[Cite as *State v. Spencer*, 2018-Ohio-5351.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106881

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RALPH SPENCER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-618343-A

BEFORE: E.T. Gallagher, J., McCormack, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: December 27, 2018

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Ralph Spencer, appeals from his convictions following a plea of no contest. He raises the following assignments of error for review:

> 1. The trial court improperly denied the appellant's motion to suppress evidence gathered from the illegal search of appellant's vehicle.
>
> 2. The trial court improperly denied appellant's motion to dismiss the indictment.

{¶2} After careful review of the record and relevant case law, we affirm the trial court's judgment.

I. Procedural and Factual History

{¶3} In April 2017, Spencer was cited for driving with a suspended license. During an inventory search of his vehicle, a handgun was found hidden under the padding of a child's seat that was positioned behind the driver's seat. Spencer was arrested and ultimately named in a

two-count indictment. He was charged with having weapons while under disability in violation of R.C. 2923.13(A)(3), and improperly handling a firearm in a motor vehicle in violation of R.C. 2923.16(B).

{¶4} In September 2017, Spencer filed a motion to suppress, arguing that the evidence seized from his vehicle was the product of an illegal search. Spencer sought to exclude all evidence gathered from his vehicle during the search conducted by Officer Nathaniel Gonzalez during a traffic stop.

{¶5} Spencer also filed a motion to dismiss his indictment. He argued that he was deprived of his constitutional right to due process when the state was unable to produce the dash-camera video of the incident because it was inadvertently recorded over. Spencer maintained that "if the video tape existed it would have conclusively shown the officer never conducted an inventory search, but rather ransacked the Defendant's vehicle under the guise of an inventory search."

{¶6} A hearing was held on the motion to suppress and the motion to dismiss. At the hearing, Officer Nathaniel Gonzalez of the Rocky River Police Department testified that on April 28, 2017, he was conducting routine traffic enforcement on Interstate 90. At some point, Officer Gonzalez "ran a license plate" and discovered that the registered owner of the vehicle, Spencer, was under suspension. Officer Gonzalez testified that he followed the vehicle and initiated a traffic stop upon identifying Spencer as the driver of the vehicle. Once Spencer's vehicle was stopped, Officer Gonzalez searched the Law Enforcement Automated Data System ("LEADS") and confirmed that Spencer was the owner of the vehicle and had a suspended license. Officer Gonzalez testified that he then issued Spencer a citation for driving under suspension and advised him that the vehicle would be impounded.

{¶7} Spencer was removed from his vehicle and escorted to the rear of another officer's patrol vehicle. Because there was no other licensed passenger to take possession of Spencer's vehicle, a towing company was contacted to remove the vehicle from the side of the interstate. Prior to the arrival of the tow truck, Officer Gonzalez conducted an inventory search of Spencer's vehicle. Officer Gonzalez testified that pursuant to the Rocky River Police Department's inventory policy, he was required to go through the entire vehicle and "document the property within the vehicle, damage to the vehicle, open containers, boxes that may be locked."

{¶8} During the inventory search of Spencer's vehicle, Officer Gonzalez opened the rear driver's side door of the vehicle and noticed there was a child's seat. Officer Gonzalez testified that he placed his hand on the child's seat and felt a gun on the inside of the child's seat. When he lifted the padding of the child's seat, Officer Gonzalez discovered a loaded handgun. Photographs were taken of the car seat, the gun before it was completely removed from the car seat, and other items inside the vehicle and in the trunk of the vehicle. Once the firearm was discovered, Spencer was read his *Miranda* rights and placed under arrest.

{¶9} During the hearing, Officer Gonzalez was questioned about the Rocky River Police Department's failure to produce a video recording of the traffic stop. He testified that the recording device on his patrol vehicle had been activated during the traffic stop of Spencer's vehicle. However, Officer Gonzalez stated that he was unable to recover a copy of the dash-cam video because the video had been "overwritten" by newer recordings on the video system's hard drive. Officer Gonzalez explained that "once the memory capacity of the hard drive is full, the oldest videos get purged." Officer Gonzalez further testified that prior to May 2017, there was no policy in place that required Rocky River police officers to wear body cameras. During his cross-examination, Officer Gonzalez admitted that he did not take the necessary steps to save the

recorded dash camera footage in accordance with the department's policy manual. He further conceded that he did not "open up all containers" and did not inventory every item that he observed inside Spencer's vehicle. He explained that it did not seem reasonable to him at the time to "pull everything out of the car" on the side of Interstate 90.

