Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-188

MARCH TERM, 2019

State of Vermont v. Shann M. Senese*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 76-10-16 Bncs
		Trial Judge: David A. Howard

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a judgment for the State, based on her consent, in this civil suspension proceeding. She attempts to challenge the court's pretrial denial of her motion to suppress and dismiss, and the denial of her motion for sanctions. We conclude that because defendant consented to judgment, she cannot now raise these arguments on appeal. Even if she could, we would reject her arguments. We therefore affirm.

Defendant was processed for suspected driving under the influence (DUI) in October 2016. She was charged with DUI and civil suspension proceedings were initiated. In August 2017, she filed a "motion to suppress and dismiss and motion for sanctions" in both cases.[1] She argued that she was entitled to relief because a video of her DUI processing was unavailable.[2] The deputy sheriff who processed defendant did so at the Vermont State Police barracks and thus relied on that agency to preserve and send him a copy of the recording. It was discovered some months later that the processing video had not been preserved on the VSP recording system. Defendant asked the court to apply the "lost-evidence" test set forth in State v. Bailey, 144 Vt. 86, 94-96 (1984), to suppress "all events and testimony of that which occurred during processing at the [Vermont State Police] barracks," including her breath-test results. She asserted that "this sanction should result in the dismissal of the civil suspension proceedings." Following a hearing, the court denied the motion. It acknowledged that the rules of discovery and statutes specific to DUI cases and civil suspension matters required the State to produce any existing audio or video recording of a processing. See V.R.Cr.P. 16(e); V.R.C.P. 80.5(e); 23 V.S.A. § 1203(k). Because the video recording of the DUI processing had not been preserved, the court applied the Bailey test. Under that test, if evidence has been lost, and "if a defendant shows a reasonable possibility that the lost evidence would be exculpatory, then the proper sanction depends 'upon a pragmatic balancing of three factors: (1) the degree of negligence or bad faith on the part of the government; (2) the importance of the evidence lost; and (3) other evidence of guilt adduced at trial.' " State v. Delisle, 162 Vt. 293, 310 (1994) (quoting Bailey, 144 Vt. at 94-95).

[1] It appears that defendant's criminal case remains pending.

[2] A video taken at the roadside was provided to defendant in response to counsel's request.

The court found, as a threshold matter, that defendant failed to show a reasonable probability that the videotape would have been exculpatory or even favorable. Even if she could satisfy this threshold requirement, the court continued, the State did not act in bad faith and was at most minorly negligent; any recording would have been of limited importance in the case against defendant; and there was substantial other evidence as to the strength of the State's case, including field sobriety tests, the officer's observations, the fact that defendant had driven her car into a telephone pole for no apparent reason, defendant's admission to consuming alcohol, and her test result of .174%.

The court noted that, at the suppression hearing, the processing officer had testified that the recording device may have been left on during defendant's call with her attorney. Based on this testimony, defendant argued for the first time at the hearing that the court should suppress her evidentiary test because the alleged recording of her conversation with her attorney violated her right to private consultation with counsel. The court found that defendant was not aware of any possibility that her conversation was being recorded, if in fact it had been. It found no evidence that defendant asked about any recording, that she was told it might be happening, or that any recording was in fact occurring. Defendant did not testify that she was concerned about being recorded while talking with counsel or that it restricted her conversation in any way. The court thus rejected this argument and denied the motion to suppress.

Prior to the final civil suspension hearing, defendant stipulated in writing "to the requisite findings required under 23 V.S.A. § 1205(h)(1) in order for the court to enter judgment for the State." She stated that her stipulation was "being made in para matiera [sic] with a Notice of Appeal and a Motion to Stay the suspension notice." In her notice of appeal, defendant stated that she was challenging the trial court's ruling on her motion to suppress.

