

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 08/04/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: GH

STATE OF ARIZONA, )  
 ) No. 1 CA-CR 10-0553  
 )  
Appellant, ) DEPARTMENT E  
 )  
v. ) **MEMORANDUM DECISION**  
 )  
BROCK CARLTON BERGE, ) (Not for Publication -  
 ) Rule 111, Rules of the  
Appellee. ) Arizona Supreme Court)  
 )  
 )  
 )

---

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-166944-001 SE

The Honorable Michael D. Jones, Judge

**REVERSED AND REMANDED**

---

William G. Montgomery, Maricopa County Attorney Phoenix  
by Linda Van Brakel, Deputy County Attorney  
Attorneys for Appellee

Debus Kazan & Westerhausen LTD. Phoenix  
by Tracey Westerhausen  
Attorneys for Appellant

---

**K E S S L E R**, Judge

¶1 The trial court dismissed without prejudice the charge  
against Brock Carlton Berge of aggravated assault, a Class 3

dangerous felony, stemming from an incident that occurred between Berge and Justin outside a bar called the Coach House in Scottsdale, Arizona. The dismissal was based on police failure to preserve a surveillance video made by the bar during the course of business on the night of the assault.

¶12 The State has timely appealed, arguing that, in dismissing the case, the trial court abused its discretion. This Court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010) and - 4032(1) (2010). For reasons set forth more fully below, we agree with the State and reverse.

#### **FACTUAL AND PROCEDURAL HISTORY<sup>1</sup>**

¶13 The charges arise from a dispute that occurred at the Coach House during the early morning hours of October 17, 2009. Justin and some friends were at the Coach House at the same time as Berge. One of Justin's friends, Lucas, made a comment to a female, and Berge approached him and a "conversation ensued." Lucas apologized, and Berge told him "they were okay and all was good."

---

<sup>1</sup> We view the facts in the light most favorable to sustaining the trial court's dismissal. *State v. Rasch*, 188 Ariz. 309, 312, 935 P.2d 887, 890 (App. 1996). We glean the facts from the record provided on appeal. Ariz. R. Crim. P. 31.8.

¶14 Several hours later, Justin and his friends left the bar and walked west towards Goldwater Boulevard. Berge and a female also exited the bar "walking directly behind them." Berge stood in front of the bar and then walked west.

¶15 Justin's wife subsequently told investigating police that a "white male" "punch[ed] [Justin] one time in the face" and then ran "eastbound on Indian School." Lucas also told police that, while he was at the stoplight at Goldwater, he saw a "White male subject between 6'06-6'08 run up to Justin, punch him one time in the face and then . . . [run] back eastbound on Indian School Road where the subject got into a cab and left eastbound." Justin fell and Lucas helped drag him across Goldwater to the southwest corner and waited for paramedics.

¶16 Justin was transported to the hospital for treatment. He sustained a "skull fracture to the back of his head causing a hematoma (bruise) and bleeding on the brain. The concussion from the fall also caused another hematoma to the front of the skull and more bleeding on [the] brain."

¶17 A Scottsdale police detective, assigned as case agent to the investigation, was informed that a "subject had been assaulted just outside the club while walking across the street." When he arrived at the scene at approximately 5:30 a.m. other officers were already posted there, and Justin had already

been transported to the hospital. Berge was also not at the scene.

¶18 The detective observed "some blood stain, blood pools on the sidewalk." Based on interviews, the detective ascertained that the assault occurred "in the middle of the intersection, right in the crosswalk, next to the median" on Goldwater, west of the Coach House.

¶19 After speaking with police at the hospital, the detective learned that the Coach House had video surveillance equipment on site that it used in connection with other technology to check customer identification. He returned to the bar to view the video and was able to identify Berge as well as other involved individuals.

¶10 However, the detective, a bar employee, and the bar manager were not able to download a copy of the relevant portion of the video. The manager attempted to copy the information, but could not remember how to do so and began having difficulties, so they stopped. Instead, the detective made arrangements with the manager to return at a later date with some detectives from the computer crime unit to get a copy. When he returned four days later, on October 20, with two forensic computer detectives, they determined that the "video surveillance was no longer on the hard drive;" they simply could not find it.

¶11 Berge filed a "Motion to Dismiss re Failure to Preserve Exculpatory Evidence" based on police failure to preserve the surveillance video. According to Berge's motion, the video supported his "claims of justification" and, because the State had the video in its control but failed to properly maintain it, he was "unconstitutionally denied substantial evidence that would support his defense."

¶12 The State responded that it had no duty to collect or preserve potentially useful evidence for Berge. It also argued that there was no "state action" because the police had never "possessed" the video tape in this case and the video contained no clearly exculpatory evidence and Berge could not show bad faith on the part of police.

