IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	:	**CASE NO. 0302017363**
Vs.	:	
DAVID B. SHUGARD	:	Submitted May 3, 2004
Defendant	:	Decided June 21, 2004

Eric G. Mooney, Esquire, appearing for Defendant below, Appellee.
Carole E. L. Davis, Esquire, Deputy Attorney General, appearing for the State, Appellant.

PROCEDURAL HISTORY

The is an appeal by the State pursuant to 10 *Del. C.* § 9902 from a Justice of the Peace Court Order of October 14, 2003 granting Defendant's Motion to Suppress the testimony of the arresting officer. On October 27, 2003, the State certified that it could not proceed without the suppressed evidence and requested the matter be dismissed. The State later filed this appeal on November 20, 2003.

FACTS

David B. Shugard (hereafter "Shugard") was arrested and charged with Driving under the Influence of Alcohol under 21 *Del. C.* § 4177(a) and for driving with a broken windshield. On May 13, 2003, the Justice of the Peace heard Shugard's motion to suppress the testimony of the arresting officer. Pursuant to his Rule 16 discovery motion, Shugard

requested that the State provide him with the in-car camera videotape of the stop of his vehicle and the sobriety tests that followed. At the suppression hearing, the State proffered that the tape had inadvertently been copied over and destroyed. Shugard argued that any testimony from the officer regarding his personal observations of the activities presumptively captured by the in-car camera must be suppressed under *Deberry v. State,* 457 A.2d 744 (Del. 1983). The State opposed the motion. The magistrate instructed both parties to provide briefs supporting their positions. On October 14, 2003, the Court ordered the suppression of the testimony of the arresting officer regarding what happened during the period of time the camera presumptively was recording. The State certified that the officer's testimony was essential and material to its case under 10 *Del. C.* § 9902 and requested the dismissal of the case. Subsequently, on November 20, 2003, the State filed this appeal which was granted.

STANDARD OF REVIEW

The State appealed from the Justice of the Peace Court's pre-trial suppression hearing ruling pursuant to 10 *Del. C.* § 9902(b), which reads:

> When any order is entered before trial in any court suppressing or excluding substantial and material evidence, the court, upon certification by the Attorney General that the evidence is essential to the prosecution of the case, shall dismiss the complaint, indictment or information or any count thereof to the proof of which the evidence suppressed or excluded is essential. Upon ordering the complaint,

> indictment or information or any count thereof dismissed pursuant to the Attorney General's certification, the reasons of the dismissal shall be set forth in the order entered upon the record.

It appears that the requirements of 10 *Del.C.* 9902(b) has been complied with thus invoking this Courts appellate jurisdiction. This Court, acting in its capacity as an intermediate appellate court, is obligated to "correct errors of law and to review factual findings of the court below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process." *State v. Richards,* 1998 WL 732960 (Del. 1972).

DISCUSSION

I. Analysis

In this appeal, the State alleges that the remedy granted by the lower court for erasing an in-car camera videotape was inappropriate. This issue was directly addressed by the Delaware Supreme Court in *Deberry v. State,* 457 A.2d 744 (Del. 1983). In that case, the Defendant was charged with rape and the State confiscated his clothing. While in the possession of the State, the clothing was lost. The victim's hand was cut by the assailant's knife so the absence of blood on the Defendant's clothing could have been exculpatory and therefore discoverable under either *Brady v. Maryland,* 373 U.S. 83 (1963), or *Superior Court Criminal Rule 16(b)*. The question asked in *Deberry* was, "what relief is appropriate when the

State had or should have had the requested evidence, but the evidence does not exist when the defense seeks its production?" *Id.* at 749.

The Court created this three-step analysis:

> 1) would the requested material, if extant in the possession of the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or *Brady*?
>
> 2) if so, did the government have a duty to preserve the material?
>
> 3) if there was a duty to preserve, was the duty breached, and what consequences should flow from a breach?

