RENDERED: SEPTEMBER 30, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000556-MR

MICHAEL WAYNE WHITTAKER — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 13-CR-00685

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, D. LAMBERT AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: Michael Wayne Whittaker, Appellant, brings this direct appeal from his trial in the Daviess County Circuit Court in which he was convicted of robbery in the first degree, burglary in the first degree and wanton endangerment in the first degree. After a careful review of the record and the applicable law, we affirm.

Relevant Facts

Tammy Tackett shared a home with her companion, Keith Leachman. On September 1, 2013, Tackett was at home alone, watching television, when a man whom she had never met came to the door asking for Leachman. Tackett responded that Leachman was not home and that she did not know when he would return. At that point, the man asked Tackett if she recognized him, to which she replied in the negative.

Later that night, two uninvited men entered the residence. These men wore bandannas covering their faces, and one brandished a handgun. They demanded to know where in the home Leachman's safe was located. Upon receiving an answer, one of the men left the residence and the other proceeded to take the safe, which weighed approximately 150 pounds. He exited the residence with the safe, and began rolling it down the street. At some point during this encounter, the man's bandanna fell off, and Tackett saw his face.

As the recently unmasked man left the home with the safe, Tackett screamed that she had just been robbed. T.J. and Martha Wallace heard Tackett screaming, and saw the man leaving the house. They approached him, and he produced the gun from his sweatshirt. He threatened them not to come closer or he would shoot. T.J. Wallace retreated after noticing something in the man's hand. The Wallaces saw the man wedge the safe between a house and a tree and escape without it. The police arrived shortly thereafter.

Before the police took the safe into custody to examine it, they allowed Leachman to access it to retrieve some prescription medications and cash contained therein. Officer Pat Isbell later lifted a palm print from the safe, and, using that palm print, Detective Jeff Payne ran a photo request through the Kentucky fingerprint identification system. Utilizing those results, Payne and Officer Cody Cliff developed a photo lineup, and Tackett identified Whittaker from the photo array as the man who had stolen the safe from her home.

Police then obtained a warrant to obtain fingerprints, palm prints, and DNA swabs from Whittaker. Officer Kevin Bennet took prints from Whittaker. Officer Jim Parham, Jr., compared the palm print lift from Whittaker with prints lifted from the safe, and determined that the lift from the safe was identical to Whittaker's palm print. Whittaker's trial counsel argued before the trial court that they had submitted Whittaker's fingerprints to Michael Sinke, an independent fingerprint analyst, who confirmed that the palm print from the safe belonged to Whittaker.

The grand jury indicted Whittaker on November 5, 2013, charging him with robbery in the first degree, burglary in the first degree, and wanton endangerment in the first degree. Following a two-day trial beginning on January 29, 2015, Whittaker was convicted by a jury. On March 12, 2015, the trial court entered its Final Judgment and Sentence, imposing a term of ten years' imprisonment. This appeal follows.

Analysis

Whittaker's sole argument on appeal is that the trial court erred when it failed to suppress the safe and palm print evidence, because the print lift destroyed the availability of any existing DNA evidence which may have been exculpatory at trial. The Commonwealth argues that the trial court did not err in denying the motion to suppress evidence, as the police had a good faith basis to return the evidence to the victim under Kentucky Revised Statutes ("KRS") 421.500(7). KRS 421.500(7) states that:

> In prosecution for offenses listed in this section for the purpose of defining "victim," law enforcement agencies and attorneys for the Commonwealth shall promptly return a victim's property held for evidentiary purposes unless there is a compelling reason for retaining it. Photographs of such property shall be received by the court as competent evidence in accordance with the provisions of KRS 422.350.

