at the December 2010 hearing was the sheriff's detective from whom the deputy said he had received the audio-video disc following the April 2008 recorded call. The detective testified that he caused this disc to be created by activating an audio-video recording system built into the police interview room, which recorded audio and video of the victim's side of the conversation but not audio or, of course, video from McEssey's side.

¶15 Thus, to summarize, following the April 2008 recorded call, police had in their possession both the audio-video recording of one side of the conversation, as well as the audio-only recording made by the deputy with his hand-held digital recorder, recording both sides of the same conversation.

However, the police lost the audio-only recording, and produced to the defense the audio-video recording capturing only the victim's side of the conversation long after it had been due to be disclosed to the defense.

¶16 At a hearing in October 2011, the court granted McEssey's second motion to dismiss the case. The court found that "there's never been any intentional effort ... to cause this evidentiary fiasco," and that it was the product of "unintentional negligence." However, the court concluded that, because the court lacked "confidence that a fair trial could have resulted because of the failure, ridiculous failure, to preserve this evidence," the remedy of dismissal was appropriate. The court subsequently entered a written order dismissing the case, which the State appeals.

DISCUSSION

¶17 We review de novo the question of "constitutional fact" as to whether the conduct of police here comports with constitutional requirements. *See* ***State v. Greenwold II***, 189 Wis. 2d 59, 66-67, 525 N.W.2d 294 (Ct. App. 1994) (***Greenwold II***). Other determinations of law are also reviewed independently, but findings of historical fact will be upheld unless clearly erroneous. ***State v. Phillips***, 218 Wis. 2d 180, 189-90, 577 N.W.2d 794 (1998).

¶18 While McEssey complains of delays in the prosecution and is highly critical of various aspects of police conduct in this case, including late rediscovery of the audio-video recording, he does not develop an argument that his due process rights were violated in any manner other than that the police failed to preserve the audio recording for his use as evidence at trial.

¶19 In the subsequent paragraphs, we explain the applicable law and our basis for concluding that, in dismissing the case, the circuit court conflated two distinct duties of government actors involved in criminal prosecutions, only one of which is pertinent in this appeal. The two doctrines are the duty to disclose evidence and the duty to preserve evidence. We first explain that only the second is pertinent here. We then apply what we conclude is the correct legal standard and address specific arguments made by McEssey on appeal.

¶20 We begin by briefly summarizing the duty to disclose. Under the Due Process Clause of the United States Constitution, as well as article I, section 8 of the Wisconsin Constitution and WIS. STAT. § 971.23(1)(h), prosecutors must disclose to the defense evidence that is material either to guilt or punishment. *See* ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737 (citing ***Brady v. Maryland***, 373 U.S. 83, 87 (1963)). The State has this duty "'irrespective of the good faith or bad faith of the prosecution.'" ***Id.*** (quoting ***Brady***, 373 U.S. at 87).

¶21 Turning to the duty to preserve evidence, as explained in a series of United States Supreme Court cases that have been adopted by the Wisconsin courts for purposes of police conduct in state prosecutions, the government is required to preserve evidence only in certain circumstances.[3] *See* ***State v. Oinas***,

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[3] Regarding citations to federal case law, "it is well established that the due process clause of the Wisconsin Constitution is the substantial equivalent of its respective clause in the federal constitution." *See* ***State v. Greenwold***, 189 Wis. 2d 59, 71, 525 N.W.2d 294 (Ct. App. 1994) (***Greenwold II***).

We use the phrase "police conduct" as shorthand, and do not intend to suggest that another person acting on behalf of the government, such as a prosecutor, may not be deemed to have failed to preserve evidence and thereby to have violated the due process rights of a defendant. We use this shorthand because, as a general rule, as in this case, police typically collect and retain evidence and in the course of that process make at least initial decisions as to what items should be preserved and how. In this appeal, there is no suggestion that any (continued)

125 Wis. 2d 487, 489-90, 373 N.W.2d 463 (Ct. App. 1985) (citing ***California v. Trombetta***, 467 U.S. 479 (1984), for the proposition that: "[W]hatever duty the constitution imposes on the states to preserve exculpatory evidence must be limited to evidence that might be expected to play a significant role in the suspect's defense. It is not enough to allege that the destroyed evidence had possibilities of being exculpatory." (footnote omitted)).