Id. at 750. When determining what consequences should flow from the breach under step three, the Court must weigh the State's conduct against the prejudice to the Defendant. *Id.* at 752. In making this evaluation the Court must consider: "(1) the degree of negligence or bad faith involved, (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available, and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction." *Bailey v. State,* 521 A.2d 1069, 1091 (Del. 1987).

A. Conduct of the State

In particular, when reviewing the degree of negligence or bad faith on the part of the State:

> the court should inquire whether the evidence was lost or destroyed while in [the State's] custody, whether the [State] acted in disregard for the interests of the accused, whether [the

> State] was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification . . . It is relevant also to inquire whether the government attorneys prosecuting the case have participated in the events leading to the loss or destruction of the evidence, for prosecutorial action may bear upon existence of a motive to harm the accused.

Deberry, 457 A.2d at 752.

B. Prejudice to the Defendant

The next step is to review the prejudice to the Defendant that results from the absence of the destroyed or misplaced evidence. In order to interpret the degree of prejudice to the defendant the Court must evaluate:

> The centrality of the evidence to the case and its importance in establishing the elements of the crime or the motive or intent of the Defendant; the probative value and reliability of the secondary or substitute evidence; the nature and probable weight of factual inference or other demonstrations and kinds of proof allegedly lost to the accused; [and] the probable effect on the jury from absence of the evidence . . .

Deberry, 457 A.2d at 752-753 *citing United States v. Loud Hawk,* 628 F.2d 1139, 1152 (9th Cir. 1979).

II. Consequences

In this case, the State concedes that the first two prongs of the *Deberry* three-prong test have been satisfied. First, the videotape was in the possession of the State at the time Shugard requested it, and it was subject to disclosure under Criminal Rule 16 or *Brady*. Second, the State had a duty to preserve the videotape. Therefore, this dispute only involves the final prong of the *Deberry* test regarding the consequences that should result from the State's failure to preserve the videotape.

As stated above, the State's conduct should be weighed against the prejudice to the Defendant when evaluating step three of *Deberry*.

A. State's conduct

First, there is little in the record regarding the State's conduct since the magistrate never heard testimony from the arresting officer. The State concedes that the tape was erased while in the State's custody. There was no testimony, however, as to whether the police: 1) acted in disregard for the interests of Shugard; 2) acted negligently in failing to adhere to established and reasonable standards of care for police and prosecutorial functions; 3) whether the erasing of the videotape was accidental or deliberate and if it was deliberate whether it was done in good faith or with reasonable justification; and 4) whether the prosecutor was involved. It should be noted however, that the State proffered to the Magistrate that a fellow officer inadvertently erased the arresting officer's tape when using his vehicle. The Defendant did not question the proffer and the parties used the proffered facts as the basis for their arguments during briefing below.

These proffered facts were accepted by the Court below in rendering its decision.

B. Prejudice to Shugard

In most cases where the record below is insufficient to establish the degree of culpability of the State's conduct, the appellate court will not be able to balance the prejudice to the Defendant against the conduct of the state. However, when the Defendant is severely prejudiced by the loss of the evidence, the degree of the State's culpability is immaterial. *Deberry*, 457 A.2d at 753. That is certainly the case here. The prejudice to the Defendant is measured by the centrality of the lost evidence and the sufficiency of the secondary evidence. The lost videotape is, without a doubt, central to this case. The police in-car camera would have captured Shugard's vehicle as he was operating it just prior to the stop. The videotape would have captured the conduct that created a reasonable articulable suspicion to pull over Shugard's car. Further, the in-car camera would have recorded the roadside sobriety tests, which presumptively established the probable cause needed to arrest Shugard for driving under the influence. The videotape is clearly central to the issue. The secondary evidence, however, may be independently sufficient. The secondary evidence in this case is the testimony of the arresting officer. The officer can testify as to his observations prior to the stop and to Shugard's performance of the sobriety tests. The officer's testimony, on its own, may be sufficient to sustain a conviction. Even though the secondary evidence is sufficient, the prejudice to the Defendant may still be considered high if the lost evidence is central to the case. In balancing the centrality of the

