COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-0709

Cir. Ct. No. 01TR002647

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

COUNTY OF SAUK,

PLAINTIFF-RESPONDENT,

V.

JAMMIE M. DOUGLAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Jammie Douglas appeals a judgment of the circuit court finding her guilty of operating a motor vehicle while under the influence of an intoxicant as a first offense. At the time of the incident, two blood samples

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

were drawn from Douglas. The blood samples were sent to the State Laboratory of Hygiene, where one sample was opened and tested. The second sample was stored in a cooler, but was eventually destroyed. Douglas argues that the case should have been dismissed because the prosecution failed to ensure that the blood sample was not destroyed. This failure, she contends, denied her the chance to challenge the results of the original alcohol content analysis by retesting the blood sample. We disagree and affirm.

Background

¶2 On April 15, 2001, Douglas was stopped by a police officer and cited for operating a motor vehicle while intoxicated. Two samples of her blood were sent to the State Laboratory of Hygiene for testing. On April 23, 2001, the samples were received by the lab and one of the blood samples was opened and tested; the results of the test showed a blood alcohol content of .19%. The other blood sample was stored.

¶3 On November 26, 2001, more than six months after the lab had received the samples, the parties learned during a pretrial conference that the second sample had not been destroyed. During this conference, the assistant district attorney telephoned the lab to see if the sample was still available for testing and, after being told that it was still available, asked that the sample be retained so that Douglas could inspect and test it.[2] Nonetheless, three days later, on November 29, 2001, the blood sample was destroyed.

[2] Douglas asserts that "the district attorney's office confirmed by telephone both that the blood samples were still available and that it would be preserved" without citing to anything in the record to support the assertion. While the State agrees that the district attorney's office "confirmed by telephone that the State Laboratory of Hygiene still had the Defendant-Appellant's
(continued)

¶4 Once Douglas discovered that the blood sample was no longer available, she moved the court to dismiss the case on the ground that exculpatory and material evidence had been destroyed. A hearing was held and the State produced evidence indicating that, despite the phone call, the second sample was destroyed pursuant to lab policy. That policy allows that when the sample is being held for implied consent purposes, it "will be retained no longer than six months unless otherwise requested by agency or subject." Under the policy, if a party wants a sample maintained beyond the six-month period, he or she must submit a written request. A chemist with the lab testified that he had found no log or written documentation of the telephonic request and that a written letter was necessary in order for the lab to begin the "save process." The district attorney's office sent a letter to the lab requesting that the sample be released "to the laboratory of [Douglas' attorney's] choice upon his written request." However, this letter was sent on December 7, 2001, eight days after the sample had been destroyed.

¶5 The circuit court denied the motion to dismiss. Subsequently, a trial to the court was held on stipulated facts and the court found Douglas guilty of operating a motor vehicle while intoxicated and guilty of operating a motor vehicle with a prohibited alcohol concentration.

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blood sample available," there is no mention made of whether they "confirmed … that it would be preserved," as Douglas argues. However, because the State never argues otherwise, we will assume that not only did they inquire about whether the blood sample was still available, but that they also requested that the lab retain the sample for further testing.

Discussion

¶6 Douglas does not argue that the State Lab's written-request policy for the handling of blood samples is itself unreasonable. Rather, she contends that once a State Lab employee was put on notice that a party wanted the sample for retesting, it was a violation of due process for any employee in the lab to destroy the sample pursuant to the normal policy. Douglas further argues that the circuit court misconstrued the applicable legal test discussed in ***Garfoot v. Fireman's Fund Insurance Co.***, 228 Wis. 2d 707, 599 N.W.2d 411 (Ct. App. 1999). We disagree.

¶7 Douglas asserts that ***Garfoot*** stands for the proposition that the "overarching issue in determining the remedy that ought to be employed is one of fairness" and that a party that profits in litigation because it improperly destroyed evidence has engaged in "egregious conduct" because such conduct "override[s] the fairness to which the other party is [entitled]." Douglas, however, does not come to grips with the plain language in ***Garfoot***. Suppression, under ***Garfoot***, is a discretionary decision for the circuit court. ***Id.*** at 717. In exercising its discretion to grant a remedy, the circuit court must address whether there has been "bad faith" or "egregious conduct."

> "A finding of 'bad faith' or egregious conduct in the context of a document destruction case involves more than negligence; rather, it consists of a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process."

Id. at 719 (quoting ***Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.***, 177 Wis. 2d 523, 533, 502 N.W.2d 881 (Ct. App. 1993)).[3]

¶8 In this case, the circuit court observed the proper standard. The court acknowledged that "dismissal as a sanction for destruction of evidence requires a determination that there was a conscious attempt to affect the outcome of the litigation or a flagrant knowing disregard of the judicial process."

¶9 After examining the relevant facts and applying the correct standard of law, the circuit court found that the destruction of the blood sample was due to "innocent failure" and that the facts simply did not support a conclusion that the destruction of the sample was an attempt to affect the outcome of the litigation or was a willful disregard of the judicial process. We agree. There was no evidence that the destruction was the result of anything more than mere negligence on the part of the lab. Mere negligence is not sufficient under ***Garfoot***. *See* ***Garfoot***, 228 Wis. 2d at 719. Furthermore, unlike ***Garfoot***, the destruction of the evidence here did not preclude testing. Rather, it denied Douglas an opportunity to have a second test performed. There is, however, no suggestion in the record that the first test was unreliable.[4] Accordingly, we affirm the circuit court.

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[3] The State, relying on ***State v. Disch***, 119 Wis. 2d 461, 351 N.W.2d 492 (1984), and ***State v. Ehlen***, 119 Wis. 2d 451, 351 N.W.2d 503 (1984), seems to argue that it does not matter whether the lab employees acted in bad faith or egregiously when they destroyed the blood sample because the employees had no due process obligation to maintain any sample of Douglas's blood for future testing. We need not reach this issue because we conclude that the circuit court properly determined that there was no bad faith or egregious conduct.

[4] Douglas did, in fact, have a six-month window in which to seek the second sample, but did not do so. We also agree with the State's observation that, as in ***Disch***, the defendant here did not establish that the blood sample remained a testable sample more than six months after collection and, therefore, failed to establish materiality. ***Disch,*** 119 Wis. 2d at 467-68.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.