In *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky**.** 2004), our Supreme Court considered a similar issue. The *St. Clair* Court held that the trial court did not err in denying the motion to suppress, stating as follows:

> Appellant argues that the trial court should have excluded the Commonwealth's fingerprint evidence at trial because he was denied an opportunity to conduct independent testing when the Commonwealth released Brady's and Keeling's trucks after it processed the vehicles for latent fingerprints. However, "[t]o warrant any relief, Appellant was required to demonstrate bad faith on the part of the police." *Crowe v. Commonwealth,* Ky., 38 S.W.3d 379, 385 (2001) (citing *Arizona v. Youngblood,* 488 U.S. 51, 57, 109 S.Ct. 333, 337, 102 L.Ed.2d 281, 289 (1988)). *See also Kirk v. Commonwealth,* Ky., 6 S.W.3d 823, 826 (1999) ("Absent a showing of bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a

> denial of the due process of law."); *Allen v. Commonwealth,* Ky.App., 817 S.W.2d 458, 462 (1991). *Cf. Estep v. Commonwealth,* Ky., 64 S.W.3d 805, 811 (2002) ("[T]he Due Process Clause is implicated only when the failure to preserve ... evidence was intentional and the potential exculpatory nature of the evidence was apparent at the time it was lost or destroyed.") In the case at bar, the Commonwealth explained in its response to Appellant's motion that "it is normal police procedure to release motor vehicles to their lawful owners after the vehicles have been processed for latent fingerprints. To retain custody is of little utility, since the latent fingerprints on the vehicle are often completely removed by the lifting process, and continued retention may be very burdensome to the lawful owners of vehicles seized." Appellant points us to "nothing in the record to support a different conclusion." *Kirk,* 6 S.W.3d at 826. We further observe that the Commonwealth provided Appellant with the information and notes incident to the lifting of the latent fingerprints, including the investigative reports from the officers who lifted the prints, photographs of the vehicle in question, and examination of the latent impressions, which distinguishes this case from *Green v. Commonwealth,* Ky.App., 684 S.W.2d 13, 16 (1984), the authority upon which Appellant relies. In past cases where evidence of bad faith is lacking and the notes and other information incident to the Commonwealth's testing is provided to the defense, we have found no merit in challenges to the admissibility of evidence collected from automobiles premised upon the Commonwealth's release of automobiles before the defense could pursue independent testing. *Perdue v. Commonwealth,* Ky., 916 S.W.2d 148, 159 (1995); *Johnson v. Commonwealth,* Ky., 892 S.W.2d 558, 560–561 (1994). Appellant "has failed to demonstrate ... bad faith under the standard recognized in this Commonwealth, [and][t]hus we cannot conclude that Appellant was denied due process of law." *Collins v. Commonwealth,* Ky., 951 S.W.2d 569, 573 (1997).

Id. at 552-53. *See also Crowe v. Commonwealth*, 38 S.W.3d 379, 384 (Ky. 2001)

("[Appellant] claims that the evidence should have been suppressed because police

investigators had discarded the victim's bloody clothing, believing it had no probative value… To warrant any relief, Appellant was required to demonstrate bad faith on the part of the police.").

Whittaker attempts to distinguish *St. Clair* for a variety of factual reasons, and because "[t]he issue [here] is that as a result of police prematurely and with no notice returning the safe to Leachman, the defense was unable to conduct any sort of independent examination of the safe for DNA or other evidence, including that which might be favorable…." Whittaker's argument is unpersuasive. In *St. Clair*, as in the present case, the appellant made an argument concerning the destruction of potentially exculpatory DNA evidence. Our Supreme Court concluded that no evidence concerning bad faith existed as to warrant relief. *Id.*

Whittaker does not a claim violation of due process, however, but a violation of his right to a complete defense. Of course, "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (internal quotations omitted). Furthermore, "[a] defendant's right to present relevant evidence . . . is subject to reasonable restrictions . . . to accommodate other legitimate interests in the criminal trial process[,]" and so, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *U.S. v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 1264, 140 L.Ed.2d 413 (1998).