videotape with the sufficiency of the officer's observations, I find that the prejudice to the Defendant is sufficiently significant. When conducting a *Deberry* analysis, a DUI stop is a unique situation. Unlike the clothing lost in *Deberry,* a video recording captures a chain of events and is more than just a single piece of evidence. More importantly, in DUI prosecutions, those events captured by the in-car camera are often the bulk of the State's case. Destroying discoverable evidence so central to the State's case severely prejudices the Defendant. The in-car camera presumptively captured the Defendant's alleged impaired driving prior to the stop as well as the sobriety tests that followed. The contents of the videotape would have been objective evidence and may have been used by Shugard to directly rebut the testimony of the officer. Depriving Shugard of such a central piece of evidence, which he was entitled to have, is significantly prejudicial.

Since I find that the prejudice to Shugard was great, I hold that the degree of the culpability of the State is immaterial. Therefore, this issue is ripe for appeal even without a sufficient lower court record regarding the culpability of the State's conduct.

III. Remedy

In this case, the Justice of the Peace Court magistrate suppressed the testimony of the officer describing his observations during the period of time that the in-car video camera was running. While in his patrol car, the officer observed Shugard's vehicle operating erratically and pulled him over. Apparently, the camera recorded part of the erratic driving as well as Shugard's performance of several sobriety tests. At the suppression

hearing, the magistrate held that since the police erased the video recording of the stop and the sobriety tests that followed, the arresting officer's testimony regarding the occurrences presumptively captured by the in-car camera must be suppressed under *Deberry*. Suppression, however, is not a remedy contemplated by *Deberry* or its progeny. *State v. Cathcart,* 2001 WL 1482867 at *3 (Del. Super. Ct.).

The proper remedy contemplated by *Deberry* when the State loses evidence in its possession is to grant the Defendant an "inference" that the lost evidence would be exculpatory in nature if available, and to require the State to stipulate to that fact. *Deberry,* 457 A.2d at 754. In a trial by jury, the judge must give an instruction to the jury that they must infer that the lost evidence, if available, would be favorable to the Defendant and harmful to the prosecution's case. Such an instruction is mandated by the due process requirements of the Delaware Constitution. *Hammond v. State,* 569 A.2d 81, 87 (Del. 1989); *see also Lolly v. State,* 611 A.2d 956, 959 (Del. 1992). If it is a bench trial, as in this case, the judge must balance the exculpatory inference against any secondary evidence offered by the State. Here, the officer's testimony regarding his personal observations is secondary evidence. The appropriate action would be to hear his testimony, and balance it against the exculpatory presumption. Whether it be a jury trial or a bench trial, the finder of fact should be given an opportunity to evaluate the quality of the secondary evidence. If the secondary evidence is sufficient in quality and credibility to override the exculpatory inference, the fact finder may decide the secondary evidence outweighs the inference. If the secondary evidence is not sufficient, then in

all likelihood the exculpatory inference would prevent the State from meeting its burden of proof.

This is not to say that the police are free to intentionally destroy evidence with impunity. In those situations where the State's conduct is so egregious as to constitute deliberate destruction of evidence or when the destruction of evidence so undermines due process that a fair trial cannot be had, dismissal may be the appropriate remedy under Rule 16(b) and/or 48(b).

Shugard argues that merely granting a presumption that the lost videotape is exculpatory in nature would "obliterate the purpose and spirit of *Deberry*" since the officer will testify contrary to the exculpatory instruction. While the Court sympathizes with Shugard's position, in this case where the chain of events constituting the offense were objectively captured by video, it can point to no case law that supports suppressing this testimony. The appropriate remedy is to grant an inference that the lost evidence was exculpatory in nature, with the ramifications that this inference in many cases, especially in cases factually similar to the case at bar, may very well undermine the State's ability to prove its cases beyond a reasonable doubt.

Therefore, the decision of the Justice of the Peace Court is reversed and remanded with instructions to proceed in a manner consistent with this decision.

IT IS SO ORDERED, this _____ day of June 2004.

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Judge Rosemary B. Beauregard