DIVISION ONE
FILED: 08/30/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0698
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	
	)	**MEMORANDUM DECISION**
SEAN LARRY HOLIDAY,	)	(Not for Publication -
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Coconino County

Cause No. CR2008-0933

The Honorable Mark R. Moran, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Angela C. Kebric, Assistant Attorney General
Attorneys for Appellee

H. Allen Gerhardt, Coconino County Public Defender — Flagstaff
By H. Allen Gerhardt
Attorneys for Appellant

B R O W N, Judge

¶1 Sean Larry Holiday appeals from his convictions and sentences for two counts of aggravated driving under the

influence and one count of possession of marijuana. Holiday argues that the trial court improperly denied his motion to dismiss because the State's destruction of evidence violated his right to due process. For the following reasons, we affirm.

BACKGROUND

¶2 In May 2006, Officer Barnett observed a vehicle traveling westbound on Route 66 with its high beam lights activated. As the vehicle approached, it failed to dim its high beams, in violation of Arizona Revised Statutes ("A.R.S.") section 28–942(1) (2004). Barnett effected a stop, and after observing signs that the driver, Holiday, was under the influence of alcohol, arrested him. Barnett transported Holiday to the jail and read to him the contents of an implied consent affidavit for the purpose of obtaining a blood sample, which Holiday refused. Barnett then obtained a warrant permitting a blood draw.

¶3 With Barnett observing, a phlebotomist collected a blood sample from Holiday. Two days after his arrest, Holiday submitted a request to the office of the county attorney for preservation of "any and all discovery in this matter," including dispatch tapes and logs, 9-1-1 tapes and logs, cell phone records of the officers, and any records of communication between the officers involved through the use of patrol vehicle computers and officer notes. Approximately two years later, in

2008, the State indicted Holiday on two counts of aggravated driving under the influence of alcohol pursuant to A.R.S. §§ 28-1381(A)(1)-(2) and -1383(A)(1) (Supp. 2010), one count of possession of marijuana pursuant to A.R.S. § 13-3405(A)(1) (Supp. 2010), and one count of possession of drug paraphernalia pursuant to A.R.S. § 13-3415(A) (2010).[1] Holiday subsequently learned that his 2006 request had not been acted upon and the evidence had been destroyed pursuant to police department policy.

¶4 Prior to trial, Holiday moved to dismiss the indictment,[2] asserting that the State destroyed material evidence and violated Arizona Rule of Criminal Procedure 15 disclosure rules, denying him due process.[3] Holiday alleged that the State destroyed the dispatch records of the stop despite his request for preservation, which he asserted provided "the only objective evidence of the stop, detention, arrest and search in this case." He alleged further that the State destroyed video and audio recordings of the blood draw, which were material to

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[1] Absent material revision after the date of an alleged offense, we cite the statute's current version.

[2] Alternatively, Holiday moved to suppress all evidence obtained during the stop, search, and detention.

[3] *See* Ariz. R. Crim. P. 15.1(b) (requiring disclosure of all "statements of the defendant" within the prosecutor's possession or control).

determine whether the proper instruments and procedure were used for the blood sample as well as to determine the time periods involved. In response, the State argued that the evidence was not material and that Holiday suffered no prejudice.

¶5 At an evidentiary hearing on the motion, the State offered the testimony of Barnett as well as an officer familiar with the video and audio recordings at the department, Lieutenant Figueroa. The trial court denied the motion, ruling that Holiday was not prejudiced by the destruction of the dispatch tape or the audio/video tape from the jail ("the tapes"). The court noted that "[there was] nothing in the facts or evidence that would show that those tapes would either be favorable to the defense or material to a relevant issue pending before the Court."[4]

¶6 Following a three-day trial, a jury convicted Holiday on two counts of aggravated driving under the influence and possession of marijuana. Holiday was sentenced to two concurrent terms of eight years' imprisonment on the aggravated driving counts and to two years' imprisonment for marijuana possession, with 137 days of presentence incarceration credit. Holiday timely appealed.

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[4] The court later denied Holiday's request for a *Willits* instruction, finding it was inappropriate because the tapes were not "material evidence that might tend to exonerate the defendant" and no prejudice existed. *See State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

DISCUSSION

¶7 Holiday argues that the trial court erred in denying his motion to dismiss and failing to impose sanctions for the willful destruction of evidence. More specifically, Holiday asserts that the State exhibited bad faith by destroying material evidence that he expressly requested be preserved, resulting in a denial of his due process rights under the federal and state constitutions. *See* U.S. Const. amend. V & XIV; Ariz. Const. art. 2, § 4.