{¶10} At the conclusion of the hearing, the trial court denied Spencer's motion to suppress and his motion to dismiss, stating:

> I see nothing whatsoever that has shown that this is anything but a proper inventory search of a vehicle when the driver has no license * * *. Also, in fact, [defense counsel's] thorough cross-examination really showed, I'm sure if you had anything exculpatory or inculpatory against the officer, it would have come up in your thorough cross-examination, and it just doesn't. So the motion is denied and the motion to dismiss is also denied based on this.

{¶11} In November 2017, Spencer withdrew his former plea of not guilty and entered a plea of no contest to each offense. He was sentenced to an aggregate 24-month term of imprisonment.

{¶12} Spencer now appeals the trial court's judgment.

II. Law and Analysis

A. Motion to Suppress

{¶13} In his first assignment of error, Spencer argues the trial court improperly denied his motion to suppress evidence seized during the illegal search of his vehicle.

{¶14} Appellate review of a suppression ruling involves mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. When ruling on a motion to suppress, the trial court serves as the trier of fact and is the primary judge of the credibility of the witnesses and the weight of the evidence. *State v. Mills*, 62 Ohio St.3d 357, 582 N.E.2d 972 (1992); *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982). An

appellate court must accept the trial court's findings of fact as true if they are supported by competent and credible evidence. *Burnside* at ¶ 8. The appellate court must then determine, without any deference to the trial court, whether the facts satisfy the applicable legal standard. *Id*.

{¶15} The Fourth Amendment to the United States Constitution and Article I, Section 14, of the Ohio Constitution guarantee the right to be free from unreasonable searches and seizures. *State v. Orr*, 91 Ohio St.3d 389, 391, 745 N.E.2d 1036 (2001). The Fourth Amendment proscribes all unreasonable searches and seizures. *United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). It is a restraint on the government. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (Footnote omitted.) *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

{¶16} When a defendant moves to suppress evidence recovered during a warrantless search, the state has the burden of showing that the search fits within one of the defined exceptions to the Fourth Amendment's warrant requirement. *Athens v. Wolf*, 38 Ohio St.2d 237, 241, 313 N.E.2d 405 (1974).

{¶17} Inventory searches are a well-defined exception to the warrant requirement of the Fourth Amendment. *South Dakota v. Opperman*, 428 U.S. 364, 369, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); *State v. Mesa*, 87 Ohio St.3d 105, 108, 717 N.E.2d 329 (1999). Under this exception, when a vehicle is impounded, police are permitted to follow a routine practice of administrative procedures for securing and inventorying the vehicle's contents. *Id*. Inventory searches are intended to (1) protect an individual's property while it is in police custody; (2)

protect police against claims of lost, stolen, or vandalized property; and (3) protect police from dangerous instrumentalities. *Id*.

{¶18} Because inventory searches are administrative caretaking functions unrelated to criminal investigations, the policies underlying the Fourth Amendment warrant requirement, including the standard of probable cause, are not implicated. *Mesa* at 109, citing *Opperman* at 370. Rather, the validity of an inventory search of a lawfully impounded vehicle is judged by the Fourth Amendment's standard of reasonableness; it must be conducted in good faith, and in accordance with reasonable standardized procedures or established routine. *Id.,* citing *State v. Hathman*, 65 Ohio St.3d 403, 604 N.E.2d 743 (1992), paragraph one of the syllabus; *Colorado v. Bertine*, 479 U.S. 367, 371, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987); and *Opperman*.

{¶19} An inventory search is reasonable when it is performed in good faith pursuant to standard police policy, and "when the evidence does not demonstrate that the procedure involved is merely a pretext for an evidentiary search of the impounded vehicle." *State v. Robinson*, 58 Ohio St.2d 478, 480, 391 N.E.2d 317 (1979). "If, during a valid inventory search of a lawfully impounded vehicle, a law-enforcement official discovers a closed container, the container may only be opened as part of the inventory process if there is in existence a standardized policy or practice specifically governing the opening of such containers." *Hathman* at paragraph two of the syllabus.