We find nothing in the rules and law applicable to civil suspension proceedings that would allow defendant to consent to judgment for the State but unilaterally "preserve" her right to challenge a pretrial ruling. See 23 V.S.A. § 1205(i), (k); V.R.C.P. 80.5(k) (stating that civil rules (with certain exceptions) apply to civil suspension proceedings, "provided that where the court finds that a procedure provided for in those rules would be inconsistent with the summary procedures contemplated by statute, it may order that a different procedure be followed"). In the criminal context, a consent to judgment through a guilty or nolo contendre plea waives a party's ability to raise such challenges. See In re Torres, 2004 VT 66, ¶ 9, 177 Vt. 507 (mem.) ("It is well settled that a defendant who knowingly and voluntarily enters a guilty plea waives all non-jurisdictional defects in the prior proceedings." (quotation omitted)); State v. Armstrong, 148 Vt. 344, 346 (1987) ("A voluntary plea of guilty waives all nonjurisdictional defects in the proceedings leading up to the plea . . . ."). The criminal rules expressly provide for entry of a conditional plea of guilty or nolo contendere—"reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion"—but such pleas may be entered only "[w]ith the approval of the court and the consent of the state." V.R.Cr.P. 11(a)(2). Assuming arguendo that Rule 11(a)(2) applied here, defendant did not satisfy the rule's requirements because there has been no showing that the court and the State consented to this arrangement. As noted, the civil rules do not provide for a conditional consent to judgment in civil suspension proceedings, which are designed to be "summary" in nature. V.R.C.P. 80.5(f)(3). We conclude that by stipulating to the necessary findings under 23 V.S.A. § 1205(h)(1) in the State's favor, defendant cannot now argue that those findings are unsupported.

Even if we were to address her arguments, however, we would find them without merit. Defendant asserts that the court failed to address her request for discovery sanctions. She also

appears to suggest that the court's decision is inconsistent with the duty to disclose exculpatory evidence in Brady v. Maryland, 373 U.S. 83 (1963) and related cases. Finally, defendant argues that the court erred in evaluating the evidence with respect to the Bailey "lost-evidence" test.

Defendant asked the court to apply Bailey and suppress "all events and testimony of that which occurred during processing at the [Vermont State Police] barracks," including her breath-test results. She asserted that "this sanction should result in the dismissal of the civil suspension proceedings." The court recognized the relief sought by defendant and looked to Bailey "to determine if suppression of any other evidence is required or dismissal of a charge is warranted." We recognized in Bailey, moreover, that "lost evidence cases are essentially permutations of failure-to-disclose cases, and derive from principles developed in Brady." 144 Vt. at 94 (quotation and brackets omitted)). While the U.S. Supreme Court has adopted a "bad faith" test as the federal constitutional standard for proof of denial of due process of law when the State loses or fails to preserve evidence, Arizona v. Youngblood, 488 U.S. 51, 58 (1988), we have adopted the Bailey test "as the state constitutional standard." Delisle, 162 Vt. at 310. The court here found an absence of bad faith, and it concluded that the Bailey test did not warrant suppression of the evidence. The court applied the appropriate test to evaluate defendant's claims.

Even though the court found that defendant failed to satisfy the threshold requirement of Bailey, it assumed arguendo that she had and considered the remaining factors. While defendant disagrees with the court's conclusions with respect to the Bailey factors, she fails to show error. Defendant essentially wars with the court's assessment of the weight of the evidence and its credibility determinations, matters reserved exclusively for the trial court. See Mullin v. Phelps, 162 Vt. 250, 261, 647 A.2d 714, 720 (1994) (explaining that Supreme Court does not reweigh evidence or make credibility findings de novo). While defendant argues that the State engaged in "gross misconduct" by losing the videotape, for example, the court found that the State did not act in bad faith and that it was at most minorly negligent. Contrary to defendant's assertion, moreover, the court was obviously mindful of the statutory obligation to produce videotapes as it cited this requirement in its decision. As to the second factor, we note that the court did consider the possible impeachment value of the videotape in concluding that the videotape would have been of limited importance in the case, despite defendant's suggestion to the contrary. Defendant concedes that the third Bailey factor—other evidence of guilt—favors the State. It is not the role of this Court to reweigh the Bailey factors on appeal. Thus, even if we were to consider defendant's challenges to the court's pretrial ruling, we would reject them.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice