

1998

State of Utah v. Howard Lloyd Miles : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

981669

STATE OF UTAH, :

Plaintiff/Appellee, : Case No. 981669-CA

vs. :

Priority No. 2

HOWARD LLOYD MILES, :

Defendant/Appellant. :

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR BURGLARY, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-202 (1973), AND CRIMINAL MISCHIEF, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-6-106 (1998), IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE TIMOTHY R. HANSON PRESIDING

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FILED
 Utah Court of Appeals
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 Clerk of the Court

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 981669-CA
vs.	:	Priority No. 2
HOWARD LLOYD MILES,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals his conviction for burglary, a third degree felony, in violation of Utah Code Ann. § 76-6-202 (1973), and criminal mischief, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-106 (1998). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

**STATEMENT OF THE ISSUE ON APPEAL AND
STANDARD OF APPELLATE REVIEW**

Whether there is sufficient evidence to support the trial court's finding that Deputy Collins did not act in bad faith when he failed to preserve blood samples. This Court reviews the trial court's ruling for an abuse of discretion. *State v. Holden*, 964 P.2d 318, 324 (Utah App. 1998).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The issue on appeal is governed by the Due Process Clauses of the U.S. and Utah Constitutions, the text of which are not at issue.

STATEMENT OF THE CASE

On December 18, 1997, defendant was charged with one count of burglary, a third degree felony, in violation of Utah Code Ann. § 76-6-202 (1973), and criminal mischief, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-106 (1998). A jury trial on these charges was begun on August 10, 1998. On the second day of trial, defendant raised the issue of the State's alleged failure to preserve evidence (R.151:308). The court declined to put the trial on hold, allowing defendant to file a post-trial motion on the issue (R.151:315). The jury trial proceeded to a guilty verdict (R.54). In a Memorandum Decision (R.116) (Appendix A) and accompanying Findings of Fact and Conclusions of Law (R.128) (Appendix B), the court denied defendant's motion to dismiss. Defendant was sentenced to 0-5 years in prison, with the sentence suspended on completion of 3 months in jail and 36 months probation (R.114).

STATEMENT OF FACTS

At approximately 4:00 a.m. on December 10, 1997, Steve Winberg was clearing snow from the parking lot of a Reams grocery store at the 2300 block of Ft. Union Boulevard in Salt Lake County, Utah (R.150:143). Winberg was preparing to spread

salt on the parking lot, and was standing in the back of his truck loading the salter (R.150:145). Defendant approached Winberg, walking up to within about ten feet and greeting him with "working hard?" Winberg responded, "yeah," and then watched as defendant walked away across the parking lot. Winberg was suspicious due to recent burglaries in the area, and followed him (R.150:146-47). Defendant looked back at Winberg two or three times as he walked away, and then continued on across the street to an Einstein Bagels store (R.150:149). Winberg watched while defendant broke out the drive-through window in the bagel store, and then climbed into the building (R.150:149).

Winberg called police on his cell phone, and continued watching the bagel store (150:152-3). Winberg then saw defendant leave the store and walk away. Winberg followed, speaking to the police dispatcher on his cell phone (150:156), and watched as police apprehended defendant (150:157).

From the time that Winberg first saw defendant walking through the Reams grocery store parking lot until defendant's arrest, Winberg never lost sight of defendant except during the time defendant was inside the bagel store, when Winberg was able to see a single figure moving around inside the store (R.150:160). In addition to Winberg, another witness also watched as defendant exited the bagel store. Starla Roque was parked outside the store while her husband was loading the newsstand at the bagel store, and saw defendant leave the store's storage room (R.150:216).

When defendant was apprehended, the officers noted that the palms of his hands had small bleeding cuts, and the knuckles of his hands had recent abrasions (R.150:234-35, 247-48, 269-70). The investigating officers found that the drive-through window of the bagel store had been broken out (R:150:246), and there were blood stains at various locations throughout the store, including the cash register drawer, the walls and floor around the broken window, and the inside of an unlocked storage room accessible only from the outside of the store (R.150:250-51).

In the course of investigating the burglary, an evidence technician was called in to preserve any available evidence. The technician, Officer John Bell, attempted to collect blood samples from the inside of the store, but was uncertain whether the blood picked up by wiping the blood stains with a cotton swab would be sufficient to test (R.151:293, 327-28). Bell gave these swabs to the lead investigating officer on the case, Scott Collins (R.151:328), but there was a miscommunication between Bell and Collins as to whether the samples could be tested (R.124,128). Officer Collins understood and believed that no testable samples had been collected, and did not submit any evidence to the lab (R.254). It is unknown what happened to the swabs.

SUMMARY OF THE ARGUMENT

Defendant has the burden to prove that Officer Collins acted in bad faith in failing to preserve or test the blood on the swabs. A finding of bad faith in this context requires a showing that the officer actually knew that the evidence could have

exonerated defendant. There is no evidence which would suggest that Officer Collins believed anything other than that the blood on the swabs was insufficient for testing. For this reason, the trial court was correct in finding that Officer Collins did not act in bad faith by not preserving the swabs.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT OFFICER COLLINS DID NOT ACT IN BAD FAITH, AS DEFENDANT HAS FAILED TO PROVIDE ANY RELEVANT EVIDENCE TO MEET HIS BURDEN OF PROVING THAT COLLINS KNEW OF THE EXCULPATORY NATURE OF THE EVIDENCE.

In *Brady v. Maryland*, 373 U.S. 838 (1982), Supreme Court held that a defendant must be given access to any known exculpatory evidence, and it is a violation of due process for the prosecution to suppress such evidence. In this appeal, defendant claims that Officer Collins' failure to preserve the swabs used in an attempt to collect a blood sample from the scene of the burglary violated this constitutional right of "access to evidence." *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988).

However, there is no "undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Youngblood*, 488 U.S. at 58. Unless the exculpatory nature of evidence was "apparent before the evidence was destroyed," it is not "constitutionally material," and there is no due process violation arising out a police officer's failure to

preserve the evidence or make it available to the defendant. *California v. Trombetta*, 467 U.S. 479, 489 (1984); *State v. Bakalov*, No. 940523, slip op. at 18 (May 11, 1999) ("‘mere possibility’ that undisclosed evidence might favor a defendant cannot establish a *Brady* violation") (quoting *State v. Shaffer*, 725 P.2d 1301 (Utah 1986)).

In this case, defendant does not, and can not, argue that the blood evidence at issue was known to be exculpatory, since that evidence had not been tested in order to determine whether it was defendant’s. Rather, this is a case in which "no more can be said than that it could have been subjected to tests," the results of which might have been exculpatory. *Youngblood*, 488 U.S. at 57. In such a case, a defendant is required to prove that the failure to preserve the lost or destroyed evidence resulted from actual bad faith on the part of the police.

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 58. Thus, if a defendant wishes to challenge an officer’s failure to collect or preserve a particular piece of evidence, he has the burden of showing that the police officer’s own actions prove that he was aware that the evidence was exculpatory, and that he destroyed it anyway. "We cannot simply presume that [lab tests] would yield results favorable to defendant. Rather, the exculpatory value of

untested or unavailable evidence 'must be apparent' before discovery is mandated by *Brady*." *Bakalov*, slip op at 18 (quoting *Trombetta*, 467 U.S. at 489); *Youngblood*, 488 U.S. at 56 n.* ("The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.").

The State's reliance at trial on evidence concerning blood found in the store and on defendant's hands does not alter this analysis. In *State v. Holden*, 964 P.2d 318 (Utah App. 1998), police officers picked up trash bags from the curbside of defendant's house, and examined them for possible evidence of drug trafficking. The officers found various items of drug paraphernalia, and then disposed of the rest of the trash. The defendant was relying on a defense that the trash which was picked up by the officers had been left in front of defendant's house by someone else, and argued that the officers had failed to preserve exculpatory evidence, since "the evidence in the trash bag was potentially useful to show that the bags were not Holden's bags or that Holden had not had control of them for some time." *Holden*, 964 P.2d at 323. The court held that defendant must come forward with evidence of bad faith on the part of the officers, and had failed in meeting this burden because there was no evidence that the officers were aware that the discarded trash contained any exculpatory evidence. *Holden*, 964 P.2d at 324.

