

County Criminal Court: CRIMINAL LAW—Destruction or Loss of Evidence. It was not error to suppress evidence of field sobriety test results as a sanction for the officer’s failure to comply with the policy of the Sheriff’s Office that DUI investigations be video-recorded. Affirmed. *State of Florida v. Dustin Funderburg*, No. 16-CF-455-ES (Fla. 6th Cir. App. Ct. May 25, 2016).

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,**

**UCN: 512016CF00455A000ES
Appeal No: CRC1600455CFAES
L.T. No: 11-1010-XGBT-ES**

v.

**DUSTIN FUNDERBURG,
Appellee.**

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On appeal from County Court,
Honorable Robert P. Cole,

Office of the State Attorney,
for Appellant,

Randall C. Grantham, Esq.,
for Appellee.

ORDER AND OPINION

The trial court did not err by suppressing evidence of field sobriety test results as a sanction for the arresting officer’s failure to comply with the policy of the Pasco Sheriff’s Office that DUI investigations be video-recorded. The order of the trial court is affirmed.

STATEMENT OF THE CASE AND FACTS

This case is before the Court for the third time on appeal. Appellant was arrested for DUI in violation of § 316.193, Fla. Stat., on December 14, 2011. At the first trial had in the matter, the trial court granted Appellee’s motion to dismiss based on the failure to video-record the DUI investigation, which the court found to be a violation of due

process as having deprived Appellee of exculpatory evidence, and that the Deputy's justification for not recording the investigation was insufficient, when it was the policy of the Sheriff's Office at the time to video-record field sobriety investigations. State appealed the June 4, 2012, order of the trial court. This Court found the trial court applied the incorrect legal standard when granting the motion to dismiss, and remanded the cause for further proceedings, directing the trial court that the applicable legal standard required a finding of bad faith to support dismissal of the charges. On remand, the trial court found the Deputy acted in bad faith by failing to follow the policy of the Sheriff's Office when the Deputy had the ability to video-record the field sobriety tests and failed to do so without sufficient justification, and again dismissed the charges. State appealed the dismissal and this Court reversed the trial court's order, finding the record insufficient to support a finding that the Deputy acted in bad faith.

On remand a hearing was held on Appellee's motion to determine sanctions short of dismissal. The trial court ordered all evidence of field sobriety test results be suppressed as a sanction for the failure to record the FSTs. State appeals the order, alleging it was error to suppress the evidence and that Appellee was not entitled to any sanction.

STANDARD OF REVIEW

"Appellate review of a motion to suppress involves questions of both law and fact." *Rosenquist v. State*, 769 So. 2d 1051, 1052 (Fla. 2d DCA 2000). This Court reviews the trial court's application of the law to the facts of the case pursuant to a de novo standard. *Id.*; *Ornelas v. U.S.*, 517 U.S. 690, 698 (1996); *State v. Petion*, 992 So. 2d 889, 894 (Fla. 2d DCA 2008). Findings of fact by the trial court are reviewed for "clear error," and the Court will give deference to inferences drawn from those facts by the trial court and law enforcement officers. *Ornelas*, 517 U.S. at 699. See *Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002).

LAW AND ANALYSIS

Appellant contends that the unpreserved evidence was not materially exculpatory, and therefore Appellee was not entitled to any remedy and it was error to suppress the evidence in this case. The trial court previously held in its February 3,

2014, order, that the evidence was exculpatory because the Deputy testified that Appellee performed well on two of the FSTs, and that the opportunity to cross-examine the officer was not the equivalent of a video-recording of the FSTs.

“When determining whether a defendant’s due process rights have been violated by the State’s destruction of or failure to preserve evidence, a court must first consider whether the missing evidence was ‘materially exculpatory’ or only ‘potentially useful.’” *State v. Bennett*, 111 So. 3d 943, 945 (Fla. 2d DCA 2013). Failure to preserve evidence “that is merely ‘potentially useful,’ posing only some likelihood of exonerating a defendant,” constitutes “a denial of due process only when law enforcement acts in bad faith.” *Id.* (citing *California v. Trombetta*, 467 U.S. 479, 488 (1984); *Arizona v. Youngblood*, 488 U.S. 51, 56–58 (1988)). To be materially exculpatory, “evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Trombetta*, 467 U.S. at 486-87.

The trial court relied on *State v. Davis*, in suppressing the evidence, in which the Court held that dismissal was too harsh a sanction where there was no finding of bad faith, but the lost evidence was “material exculpatory evidence,” and therefore “the loss of such evidence is a violation of the defendant’s due process rights and the good or bad faith of the State is irrelevant.” 14 So. 3d 1130, 1132 (Fla. 4th DCA 2009). In *Davis*, the Court remanded the cause to the trial court to consider sanctions short of dismissal to address the loss of evidence, noting that possible sanctions may include precluding State from presenting evidence of the roadside sobriety tests. *Id.* at 1133.

In its previous order, this Court relied on *State v. Powers*, 555 So. 2d 888, 889 (Fla. 2d DCA 1990), in which the Court held that “the appellees’ due process rights were not violated by the sheriff’s department not video taping the appellees’ performance during field sobriety testing.” State contends that based on this analysis, lesser sanctions are not appropriate absent a finding of bad faith, because this case does not involve lost or unpreserved evidence, and that Appellee was not entitled to any remedy based on the failure to video-record the FSTs.

Appellee responds that the trial court's order is entitled to a presumption of correctness, and that the trial court found the Deputy's testimony was not credible. Appellee contends the decision to impose sanctions was within the trial court's discretion and that the trial court did not abuse its discretion in this case. See *Carr v. Reese*, 788 So. 2d 1067 (Fla. 2d DCA 2001); *Turner v. Anderson*, 376 So. 2d 899 (Fla. 2d DCA 1979).

In *Powers*, the express policy of the sheriff's office was not to video record performance tests, whereas in the instant case the Deputy acted in contravention of the Sheriff's Office express policy of video-recording FSTs. See *Powers*, 555 So. 2d 888. In *Powers* the Court held:

Law enforcement does not have a constitutional duty to perform any particular tests. Certain duties arise, however, once a policy of gathering evidence through certain tests is established. Once law enforcement has gathered and taken possession of evidence, a duty of preservation in some form attaches.

Id. at 890 (citing *Youngblood*, 488 U.S. 51). Further,

Whatever duty law enforcement has to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Id. at 891. See *Trombetta*, 467 U.S. 479. The trial court found that the Deputy testified that Appellee's performance on two parts of the FSTs would be considered exculpatory evidence. The Deputy testified on cross-examination that although Appellee exhibited signs of impairment based on his performance of four of the FSTs, Appellee performed well on two of the exercises, and therefore the trial court found a video-recording of the tests would be considered exculpatory evidence. This Court will not reverse the factual findings of the trial court absent a showing of clear error. *Pagan*, 830 So. 2d at 806. The trial court's finding on this issue is supported by the Deputy's testimony in this case. The Court finds it was not error for the trial court to suppress the evidence of the FST results in reliance on *Davis*, 14 So. 3d at 1132. The order of the trial court is affirmed.

CONCLUSION

It was not error for the trial court to suppress the evidence in this case based on the Deputy's conduct in failing to record the field sobriety tests. The order of the trial court is affirmed.

It is ORDERED AND ADJUDGED that the order of the trial court is AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 25th day of May, 2016.

Original order entered on May 25, 2016, by Circuit Judges Susan Barthle, Kimberly Campbell and Daniel D. Diskey.