

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1242

Filed: 19 November 2019

Wayne County, No. 16 CRS 55186

STATE OF NORTH CAROLINA

v.

BRANDISS TAYLOR

Appeal by State from Order entered 12 June 2018 by Judge Phyllis M. Gorham
in Wayne County Superior Court. Heard in the Court of Appeals 5 June 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L.
Hyde, for the State.*

Strickland Agner Pittman, by Dustin B. Pittman, for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

The State appeals from the trial court's Order granting Defendant's Motion to Dismiss Based on Loss and Destruction of Exculpatory Evidence (Motion to Dismiss). The Record tends to show the following:

On 27 November 2016, Brandiss Taylor (Defendant) was arrested and given a citation for Impaired Driving and Failure to Maintain Lane Control. On 4 December 2017, a Wayne County Grand Jury returned an Indictment charging Defendant with Habitual Impaired Driving, Driving While License Revoked, and Driving Left of Center. On 25 April 2018, Defendant filed her Motion to Dismiss, which came on for

a hearing in Wayne County Superior Court on 11 June 2018. At the beginning of this hearing, both the State and Defendant stipulated to the following Factual Allegations from Defendant's Motion to Dismiss:

1. On 27 November 2016 at approximately 1:20 A.M., Trooper Adam J. Hostinsky of the North Carolina Highway Patrol [(Trooper Hostinsky)] observed a truck merge onto U.S. 117 South from a parking area;
2. The truck made a number of maneuvers that alerted [Trooper Hostinsky] to its presence and he began to follow. [Trooper Hostinsky] noted varying speeds, failure to maintain lane and the truck drive left of the center line twice with sharp corrections back. In [Trooper Hostinsky's] words "it appeared the driver may be lost or unsure of where they are going;"
3. Based on those observed traffic violations, [Trooper Hostinsky] conducted a traffic stop on the truck and it pulled to the side of the road and the "truck was put into park while still travelling about 15 MPH;"
4. When [Trooper Hostinsky] approached the truck, he found two people sitting on the passenger side of the truck, [Defendant] and another individual named Roy Lee;
5. [Trooper Hostinsky] indicates in his written notes that he identified [Defendant] as the driver and that he "saw the driver make their way to the passenger side of the vehicle" after the traffic stop was conducted;
6. [Defendant] has from the very beginning denied driving the truck that night and has maintained that throughout the life of this case;
7. As early as 28 November 2016, Trooper Hostinsky notes that [Defendant] was being considered for the felony charge of Habitual Impaired Driving;

8. On 16 December 2016, less than 30 days after the initial DWI charge was filed, agents of the Office of the District Attorney began requesting certified copies of records of prior convictions of [Defendant], presumably to prepare an indictment for Felony Habitual Impaired Driving;
9. On 29 December 2016, thirty-two (32) days after the traffic stop was conducted, Trooper Hostinsky submitted his investigative file to the Office of the District Attorney and certified his compliance with N.C. Gen. Stat. § 15A-501(6) in gathering “all materials and information acquired in the course of all felony investigations;”
10. On 28 July 2017, [defense counsel] filed a “Request for Voluntary Discovery (Alternative Motion to Compel Discovery) in a Driving While Impaired Case;
11. Even though the investigative file was submitted some seven months before the request, discovery was not released to [defense counsel] until 6 December 2017 as [defense counsel] has been informed multiple times by Assistant District Attorneys and their staff that “discovery does not exist in district court” especially as it relates to Driving While Impaired offenses;
12. In the request for discovery, Defendant makes specific request for any and all video including Dash Camera and Body Camera footage;
13. The case was submitted to the Grand Jury in December 2017 and a true bill of indictment was returned for Felony Habitual Impaired Driving;
14. [Defense counsel] made additional request of the State for the Dash Camera footage in January of 2018;
15. [Defense counsel] was informed in February 2018 that the video had been deleted from the “local server” and the Highway Patrol was attempting to locate it from other sources;

16. [Defense counsel] was informed in March of 2018 that the video had been “purged” and was not available for release;
17. Upon information and belief, it is the policy of the North Carolina Highway Patrol to only download and release dash camera footage upon request of the Office of the District Attorney;
18. Upon information and belief, it is the policy of the North Carolina Highway Patrol to maintain video for ninety (90) days following its creation unless such a request is made;
19. Upon information and belief, the Office of the District Attorney was notified of this policy and the existence of this video while it was still in existence, at least prior to 3 February 2017, and failed to take adequate steps to ensure its preservation.

