

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLINTON COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2014-07-010
 :
 - vs - : OPINION
 : 5/4/2015
 :
 WILBUR F. HAMILTON, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI 2013-5152

Richard W. Moyer, Clinton County Prosecuting Attorney, Matthew M. Suellentrop, 103 East Main Street, Wilmington, Ohio 45177, for plaintiff-appellee

Dennis & Williams Co., L.P.A., Joseph H. Dennis, 245 N. South Street, Wilmington, Ohio 45177, for defendant-appellant

HENDRICKSON, J.

{¶ 1} Defendant-appellant, Wilbur Hamilton, appeals his conviction for illegal manufacture of drugs in the Clinton County Court of Common Pleas. For the reasons detailed below, we affirm.

{¶ 2} On May 17, 2013, law enforcement officers executed a search warrant at Hamilton's home and found evidence that Hamilton was involved in the manufacture of

methamphetamine. While at the scene, officers with the Warren County Drug Task Force Clandestine Lab Team neutralized and disposed of several hazardous items believed to be used in the manufacture of methamphetamine. The case summary provided the following items were disposed of: (1) a glass jar with bi-layer substance, (2) a Gatorade bottle believed to be left over from a "one pot" meth lab, (3) rubber tubing that tested positive for Hydrogen Chloride (HCL) gases, (4) one gallon of muriatic acid labeled "Do not Touch" with permanent marker, and (5) DampRid, which is used in the production of HCL gases.

{¶ 3} Hamilton later challenged the destruction of the items found at his property and argued that the charges against him should be dismissed based on due process violations. Hamilton alleged that he was deprived "of his procedural due process rights when the evidence was destroyed before there was any opportunity to move for preservation. His substantive due process rights were violated when he is denied the right to access and potentially exculpatory evidence." [sic]

{¶ 4} On February 3, 2014, the trial court held a hearing on Hamilton's motion to dismiss for failure to preserve evidence. At the hearing, the state presented testimony of Special Agent Paul Aspacher and Detective Scott Baker. Agent Aspacher is employed by the Ohio Attorney General's Office Bureau of Criminal Investigations and is a safety officer utilized in the cleanup of clandestine methamphetamine labs. Agent Aspacher testified about the process for manufacturing methamphetamine, including the "one pot" method, which Hamilton was suspected of utilizing in his operation. The "one pot" method involves the mixture of various household materials, as well as pseudoephedrine into a single vessel, which is then processed into the finished methamphetamine product. Agent Aspacher also testified about the volatile and dangerous chemicals used in that process and explained that the hazardous items used in the production of methamphetamine must be destroyed on scene because of the dangers posed to human health.

{¶ 5} Next, Detective Baker was called to testify about the specific items found at Hamilton's residence. Detective Baker testified that the Gatorade bottle found at Hamilton's residence was next to a coffee grinder containing a white powder, which is consistent with a methamphetamine operation. The Gatorade bottle tested positive for anhydrous ammonia, a toxic chemical used in the manufacture of methamphetamine. In addition, Detective Baker stated that DampRid is generally mixed with muriatic acid to form HCL gas, another hazardous chemical used in the manufacture of methamphetamine. Detective Baker further explained that the chemicals and instrumentalities used in the manufacture of methamphetamine are hazardous to human health, and could even corrode evidence cages and lockers because of the high acidity of the chemicals. As a result, Detective Baker stated that those hazardous items are neutralized and disposed of on scene, which occurred in the present case.

{¶ 6} After the hearing, the trial court found that Hamilton's due process rights were not violated and denied his motion for dismissal. Thereafter, Hamilton pled no contest to the illegal manufacture of a controlled substance in violation of R.C. 2925.04(A), a second-degree felony. The trial court then made a finding of guilt and imposed a five-year prison sentence. Hamilton now appeals, raising one assignment of error for review.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT/APPELLANT IN OVERRULING THE MOTION TO DISMISS FOR FAILURE TO PRESERVE EVIDENCE. THE TRIAL COURT FAILED TO SANCTION THE STATE IN ANY WAY FOR THIS DUE PROCESS VIOLATION, TO THE PREJUDICE OF DEFENDANT.

{¶ 9} In his sole assignment of error, Hamilton claims the trial court erred in denying his motion to dismiss because the state destroyed materially exculpatory evidence. We disagree.

{¶ 10} "Depending on the nature of the evidence, different tests are applied to determine whether the state's failure to preserve evidence amounts to the level of a due process violation." *State v. Gatliff*, 12th Dist. Clermont No. CA2012-06-045, 2013-Ohio-2862, ¶ 40, citing *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, ¶ 73-77. The state's failure to preserve "materially exculpatory" evidence, regardless of whether such failure was done in good faith or bad faith, violates due process. *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528 (1984). Evidence is constitutionally material when it possesses "an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Powell* at ¶ 74. The defendant bears the burden to show that the evidence was materially exculpatory. *Id.*

{¶ 11} "However, a different rule is used when the evidence is merely 'potentially useful.'" *Id.* at ¶ 41, quoting *State v. Geeslin*, 116 Ohio St .3d 252, 2007-Ohio-5239 at ¶ 9-10. "Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S .Ct. 333 (1988). Bad faith implies more than bad judgment or negligence, rather "[i]t 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 fraud." *Powell* at ¶ 81.

{¶ 12} We find that Hamilton's due process rights were not violated when the state failed to preserve the items seized from Hamilton's residence. As an initial matter, we disagree with Hamilton's assertion that the items destroyed were materially exculpatory. Although the chemicals and instrumentalities were all household items that could be purchased at any "hardware store," the state presented overwhelming evidence that those materials are also commonly used in the "one pot" cooking method, which Hamilton was

accused of utilizing in his methamphetamine operation. In addition, the undisputed evidence at the hearing indicates that the items destroyed were photographed and tested, and the photographs and test results were available to Hamilton. Based on our review of the evidence, we find the items destroyed at the scene did not provide "materially exculpatory" evidence.

{¶ 13} Because the items did not provide any materially exculpatory evidence, our inquiry turns to whether it would be potentially useful and whether the evidence was destroyed in bad faith. *Gatliff*, 2013-Ohio-2862 at ¶ 43. Even assuming that the items taken from Hamilton's residence would be potentially useful, Hamilton has failed to point to any evidence to show they were destroyed in bad faith. The undisputed testimony provides that the items discovered on the scene were highly volatile and dangerous substances that posed serious health risks. The evidence presented by Agent Aspacher and Detective Baker supports the position that the items could not practically be preserved, posed serious health risks, and offered limited, if any, evidentiary value to the case. Therefore, Hamilton has not shown the state acted in bad faith necessary to support his allegations that he was deprived of due process. Accordingly, we find the trial court did not err in denying Hamilton's motion based on alleged due process violations. Hamilton's sole assignment of error is overruled.

{¶ 14} Judgment affirmed.

PIPER, P.J., and M. POWELL, J., concur.