County Criminal Court: CRIMINAL LAW – Evidence – Since the trial court applied the incorrect standard in its order dismissing Appellee's charge for the officer's failure to videotape the DUI investigation, this cause is remanded. *State v. Dustin Funderburg*, No. 12-CF-004377-ES (Fla. 6th Cir. App. Ct. June 28, 2013).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

STATE OF FLORIDA,
Appellant,

v.

UCN: 512012CF004377A000ES
Appeal No: CRC1204377CFAES
L.T. No: 11-01010XGBTES

DUSTIN FUNDERBURG,
Appellee.
_____/

Appeal from Pasco County Court

County Judge Robert P. Cole

Matthew O. Parrish, A.S.A.
for Appellant

Randall C. Grantham, Esq.
for Appellee

ORDER AND OPINION

The State challenges the trial court order granting Appellee's motion to dismiss for the law enforcement officer's failure to videotape the field sobriety exercises during the DUI investigation. In its order, the trial court dismissed Appellee's charge as a denial of due process. Since it appears that the trial court was not applying the proper standard, we shall remand this cause as set forth below.

STATEMENT OF CASE AND FACTS

On December 14, 2011, Appellee was charged with DUI. Appellee entered a plea of not guilty. Appellee filed a motion to suppress evidence derived from the stop. Appellee also filed a motion to dismiss based on the deputy's failure to not videotape the field sobriety exercises during the investigation.

At the May 22, 2012 hearing held before Judge Cole, the following was presented:

Deputy Shane Metzler testified that he was driving southbound on US 41 at around 4:00 in the morning in his recording camera equipped vehicle when he noticed Appellee's vehicle, a silver BMW. The vehicle made a sudden turn into the parking lot of a closed business. While passing by the same location a few minutes later, Deputy Metzler observed a white female walking northbound with the silver BMW behind her. The female flipped a bird to the driver after he drove up on the curb and almost hit her. The driver then began honking his horn. Suspecting a domestic dispute or aggravated assault, Deputy Metzler activated his lights and made contact with the female. When he did, the BMW sped off out of sight towards the rear of the parking lot. Deputy Metzler saw Appellee behind the wheel.

Deputy Metzler spoke to the female driver and learned she was in a fight with her ex-boyfriend (the BMW's driver) and told him to let her out so she could walk home. Since the female appeared very intoxicated, Deputy Metzler asked her if Appellee had been drinking as well, to which she replied, "Yep, he's drunk." At this point, Deputy Metzler parked his unmarked police vehicle by the side of the road with the emergency lights flashing to keep traffic from hitting the female who remained at the vehicle. He proceeded on foot to the rear of the parking lot. Deputy Metzler did not know if the driver was still with the car, but was sure the car at least was still there since there was no other way to get out without driving past them. Given how the BMW drove away when he first made contact with the female, Deputy Metzler did not expect to find Appellee. Deputy Metzler found the silver BMW parked in the back of the complex—out of sight of US 41 and the deputy's vehicle. Appellee was still sitting in the driver's seat with the keys on the passenger floorboard. Deputy Metzler had already called for a canine before he knew what was going on. Three or four officers arrived within minutes.

At least one officer stayed with the female, but he did not know that the other officer was there at the time. Deputy Metzler was around the back of the building and could not see to the front to know if other officers had arrived.

Deputy Metzler made contact with Appellee and took his statement regarding the situation. During the interview, Deputy Metzler noticed that Appellee had bloodshot, watery, and glassy eyes; a strong odor of alcohol coming from his breath; slurred speech; and gave inconsistent answers to questions. Appellee also admitted to drinking that evening. Based on these observations, Deputy Metzler intended to begin a more thorough investigation for possible DUI.

When Deputy Metzler made contact with Appellee, he was no longer able to see his police vehicle. He did not know if other law enforcement had responded to the scene at that time. To avoid re-escalating the situation between Appellee and his ex-girlfriend, Deputy Metzler chose to have Appellee perform field sobriety exercises near the BMW instead of returning to the patrol vehicle where his camera was. Deputy Metzler could not move his car to Appellee at that point because his car was being used for traffic control at that point. Appellee performed poorly on the field sobriety exercises. Appellee was placed under arrest for DUI. A video was made of the female on the side of the road. According to defense counsel, Appellee can be heard speaking with Deputy Metzler on the video.

Appellant testified that he thought that he did well on the field sobriety exercises, other than being nervous.