¶8 Generally, an order denying a motion to dismiss or motion to suppress will not be disturbed absent an abuse of discretion. *State v. Chavez,* 208 Ariz. 606, 607, ¶ 2, 96 P.3d 1093, 1094 (App. 2004). "We view the facts and evidence in the light most favorable to sustaining the trial court's ruling, but we review questions of law de novo." *Id.* (citation omitted).

¶9 A defendant is "not deprived of due process by the destruction of evidence unless the state has acted in bad faith or the defendant is prejudiced by the loss." *State v. Youngblood*, 173 Ariz. 502, 507, 844 P.2d 1152, 1157 (1993) (citation omitted). Moreover, where the nature of the evidence (exculpatory, inculpatory, or neutral) is unknown, "there can be no showing of prejudice in fact" and "thus, only a showing of bad faith implicates due process." *Id.*; *see also State v. O'Dell*, 202 Ariz. 453, 457, ¶ 12, 46 P.3d 1074, 1078 (App. 2002)

(where the evidence in controversy no longer exists, due process is violated only upon a showing of bad faith). The determination of bad faith "must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Arizona v. Youngblood*, 488 U.S. 51, 56 (1988); *see also State v. Dunlap,* 187 Ariz. 441, 452, 930 P.2d 518, 529 (App. 1996).

¶10 Here, the contents of the destroyed tapes are unknown and therefore a showing of bad faith is required for reversal. However, the officers had no knowledge of the exculpatory value of the tapes at the time they were destroyed. Officer Barnett testified that there was nothing unusual about this traffic stop, and it was not his common practice to preserve any recordings of the stop on dispatch. Lieutenant Figueroa also testified that it was not typical procedure for an arresting officer to request preservation of audio and video. The record indicates that the officers were acting in good faith and in accordance with their normal practice when the tapes were destroyed. Because the record fails to support a finding that the officers were aware of the exculpatory nature of the evidence, bad faith cannot be present. *See State v. O'Dell*, 202 Ariz. at 459, 46 P.3d at 1080. Absent a showing of bad faith, "it is fundamentally unfair to bar the state from our courts." *Youngblood*, 173 Ariz. at 507, 844 P.2d at 1157.

¶11 Holiday argues nonetheless that pursuant to *State v. Lopez*, 156 Ariz. 573, 574-75, 754 P.2d 300, 301-02 (App. 1987), bad faith is presumed because the State failed to preserve evidence that was expressly requested by him. In *Lopez*, the defendant, by certified letter, requested preservation of the police radio transmission tapes from the day of his arrest. *Id.* at 574, 754 P.2d at 301. The defendant received returned receipts, indicating DPS received his request. *Id.* However, when the defense went to request the tapes, they had been destroyed pursuant to departmental policy. *Id.* As a result, the defendant's motion to dismiss was granted by the trial court. *Id.* On appeal, the State asserted that the court erred in dismissing without a showing that the evidence was exculpatory, that defendant was prejudiced by the destruction, or that the State acted in bad faith. *Id.*

¶12 This court affirmed the dismissal, finding there was a reasonable possibility that the evidence was favorable and material. *Id*. at 574-75, 754 P.2d at 301-02. We noted that it was "undisputed" that DPS received defendant's request for preservation of evidence and stated, "[w]hen the state receives a specific request for such evidence, failure to disclose is seldom, if ever, excusable." *Id.* at 574, 754 P.2d at 301 (citation omitted). We reasoned that the critical issue in that case was whether the officers had reasonable suspicion to stop

the defendant's vehicle, and the requested tapes were the only evidence that "would have revealed the reasons given over the air by the officers for stopping the vehicles, the time periods involved, and the identities of the vehicles and drivers." *Id.* at 574–75, 754 P.2d at 301–02. We therefore concluded that because the evidence was favorable and material to the defense, dismissal was proper.

¶13 Unlike *Lopez*, there is no evidence here that Holiday sent a request for preservation of evidence to the police department, or that such a request was ever received. In fact, Officer Barnett testified that he never received any such request. Although the State conceded that Holiday's request was "probably received" by the county attorney's office in 2006, there is no evidence that the county attorney was ever in possession of the tapes: Holiday was not indicted until 2008, approximately two years after his arrest, and two years after the tapes had been destroyed in accordance with department policy. Knowledge of the exculpatory value of the evidence at the time it was lost or destroyed is determinative of bad faith, which was not present here. *See Youngblood*, 488 U.S. at 56.

¶14 In sum, we find nothing in the record here that shows the State acted in bad faith in not preserving the tapes. We therefore conclude Holiday's right to due process was not

violated and thus the trial court did not err in denying his motion to dismiss.

CONCLUSION

¶15 For the foregoing reasons, we affirm Holiday's convictions and sentences.

/s/
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MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
MAURICE PORTLEY, Presiding Judge

/s/
_____
MARGARET H. DOWNIE, Judge