After hearing testimony from Trooper Hostinsky and arguments from the State and defense counsel, the trial court took the matter under advisement. On 12 June 2018, the trial court entered its Order granting Defendant’s Motion to Dismiss. In this Order, the trial court concluded that the dash camera footage was relevant, “material[,] and exculpatory in nature” and that the State’s failure to provide this evidence flagrantly violated Defendant’s constitutional rights and caused irreparable prejudice to Defendant. Based on this conclusion, the trial court dismissed the charges against Defendant pursuant to N.C. Gen. Stat. § 15A-954(a)(4). On 14 June 2018, the State timely filed Notice of Appeal. *See* N.C. Gen. Stat. § 15A-1445(a)(1) (2017) (allowing the State to appeal “[w]hen there has been a decision . . . dismissing criminal charges as to one or more counts”).

Issue

The sole issue on appeal is whether the trial court erred by concluding the destruction of the dash camera footage violated Defendant's *Brady* protections,¹ requiring dismissal of the charges against Defendant.

Analysis

I. Standard of Review

In reviewing a trial court's grant of a criminal defendant's motion to dismiss, we are "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Williams*, 362 N.C. 628, 832, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted). We, however, review a trial court's conclusions of law de novo. *See State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted).

II. Motion to Dismiss

Section 15A-954(a)(4) of our General Statutes requires a trial court to dismiss criminal charges where a "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-

¹ *See Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963).

954(a)(4) (2017). Defendant has “the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case.” *Williams*, 362 N.C. at 634, 669 S.E.2d at 295. Because this Statute “contemplates drastic relief,” our Supreme Court has cautioned that “a motion to dismiss under its terms should be granted sparingly.” *Id.* (citation and quotation marks omitted).

“Whether a failure to make evidence available to a defendant violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution depends in part on the nature of the evidence at issue.” *State v. Taylor*, 362 N.C. 514, 525, 669 S.E.2d 239, 252 (2008) (citation omitted). In *Brady*, the United States Supreme Court held that “suppression by the prosecution of evidence *favorable* to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87, 10 L. Ed. 2d at 218 (emphasis added). However, “when the evidence is only *potentially useful* or when no more can be said of the evidence than that it could have been subjected to tests, the results of which might have exonerated the defendant, the state’s failure to preserve the evidence does not violate the defendant’s constitutional rights unless the defendant shows bad faith on the part of the state.” *Taylor*, 362 N.C. at 525, 669 S.E.2d at 253 (emphasis added) (alteration, citations, and quotation marks omitted).

Here, the trial court concluded the destruction of the dash camera footage constituted a *Brady* violation, requiring dismissal of Defendant's charges. In reaching this conclusion, the trial court determined the dash camera footage was "material and exculpatory in nature[.]" However, the trial court made no findings concerning what the dash camera footage would have shown and, on this record, could not have made such a finding because there is no actual record of what it may have shown. Rather, the dash camera footage was only "potentially useful" to Defendant, which requires Defendant to establish bad faith on the part of the State in order to show a constitutional violation. *Id.* (citations and quotation marks omitted); see *State v. Dorman*, 225 N.C. App. 599, 621, 737 S.E.2d 452, 466-67 (2013) (holding bones of the alleged victim that were destroyed prior to the defendant being able to examine them made it "speculative to evaluate to what degree, if at all, those bones would have been material and favorable to [the defendant's] case . . . [and thus the defendant] cannot meet his burden of demonstrating the evidence was actually, as opposed to potentially, material and favorable to his defense"). Therefore, because the dash camera footage was not exculpatory but rather only *potentially* exculpatory, the trial court erred by applying the *Brady* analysis and by concluding its destruction warranted dismissal, irrespective of bad faith on the part of the State. See *Taylor*, 362 N.C. at 525, 669 S.E.2d at 253 (citations omitted).