{¶20} Generally, "[a] search which is conducted with an investigatory intent, and which is not conducted in the manner of an inventory search, does not constitute an 'inventory search.'" *State v. Caponi*, 12 Ohio St.3d 302, 303, 466 N.E.2d 551 (1984). Likewise, "[i]nventory searches 'must not be a ruse for a general rummaging in order to discover incriminating evidence.'" *State v. Burton*, 8th Dist. Cuyahoga No. 64710, 1994 Ohio App. LEXIS 1590, 4-5

(Apr. 14, 1994), quoting *Florida v. Wells*, 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990). *Accord State v. Woods*, 2012-Ohio-5509, 982 N.E.2d 1305, ¶ 25 (8th Dist.) (affirming conclusion that police used towing inventory as pretext for a search of vehicle).

{¶21} In this case, Officer Gonzalez testified that pursuant to the Rocky River Police Department's inventory policy, he was required to "go through the entire vehicle" and "document the property within the vehicle, damage to the vehicle, open containers, boxes that may be locked." On appeal, Spencer does not dispute the scope of the police department's inventory policy. However, he argues that Officer Gonzalez acted in contravention of the standardized procedures of the Rocky River Police Department by failing to "inventory everything in the vehicle." Spencer suggests that Officer Gonzalez's incomplete inventory of the vehicle demonstrated that he was merely searching the vehicle "until he found evidence that he could use to arrest [Spencer]."

{¶22} After careful consideration, we find the inventory search in this case was reasonable and performed in good faith pursuant to the standard policy of the Rocky River police department. Contrary to Spencer's position on appeal, there is nothing in this record to suggest the inventory search of Spencer's vehicle was merely a pretext for an investigatory search of his vehicle. While the inventory report broadly categorizes the property contained in Spencer's vehicle, rather than providing a specific description of each piece of property, we find no nexus between the adequacy of the inventory report and the intent of the officer's searching the vehicle. In this case, Officer Gonzalez took multiple photographs depicting the vehicle and the property contained therein. In addition, his written inventory report included "a description of property within the vehicle," as required by section 502.2 of the inventory policy. To be certain, Officer Gonzalez failed to inventory each piece of property that was inside Spencer's vehicle, including

the tool boxes and containers discovered in the trunk. However, Officer Gonzalez explained that he did not believe removing everything from the vehicle to complete a thorough inventory while on the side of Interstate 90 would be practical.[1]

{¶23} Under the totality of these circumstances, we are unable to conclude that the brief nature of the officer's inventory report demonstrated that the inventory of Spencer's vehicle was a pretext for an illegal investigatory search. In our view, the testimony presented at the suppression hearing demonstrated that Officer Gonzalez performed the investigatory search in a good faith effort to document the contents of the vehicle and without any expectation of discovering illegal contraband. This fact is highlighted by Officer Gonzalez's testimony that the responding officers agreed to transport Spencer to his place of employment before the gun was ultimately discovered inside his vehicle.

{¶24} Spencer further argues for the first time on appeal that, in addition to his failure to strictly comply with the Rocky River inventory policy, Officer Gonzalez's act of patting down the child seat further demonstrated his investigatory intent. Spencer contends that this case is comparable to the circumstances addressed by this court in *State v. Foster*, 8th Dist. Cuyahoga No. 104809, 2017-Ohio-13, and *State v. Seals*, 8th Dist. Cuyahoga No. 90561, 2008-Ohio-5117.