In this case, defendant makes a similar claim that the State used the evidence that blood was found at the scene of the burglary and on defendant's hands in order to convict him, but prevented him from testing the blood to show that it was not his. As in *Holden*, however, defendant in this case has failed meet his burden to prove that the officers acted in bad faith because there is no basis for finding that the officer understood that he was destroying exculpatory evidence. *See Youngblood*, 488 U.S. at 56, n.* ("respondent has not shown that the police knew the semen samples would have exculpated him when they failed to perform certain tests or [preserve the evidence]").

Indeed, defendant failed to present to the trial court any meaningful evidence that Officer Collins believed the swabs were exculpatory. The only evidence cited by defendant as showing bad faith is (a) a dispute between the prosecutor and defense counsel as to whether certain police reports were provided to defense counsel prior to the start of the trial, (b) the trial testimony of Officer Collins in which he expressed his understanding that no testable blood evidence could be collected, (c) the conflicting testimony of Officer Bell, the evidence technician, as to whether the blood samples he collected were sufficient to test, and (d), an alleged violation by Collins of standard procedures for processing evidence. As discussed below, this evidence is irrelevant to the issue of Collins' bad faith.

A. Alleged discovery violation. On the second day of trial, prior to the beginning of testimony, Officer Bell spoke with defense counsel and told her that he

had prepared a police report concerning his investigation at the bagel store (R.151:287). Defense counsel asserted that she had not been given a copy of this report earlier. The prosecutor was unaware that defense counsel did not have the report, and stated that all of the reports had been copied and sent to defense counsel (R.151:288). The trial court was not able to determine who was at fault for the problem, but rejected any conclusion that the prosecutor was trying to hide something. "It may have not gone over, it may have. Maybe it didn't get sent over inadvertently, maybe it got sent over and misplaced. There's -- I try never to ascribe a reason that constitutes malice to something that can be explained by inadvertence equally well" (R.151:310).¹

However, even if it is assumed that the prosecutor made an error in failing to provide the report, such does not have any relevance to the issue here, which is whether Officer Collins knew that the blood samples were exculpatory at the time he decided not to submit them for testing. There is no evidence that Collins personally hide the police report from defendant, or was in any way responsible for providing

¹ Defendant does not claim in this appeal that he was harmed in the presentation of his case by the alleged discovery violation. The trial court allowed defense counsel whatever time necessary to prepare for her cross-examination of Bell in light of the report (R.290), and counsel made no request to recall Collins as a witness in order to cross-examine him further regarding the issues raised in Bell's report.

discovery to defendant. There is no logical connection between the alleged discovery violation and the issue of Collins' bad faith.

B. Officer Collins' testimony. Defendant asserts that Collins was deliberately deceptive because he "left the impression" during his trial testimony that no blood samples were collected. However, there is no reason to believe that Collins was trying to mislead the court or hide the fact that the evidence technician had given him swabs with blood on them.

First, defendant is unable to point to any false testimony. When asked whether any blood was collected, Collins accurately stated "not successfully where we felt it would have any evidentiary value." This assertion is consistent with his repeated statements that it was his understanding, a "collective opinion" based on those who were at the scene, that the blood on the swabs was inadequate to test. Collins' entire testimony is therefore consistent with his stated understanding that the blood could not be tested; if the blood on the swabs was not subject to testing, his conclusion that blood "samples" could not be gathered is accurate.