¶22 The current state of this law, as applied to this case, is that McEssey's due process rights were violated only if one of the following is true: (1) the audio recording was "apparently exculpatory" evidence; or (2) the audio recording was merely "potentially exculpatory" evidence, but the police acted "in bad faith" in failing to preserve it. *See* ***Greenwold II***, 189 Wis. 2d at 67-68 (citing ***Arizona v. Youngblood***, 488 U.S. 51, 57-58 (1988); ***State v. Greenwold***, 181 Wis. 2d 881, 885-86, 512 N.W.2d 237 (Ct. App. 1994) (***Greenwold I***)).[4] It is McEssey's burden to prove that this evidence was apparently and not merely potentially exculpatory, ***State v. Munford***, 2010 WI App 168, ¶21, 330 Wis. 2d 575, 794 N.W.2d 264, or that it was potentially exculpatory and not preserved through bad faith conduct, *see* ***Greenwold II***, 189 Wis. 2d at 69-70.

¶23 The circuit court applied the wrong legal test in two related ways. First, in support of its decision to dismiss this case, the circuit court relied on

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prosecutor failed to preserve evidence or failed to disclose evidence available to be disclosed, only that police failed to preserve evidence.

[4] After concluding in ***State v. Greenwold***, 181 Wis. 2d 881, 885, 512 N.W.2d 237 (Ct. App. 1994) (***Greenwold I***), that the evidence which police had not preserved in that case, blood samples from the scene of a car crash, was only potentially exculpatory, we then remanded for the circuit court to conduct a bad faith analysis, after which came the subsequent appeal, ***Greenwold II***.

standards from duty to disclose case law, in particular resting its decision on ***State v. White***, 2004 WI App 78, ¶¶2, 22-23, 271 Wis. 2d 742, 680 N.W.2d 362, which is a ***Brady***-based, duty-to-disclose case. Second, although the court concluded that the lost audio recording was only potentially, not apparently, exculpatory, the court apparently deemed there to be a due process violation even in the absence of bad faith by police.

¶24 We now turn to the application of the duty-to-preserve standards to this case.

"Apparently" Versus "Potentially" Exculpatory

¶25 We conclude that police did not deprive McEssey of due process under the first of the two tests under ***Greenwold II***, because the audio recording was not apparently exculpatory.

¶26 Evidence is deemed apparently exculpatory when its exculpatory nature was apparent to the government actor or actors who failed to preserve the evidence, and the evidence is of such a nature that the defendant cannot obtain comparable evidence by other reasonable means. ***Munford***, 330 Wis. 2d 575, ¶21 (citing ***Oinas***, 125 Wis. 2d at 490). In contrast, evidence is deemed potentially exculpatory when "no more can be said" of its value at the time it was not preserved than that it might be useful to establish innocence but is not "material" exculpatory evidence; it is only "potentially useful." *See* ***Illinois v. Fisher***, 540 U.S. 544, 548 (2004).

¶27 As summarized above, at the May 2010 hearing on McEssey's first motion to dismiss, the circuit court concluded that the audio recording was "merely potentially exculpatory evidence—not apparently exculpatory evidence."

The court concluded that the deputy's testimony established that, during the recorded conversation, McEssey made statements which, taken together, were "equivocal," as opposed to clearly exculpatory, and that in fact McEssey "confessed" during the conversation. The court also considered the nature of McEssey's "equivocal" statements in the context of other evidence in the record, and effectively found his statements to be by and large consistent with that evidence, to the effect that McEssey's position after the incident was that he was "surprised" on the night of the incident, because he had confused the victim with someone else and "felt terrible" about it afterwards.

¶28 McEssey makes essentially two arguments in opposition to the circuit court's conclusion that the audio recording was not apparently exculpatory, but neither is well developed or persuasive and neither squarely addresses the grounds for the court's conclusion.

¶29 First, McEssey asserts that "the State cannot complain" that he has failed to meet his burden of showing that the audio recording was apparently exculpatory, because the State, in some manner, "prevented" McEssey from "describing exactly how the [audio] recording would be used at trial to impeach the alleged victim." This argument appears to focus on the State's decision not to call the victim as a witness during the evidentiary hearing on McEssey's first motion to dismiss, to testify to his memories of what was said during the recorded conversation. The State instead called only the deputy. However, the decision not to call the victim as a witness is one that McEssey joined in making, and McEssey supplies no reason why he could not call the victim as a witness at this evidentiary hearing. Moreover, McEssey fails to explain why we should conclude, from the State's decision not to call the victim as a witness, that the circuit court erred in concluding that the lost evidence was only potentially exculpatory.

¶30 Second, McEssey appears to argue that, because police were aware that the audio recording might be considered discoverable to the defense and also aware that it reflected denials he made of the sexual assault, "the State cannot credibly argue that law enforcement did not appreciate the apparent exculpatory value" of the audio recording. This is a conclusory argument that does not explain, based on relevant facts or law, why we should conclude that the "materiality" of the audio recording, if the recording were available to be presented in its entirety, "rises above being potentially useful to [being] clearly exculpatory." *See* ***Greenwold II***, 189 Wis. 2d at 68.[5]

Bad Faith

¶31 Having concluded that the McEssey has failed to show that the audio recording is apparently exculpatory, and assuming without deciding for the remainder of our discussion that the recording is potentially exculpatory, we turn to the question of whether McEssey has shown that the failure to preserve the audio recording was in bad faith. We conclude that he has not done so, consistent with the circuit court's conclusion on this issue.

