ATTORNEY FOR APPELLANT:

CONOR O'DANIEL
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MATTHEW D. FISHER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DIANA LYNN HUGHES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 65A01-0512-CR-549
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE POSEY SUPERIOR COURT
The Honorable S. Brent Almon, Judge
Cause No. 65D01-0405-FB-231

October 31, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Dianna Lynn Hughes appeals her conviction and sentence for possession of precursors with intent to manufacture methamphetamine, as a class D felony,[1] and maintaining a common nuisance, as a class D felony.[2]

We affirm.

ISSUES

1. Whether the trial court erred when it refused to compel the State to disclose the name of a confidential informant.

2. Whether the trial court erred in denying Hughes' motion to dismiss.

3. Whether the sentence is excessive.

FACTS

At approximately 1:56 a.m. on May 9, 2004, the Posey County Sheriff's Department received a complaint from the Hughes' residence. Hughes reported that there were people "acting crazy on top of the roof" and "had torn up her house." (Tr. 53). Hughes left her residence at approximately 5:10 a.m. to go to work.

After investigating other complaints, Deputy Thomas E. Latham, Jr. arrived at Hughes' residence at approximately 5:55 a.m. and parked in the driveway. Deputy Jeremy Fortune and Indiana State Police Trooper Frank Smith arrived at Hughes' residence shortly after Deputy Latham. Deputy Latham observed two men, Franklin McGhee and Roger Brammer, Hughes' son-in-law, exiting Hughes' residence; Brammer

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[1] Ind. Code § 35-48-4-14.5.

[2] I.C. § 35-48-4-13.

was locking the front door. Deputy Latham smelled "a very strong odor of ether" as he was getting out of his patrol car. (Tr. 55). McGhee told Deputy Latham that the owner of the residence was not at home. At Deputy Latham's request, Brammer contacted Hughes on his cell phone. Deputy Latham advised Hughes that he "could smell a strong odor of ether coming from her house and that . . . [he] believe[d] that there may be illegal activity taking place within the residence." (Tr. 58). Deputy Latham asked for permission to search her residence, which Hughes gave as long as Brammer accompanied the officers.

Deputy Latham "took a couple of steps inside the doorway. [T]he fumes and . . . a chemical cloud—a light fog within the residence—was overwhelming so [they] immediately left the residence." (Tr. 60). There was "a strong odor of ether and anhydrous ammonia" in the residence. (Tr. 61). Before leaving the residence, Deputy Latham observed items commonly used to manufacture methamphetamine. The officers secured the scene and contacted the Posey County Narcotics Unit and the Wadesville Fire Department.

Officers discovered several items used to manufacture and sell methamphetamine throughout Hughes' residence, including anhydrous ammonia, ether, hoses, jars, baggies, salt, filters, cans of starter fluid, cold medicine containing pseudoephedrine, and scales. Officers also discovered several receipts for the purchase of precursors. Officers photographed and videotaped the interior and exterior of Hughes' residence.

At some point, Indiana Conservation Officer Dan Bellwood arrived on the scene and saw some tubing in the passenger compartment of a van located on Hughes'

property. The van also smelled strongly of anhydrous ammonia. Brammer admitted that that he and McGhee had driven the van to Hughes' residence and that the van belonged to him.

Hughes returned to her residence at approximately 8:45 a.m. She told Deputy Latham that "she had got[ten] home on May 8th at [9:30] p.m. And when she got home, she observed the house a wreck." (Tr. 65). She claimed that "two . . . people that she didn't know came into her home and trashed it." (Tr. 65). Hughes, however, did not report anything was amiss until the early morning of May 9, 2004.

The State charged Hughes with Count 1, dealing in methamphetamine; Count 2, possession of precursors with intent to manufacture methamphetamine; Count 3 possession of anhydrous ammonia or ammonia solution with the intent to manufacture methamphetamine; and Count 4 maintaining a common nuisance.

On January 24, 2005, Hughes filed a subpoena, seeking to take the deposition of a confidential informant. The State filed a motion to quash, arguing "the confidential informant subpoenaed by the defense is not a confidential informant in Defendant Hughes' case," and "the confidential informant is an informant in a case filed against Roger Brammer and Franklin McGhee for a separate methamphetamine lab." (App. 25). On February 25, 2005, the trial court held a hearing on the motion to quash. The trial court heard further arguments on March 8, 2005. On March 22, 2005, the trial court granted the State's motion to quash.

On March 23, 2005, Hughes filed a motion to dismiss, requesting that the trial court dismiss her case because the videotape of her residence had been lost or destroyed. The trial court denied Hughes' motion following a hearing on June 27, 2005.

Hughes' trial commenced on July 13, 2005. On July 15, 2005, the jury found Hughes guilty of Counts 2 and 4: possession of precursors with intent to manufacture methamphetamine and maintaining a common nuisance. On August 16, 2005, the trial court sentenced Hughes to eighteen months, with six months suspended, on each count and ordered the sentences to be served concurrently.

Additional facts will be provided as necessary.

DECISION

1. Disclosure of Confidential Informant's Identity

Hughes asserts the trial court erred when it refused to require the State to disclose the identity of a confidential informant. Hughes argues that the

> informant could have shed light on other individuals with whom Roger Brammer and Franklin McGhee had dealings, which may have allowed for future or further discovery in an effort to show that they alone were the ones who purchased the precursors and set up the methamphetamine lab at Dianna Hughes' house in a very quick fashion and without her knowledge.

Hughes' Br. 10.

