[Cite as *State v. Ealy*, 2010-Ohio-4531.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23391
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-TRD-3189
v.	:	
	:	(Criminal Appeal from Dayton
LARRY EALY	:	Municipal Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 24th day of September, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Larry Ealy appeals from his conviction and sentence for failure to reinstate his driver's license, for failure to use a seat belt, and failure to signal a turn. He contends that the trial court erred "when it allowed the trial to go forward in the absence of the arresting officer's cruiser video tape of Mr.

Ealy's arrest." He further contends that the trial court erred in admitting a report from the Ohio Bureau of Motor Vehicles in evidence without proper authentication.

{¶ 2} Ealy has failed to show how the cruiser video tape, assuming that it was wrongfully withheld from him, was material to the issue of his guilt or innocence, in view of the fact that the officer did not turn his cruiser video recorder on until after he had observed the turn-signal and seat-belt violations. Ealy contends that the tape would have shown that the stop was pretextual, but pretextual stops are permitted under *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89, and *Dayton v. Erickson* (1996), 76 Ohio St.3d 3. Because Ealy has failed to show that the video tape would have been of any potential use to him, we conclude that his lack of access to the video tape, even if it was wrongfully withheld from him, was harmless beyond a reasonable doubt.

{¶ 3} Ealy waived any objection to the admission of the BMV report when he was asked if he had any objection to its admission in evidence, and responded in the negative. Although plain error does not require an affirmative act to preserve it for appellate review, it may nevertheless be expressly waived.

{¶ 4} The judgment of the trial court is Affirmed.

I

{¶ 5} Dayton police officer Nathan Speelman was on patrol on February 10, 2008, when he saw Ealy make a left turn without having activated his turn signal at least 100 feet before the intersection. Ealy did signal between 25 to 50 feet before the intersection. When Ealy made his left turn onto Salem Avenue, Speelman could

see that both Ealy and his passenger were not wearing seatbelts.

{¶ 6} Speelman then saw Ealy shift from the left lane of travel to the right lane, without signaling. Then, Ealy turned right onto Plymouth Avenue. At that time, Speelman stopped Ealy:

{¶ 7} "Q. After he made his turn what did you do with regard to him at that point?

{¶ 8} "A. He mean [sic] his turn onto Plymouth?

{¶ 9} "Q. Yes.

{¶ 10} "A. At that time I activated my emergency equipment to perform a traffic stop."

{¶ 11} When Speelman activates his overhead lights, his cruiser video recording system is automatically engaged:

{¶ 12} "Q. Now when you made the stop is your cam corder – cam cruiser recorder automatically activated and at what point was it running?

{¶ 13} "A. As soon as I activate the overhead lights the camera will turn on.

{¶ 14} "Q. And you made the activation right at (inaudible) and Salem?

{¶ 15} "A. That was while we were traveling eastbound on Plymouth so right after you had made your right hand turn off of Salem Avenue.

{¶ 16} "Q. But I wasn't ticketed for failure to signal at the lane change?

{¶ 17} "A. That is correct.

{¶ 18} "Q. Why is that?

{¶ 19} "A. I didn't feel it was necessary."

{¶ 20} When Speelman ran Ealy's identifying information on his cruiser

computer, he determined that Ealy's driver's license was suspended. Ealy was charged with failure to reinstate his driver's license, with failure to signal a turn properly, and with failure to wear a seatbelt.

{¶ 21} Ealy moved to suppress the evidence. Following a hearing, his motion was overruled. Numerous other ancillary proceedings were had, none of which are germane to this appeal. Ealy elected to proceed to a jury trial without a lawyer, although an attorney was present to advise him as necessary.

{¶ 22} The jury found Ealy guilty as charged, a judgment of conviction was entered, and he was sentenced accordingly. From his conviction and sentence, Ealy appeals.

II

{¶ 23} Ealy's First Assignment of Error is as follows:

{¶ 24} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS."

{¶ 25} When Ealy's appellate counsel filed his brief, he did not have a transcript of Officer Speelman's testimony at the suppression hearing. He argued, in support of this assignment of error, that the State had not met its burden to establish a proper basis for the traffic stop.

{¶ 26} Since Ealy's brief was filed, counsel obtained a transcript of Officer Speelman's testimony at the suppression hearing. Upon reviewing that transcript, counsel concluded that this assignment of error is without merit. Counsel has filed an express withdrawal of this assignment of error from this court's consideration, and therefore we need not consider it.

III

{¶ 27} Ealy's Second Assignment of Error is as follows:

{¶ 28} "THE TRIAL COURT COMMITTED ERROR WHEN IT ALLOWED THE TRIAL TO GO FORWARD IN THE ABSENCE OF THE ARRESTING OFFICER'S CRUISER VIDEO TAPE OF MR. EALY'S ARREST."

{¶ 29} As Ealy points out, there is a distinction between the State's failure to preserve evidence that is definitely exculpatory and material and evidence that is merely potentially useful to the defense. In order to qualify as a basis for relief under *Maryland v. Brady* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, the State's failure to preserve evidence that is merely potentially useful to the defense must have been in bad faith. *Arizona v. Youngblood* (1988), 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281.

{¶ 30} Officer Speelman testified that he did not turn on his overhead lights until after he observed the turn-signal and seat-belt violations, and, obviously, after he had observed Ealy, whom he later determined to be under an unreinstated license suspension, driving the car. Officer Speelman also testified that his cruiser video recorder was not activated until he turned on his overhead lights, when it was automatically activated. There is no reason to disbelieve this testimony, which was not contradicted. The State argues that nothing recorded on the cruiser video recording system could have been even potentially useful to the defense.