¶32 "[T]here is no bad faith when the police negligently fail to preserve evidence which is merely potentially exculpatory." ***Id.*** at 68. Canvassing relevant authority in ***Greenwold II***, we explained further that, under ***Youngblood*** and its

[5] McEssey also argues that the State waived the argument that the exculpatory value of the audio recording was potential at best, but this is inaccurate, based on the transcript of the April 2010 hearing on McEssey's first motion to dismiss, which reflects an argument to this effect by the State. Moreover, as discussed in the text above, the circuit court reached a corresponding conclusion in May 2010, that the audio recording was merely potentially exculpatory, after the State advanced this argument.

progeny, "bad faith can only be shown if: (1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; *and* (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence." ***Id.*** at 69.

¶33 The circuit court consistently found, during the course of both evidentiary hearings, that failure by the police to preserve the audio recording was an inadvertent act, and concluded there was no bad faith. For example, following the first evidentiary hearing, the court stated, "*I certainly don't think that there was bad faith* in this particular case, because it was an understandable error of technology or knowing how to use the equipment." (Emphasis added.) And, while the court later expressed understandable consternation, after taking evidence on the additional topic of the late "rediscovery" of the audio-video disc, the court used the phrase, "unintentional negligence" to describe all of the conduct at issue.[6]

¶34 In reaching these determinations, the circuit court was entitled to consider the following concession made by McEssey's counsel as part of argument to the court after the deputy testified about how the audio recording was lost:

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[6] McEssey argues, "Importantly, the circuit court did not make a finding that there was no 'bad faith' in this case." By this, McEssey apparently means that we should assume that the court changed its position regarding bad faith from the time the court first concluded that there was no bad faith in connection with the loss of the audio recording and the time the court heard about rediscovery of the audio-video disc. However, as we explain in the text, the court was consistent over the course of both hearings in concluding that there was only negligence, albeit extensive or "ridiculous" negligence, and not bad faith, even after the court heard evidence about the rediscovery of the disc. The court's decisions after each evidentiary hearing, whether considered separately or together, cannot reasonably be construed as implying that the court thought that the police acted with official animus or made a conscious effort to suppress exculpatory evidence.

> Now, again, it's not ... that ... mistakes don't happen. *I'm willing to give this officer the benefit of the doubt that this was inadvertently somehow deleted.* But I don't think you end the analysis there. Everything that happens after that still needs to be part of the analysis, whether the State was acting in good faith or bad faith.

This comes at least close to a concession on the core question of whether the only evidence claimed to have been lost in this case was lost through negligence.

¶35 To the extent that the court's conclusions rested on credibility determinations, McEssey fails to persuade us that there is any reason to depart from our usual deference to the circuit court on such determinations. McEssey also fails to persuade us that the court's conclusions as to negligence and a lack of bad faith involved any erroneous understanding of relevant legal standards.

¶36 McEssey asks this court to conclude, contrary to the circuit court's conclusion, that there was bad faith, based on two aspects of the record. First, McEssey points to an isolated comment by the detective that we emphasize in the following exchange between McEssey's counsel and the detective regarding the audio-video disc (as opposed to the lost audio recording) during the December 2010 evidentiary hearing:

> Q. But I'm just asking[,] is there one [sheriff's department employee who] should have been in charge of [recording the audio-video disc in an evidence log]?
>
> A. I don't know. An investigation is kind of worked together. Maybe it fell by the wayside. *I don't care.* I don't know. But I did not log it in.

(Emphasis added.) McEssey's counsel did not follow up on this "I don't care" comment, and we can conclude little of substance from it based on the paper record. In any case, McEssey's argument based on this comment is, boiled down,

a request that we set aside the circuit court's underlying credibility determinations regarding police motivations and intentions, and McEssey provides no persuasive reason why we may or must set aside those determinations.

¶37 Second, McEssey asserts that "it is unexplainable how the State (taken as a whole) had such a large breakdown in communications such that no one person had all the evidence in this case—absent animus on the part of the State." This assertion is accompanied by a citation to the record in which the detective testified on several topics, none of which appears to suggest animus or the intent to destroy exculpatory evidence. Regardless, this argument is another attempt to have this court set aside credibility determinations regarding police motivations and intentions, and again McEssey provides no persuasive reason why we may or must do so.

CONCLUSION

¶38 For these reasons, we reverse the circuit court's order dismissing the charges against McEssey and remand for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.