Second, defendant argues that Collins' testimony was somehow calculated to conceal the fact that some blood had been collected, but this assertion is illogical in light of the facts. At the time of his testimony, Collins would have believed that defense counsel had read all the police reports and thus already knew that some blood had been collected at the scene and turned over to him. Bell stated in his report that he

"picked up some blood for possible future lab work, and turned it over to Deputy Collins" (R.303), and Collins would therefore have had no reason to believe that he would be able to hide the fact that "some blood" had been turned over to him. There is nothing in the record to imply that Collins knew that defense counsel did not have a copy of Bell's report or that defense counsel's ignorance of the report was other than inadvertent. None of the parties knew of this problem until the second day of trial. Accordingly, defendant's assertion that Collins was engaging in a "deliberate deception" simply makes no sense in this context.² Collins' testimony does nothing other than consistently confirm his understanding that the swabs given to him by Bell were of no evidentiary value.

Finally, even if it is assumed that Collins' testimony showed a desire to avoid questioning about the missing swabs, it would not be relevant to the court's finding of no bad faith: such a reading of the testimony would at worst only imply that Collins believed that he may have made a mistake in failing to submit the swabs so that the lab could determine whether they could be tested, thereby weakening the State's case by

² There is, of course, nothing in the record to imply that the prosecutor intentionally withheld the report in order to prevent defense counsel from learning that blood samples had been taken, and then conspired with Collins to deny the existence of such samples. It would be poor planning to engage in such a tactic, but then to call the preparer of the withheld police report to the witness stand in order to disclose the existence of that report to the defense and testify as to the facts contained in it.

allowing defendant to argue that there was evidence out there that he failed to pursue.³

The issue raised in this appeal is, however, not whether Collins made a mistake in believing that such samples could not be tested, or in negligently failing to submit them to the lab. The issue is only whether Collins believed that the swabs, if tested, would actually prove to be exculpatory. *Youngblood*, 488 U.S. at 58. There can be no such implication from his testimony.

C. Officer Bell's testimony. Officer Bell testified that he told Collins that he did not know whether the blood gathered on the swabs would be sufficient for testing, and that there was "a possibility" that a test could be run (R.151:328). As the trial court noted, this testimony conflicts with Collins' statement that "the consensus was that the blood samples could not be analyzed and that they did not have any evidentiary value." Memorandum Decision, p.2-3 (R.118-119). The trial court found that there was "an apparent miscommunication" between Collins and Bell (R.124). Defendant does not point to any evidence which would undermine the trial court's finding that there was a misunderstanding, and such appears to be the only reasonable explanation for the conflict in the testimony.

³ Indeed, defendant made this argument at trial, emphasizing the State's failure to test any of the blood evidence (R.151:399-401). *See Youngblood*, 488 U.S. at 59 (Stevens, J. concurring) ("it is unlikely that the defendant was prejudiced by the State's omission. In examining witnesses and in her summation, counsel impressed upon the jury the fact that the State failed to preserve the evidence and that the State could have conducted tests that might well have exonerated the defendant.")

The existence of this misunderstanding does not undermine the trial court's conclusion that Collins did not act in bad faith, nor does it in any way imply that Collins believed that the evidence was exculpatory. As the trial court noted, "Officer Collins testified that he did not recognize the blood samples as having any evidentiary value one way or the other" (R.125). Thus, even if it is assumed that Collins was wrong or negligent, in believing that the samples were insufficient to test, there is still nothing in the record to imply that Collins believed that the swabs would prove to be exculpatory if they had been submitted for testing.⁴

D. Alleged deviation from normal practice. Defendant asserts that Collins violated "normal practices" in failing to submit the swabs for testing. However, there is no evidence in the record as to the existence of any "normal" practice or standard procedure on this issue. The only facts in the record are that Collins believed the swatches to contain an insufficient amount of blood for testing, and that he did not, in fact, submit them. There is no evidence of a standard procedure or practice established for deciding whether to submit a questionable sample for testing. Indeed, even if it is

⁴ Officer Collins' decision not to submit the blood samples for testing "can at worst be described as negligent." Memorandum Decision, p. 9 (R.124). *See State v. Holden*, 964 P.2d 318, 323 (Utah App. 1998) ("Bad faith requires that a defendant prove more than mere negligence; a defendant must show that 'the police . . . by their conduct indicate that the evidence could form a basis for exonerating the defendant.'"), *quoting Youngblood*, 488 U.S. at 58 (no bad faith because officer's behavior in failing to preserve samples and perform tests was at worst negligent).