Whittaker overlooks the fact that the test used by Kentucky courts for relief from the destruction of exculpatory evidence encompasses a defendant's right to present a complete defense. The Sixth Circuit discussed the right to present a complete defense in *United States v. Collins*, 799 F.3d 554 (6th Cir. 2015), in which the court discussed two different tests in *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984), and *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). "The first test, established in *Trombetta*, applies in cases where the government fails to preserve material exculpatory evidence, while the second test, established in *Arizona v. Youngblood*, applies in cases where the government fails to preserve 'potentially useful' evidence." *United States v. Collins*, 799 F.3d 554, 569 (6th Cir. 2015) (citations omitted). The Sixth Circuit explained the difference between those two tests as follows:

> Under *Trombetta*, to be deemed constitutionally material, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. In such cases, the destruction of material exculpatory evidence violates due process regardless of whether the government acted in bad faith. Meanwhile, under the *Youngblood* standard, in cases where the government fails to preserve evidence whose exculpatory value is indeterminate and only potentially useful, the defendant must demonstrate: (1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before its destruction; and (3) that the nature of the evidence was such that the defendant would

> be unable to obtain comparable evidence by other reasonably available means.
>
> In order to establish bad faith, a defendant must prove official animus or a conscious effort to suppress exculpatory evidence.

Id. (citations and internal quotation marks omitted).

One defendant in *Collins* argued "that government agents impermissibly destroyed equipment suspected of being used to manufacture methamphetamine before that equipment could be tested for fingerprints that might have linked it to an individual named Joseph Ore rather than to Brosky[, a defendant]." *Id.* at 570. The Sixth Circuit, after discussing the difficulty in establishing the federal standard of review, noted that:

> Brosky has failed to establish a due process violation under *Youngblood*. In addition to the fact that there is no apparent exculpatory value to the destroyed items, Brosky has not shown that any evidence was destroyed because of "official animus" or a "conscious effort to suppress exculpatory evidence," as required to establish a due process violation under *Youngblood*. Consequently, the district court did not err by denying Brosky's motion to dismiss his indictment on the ground that law enforcement destroyed exculpatory evidence.

Id. (citation omitted).

The Kentucky Supreme Court adopted *Youngblood, supra*, in *Collins v. Commonwealth*, 951 S.W.2d 569 (Ky. 1997), stating that:

> mere negligence simply does not rise to the level of bad faith required by *Youngblood, supra*. Appellant cannot substantiate any ill motive or intention on the part of the Commonwealth in failing to collect the towel. Further, even if we were to apply the rationale set forth in

> *Tamme, supra* and *Trombetta, supra*, Appellant is unable to prove that the towel possessed "an exculpatory value that was apparent before it was destroyed." *Tamme*, 759 S.W.2d at 54. Indeed, it is more likely that the towel would have been useful to the Commonwealth.

Id. at 573.

The Sixth Circuit came to a similar conclusion in *United States v. Spalding*, 438 F. App'x 464, 465 (6th Cir. 2011). In *Spalding*, "[t]he evidence technician destroyed the sandwich box after lifting the fingerprints, believing she had gathered any potentially useful evidence." Thereafter, "[a]fter determining that there was no open case in the name of the victim, [the lead detective] authorized the disposal of the items without realizing their connection to [the defendant's] case." *Id.* at 465. The Sixth Circuit affirmed, stating that "[t]he conduct of the government agents was, at most, negligence, but it was not bad faith or reckless." *Id.* at 466. We conclude that Kentucky law comports with United States Supreme Court precedent surrounding a defendant's right to present a complete defense.

In the present case, Whittaker has failed to demonstrate any evidence of bad faith on behalf of the police. Indeed, assuming that the police were complying with KRS 421.500(7), they could not have been acting in bad faith. Furthermore, whether any evidence at all was destroyed is pure speculation, as Whittaker was actually able to perform some print analysis on the safe. Whittaker has failed to establish that he was denied the right to present a complete defense

because, as in *St. Clair*, *supra*, he has failed to establish bad faith on behalf of the police.

For the foregoing reasons, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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