"The general policy is to prevent disclosure of an informant's identity unless the defendant can demonstrate that disclosure is relevant and helpful to his defense or is necessary for a fair trial." *Schlomer v. State*, 580 N.E.2d 950, 954 (Ind. 1991). It is the defendant's burden to demonstrate the need for disclosure. *Id.* "[B]are speculation that the information may possibly prove useful" is not enough to justify the disclosure of a

confidential informant's identity, and an informant's identity shall not be disclosed "to permit 'a mere fishing expedition.'" *State v. Cook*, 582 N.E.2d 444, 446 (Ind. Ct. App. 1991) (quoting *Dole v. Local 1942, et al.*, 870 F.2d 368, 373 (7th Cr. 1989)).

In this case, Hughes sought the identity of a confidential informant who provided information regarding Brammer and McGhee in an *unrelated* methamphetamine case.[3] A review of Hughes' argument reveals nothing more than bare speculation that the confidential informant had information relevant to Hughes' case. Such speculation is insufficient to require disclosure of a confidential informant's identity. Thus, we find no error.

2. Motion to Dismiss

Hughes asserts the trial court erred in denying her motion to dismiss "because the State negligently destroyed evidence in their possession, which may have shown additional evidence and additional exculpatory evidence . . . ." Hughes' Br. 11. Hughes argues that videotape "would support the defendant's statements made to officers that her home had been invaded and/or the co-defendants could easily have brought the materials used in the manufacturing process into the home, and that there were other materials found in the Brammer van." Hughes' Br. 12.

Whether a defendant's due process rights have been violated by the State's failure to preserve evidence depends on whether the evidence was "potentially useful evidence" or "materially exculpatory evidence." *Chissell v. State*, 705 N.E.2d 501, 504 (Ind. Ct.

[3] That case arose when, on February 16, 2004, a methamphetamine lab exploded, causing a house fire. Subsequently, the confidential informant told officers that she provided Brammer and McGhee with precursors for the manufacturing of methamphetamine and they in turn gave her methamphetamine.

App. 1999) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988), *reh'g denied*), *trans. denied*. Potentially useful evidence is defined as "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* (quoting *Youngblood*, 488 U.S. at 57). The State's failure to preserve potentially useful evidence will only constitute a denial of due process of law if the defendant can show bad faith on the part of the State. *Id.*

Materially exculpatory evidence is evidence possessing "an exculpatory value that was apparent before the evidence was destroyed." *Id.* (quoting *California v. Trombetta*, 467 U.S. 479, 489 (1984)). The evidence must "'be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.'" *Id.* (quoting *Trombetta*, 467 U.S. at 489). "While a defendant is not required to prove conclusively that the destroyed evidence was exculpatory, there must be some indication that the evidence was exculpatory." *Id.* Regarding such evidence, whether the State destroyed the evidence in good or bad faith is irrelevant. *Id.*

During the hearing on Hughes' motion to dismiss, Deputy Jimmie Reeves testified that he videotaped the interior and exterior of Hughes' residence and that photographs also were taken of interior and exterior of Hughes' residence. Deputy Reeves testified that he had had an opportunity to review the videotape and recalled that it included footage of Brammer's van and a gallon jar "with liquid substance and a dough substance in the bottom of it, and it was reacting or bubbling," which the photographs did not depict. (Mot. to Dismiss Tr. 6). Otherwise, Deputy Reeves agreed that the photographs depicted "the same or similar" evidence as the videotape. (Mot. to Dismiss Tr. 7).

Deputy Reeves further testified that at some point he became aware that the videotape was missing, and despite "look[ing] everywhere the tape could possibly be," it remained missing. (Mot. to Dismiss Tr. 5).

In this case, there is no indication that the videotape contained materially exculpatory evidence, and we will not assume that it contained materially exculpatory evidence where the record is devoid of such indication. *See Chissell*, 705 N.E.2d at 504. At the most, the videotape may have contained potentially useful evidence, namely footage of Brammer's van.

Accordingly, Hughes must show bad faith on the part of the State for the failure to preserve the videotape to constitute a denial of due process. Here, there is no evidence the State acted in bad faith, which requires more than bad judgment or negligence. *See Land v. State*, 802 N.E.2d 45, 51 (Ind. Ct. App. 2004), *trans. denied*. Thus, the State did not violate Hughes' due process rights, and we find no error in denying Hughes' motion to dismiss.

3. Sentence

Hughes asserts that her sentence is excessive. Hughes argues that "the term of incarceration was not based upon the constitutional principles cited under the Indiana Constitution, Article 1, Section 18," because "[t]he term of incarceration of one year is nothing more than punishment" and not in keeping with "the principles of reformation . . . ." Hughes' Br. 15. Accordingly, Hughes argues "the sentence should be modified to time served at this point[.]" *Id.*

Our Supreme Court had held that "particularized, individual applications are not reviewable under Article 1, Section 18 because Section 18 applies to the penal code as a whole and does not protect fact-specific challenges." *Ratliff v. Cohn*, 693 N.E.2d 530, 542 (Ind. 1998), *reh'g denied*. Thus, review of Hughes' sentence under Article 1, Section 18 of the Indiana Constitution is not available.

Furthermore, according to the State's brief, Hughes was released from jail on February 2, 2006. Thus, Hughes has served her sentence. Hughes claim on this issue is therefore moot because no relief in this regard can be granted to her. *Irwin v. State*, 744 N.E.2d 565, 568 (Ind. Ct. App. 2001).

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.