Online Reference: FLWSUPP 2707STEP

Criminal law -- Driving under influence -- Evidence -- Loss or destruction by state -- Defendant's ability to confront allegations against her was compromised by failure of arresting officer and back-up officer to follow videotaping policy -- DUI charge is dismissed with prejudice

STATE OF FLORIDA, Plaintiff, v. RONEKA STEPHENS, Defendant. Circuit Court, 2nd Judicial Circuit in and for Leon County. Case No. 2016-CT-1112. SPN Case No. 245254. April 11, 2019. Augustus D. Aikens, Jr., Judge. Counsel: Aaron M. Wayt, Sr. Trial Attorney, Pumphrey Law Firm, Tallahassee, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION

TO DISMISS FOR A VIOLATION OF DUE PROCESS

THIS CAUSE come before the Court on Defendant's Motion to Dismiss for a Violation of Due Process, pursuant to Rule 3.190(b) of the Florida Rules of Criminal Procedure and the being fully advised in the premises finds as follows:

1. The State did not traverse or demur to any factual matters alleged in the motion and are thereby admitted. Fla. R. Crim. P. 3.190(d).

2. On May 8, 2016, officers from FSUPD initiated a stop on Defendant, Roneka Stephens, for running a red light. The arresting officer, Cherry Martina, was an inexperienced officer in the field training program. At the time of her arrest, Officer Martina was driving another officer's vehicle which was equipped with a mobile video system (hereinafter "MVS"). Notably, the backup officer, Brian Cutcliffe, who arrived prior to Defendant's arrest also testified he had a MVS.

3. The arresting officer and Field Training Officer, Corporal Isquierdo, testified a video of the encounter with Defendant was made from MVS in the patrol vehicle and it was uploaded into the agency's system at the end of the officer's shift. The arresting officer specifically remembered wearing the microphone and that it was vibrating and beeping, which indicated to her that it was actively recording. This Court therefore finds a video of Defendant's traffic encounter was made.

4. After allegedly noticing what she believed was indicators of alcohol impairment, the FSUPD officers decided to conduct a DUI investigation. Following performance of the field sobriety exercises, Officer Martina determined Defendant was impaired and Defendant was placed under arrest for DUI and transported to the Leon County Detention Facility.

5. Following the Defendant's arrest, Defendant requested a copy of the recorded video. In response to Defendant's discovery request, no video was produced.

6. Defendant argued there was no mention that the arresting officer heard slurred speech in the probable cause affidavit, yet the arresting officer later testified that Defendant's speech was slurred. Therefore, the lost video is absolutely crucial in assisting a jury in resolving this discrepancy.

7. The arresting officer testified during the walk-and-turn exercise, the Defendant used her arms for balance thereby showing her impairment. When asked whether her arms were up like an airplane or barely away from her side, the arresting officer could not recall specifically how much, only that they weren't at her side.

8. Officer Martina further testified that Defendant put her foot down twice during the one-leg-stand. The arresting officer could not remember at what point in the exercise this occurred and how long her foot was on the ground. The lost video would be crucial in assisting the jury in judging the Defendant's impairment.

9. Regarding the one-leg-stand, officers are taught to look for four indicators of impairment: putting their foot down, using their arms for balance, swaying and hopping. The arresting officer testified that the only

standardized indicator she saw while Ms. Stephens performed the one-leg-stand was the aforementioned indicator of putting her foot down twice.

10.The Florida State University Police Department adopted policies for the regular and systematic use of in-car audio/video equipment prior to Defendant's arrest. These policies are set forth in FSUPD General Order 13-220 D.3 which provides in pertinent parts

> **13-22 D.3 Policy.** It is the policy of the Florida State University Police Department to use mobile video equipment for the purpose of gathering recorded evidence for court prosecution of violators of both traffic and criminal laws.

11. The Florida State University Police Department policy limits the use of mobile video equipment to officers who have been properly trained:

> **V. Assignment of Officer to vehicle with MVSs and Their Operation.**
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> **A.** No officer shall be authorized to operate a patrol vehicle equipped with a MVS until he or she has received the appropriate training discussed in Section IV., above, of this general order.

12. Prior to each shift, the FSUPD policies requires the video and audio equipment to be checked for operability:

> **B.** At the beginning of each shift, an officer assigned to a vehicle equipped with an MVS shall check out a wireless microphone through the shift commander. The wireless microphone ID number shall be recorded in the Daily Activity Sheet compile by the Shift supervisor.
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> **C.** Officer assigned to a vehicle equipped with an MVS shall also ensure that the equipment is in proper operating condition. The officer shall ensure that the date, time, and vehicle number are displayed on the viewing monitor. Any deficiencies shall be brought to the attention of the officer's supervisor as soon as practical. **13-22 D.4 II General Protocols for Video Recording.**

13. Officers assigned a MVS are required to utilize the system to record traffic enforcement and field sobriety exercises among other things. **13-22 D4. VI. Utilization of MVS Field Activities.**

14. For DUI investigations, the Florida State University Police Department Policy requires the MVS to be activated upon the initial observation of an infraction or safety concern which may be prior to the activation of the vehicle's emergency lighting system. **13-22 D.4 VI D.**

15. Officers are required to document the use of MVS equipment in their reports and to record the entire occurrence unless properly explained the reason for not doing so. Such documentation was not provided to this Court. The policy provides:

> **G.** Members shall document in their original or supplemental incident report if a MVS was utilized during an incident.
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> **H.** Once the MVS is activated, members shall not deactivate the MVS until the occurrence has been concluded or the continued recording will not serve to obtain additional evidence (e.g.; crime scene security, extended traffic control, parade routes). **13-22 D.4 II**

16. Neither the arresting officer nor could any other witness explain why the recorded MVS tape could not be produced.

17. The Court finds the tape of Defendant's traffic encounter and field sobriety exercises was made on the arresting officer's MVS in accordance with Department policy and was not preserved through careless and a failure to follow the Florida State University Policy. This Court finds the backup officer never attempted to record the traffic encounter with Defendant contrary to Department policy.