{¶ 31} Ealy's only argument that the cruiser video tape was potentially useful to his defense is as follows:

{¶ 32} "Irrespective of the position this Court takes on the issue of whether Mr.

Ealy's police tape should be considered 'materially exculpatory' or 'potentially useful,' in both [*State v.*] *Combs*[, Del. App. No. 03CA-C-12-073, 2004-Ohio-6574] and the case sub judice, there existed a police video tape which would have been at least 'potentially useful' at trial. This is so in the case at bar because the existence of the tape would have answered definitively whether or not the arresting Dayton Police officer did in fact stop Mr. Ealy because of the alleged turn signal violations, or rather if the officer stopped Mr. Ealy pretextually, as Mr. Ealy repeatedly suggested."

{¶ 33} It is immaterial that a police officer uses a traffic violation as a pretext for making a stop, so long as the police officer has, in fact, observed a traffic violation that would justify a stop. *Whren v. United States*, supra, and *Dayton v. Erickson*, supra. Therefore, the only potential use in his defense that Ealy has been able to identify for the cruiser video tape is not, in fact, material.

{¶ 34} In view of the fact that Ealy has been unable to identify any potential use for the cruiser video tape, we conclude that even if Ealy could demonstrate bad faith on this record, he cannot demonstrate prejudice that would justify a reversal of his conviction.

{¶ 35} Ealy's Second Assignment of Error is overruled.

IV

{¶ 36} Ealy's Third Assignment of Error is as follows:

{¶ 37} "THE TRIAL COURT COMMITTED ERROR WHEN IT ALLOWED AN UNCERTIFIED BMV DOCUMENT TO BE USED AND ADMITTED AT TRIAL."

{¶ 38} The significance of structural error, compared and contrasted with plain error, is laid out in *Johnson v. U.S.* (1997), 520 U.S. 461, 117 S.Ct. 1544, 137

L.Ed.2d 718. Plain error is error that was not brought to the attention of the trial court, but which is both sufficiently plain and sufficiently prejudicial as to merit reversal on appeal despite the fact that it was not brought to the attention of the trial court. Structural error is error that affects the entire structural framework of the proceedings to such an extent that harmless-error analysis is inappropriate; i.e., prejudice is presumed. Id., at 468. Of course, an error might satisfy both tests, so that the error would be both plain and structural.

{¶ 39} The failure to empanel a jury, in a felony trial, is an example of an error that is both plain and structural. The defendant is not required to take an affirmative action to preserve the error for appellate review, and prejudice is presumed – the defendant is not required to show that the outcome of his trial would likely have been different if he had been tried to a jury. And yet, a defendant may affirmatively waive a jury trial, and elect to be tried to the court, alone. A defendant may choose, for whatever reason, to affirmatively waive a due process right.

{¶ 40} Here, Ealy contends that the BMV record of his driver's license was not properly authenticated. He claims that he objected to its admission at trial, citing p. 127 of the transcript:

{¶ 41} "Q. I'm going to hand you what's been marked as State's Exhibit '2.' Do you recognize that document as a BMV report?

{¶ 42} "A. Yes ma'am.

{¶ 43} "Q. And you don't actually have the printed out report in your cruiser but you have a screen that's displayed

{¶ 44} "THE DEFENDANT: I want to object to that. He can't testify to what

that is. He's not –

{¶ 45} "THE COURT: I'm sorry. Repeat your question.

{¶ 46} "THE STATE: Your Honor I'm asking him if he recognizes what that is and if it contains any information that was available to him in the cruiser – the BMV report.

{¶ 47} "THE COURT: All right. Overruled.

{¶ 48} "Q. You recognize that as being the same thing that you had on the KDT?

{¶ 49} "A. Yes ma'am.

{¶ 50} "Q. And this is (inaudible) record official BMV report. Your Honor I would ask that the court take note of it being self authenticating as such.

{¶ 51} "THE COURT: It is self authenticating. Is that the report from his cruiser or that was forwarded by the BMV?

{¶ 52} "THE STATE: This is the report forwarded by the BMV your Honor."

{¶ 53} The context of Ealy's objection was not the admission of the exhibit, but the questioning of the witness from the exhibit. The State's motion to admit the exhibit came later, and, as the State notes, Derrick Hooten, Supervisor of the Bureau of Motor Vehicles Regional Center had testified in the meantime that he is the keeper of the records, and he identified the exhibit as being the official sealed record of Ealy's driving history. It is perhaps not surprising, then, that when the State did offer this exhibit in evidence, at the end of Hooten's direct testimony, Ealy said he had no objection:

{¶ 54} "THE STATE: Your Honor I'd announce [sic] that State's Exhibit '2' be

admitted into evidence.

{¶ 55} "THE COURT: You are offering that at this time?

{¶ 56} "THE STATE: Yes.

{¶ 57} "THE COURT: Any objection?

{¶ 58} "THE DEFENDANT: No your Honor.

{¶ 59} "THE COURT: Admitted. Exhibit '2' for the record. Any other questions?"

{¶ 60} Ealy consented to the admission of this exhibit when he told the trial court he had no objection to its admission. He cannot now be heard to complain that the trial court admitted this exhibit. Ealy's Third Assignment of Error is overruled.

V

{¶ 61} Ealy's Second and Third assignments of error having been overruled, and his First Assignment of Error having been withdrawn, the judgment of the trial court is Affirmed.

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FROELICH and OSOWIK, JJ., concur.

(Hon. Thomas J. Osowik, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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