{¶25} In *Seals*, this court concluded that the trial court erred by failing to suppress evidence discovered inside an aerosol can that was opened by an officer during an inventory search of a vehicle. The record demonstrated that the officer found a rock of crack on the

[1] The United States Supreme Court has long held that it is not necessary for the police to tow a vehicle to the police station or towing yard before conducting an inventory search. In *Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739, the police inventoried the defendant's vehicle before the arrival of the tow truck. In light of the purposes of inventory procedures, the court noted that the exact location of the inventory search is not critical to effectuating these purposes, and it therefore held that a search conducted prior to impoundment may be reasonable. *Id.* at 372-373. Accordingly, the fact that an inventory search was conducted prior to impoundment does not render the search unreasonable and unconstitutional.

driver's seat and then discovered the aerosol can in the trunk of the vehicle. The officer explained that because drug couriers frequently carry drugs in cans with false bottoms, he shook the can. He concluded that it felt like a bean bag was inside, leading him to suspect that the can was concealing drugs. In concluding that the officer conducted an investigatory search by opening the can, this court stated:

> An inventory search "which is conducted with an investigatory intent, and which is not conducted in the manner of an inventory search, does not constitute an 'inventory search' and may not be used as a pretext to conduct a warrantless evidentiary search." It appears that is exactly what Officer Florjanic did. He used the inventory search as a pretext for searching for more evidence. If he suspected evidence was contained in the can, he should have obtained a search warrant to open the can. The vehicle was not at risk of being driven away because it was to be towed to a secured police parking lot.

Id. at ¶ 28.

{¶26} Similarly, in *Foster*, this court affirmed the suppression of evidence obtained during an inventory search where the officer opened up an iced tea can and took a swab of its contents because the officer felt it was heavy and may contain drugs. The officer explained that in his experience and training, false-bottom containers, such as the one discovered on the iced tea can, are commonly used to conceal drugs. This court determined that the search of the can "clearly manifested the officer's intention of finding evidence and not merely chronicling the contents of the car." *Id*. at ¶ 20. Accordingly, this court held that "despite the existence of a standardized written policy, the officer's actions went beyond the administrative caretaking functions for securing and inventorying the vehicle's contents, and demonstrated that the search was conducted as an investigative, warrantless evidentiary search." *Id*.

{¶27} After careful consideration, we find *Seals* and *Foster* to be distinguishable. Unlike the circumstances presented in *Seals* and *Foster*, the firearm discovered in Spencer's vehicle was recovered while Officer Gonzalez was looking through the vehicle for items of value

to list in his inventory report. At the time Officer Gonzalez placed his hand on the child seat to feel for additional property, he had no basis to believe suspected contraband would be discovered. This is in stark contrast to the facts of *Seals* and *Foster*, where the officers specifically testified that their decision to open the subject containers was solely predicated on their belief that drugs or other contraband was hidden therein. Under such circumstances, the search ceased to be administrative and required a search warrant. In this case, the gun was discovered in the process of the inventory search and not after a reasonable calculation that a certain container would likely contain illegal contraband based on other contributing factors. Thus, we find no basis to conclude that Officer Gonzalez's decision to pat down the child seat was done with an investigatory purpose. Unlike an aerosol can or an iced tea can, a child's car seat is a reasonable location to search for property without investigative motives.

{¶28} Based on the foregoing, we find the state satisfied its burden of showing that the search of Spencer's vehicle fit within a well-defined exception to the warrant requirement of the Fourth Amendment. Accordingly, the trial court did not error by denying Spencer's motion to suppress. Spencer's first assignment of error is overruled.

B. Motion to Dismiss

{¶29} In his second assignment of error, Spencer argues the trial court erred in denying the motion to dismiss because the state's failure to secure video footage of the traffic stop deprived him of "objective, incontrovertible, exculpatory evidence."

{¶30} We review de novo a trial court's decision involving a motion to dismiss on the ground that the state failed to preserve exculpatory evidence. *State v. Blackshaw*, 8th Dist. Cuyahoga No. 85432, 2005-Ohio-5203, ¶ 10. The suppression of materially exculpatory evidence violates a defendant's due process rights, regardless of whether the state acted in good

or bad faith. *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, ¶ 9, citing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

{¶31} The principle is well established that "[t]he Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a criminal defendant from being convicted where the state fails to preserve materially exculpatory evidence or destroys in bad faith potentially useful evidence." *State v. Franklin*, 2d Dist. Montgomery No. 19041, 2002-Ohio-2370, ¶ 44, citing *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

{¶32} "To be materially exculpatory, '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.'" *State v. Newton*, 8th Dist. Cuyahoga No. 105771, 2018-Ohio-1392, ¶ 17, quoting *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). The Supreme Court of Ohio has further concluded that evidence is materially exculpatory "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Jackson*, 57 Ohio St.3d 29, 33, 565 N.E.2d 549 (1991), quoting *State v. Johnston*, 39 Ohio St.3d 48, 529 N.E.2d 898 (1988), paragraph five of syllabus.