CONCLUSION OF LAW

18. As the Florida Supreme Court explained in *Patterson v. State,* 199 So.3d 253 (Fla. 2016) [41 Fla. L. Weekly S350a], the standard for analyzing an alleged due process violation in cases involving the defendant's constitutional right to access evidence "depends on the type of error asserted and whether the evidence is exculpatory, impeaching, or merely potentially useful." *Beasley v. State,* 18 So.3d 473, 487 (Fla. 2009) [34 Fla. L. Weekly S439a].

19. Claims involving the State's suppression of favorable evidence are analyzed under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed2d 215 (1963), recognizing a due process violation where the defendant shows "(1) that favorable evidence -- *either exculpatory or impeaching,* (2) was willfully or inadvertently suppressed by the State, and (3) that because the evidence was material, the defendant was prejudiced." *Beasley,* 18 So.3d 487.

20. In contrast, claims involving the State's destruction of evidence "potentially useful to the defense" are analyzed under *Youngblood,* on recognizing a due process violation "only if the defendant can show bad faith on the part of the [State]." *Guzman v. State,* 868 So.2d 498, 509 (Fla. 2003) [28 Fla. L. Weekly S829a]; see also *King v. State,* 808 So.2d 1237, 1242 (Fla. 2002) [27 Fla. L. Weekly S65a] ("The landmark case of . . . *Youngblood,* and all cases since, requires a defendant to show bad faith on the part of the person destroying evidence before any relief can be afforded."); see also Charles W. Ehrhardt, Florida Evidence § 401.1 at 164-65 (2015 ed.)(("In a criminal case, due process apparently is not violated by the state introducing circumstantial evidence or testimony which the state has lost or destroyed unless it is shown that the destruction was in bad faith and there is actual prejudice to the accused.")

21. The issue in this case is whether FSUPD acted in bad faith by losing (or destroying) the video/audio tape of Defendant. In *Youngblood,* the U.S. Supreme Court explained the reason for requiring the defendant to show bad faith where the lost or destroyed evidence is only "potentially useful" evidence (as opposed to material exculpatory evidence under *Brady*) as follows: "Part of the reason for the difference in treatment is sound in the observation made by the Court in *California v. Trombetta,* 467 U.S. 479, 486, 104 S.Ct. 2528, 81 L.ED.2d 413 (1984), that '[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.' Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause . . . as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interest of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Youngblood,* 488 U.S. at 57-58, 109 S.Ct. 333.

22.This case falls in that class of cases where the interest of justice most clearly require it.

23. In this case, the State arrested Defendant because it alleges she failed to comply with Florida Statutory law by failing to stop on a steady red light on May 18, 2016, a civil traffic infraction. §316.075(1)(c), F. S. Alleging a further violation of Florida law of driving under the influence §316.193(1), F.S., Defendant was arrested and taken to the Leon County Detention facility.

24. Once lawfully arrested while driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages, Defendant was "deemed to have been given his or her consent to submit to an approved chemical test. . ." §316.1932(1), F.S. For violation of any of these statutory requirements, Defendant is required to be penalized.

25.To enforce these laws, the State must also follow statutory law as well as its departmental regulations. It cannot pick and choose among those in which it must follow.

26. These officers were required to check the MVS equipment at the beginning of the shift to ensure it was in "proper operating condition." There was no testimony this requirement was performed. **13-22 D.4. II**

27. Officer assigned a MVS **are required** to utilize the system to record traffic enforcement and field sobriety enforcements. **13-22 D.4 VI.** This policy was equally incumbent upon the backup Officer Cutcliffe to record Defendant's stop. There was no explanation what happened to backup Officer Cutcliffe's video recording. These actions or lack of action, constitute bad faith. These actions constitute multiple violations of its Department's policy.

28. As this Court held in *State v. Thompson,* 2008 CT 456,

> The Defendant contends, and the Court agrees, that bad faith can be shown even where there is no proof of repeated violations of department policy. See *State v. Culver,* 14 Fla. L. Weekly Supp. 377b (Fla. Monroe Cty. Ct. 2007). In *Culver,* a DUI investigation occurred in close proximity to police headquarters, where a number of patrol vehicles equipped with recording devices were parked. Although the investigating officer was aware that his recording system was not functioning, he chose not to take advantage of the available nearby vehicles with operational systems. In finding bad faith and dismissing the charge, the Court held, "key fact in this case is the simple fact that the accident took place so close to so many police cars in the police parking lot so that it would have been very easy to obtain a video tape in compliance with the policy of the department." *Id*.
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> In *State v. Sterling Sutton,* 2007 CT 4044 (Fla. Leon Cty. Ct. October 8, 2008), this Court was recently confronted with a situation where the investigating officer turned off her microphone for a seven minute period during a DUI investigation. In dismissing the DUI charge, this Court held that the officer's "flagrant violation" of TPD's policy violated the defendant's due process rights and constituted bad faith.
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> In the instant case, Officer Tatum's flagrant violation of agency policy is even more egregious than what occurred in Sutton, as the audio of the investigation is *completely* missing. As a result the Defendant's ability to confront the allegations against him has been compromised and his due process rights have been violated.

29. Here the Defendant's ability to confront the allegations against her has also been compromised and her due process right have been violated by the Florida State University Police Department officers' failure to follow its policy.

30. Based on the foregoing authority, the Defendant's DUI charge is dismissed with prejudice. Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss for a Violation of Due Process is hereby GRANTED.

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