assumed that Collins believed that adequate blood samples existed, there is no evidence that there is a standard procedure which requires all such samples to be gathered, let alone that they must in all cases be tested. *See Bakalov*, slip op. at 18 ("due process . . . does not require that the State 'search for exculpatory evidence, conduct tests, or exhaustively pursue every angle on a case.'") (*quoting Shaffer*, 725 P.2d at 1306).

Bell testified only that he thought there was a possibility that the blood on the swabs could have been tested, and that such a determination could be made by the lab. He did not testify that there was some policy requiring all samples to be tested, or that all blood swabs with unknown evidentiary value must be preserved. Indeed, Bell testified that it was Collins' decision whether to send the swabs for testing (R. 329). There is thus no evidence that Collins' failure to preserve the swabs constituted a knowing violation of standard procedures.

Defendant has not met his burden to show that Officer Collins acted in bad faith. The trial court's conclusion to the contrary is fully supported by the record and did not constitute an abuse of discretion.

CONCLUSION

For the reasons stated, defendant's convictions should be affirmed.

RESPECTFULLY SUBMITTED this 1 day of ~~May~~^{June}, 1999.

JAN GRAHAM
Attorney General

A handwritten signature in black ink, appearing to read "Scott Keith Wilson". The signature is written in a cursive style with a large initial "S" and "W".

SCOTT KEITH WILSON
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellee were hand-delivered

this 7 day of June, 1999 to:

Linda M. Jones
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Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Linda M. Jones", is written over a horizontal line.

Addenda

Addendum A

SEP 30 1998

SALT LAKE COUNTY
By [Signature]
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 971922700
vs.	:	
HOWARD LLOYD MILES,	:	
Defendant.	:	

Before the Court is the defendant's Motion to Dismiss Based on State's Destruction of Evidence. A hearing was held on this matter on September 18, 1998, at which time counsel for defendant and counsel for the State presented their respective positions. Following oral argument, the Court took the matter under advisement to further consider the written submissions. Since having taken the defendant's Motion under advisement, the Court has had an opportunity to once again review the moving and responding legal Memoranda, and being otherwise fully advised, enters the following Memorandum Decision.

FACTUAL BACKGROUND

On December 18, 1997, the defendant was charged by Information with burglary, a third degree felony, and criminal mischief, a

class B misdemeanor. Following a jury trial held August 10 and 11, 1998, the defendant was found guilty on both charges.

At the trial, the State presented circumstantial evidence and eye-witness testimony that connected the defendant to a burglary that occurred at an Einstein's Bagel restaurant on December 10, 1997. During the course of the trial, Officer John Bell testified that he was called to the scene of the burglary to process it for fingerprints and to collect blood samples. Officer Bell testified that he was able to obtain two blood samples; one collected near a small ledge under the cash register and one collected near the outside window of the restaurant. According to Officer Bell's testimony, he placed the two "swatches" of blood in a container and turned them over to Officer Scott Collins. Officer Bell testified that he did not know whether there was a sufficient amount of the blood samples for the State Crime Lab to perform tests on them, but that he left the decision of whether to actually take the samples to the Lab up to Officer Collins.

Officer Collins testified that Officer Bell communicated his opinion that there was an insufficient amount of blood collected for any tests to be performed by the State Crime Lab. According to Officer Collins, the consensus was that the blood samples could not

be analyzed and that they did not have any evidentiary value. For this reason, Officer Collins apparently made the decision not to preserve the samples.

LEGAL ANALYSIS

In his Motion, the defendant argues that the State violated his due process right to access to material evidence when the police officers collected a blood sample from the scene of the crime and then discarded it. The State's position is that the blood samples were not constitutionally material and that even if they were, the defendant cannot present any evidence that the police acted in bad faith.