Instead, the trial court was required to assess whether or not the footage was destroyed in bad faith. Here, because the trial court perceived the destruction of the dash camera footage to constitute a *Brady* violation, the trial court made no findings or conclusions relating to whether the State's destruction of the dash camera footage was in bad faith. Therefore, because the trial court erroneously based its ruling on the dash camera footage, in fact, being exculpatory and thus controlled by *Brady*, we remand the matter to the trial court for a determination of whether, on these facts, the State's destruction of the footage was done in bad faith. *See State v. Young*, 368 N.C. 188, 215, 775 S.E.2d 291, 309 (2015) ("According to well-established North Carolina law, where a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light." (alteration, citation, and quotation marks omitted)).

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Order and remand this matter for a determination of whether bad faith existed on the part of the State in failing to preserve the dash camera footage.

VACATED AND REMANDED.

Judge DIETZ concurs.

Judge BERGER dissents in a separate opinion.

BERGER, Judge, dissenting in separate opinion.

I respectfully dissent because we should take the additional step of reversing the trial court's order.

Section 15A-954(a)(4) of the North Carolina General Statutes requires a trial court to dismiss criminal charges where a “defendant’s constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant’s preparation of his case that there is no remedy but to dismiss the prosecution.” N.C. Gen. Stat. § 15A-954(a)(4) (2017). The “defendant bears the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case. This statutory provision contemplates drastic relief, such that a motion to dismiss under its terms should be granted sparingly.” *State v. Williams*, 362 N.C. 628, 634, 669 S.E.2d 290, 295 (2008) (citation and quotation marks omitted).

In *Brady v. Maryland*, the Supreme Court held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. 83, 87 (1963). However, the Supreme Court subsequently clarified that “the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material . . . which might have exonerated the defendant.” *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). “[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *Id.* at 58. “However, evidence of bad faith standing

alone, even if supported by competent evidence, is not sufficient to support a dismissal under N.C. Gen. Stat. § 15A-954(a)(4).” *State v. Hamilton*, ___ N.C. App. ___, ___, 822 S.E.2d 548, 552 (2018) (citation and quotation marks omitted), *review dismissed*, ___ N.C. ___, 830 S.E.2d 822 (2019), and *review denied*, ___ N.C. ___, 830 S.E.2d 824 (2019). Thus, a defendant must demonstrate not only that the State’s failure to preserve potentially exculpatory evidence was done in bad faith, but also that he was irreparably prejudiced in the preparation of his case in order to show a violation of due process sufficient to justify dismissal.

In *State v. Hamilton*, this Court analyzed a similar issue to the present action. In *Hamilton*, the Macon County Sheriff’s Department received a drug trafficking tip that contained specific information identifying the individuals and vehicles involved. *Id.* at ___, 822 S.E.2d at 550. After locating one of the aforementioned vehicles, the officer stopped the vehicle for failing to stop at a stop sign and conducted a free air sniff of the car with a K9 unit. *Id.* at ___, 822 S.E.2d at 550. The K9 unit alerted on the vehicle and the occupants of the vehicle were arrested with more than two pounds of methamphetamine in their possession. *Id.* at ___, 822 S.E.2d at 550. The officer asked the occupants if they would assist in proving that the defendant was involved in the drug trafficking, and the occupants agreed. *Id.* at ___, 822 S.E.2d at 550. The officer attempted to record the phone call between the defendant and the occupants, however, no audio was captured because the officer was not familiar with the new

equipment. *Id.* at ___, 822 S.E.2d at 551. At trial, the defendant filed a motion to dismiss which was denied, and on appeal, the defendant argued that the trial court erred in denying the motion to dismiss because the State failed to preserve and disclose the audio recording. *Id.* at ___, 822 S.E.2d at 551. This Court affirmed the trial court's denial and found no bad faith on behalf of the State because the defendant (1) "had the opportunity to question [the occupant] about his phone call with [d]efendant," (2) "cross-examine [the officer] about destruction of the blank audio recording, and argue the significance of the blank audio recording to the jury," and (3) the defendant "failed to show bad faith on the part of [the officer]." *Id.* at ___, 822 S.E.2d at 552.

