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 PINELLAS COUNTY

STATE OF FLORIDA

Appellant,

Appeal No. CRC 12-00046APANO
UCN: 522012AP000046XXXXCR

CHRISTOPHER LEE HASTINGS

Appellee.
_____/

Opinion filed February 26, 2013.

Appeal from an Order Granting
Motion to Suppress
entered by the Pinellas County Court
County Judge Lorraine M. Kelly

Adam D. Rieth, Esquire
Office of the State Attorney
Attorney for Appellant

J. Kevin Hayslett, Esquire
Attorney for Appellee

**ORDER AND OPINION**

PETERS, Judge.

THIS MATTER is before the Court on Appellant, State of Florida's appeal from an order of the Pinellas County Court granting Appellee's Motion to Suppress. After reviewing the briefs and record, this Court reverses the order of the trial court.

*Background*

A deputy sheriff initiated a traffic stop of a vehicle being operated by the Appellee, Christopher Lee Hastings, for speeding and weaving within its lane of travel. Upon contact with Mr. Hastings, the deputy noticed several indications of impairment. It was also determined that the Appellee's driver's license was suspended. The deputy had Mr. Hastings perform field sobriety exercises which were videotaped. The deputy also had the Appellee submit to a horizontal gaze nystagmus (HGN) exercise which was not videotaped. The deputy testified that during the HGN exercise, the Appellee showed six out of six possible clues for impairment. There was no testimony offered at hearing that the Appellee did well on HGN. It was the policy of the Pinellas County Sheriff's Office to not videotape HGN tests. Mr. Hastings was charged with driving under the influence.

The Appellee filed a Motion to Suppress arguing in part, "[t]he Pinellas County Sheriff's Office, by promulgating and enforcing Stand Operating Procedure [...] requiring HGN tests to be done off-camera during DUI investigations, has acted intentionally and institutionally to conceal material and/or possibly exculpatory evidence in violation of [Appellee's] Florida and Federal Constitutional rights." After an evidentiary hearing the trial court granted the motion concluding in part "[b]y promulgating and enforcing [the involved rule], the Pinellas County Sheriff's Office did not exhibit 'bad faith,' and in complying with [the involved rule] Dep. Kaselak did not exhibit 'bad faith'" and "[h]aving an officer testify about evidence intentionally not recorded makes any trial incorporating that evidence fundamentally unfair, due to lack of cross examination." This appeal was timely filed.

*Standard of Review*

Our review of a trial court's ruling on a motion to suppress evidence involves a mixed question of law and fact. We accord a presumption of correctness with regard to the trial court's determination of facts where the trial court's factual findings are supported by competent, substantial evidence. All evidence and reasonable inferences therefrom must be construed in a manner most favorable to upholding the trial court's ruling. However, we review the trial court's application of the law to those facts de novo. *Ornelas v. United States,* 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Connor v. State,* 803 So.2d 598 (Fla.2001); *State v. Pruitt*, 967So2d 1021 (Fla. 2nd DCA 2007); *Newkirk v. State,* 964 So2d 861, 863 (Fla. 2nd DCA 2007).

*Gathering and Preserving Evidence in a Particular Manner*

Law enforcement does not have a constitutional duty to perform any particular tests. *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); *State v. Powers*, 555 So.2d 888, 890 -891 (Fla. 2nd DCA 1990).

> The Arizona Court of Appeals also referred somewhat obliquely to the State's "inability to quantitatively test" certain semen samples with the newer P–30 test. [...] If the court meant by this statement that the Due Process Clause is violated when the police fail to use a particular investigatory tool, we strongly disagree. The situation here is no different than a prosecution for drunken driving that rests on police observation alone; *the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory*, but the police do not have a constitutional duty to perform any particular tests.

*Youngblood,* 488 U.S. at 58-59, 109 S.Ct. at 338, (internal citation omitted) (emphasis added). There is no case law or statute imposing a duty on law enforcement to record a criminal transaction or to perform any particular tests even where [...] the agency has the means to do so. *State v. Daniels*, 699 So.2d 837, 838 (Fla. 4th DCA 1997). In *Daniels*

the trial court expressed concern that the state based its case solely on the testimony of an officer who conducted the drug buy. The officer made no official report or recording of the transaction. The *Daniels* court concluded the "defendants were not denied the means to defend the charges by the failure of the police to record the transaction."