The trial court entered an order denying Appellee's motion to suppress that challenged the basis of the stop, but granted the motion to dismiss based on the failure to videotape. The trial court concluded that the failure to videotape was a violation of due process, deprived Appellee of potential exculpatory evidence, and Deputy Metzler's stated reasons for not videotaping were insufficient. The trial court's order was rendered on June 4, 2012. The State filed a timely notice of appeal on June 14, 2012.

LAW AND ANALYSIS

The State argues that the trial court erred by granting Appellee's motion to dismiss for the officer's failure to use his video recording equipment in the DUI investigation. In its order, the trial court found that the failure to videotape the field sobriety exercises was a denial of due process and that Deputy Metzler's excuse for not videotaping the field sobriety exercises was not sufficient. The trial court also made a factual finding that the conduct violated the written directions of the Pasco County Sheriff's Office, which deprived Appellee of potentially exculpatory evidence. While the trial court cited State v. Powers, 555 So. 2d 888 (Fla. 2d DCA 1990), it appears that the trial court applied the wrong standard.

As in this case, the officers in Powers did not videotape the defendant's DUI investigation. Likewise, the issue was not the failure to preserve evidence, but rather the failure to gather and preserve evidence in a particular manner. Id., at 890. In its reasoning, the Second District noted that if the State were required in its investigation of every crime "to leave no stone unturned and preserve the evidence obtained in a manner satisfactorily only to the accused, it would shift the line of fairness between the rights of the accused and the rights of society totally to one side." Id., at 890 (citing State v. Wells, 103 Idaho 137, 645 P.2d 371 (Idaho Ct. App. 1982)).

While law enforcement does not have a constitutional duty to perform any particular test, certain duties may arise once a policy of gathering evidence is established. Id., at 890; Arizona v. Youngblood, 488 U.S. 51 (1988); Bennett v. State, 23 So. 3d 782 (Fla. 2d DCA 2009). Unlike the present case, the law enforcement agency in Powers had a long-standing policy of not videotaping field sobriety exercises. Even if the officers in the instant case had a duty to preserve evidence, however, that duty was limited to evidence that could be expected to play a significant role in the defense. California v. Trombetta, 467 U.S. 479 (1984); Houser v. State, 474 So. 2d 1193 (Fla. 1985).

The State's failure to preserve potentially useful evidence does not constitute a violation of due process unless a defendant can demonstrate bad faith by law

enforcement. Arizona v. Youngblood, 488 U.S. 51 (1988). In its order, the trial court ostensibly failed to consider whether law enforcement acted in bad faith by not videotaping the field sobriety exercises. If the officer's failure to videotape the field sobriety exercises was a flagrant and deliberate act done in bad faith with the intent of prejudicing the defense, a dismissal of the DUI charge would be warranted. *See* Strahorn v. State, 436 So. 2d 447 (Fla. 2d DCA 1983); State v. Betts, 659 So. 2d 1137 (Fla. 5th DCA 1995). The dismissal of a criminal charge is the most severe sanction a court can impose for the destruction of evidence; it is to be used with the greatest caution and deliberation." State v. Thomas, 826 So. 2d 1048 (Fla. 2d DCA 2002). On remand, the trial court should first consider whether law enforcement acted in bad faith.

If the trial court finds that law enforcement did not act in bad faith, the trial court should determine whether Appellee's due process rights were violated. The trial court should be aware that law enforcement did not simply fail to preserve evidence, but did not preserve it in a manner desired by Appellee. Whatever duty law enforcement had to preserve the field sobriety exercises is limited to material matter. In other words, the evidence must have both an exculpatory value and be of such a nature that Appellee would be unable to obtain comparable evidence by other reasonably available means. Even if there is evidence that a videotape of the field sobriety exercises might have been exculpatory, it does not follow that Appellee would not have an alternate means to defend against the results of the field sobriety exercises by cross-examining the officers who witnessed the exercises or presenting other evidence regarding the reliability of the results. If there is no indication that law enforcement acted in bad faith and the defense has sufficient opportunity to question the results of the exercises, then Appellee's due process rights could not be said to be violated. California v. Trombetta, 467 U.S. 479 (1984); Houser v. State, 474 So. 2d 1193 (Fla. 1985). Therefore, it is

ORDERED that this cause is hereby REMANDED for consideration in accordance with this opinion.

DONE AND ORDERED in Chambers, at New Port Richey, Pasco County, Florida this 28th day of June 2013.

Original order entered on June 28, 2013 by Circuit Judges Stanley R. Mills, W. Lowell Bray, Jr., and Linda H. Babb.

Copies to:
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