¶13 The trial court held a hearing on Berge's motion at which the detective testified. After hearing the testimony and arguments, the court dismissed the case without prejudice. The court specifically found that the surveillance tape was "clearly relevant, likely exculpatory, certainly important as [the] detective . . . described in his testimony" and that the police officers' failure to take sufficient steps to copy or otherwise preserve the surveillance video was not reasonable. The court also held that, while the video did not contain audio, it would nonetheless be helpful to Berge's self defense and defense of third-party arguments for a "fact finder" to be able to view the

facial expressions, demeanor, and physical carriage of the involved parties. The court also found that although there were other officers who had viewed the surveillance video and who would therefore be available to testify about possible inconsistencies in witnesses' accounts of the events, Berge was clearly prejudiced by not having the "graphic video of the scene" to use for impeachment purposes.

#### DISCUSSION

¶14 "Generally, a trial court's ruling on a motion to dismiss the indictment . . . will not be overturned [on appeal] absent an abuse of discretion." *State v. O'Dell*, 202 Ariz. 453, 456, ¶ 8, 46 P.3d 1074, 1077 (App. 2002). We defer to the trial court's factual findings unless these are clearly erroneous, but are not bound by its legal conclusions, which we review *de novo*. *Id.* We also review due process claims *de novo*. *Id.* "A trial court abuses its discretion when it misapplies the law or predicates its decision on incorrect legal principles." *State v. Jackson*, 208 Ariz. 56, 59, ¶ 12, 90 P.3d 793, 796 (App. 2004).

¶15 The Due Process Clause of the Fourteenth Amendment requires that "criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). In accordance with that right, the Supreme Court has developed an "area of

constitutionally guaranteed access to evidence" with the aim to "deliver[] exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." *Id.*

¶16 In determining whether the state's failure to preserve evidence violates a defendant's constitutional rights, "[t]he critical distinction . . . is between 'material exculpatory' evidence and 'potentially useful' evidence." *State v. Speer*, 221 Ariz. 449, 457, ¶ 37, 212 P.3d 787, 795 (2009) (citations omitted). The state denies a defendant his due process rights when it destroys evidence that possesses "an exculpatory value that was apparent before the evidence was destroyed" and that is also "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 488-89.

¶17 The Supreme Court has also established 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." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). The test is the same under the Arizona Constitution. *Speer*, 221 Ariz. at 457, ¶ 36, 212 P.3d at 795. Thus, when evidence is merely "potentially exculpatory," police failure to preserve "potentially useful evidence" is not a denial of the defendant's due process rights

unless the defendant can show bad faith on the part of the police. *Youngblood*, 488 U.S. at 58. "Bad faith" is the key factor, because the Supreme Court has been unwilling to read due process requirements "as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Id.* at 57-58. Thus, absent a showing of "bad faith," the inference that the lost evidence may be exculpatory is not strong enough to dismiss the case; it is sufficient to allow the jurors to decide whether to draw such an inference. *State v. Lehr*, CR-09-0095-AP, 2011 WL 2694575, at \*8, ¶ 41 (Ariz. July 13, 2011) (citing *State v. Youngblood*, 173 Ariz. 502, 507, 844 P.2d 1152, 1157 (1993)).

¶18 The testimony at the evidentiary hearing established that on October 17, the detective and another officer reviewed relevant portions of the bar's surveillance video that spanned a period from approximately 10:00 p.m. to 2:00 a.m., the bar's closing time. The video was "important" to the detective because from the descriptions he had obtained and the ID scanning mechanisms employed by the club, he was able to identify Berge and some of the other individuals involved in the incident.

¶19 The video showed "a time when the defendant came over to the table where [Justin] and his associates were" and that



"[a] conversation took place." The detective could not see from the tape precisely with whom Berge was having this conversation, and, at the hearing, he could not remember where Justin was seated at the table. However, the detective testified that he was "not . . . aware" that Berge was having the conversation with Justin. According to the detective, Berge's demeanor during the conversation was not "animated" and there was also no evidence of any "assaultive behavior" contained on the entire video. Berge simply left the table at some point.

¶20 At some point in the evening, the video showed Berge having a conversation with two bouncers at the bar. However, because there was no audio, there was no indication of what was being said.

¶21 The detective stated that the video showed that "anywhere between 30 minutes, 45 minutes, maybe . . . an hour" passed between that encounter and when the video showed Justin exiting the bar "around 2:00 a.m." The video established that, when Justin left the bar, Berge was still inside the Coach House, "in the bar area;" Berge and Justin had not been close to each other. Another surveillance camera then picked up Justin walking past a railing outside the bar towards Indian School before Justin went out of range of the camera.