> Defendants were able to cross-examine the police officer and challenge his ability to recall the specifics of the transaction, absent a report or a tape to assist him. In fact, defendants elicited on cross-examination that [the officer] had engaged in between 250 to 600 transactions during the course of his work while posing as a drug dealer. Approximately 150 of these arrests had taken place at the same intersection where he encountered defendants. Defendants took the stand and recounted an innocent version of their encounter with [the officer]. Defendants were certainly able to argue to the jury that reasonable doubt was created by the absence of corroborating evidence.
>
> *If we were to uphold the trial court's order in this case, we would in effect be imposing an unbending legal requirement, of constitutional dimension, that all drug transactions must be taped when law enforcement has the readily-available means to do so.*
>
> If we were to require the state in every case, in its investigation of a 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 an accused and the rights of society totally to one side. *Powers,* 555 So.2d at 890 (citation omitted). *Because the failure to record the reverse sting transaction was not done in bad faith and did not deprive defendants of the ability to defend against the charges, the failure to tape record this transaction did not render the convictions constitutionally infirm.*

*Daniels* 699 So.2d at 839, (emphasis added).

*Bad Faith*

The term "bad faith" generally implies something more than bad judgment or negligence. It 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. It also embraces actual intent to mislead or deceive another. *Bennett v. State,* 23

So.3d 782, 793 (Fla. 2nd DCA 2009) (quoting *State v. Piper,* 2008 WL 170666, 2 (Ohio Ct. App. Jan. 11, 2008).[1]

*The Present Case*

The present case does not involve law enforcement *bad faith* or the loss or destruction of existing evidence; the issue presented is the constitutional propriety of a law enforcement department policy to not video record HGN tests. The trial court ruled "[h]aving an officer testify about evidence intentionally not recorded makes any trial incorporating that evidence fundamentally unfair, due to lack of cross examination." The trial court is imposing a requirement of a video recording, in all cases, of a suspect's HGN test before any law enforcement trial testimony would be permitted concerning that test; this requirement would apply without regard to any issue of law enforcement *bad faith.*

This court feels a concern similar to that expressed by the *Daniels* court cited above. If we were to uphold the trial court's order in this case, we would in effect be imposing an unbending legal requirement, of constitutional dimension, that all HGN tests in DUI cases must be videotaped when law enforcement has the readily-available means to do so. There is no precedent in existing case law for such a holding given the circumstances of the instant case. The present case involves no issue of *bad faith* by law enforcement, no issue of the loss or destruction of existing evidence and there is no recognizable deprivation of Mr. Hastings' ability to defend against the charges. Defense counsel at trial is able to cross-examine the law enforcement officer and challenge his credibility and his ability to recall the specifics of the HGN test, absent a video recording. Defense counsel will almost certainly argue to the jury that reasonable doubt is created by

[1] The *Bennett* opinion contains a comprehensive discussion by Judge Altenbernd of case law addressing the State's responsibilities regarding the maintenance or creation of evidence helpful to a defendant.

the absence of corroborating video evidence of the HGN test that could have been created by law enforcement along with the other video recordings that were made and presented to the jury. Regardless, law enforcement does not have a constitutional duty to perform any particular tests or to use a particular investigatory tool.

The words of the *Powers* court are instructive; "if we were to require the state in every case, in its investigation of a 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 an accused and the rights of society totally to one side."

*Conclusion*

The order of the trial court granting Appellee's Motion to Suppress should be reversed.

IT IS THEREFORE ORDERED that the order of the trial court granting Appellee's Motion to Suppress is reversed.

ORDERED at Clearwater, Florida this 26rd day of February 2013.

Original order entered on February 26, 2013, by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable Lorraine M. Kelly
Office of the State Attorney
J. Kevin Hayslett, Esquire