The principle that the government is only required to preserve evidence in certain circumstances was first definitively addressed in California v. Trombetta, 467 U.S. 479 (1984). In Trombetta, the defendants had been stopped for suspected drunken driving. Each defendant took a breathalyzer test and registered higher than .10 percent, an amount which carries a presumption of intoxication. Although feasible, the arresting officers failed to preserve samples of the defendants' breath.

A unanimous Supreme Court declined to find a constitutional error in the state's failure to take and preserve samples. The Court held that the standard of fundamental fairness required by

the Due Process Clause did "not require law enforcement agencies [to] preserve [evidence] in order to introduce the results of the tests" conducted on such evidence for three reasons. Id. at 941.

First, the government did not destroy the evidence "in a calculated effort to circumvent the disclosure requirements established by Brady v. Maryland and its progeny"; rather, the police officers acted "in good faith and in accord with their normal practices." Id. at 488.

Second, the evidence was not constitutionally material. According to the Court, materiality meant evidence which possessed "an exculpatory value that was apparent before the evidence was destroyed" and was of "such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. at 489. On this point, the Court found that other methods of challenging the Intoxilyzer test results existed, including inspecting the machine and its records and introducing evidence of any outside influences, such as chemicals or radio waves, that could have affected the test. Id. at 490.

Finally, the likelihood that the evidence would have been exculpatory had it been preserved was small. The Court noted that the possibility of error in the breath tests was "extremely low"

and found that the breath samples were more likely to be inculpatory rather than exculpatory.

In Arizona v. Youngblood, 488 U.S. 51 (1988), defense counsel sought access to an assault kit and clothing to perform blood-group tests that might exonerate the defendant of charges of sexual assault. Id. at 54. Such tests proved impossible because the police had failed to store the samples properly. Id. at 53. Youngblood's principle defense was that the victim mistakenly identified him as the rapist, and that the semen samples, if properly preserved, would have exonerated him. Id. The trial court proceeded, but instructed the jury that if it found that the state had destroyed or lost evidence, it should infer that the evidence would have been favorable to the defendant. Id. at 54.

The Supreme Court broadened the test articulated in Trombetta, by holding that "unless 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. In so doing, the Court further explained that the mere possibility that evidence could exculpate a defendant, had it been preserved, would not be sufficient to satisfy the constitutional materiality standard articulated in Trombetta. Instead, the

exculpatory value of the evidence must be apparent, and this apparency must be judged before the evidence is destroyed. Therefore, "the presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Id. at 56.

The Supreme Court rejected Youngblood's argument that the mishandling of the samples deprived him of his due process rights, finding no suggestion of bad faith on the part of the police. The Court acknowledged that the likelihood of exoneration was higher than in Trombetta, but distinguished Trombetta by observing that the state's case in Youngblood did not rely upon results from absent evidence, as was the case in Trombetta.¹ The Court found that the "apparently exculpatory value" standard set forth in Trombetta was not satisfied, because no tests had yet been performed, and held that failure to preserve "potentially useful evidence" does not constitute a due process violation unless there is evidence of bad faith. Id. at 56. In reaching this holding, the Court expressed its unwillingness to speculate about the possible significance of the destroyed materials and was reluctant

¹Youngblood was convicted on the basis of a photographic lineup identification.

to "impose . . . an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." Id. As for bad faith, the Court stated that "the presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Id. at 56-57.

The Court determines that the present case more closely resembles Youngblood than Trombetta. In Trombetta, the government failed to save breath samples after they had been tested. In Youngblood, similar to the present case, the government failed to preserve samples so that definitive tests could not be performed. Also, in Trombetta, a subsequent test by the defendant merely provided impeachment evidence. On the other hand, in Youngblood, as in the present case, a test by the defendant, could it have been done, offered a possibility of exoneration. Therefore, the "bad faith" standard asserted in Youngblood supplies the controlling Due Process standard.

The "bad faith" standard established in Youngblood was recently interpreted by the Utah Court of Appeals in State v.