Here, Defendant had the opportunity to cross-examine Trooper Hostinsky about the loss of the dash camera footage and argue its significance to the jury. Further, Defendant failed to make a showing that Trooper Hostinsky exercised bad faith in failing to preserve the dash camera footage. At trial, Trooper Hostinsky testified to his understanding of the dash camera recording system as follows:

[Trooper Hostinsky]. So at the initial point in time, this is a newer technology for the highway patrol, we were given training by a WatchGuard company representative, he told us that the way the cameras were to be set up was that if we tagged, tagged the videos, whether it be a warning stop, a stop for speeding, seatbelts, et cetera, that it would be a 90 day retention schedule on the server. He said there were four events that which we tagged it would remain on the server for three years. As I was initially understanding it, the four events for the three year

retention schedule was anything involving a pursuit, an emergency response, a use of force, or a driving while impaired offense.

[The State]. And since that time have you come to understand something different about the retention policy?

[Trooper Hostinsky]. Yes, sir.

[The State]. Could you describe that for the Court?

[Trooper Hostinsky]. Just earlier this year after speaking with our technical services units I learned that the only incidences that are saved for the three year period is a chase or a use of force. The emergency response and the driving while impaired are actually just a 90 day retention schedule.

[The State]. And, and how did you mark this video?

[Trooper Hostinsky]. As a DWI.

[The State]. Okay. And so, per your knowledge, how long was this video retained?

[Trooper Hostinsky]. I, I assumed the video would be available for three years at the time of the incident. . . .

[The State]. Okay. And when did you first speak to the Wayne County DA's office about this video?

[Trooper Hostinsky]. The, the earliest recollection I have of it was either January or February of this year, of 2018.

[The State]. Okay. And could you just sort of briefly summarize what that was for the Court?

[Trooper Hostinsky]. I was reached out to by Ms. Tracy Moore asking how she could get a copy of the video,

I told her just simply go to the district office and ask one of the sergeants to pull it from the server and burn it onto a DVR. I was contacted after that, told that the video was not available, so I began to personally reach out to my sergeant when I was located here. He said he could not locate the video. I then called our technical services unit in Raleigh and got ahold of the gentleman who runs the WatchGuard platform for us, and after going back and forth with him, he attempted to locate it, and the video was not available on either the main server or any of their redundancy servers.

. . . .

[The State]. Did anyone at the DA'S office ever tell you to delete this video?

[Trooper Hostinsky]. Absolutely not.

[The State]. Did you ever take any action to delete this video?

[Trooper Hostinsky]. No, sir.

[The State]. Did you ever . . . did you ever specifically choose not to take an action because you had an intention to deprive the Defendant of the video in this case?

[Trooper Hostinsky]. No, sir.

[The State]. Are you aware of such an intention on the part of anybody else in the DA's office or in law enforcement?

[Trooper Hostinsky]. No, sir.

From this testimony, it is apparent that Trooper Hostinsky was given conflicting information regarding the dash camera recording system, and he was simply operating under a misunderstanding about how the new system worked. As

in *Hamilton*, there is no evidence in the record that Trooper Hostinsky deleted the dash camera footage in bad faith. Rather, the testimony at the suppression hearing tends to show that he made a mistake because he was using a new recording system without adequate training.

Defendant failed to demonstrate bad faith on the part of Trooper Hostinsky or the prosecutor at the hearing. This is plainly evident because the trial court did not make a finding that either Trooper Hostinsky or the prosecutor acted in bad faith. Because the evidence presented could not support a finding of bad faith, Defendant cannot satisfy *Youngblood* and has failed to show irreparable prejudice. The trial court's order of dismissal should be reversed.