{¶33} "Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt." *Id.* "The defendant bears the burden to show that the evidence was materially exculpatory." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 74, citing *State v. Jackson*, 57 Ohio St.3d 29, 33, 565 N.E.2d 549 (1991).

{¶34} This court has previously held that the possibility that evidence could have exculpated the defendant if preserved or tested is not enough to satisfy the standard of constitutional materiality. *State v. Durham*, 8th Dist. Cuyahoga No. 92681, 2010-Ohio-1416, ¶ 12, citing *Youngblood*, 488 U.S. 51, at 56, 109 S.Ct. 333, 102 L.Ed.2d 281. "A clear distinction is drawn by *Youngblood* between materially exculpatory evidence and potentially useful evidence. If the evidence in question is not materially exculpatory, but only potentially useful, the defendant must show bad faith on the part of the state in order to demonstrate a due process violation." *Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d at 254. Therefore, when evidence is only potentially useful, its destruction does not violate due process unless the police acted in bad faith when destroying the evidence. *Cleveland v. Townsend*, 8th Dist. Cuyahoga No. 99256, 2013-Ohio-5421, ¶ 22, citing *State v. Miller*, 161 Ohio App.3d 145, 2005-Ohio-2516, 829 N.E.2d 751 (2d Dist.).

> The term "bad faith" generally implies something more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive, or ill will partaking of the nature of the fraud. It also embraces actual intent to mislead or deceive another.

Powell, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 81.

{¶35} In *Durham*, this court examined a situation where an alleged criminal incident was caught on videotape but no one viewed the videotape before it was erased. This court noted that the videotape evidence might have been inculpatory or exculpatory or a combination of the two. We held that the defendant was unable to demonstrate that the evidence was materially exculpatory and we treated the erased video as only potentially useful. *Id.* at ¶ 21.

{¶36} On appeal, Spencer argues that the destruction of the dash-camera video footage was material and "would have shown that [Officer Gonzales] never conducted an inventory

search, but rather searched the vehicle until he found something to charge [Spencer] with, and then stopped." In support of his position, Spencer directs this court to the decisions rendered in *State v. Benton*, 136 Ohio App.3d 801, 737 N.E.2d 1046 (6th Dist. 2000); *State v. Benson*, 152 Ohio App.3d 495, 499, 2003-Ohio-1944, 788 N.E.2d 693 (1st Dist.); and *State v. Blair*, 2d Dist. Montgomery No. 25578, 2014-Ohio-1279.

{¶37} In *Benton*, the defendant appealed his driving while under the influence conviction after the trial court denied his motion to dismiss due to the state's failure to preserve a videotape of his traffic stop. The defendant had requested the videotape within five days of the traffic stop, yet the tape was not produced. Several months later, the arresting officer "discovered that the tape, if one ever existed, was erased and reused." *Id*. at 804.

{¶38} On appeal, the defendant argued that the state's destruction of the tape violated his due process rights. Assuming that the videotape had existed, the Sixth District Court of Appeals held that "where a defendant moves to have evidence preserved and that evidence is nonetheless destroyed by the state in accordance with its normal procedures, the appropriate remedy is to shift the burden to the state to show that the evidence was not exculpatory." *Id.* at 805, citing *Columbus v. Forest*, 36 Ohio App.3d 169, 173, 522 N.E.2d 52 (10th Dist.1987). The court determined that the state did not meet its burden of showing that the videotape was not exculpatory. *Id.* at 806. Specifically, the court noted that given the record in the case, it was "equally possible that the tape would have been exculpatory as inculpatory." *Id*. The court explained: "Because appellant testified that he disputes much of the testimony that the officer gave at the suppression hearing, the tape would have provided the only possible objective evidence of the events as they happened on the night that appellant was stopped." *Id*. In the

end, the court held that the state violated the defendant's due process rights when it destroyed the evidence that the defendant specifically requested. *Id*.