¶22 The detective testified that the surveillance cameras inside the bar then showed Berge leaving the bar "a few minutes"

after Justin had left. The detective's recollection was that Berge was not "directly behind and following" Justin. The video also showed a taxi leaving from a stand in front of the bar at approximately 2:06 a.m., and then, some seconds after the cab had left, it showed Berge walking eastbound on Indian School Road.<sup>2</sup> According to the detective, none of the surveillance cameras used by the Coach House covered the area of Indian School Road and Goldwater, where the actual assault took place.

¶23 Initially, we note that the trial court's dismissal assumed that the video was "within the control of the Scottsdale Police Department" because the officers "were able to view it, to look at it[,] understand and also include a great deal of the information from that surveillance video and incorporate that information into the departmental report that was prepared by [the] detective . . . in this case." The State challenges this finding, arguing that the video was never in the actual possession of the police and that whatever occurred to destroy it was not the result of police action.

¶24 We need not decide the issue of "possession" because it is not dispositive. The trial court's dismissal hinges on its finding that the police acted unreasonably in failing to take sufficient steps to preserve the video. However, because

---

<sup>2</sup> The detective acknowledged that the video evidence appeared to be contrary to Lucas's testimony that he had seen Berge leaving in a cab immediately after hitting Justin.

the evidence does not show, and the trial court did not find, bad faith, the court's dismissal of the complaint was erroneous.

¶125 The detective testified that neither he nor the manager was capable of making a copy of the video on the night of the assault and they stopped their attempts. He also testified that the manager assured him that surveillance tapes were routinely saved for approximately thirty days and that "no one would touch it." The detective stated that he did not physically seize the entire "CPU unit" that night, even though he could have, because it was not his routine to do so. His duties did not permit him to return to the bar until four days later, and then he did so specifically with two forensic computer detectives to ensure they could safely download the video. For reasons not contained in the record, at that time the forensic detectives determined the relevant video was "gone" and "[t]hey couldn't find it."

¶126 The trial court's order concluded that it was "not reasonable" that the police allowed the surveillance video to remain on the hard drive at the bar for four days, that the manager's assurances that she would preserve the tape were insufficient "as a matter of law," and that the officers should have taken "some additional measures" to preserve the "important information in this case." It concluded that Berge was prejudiced because, even though there were other witnesses that

could testify about possible inconsistencies, the video would have been a better instrument for impeachment purposes.

¶127 Because the trial court did not find that the officers acted in bad faith in failing to preserve the video, we need not address whether the officers' actions in this case were "reasonable." See *Youngblood*, 488 U.S. at 58. Moreover, we find nothing in the record that would support such a finding.

¶128 Berge suggested that it might have been imprudent of the detective to rely on the bar manager's assurances as she might have had self-interested motives for destroying the video. However, this is pure speculation. Berge also suggested that unfavorable inferences might be drawn from the fact that the detective and the two forensic detectives failed to write a report documenting the fact that they had gone to the bar four days later to try and download the evidence. This lapse in police procedure does not suggest bad faith, particularly because there is no dispute that the detective returned to obtain a copy of the video. Absent any indication, let alone a finding, of bad faith in the officers' actions or inactions in failing to preserve the video, there is no violation of due process. *Id.*

¶129 Furthermore, and contrary to Berge's arguments, there also is no indication in the record that the video contained evidence that was clearly or materially exculpatory. See *Speer*,

221 Ariz. at 457, ¶ 37, 212 P.3d. at 795. It is undisputed that nothing on the video shows what happened on the street once the parties left the Coach House. If anything, the fact that the video shows Berge leaving the bar soon after Justin is arguably unfavorable to a self-defense or defense of third party argument.

¶30 The trial court's finding of prejudice appears to be rooted in a "best evidence" theory, suggesting the video is a better impeachment tool than relying on comparable evidence available through witness testimony. But the fact that the evidence might have been more useful to Berge does not, without more, establish a constitutional violation. *Id.*

¶31 Based on this record, the trial court in this case abused its discretion in granting Berge's motion to dismiss.<sup>3</sup> The evidence presented did not establish either that the video contained material exculpatory evidence or that its loss was attributable to any bad faith.

---

<sup>3</sup> We leave it to the trial court to determine at the close of evidence whether a *Willits* instruction may be merited at trial. See *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

**CONCLUSION**

¶32 For the foregoing reasons, we reverse and remand this matter to the trial court for further proceedings consistent with this decision.

\_\_\_\_/S/\_\_\_\_\_  
\_\_\_\_\_  
DONN KESSLER, Judge

CONCURRING:

\_\_\_\_/S/\_\_\_\_\_  
JOHN C. GEMMILL, Presiding Judge

\_\_\_\_/S/\_\_\_\_\_  
PATRICK IRVINE, Judge