Holden, 348 Utah Adv. Rep. 17 (Utah Ct. App. 1998). In Holden, the defendant appealed the denial of two motions to suppress, one of which was based on the contention that the police acted in bad faith when they destroyed nonincriminating evidence from the search of the defendant's garbage bags. The defendant in Holden argued that the police acted in bad faith by failing to save "potentially useful" evidence from the trash because "the burden of preservation was minimal" and because the police acted too quickly in disposing of the trash without consulting supervisors or written police procedures. Id. at 21.

In discussing the requirement of bad faith set forth in Youngblood, the court emphasized that "[b]ad faith requires that a defendant must show that 'the police . . . by their conduct indicate that the evidence could form a basis for exonerating the defendant.'" Id. at 20 (quoting Youngblood, 488 U.S. at 58). The court held that the trial court did not abuse its discretion "in concluding that the police had not acted in bad faith in simply doing with the rest of his garbage what Holden intended would be done with it, i.e. disposing of it." Id. at 21.

In this case, the "exculpatory nature" of the destroyed blood samples is at best a mere possibility. Under Youngblood, this is

not enough to satisfy the constitutional materiality requirement articulated in Trombetta. Moreover, there exists no evidence of bad faith on the part of Officer Collins. In his Motion, the defendant seems to argue that a finding of bad faith is justified on the basis that Officer Collins' testimony is at odds with Officer Bell's testimony as to whether Officer Collins was informed that the blood samples were insufficient and could not be tested. The defendant's emphasis on whether Officer Collins discarded the blood samples because he thought they were insufficient is misplaced. Under Youngblood, the only relevant inquiry to the issue of whether Officer Collins acted in bad faith is whether Officer Collins knew of the exculpatory value of the blood samples at the time that he made the decision to not preserve the blood samples for analysis. The apparent miscommunication between the officers as to the sufficiency of the blood samples is immaterial to this inquiry.

The Court finds that Officer Collins did not have knowledge of the exculpatory value of the blood samples at the time he discarded them because the blood had not been tested yet. While the failure of Officer Collins to take the blood samples to the State Laboratory for testing can at worst be described as negligent,

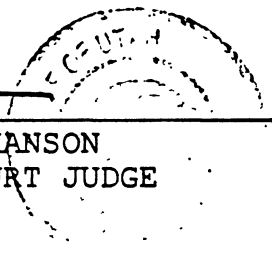
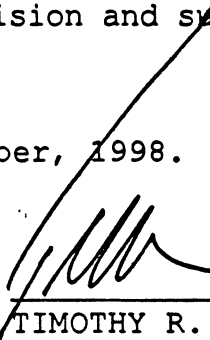
there is no suggestion that Officer Collins discarded the samples because he knew that they could form the basis for exonerating the defendant. In fact, Officer Collins testified that he did not recognize the blood samples as having any evidentiary value one way or the other. Accordingly, the defendant's Motion fails to satisfy the standards of Youngblood.

During oral argument, counsel for the defendant argued that this case is analogous to State v. Cook, 953 P.2d 712 (Nev. 1998). In that case, the Nevada Supreme Court reversed Cook's conviction because the State lost a number of critical pieces of evidence including photographs, a report prepared by a detective interviewing the defendant, a report of the victim's initial statement to police and the victim's sweater. While the court in Cook did not apply the Youngblood standard, the court essentially found that the police acted in bad faith by losing items that they could have "reasonably anticipated to be both material and exculpatory." Id. at 715. Cook is clearly distinguishable from the present case. Unlike the numerous items lost by the police officers in Cook, the blood samples that were discarded in this case did not meet the constitutional materiality requirement articulated in Trombetta. In addition, the police officers in this

case did not act in bad faith and could not have reasonably anticipated whether the blood samples would be material and exculpatory since the tests on the blood had not yet been performed. Accordingly, the Court determines that the defendant's reliance on Cook is misplaced.

Based on the foregoing analysis, the Court denies the defendant's Motion. Counsel for the State is to prepare an Order consistent with this Memorandum Decision and submit the same to the Court for review and signature.