{¶39} Similarly, the defendant in *Benson,* 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693, appealed the trial court's decision to deny his motion to dismiss the indictment for driving while under the influence and for disregarding a traffic control device. The defendant asserted that the state withheld videotape evidence of his encounter with the officer and that the videotape contained materially exculpatory evidence. He argued that the tape was materially exculpatory "because it related to the officer's roadside observations and the ultimate issue of whether [the defendant] had been driving under the influence." *Id.* at ¶ 6. The trial court determined, however, that the state did not violate the defendant's due process right to a fair trial by failing to produce the videotape recording of the officer's encounter with the defendant.

{¶40} On appeal, the court first determined that the state bore the burden to prove that the evidence was not materially exculpatory. The court observed that the defendant had specifically requested the videotape and that the state had failed to preserve the evidence. Ultimately, the court concluded that the state did not meet its burden because "it [was] possible that the tape was materially exculpatory." *Id*. at ¶ 12. The court explained that the defendant and two eyewitnesses disputed much of the officer's testimony regarding the defendant's conduct. Thus, the court held that the defendant's due process rights were violated when the state destroyed the only evidence that would have constituted "objective evidence of the events on the night [the defendant] was stopped." *Id.*

{¶41} In *Blair,* 2d Dist. Montgomery No. 25578, 2014-Ohio-1279, the defendant was alleged to have assaulted a police officer during a traffic stop of the defendant's vehicle. The

defendant appealed his assault and carrying concealed weapons convictions after the trial court denied his motion to dismiss due to the state's failure to preserve a videotape of his traffic stop.

{¶42} On appeal, the court relied on *Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693, in holding that the subject videotape was the only objective evidence available to support the defendant's contention that the violence was initiated by the officer. *Id*. at ¶ 25. While finding the defendant had the burden to establish that the videotape was materially exculpatory, the court concluded that the defendant met his burden where the videotape was the only evidence that could have resolved the conflicts and inconsistencies observed in the officers' accounts of the incident and witness statements.

{¶43} We begin by noting that unlike the situations presented in *Benson* and *Benton*, 136 Ohio App.3d 801, 737 N.E.2d 1046, Spencer, not the state, bears the burden to prove that the video footage is materially exculpatory. In contrast to *Benson* and *Benton*, we find no evidence that the state failed to preserve the dash-camera video after Spencer specifically requested the evidence in July 2017. Instead, the data was mistakenly overwritten well before Spencer's discovery requests were made in this matter. *See State v. Fox*, 4th Dist. Ross No. 11CA3302, 2012-Ohio-4805, ¶ 48.

{¶44} Applying the foregoing, we cannot say Spencer satisfied his burden of establishing that the evidence was materially exculpatory. Having reviewed the testimony and allegations supporting Spencer's convictions, we find no basis to conclude that the result of the proceedings would have been different had the video footage taken from Officer Gonzalez's patrol car been preserved and disclosed to the defense. In contrast to the circumstances presented in *Benson, Benton,* and *Blair*, 2d Dist. Montgomery No. 25578, 2014-Ohio-1279, the dash-cam video in this case would not have assisted Spencer in challenging the *substance* of the allegations against him,

i.e. the having weapons while under disability and improperly handling a firearm in a motor vehicle convictions. *See State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, ¶ 13 (distinguishing *Benson*). In addition, video footage depicting the scope of Officer Gonzalez's inventory would not have been material to the court's resolution of the specific arguments raised during the suppression hearing.

{¶45} Here, Spencer's motion to suppress alleged that the lack of specificity in Officer Gonzalez's inventory report indicated that the inventory search was just a pretext for an investigatory search. Regarding this issue, Officer Gonzalez conceded that his inventory report "generalized" the property discovered inside Spencer's vehicle. He further admitted that, in contravention of his department's inventory policy, he did not "take out each and every item from [the] trunk [of the vehicle] and inventory it" due to safety concerns. However, Officer Gonzalez consistently testified that (1) he was required to impound and inventory Spencer's vehicle once it was determined that Spencer was driving without a license, (2) the purpose of the inventory search was to document Spencer's property, and (3) Spencer would have been released, uncharged, if the gun was not discovered inside his vehicle. As previously stated, we do not find that Officer Gonzalez's failure to strictly adhere to his department's inventory policy rendered his search invalid, or demonstrated that his search of Spencer's vehicle was performed with an investigative intent.