Dated this 25 day of September, 1998.



TIMOTHY R. HANSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 25 day of September, 1998:

*Handed to Counsel in
Court E.D.*

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Addendum B

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FILED BY: [Signature]
Third District Court
OCT - 8 1998
SALT LAKE COUNTY
By: [Signature]
Deputy Clerk

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY
FOR THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- HOWARD LLOYD MILES, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW. Case No. 971922700 FS Judge TIMOTHY R. HANSON
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Defendant's Motion to Dismiss Based on State's Destruction of Evidence in the above entitled matter came before this Court for hearing on September 18, 1998. Counsel for Defendant, Rebecca Hyde, Salt Lake Legal Defenders Association, and counsel for the State, Ernest W. Jones, Deputy District Attorney, presented their respective positions. Following oral argument the matter was taken under advisement to further consider the written submissions. This Court now enters the following FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT

1. The destroyed blood samples, at best, have only a mere possibility of being exculpatory in nature.
2. There exists no evidence of bad faith on the part of Officer Collins.
3. There was an apparent miscommunication between the officers as to the sufficiency of the blood samples.

4. Officer Collins did not have knowledge of the exculpatory value of the blood samples at the time he discarded them because the blood had not yet been tested.

CONCLUSIONS OF LAW

1. The blood samples that were discarded in this case did not meet the constitutional materiality requirement articulated in California v. Trombetta, 467 U.S. 479 (1984).

2. The government did not destroy the evidence “in a calculated effort to circumvent the disclosure requirements established by Brady v. Maryland and its progeny”; rather, the police officers acted “in good faith and in accord with their normal practices.” Trombetta at 488.

3. The apparent miscommunication between the officers as to the sufficiency of the blood samples is immaterial to this inquiry.

4. The likelihood that the evidence would have been exculpatory had it been preserved was small, and therefore the “apparently exculpatory value” standard set forth in Trombetta was not satisfied.

5. Because the present case deals with a government failure to preserve samples so that definitive tests could be performed, but does not deal with a failure to preserve samples after they have been tested, it more closely resembles Arizona v. Youngblood, 488 U.S. 51 (1988), rather than Trombetta. Therefore, the bad faith standard asserted in Youngblood and recently interpreted in State v. Holden, 348 Utah Adv. Rep. 17 (Utah Ct. App. 1998), supplies the controlling Due Process standard.

6. Because there is no suggestion that Officer Collins discarded the samples because he knew that they could form the basis for exonerating the defendant, and because he testified that

he did not recognize the blood samples as having any evidentiary value at all, the defendant's Motion fails to satisfy the "bad faith" standards of Youngblood.

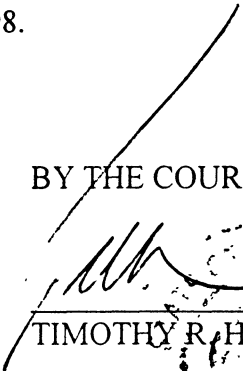
7. The defendant's reliance on State v. Cook, 953 P.2d 712 (Nev. 1998) is misplaced because that case involved numerous items lost by police which they "could reasonably [have] anticipated to be both material and exculpatory," whereas this case involves blood samples which do not meet the constitutionality requirement set forth in Trombetta.

8. The destruction of the blood samples did not violate defendants right to Due Process.

9. Defendant's Motion to Dismiss is Denied.

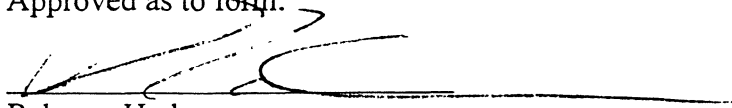
DATED this 8 day of October, 1998.

BY THE COURT:


TIMOTHY R. HANSON, Judge



Approved as to form:


Rebecca Hyde

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Findings Of Fact And
Conclusions Of Law was hand delivered/mailed postage prepaid on this 6th day of October, 1998

to:

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Attorney for Defendant
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Michelle Watson