{¶46} In light of Officer Gonzalez's admissions during the suppression hearing regarding the scope of his inventory, there is nothing in this record to indicate the dash-camera video would have contradicted or disputed Officer Gonzalez's account of the search. We are mindful that video footage taken from the patrol car would have offered limited views and would not have provided more information about the property discovered in Spencer's vehicle than that gleaned

from the photographic evidence. Moreover, and perhaps most importantly, it is speculative to suggest the video footage would have provided the defense with favorable information concerning Officer Gonzalez's motives or intent while performing the search. Similar to the circumstances presented in *Durham*, 8th Dist. Cuyahoga No. 92681, 2010-Ohio-1416, the exculpatory value of the dash-cam video in this case was not apparent before the evidence was destroyed.

{¶47} Based on the foregoing, we find video footage of the search would be only potentially useful in sufficiently analyzing Officer Gonzalez's search of Spencer's vehicle. We further find there is nothing in this record to suggest the destruction of the video footage was the product of bad faith. As in *Durham*, Officer Gonzalez testified that before anyone had the opportunity to view the video, it was "overwritten" because "it did not occur to [him] to save the video." Officer Gonzalez explained that at the time, there was nothing about the traffic stop of Spencer's vehicle that stood out to him and made him believe it was necessary to save the dash-camera video of the incident. While his actions were improper and in contravention of the clear police procedure for preserving video evidence, we find no ulterior motive to mislead or deceive.

{¶48} Spencer's second assignment of error is overruled.

{¶49} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

TIM McCORMACK, P.J., CONCURS;
MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY WITH SEPARATE ATTACHED OPINION

MARY J. BOYLE, J., CONCURRING IN JUDGMENT ONLY:

{¶50} I fully agree with the majority's reasoning and analysis for Spencer's first assignment of error. But I concur in judgment only with respect to Spencer's second assignment of error, regarding Spencer's motion to dismiss based on the state's failure to produce video evidence of the traffic stop. While I agree that Spencer did not satisfy his burden of establishing that the evidence was materially exculpatory, I hesitate to follow part of the majority's analysis of the cases that Spencer cites in his brief. Specifically, I disagree with the following statement from the majority: "In contrast to *Benson* and *Benton*, we find no evidence that the state failed to preserve the dash-camera video after Spencer specifically requested the evidence in July 2017. Instead, the data was mistakenly overwritten well before Spencer's discovery requests were made in this matter."

{¶51} I fear that the majority's statement leads to an unwritten rule that if a police department destroys a videotape of a traffic stop before defendants file their discovery requests, then defendants bear the burden of showing that the evidence was materially exculpatory. There is little chance that a defendant will be indicted, arraigned, and have the time to file discovery requests before the 30-day expiration period for Rocky River Police Department's

videotapes of traffic stops. A discovery request in a criminal case should not be the event that triggers a police department to save potentially exculpatory evidence of a crime.

{¶52} Moreover, there is evidence in this case that the Rocky River Police Department had a retention policy for dash-camera videos, but that the officer failed to comply with those policies. The department has a policy that clearly requires police officers to save the video recordings that contain evidence of "a potential criminal matter[.]" The department's manual concerning mobile audio and video recordings also states that "[o]fficers should ensure relevant recordings are preserved."

{¶53} Further, I find it incredulous that the officer did not save the video because it "did not occur to [him]" and "nothing stood out" about the traffic stop to believe that saving the video of the traffic stop was necessary. The officer found a gun inside a child's car seat and arrested Spencer for a felony. Spencer was charged with having weapons while under disability, a third-degree felony carrying a potential three-year prison term, and improperly handling firearms in a motor vehicle, a felony of the fourth degree carrying a potential 18-month prison term.

{¶54} Overall, the failure to retain evidence, exculpatory or not, of an incident that leads to a felony charge is serious. Video evidence of interactions between police officers and members of the public have been crucial in numerous cases across the country, vindicating both police officers and those arrested and accused of serious offenses. Therefore, the lack of that evidence in this case cannot go unmentioned.