1998

The State of Utah v. Howard Lloyd Miles : Brief of Appellant

Utah Court of Appeals

Scott Keith Wilson; Assistant Attorney General; Jan Graham; Attorney General; Attorneys for Appellee.
Linda M. Jones; Salt Lake Legal Defender Association; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Burglary of a Building, a third degree felony in violation of Utah Code Ann. § 76-6-202 (1995), and Criminal Mischief, a class B misdemeanor in violation of Utah Code Ann. § 76-6-106 (Supp. 1997), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, Judge, presiding.

LINDA M. JONES (5497)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorney for Appellant

JAN GRAHAM (1231)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

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JAN GRAHAM (1231)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
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HOWARD LLOYD MILES,	:	Case No. 981669
	:	Priority No. 2
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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

The issue presented for review is as follows:

Whether Officer Collins acted in bad faith in disposing of blood samples after being informed that other evidentiary samples from the scene of the crime could not be collected and after being directed by the lab technician to provide the samples to the State Crime Lab for testing, among other things.

Standard of Review:

> [T]he determination of whether specific police conduct rises to the level of bad faith is a question of law, reviewed under a correctness standard. *See State v. Pena*, 869 P.2d 932, 936-37 (Utah 1994). However, because the determination of bad faith turns on "`the quintessential factual question of intent,'" [*U. S. v. Bohl*, 25 F.3d 904, 909 (10th Cir. 1994)] (citation omitted); [*U.S. v. McKie*, 951 P.2d 399, 403 (D.C. Cir. 1991)], the bad-faith legal standard "is one that conveys a measure of discretion to the trial judge when applying that standard to a given set of facts." *Pena*, 869 P.2d at 939. As in *Pena*, a case involving a constitutional question dependent on application of a legal standard to a given set of facts, it is impossible for us to precisely define the scope of that discretion other than to say that "we would not anticipate a close, de novo review. On the other hand, a sufficiently careful review is necessary to

> assure that the purposes of the [bad-faith] requirement are served." *Id.* Accordingly we apply an abuse-of-discretion standard of review.

State v. Holden, 964 P.2d 318, 324 (Utah App. 1998); see also Valcarce v. Fitzgerald, 961 P.2d 305, 315-16 (Utah 1998).

PRESERVATION OF ARGUMENT

The issue on appeal was preserved in the record ("R.") at 100; 102-110; 151:301-02, 315; 152.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following constitutional provisions will be determinative of the issue on appeal:

Utah Const. art. I, § 7.

U.S. Const. amend. XIV.

The text of those provisions is contained in Addendum A.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition in the Court Below.

On December 18, 1997, the state charged Howard Lloyd Miles ("Miles") with burglary, a third degree felony offense in violation of Utah Code Ann. § 76-6-202 (1995), and criminal mischief, a class B misdemeanor in violation of Utah Code Ann. § 76-6-106 (Supp. 1997). (R. 2-4.) After the first day of trial in this matter, Miles made a motion to dismiss the charges based on the state's destruction of evidence. (R. 102-110.) The trial court denied the motion, as set forth in the Memorandum Decision attached hereto as Addendum B, and the state-prepared Findings and Conclusions attached hereto as Addendum C. (See R. 116-130.)

The jury found Miles guilty of both offenses as charged (R. 52; 90-91), and Miles was sentenced to serve three months in jail followed by probation. (R. 112-15.) A copy of the judgment and sentencing order is attached hereto as Addendum D. Miles hereby appeals from the final judgment; he is challenging the trial court's ruling on the motion to dismiss.

STATEMENT OF FACTS

Miles was charged with burglary, a third degree felony offense, and criminal mischief, a class B misdemeanor for allegedly breaking into an Einstein Bagels restaurant in December 1997. (R. 2-4.) During the trial, the state designated Officer Scott Collins as the state's representative (R. 150:105), and presented the following evidence.

Restaurant manager Eric Heaston testified that he was notified of a break-in at the restaurant at 4:00 a.m. on December 10, 1997. When he arrived at the restaurant he observed that the double-pane glass in the drive-through window was shattered, and there was "blood all over the place from -- probably from the [broken] glass." (R. 150:121, 123, 124, 129.) According to Heaston, there was a particularly bloody area inside the restaurant (R. 150:131), and there were bloody handprints inside a closet that was accessible only from the outside of the building. (R. 150:133-34.)

Nothing was taken from the bagel shop. (R. 150:125.) Restaurant employees began cleaning the blood smears at 6:00 a.m. on the morning of the incident. (R. 150:141.)

Steven Winberg was across the street from the restaurant, in the bed of his truck, loading a salter on the morning of December 10th. (R. 150:144-45.) He testified that he observed a person in a knit ski cap walking in the area, and at one point, as the person walked by his truck, he had his head down and they "kind of looked at each other [at] the same time," and they exchanged words. (R. 150:146-47, 161, 164, 177.) Thereafter, the person crossed the highway to a dark parking lot, and Winberg either got into his truck (R. 150:150) or started walking to follow the person. (R. 150:151.) From a distance "across the highway" (R. 150:151), Winberg observed the person punch out the glass in the drive-through window of the restaurant, and crawl into the building through the window. (R. 150:149-153.) Winberg tried several times to contact police and "finally got a hold of them and told them what was going on and they just told [him] to hang tight." (R. 150:153, 186.)

Winberg admitted that "because of the darkness and not good light," all he could see at that point "was a figure." "I couldn't see anything besides that. All I seen was somebody was there." (R. 150:154; see also 150:169.) According to Winberg, there were no street lights in the area of the bagel shop, and he could not recall what the lighting was like in the restaurant parking lot. (R. 150:184.) Winberg testified that as he observed the incident from across the street, he also was attempting to get the attention of another worker "to come down and pick [him] up." (R. 150:154.)

Winberg observed the person in the cap exit the building through a back door (R. 150:155-56), and walk south. Thereafter, Miles was arrested. (R. 150:157-58.)

Winberg testified that he "never lost sight [of the person in the cap] the whole time." (R. 150:158.) He also testified that during the entire incident he was on the telephone, he was looking for the other worker to pick him up, and he walked around the truck to climb into it. (R. 150:165-68.)

Winberg identified Miles as the person in the cap. (R. 150:159-162.) Miles was not wearing a cap. (R. 150:161-62, 167, 192-93, 200-01.) Winberg's testimony required the jury to resolve whether Winberg clearly identified Miles as the person who broke into the restaurant.(See R. 82-84 (eyewitness instruction); 151:316.)

The state's next witness, Starla Roque, was delivering papers at the restaurant on December 10th. She testified that while she sat in her car she observed a man exit the building at 4:00 in the morning, and then he disappeared around the side of the building. She stated that she later saw Miles in police custody. (R. 150:216.) Roque testified that she observed the man, who exited the restaurant, five feet from her car. She identified the man as Miles. (R. 150:217, 227.)

On cross-examination, Roque admitted that prior to trial she did not recall what the man looked like; she did not recall whether he was wearing a cap, whether he had facial hair, or whether his hair was straight or curly, but remembered only that

he had blond hair and dark clothes. (R. 150:221.) Roque also admitted that before she testified, the prosecutor sought to enhance her identification of Miles with a picture of him. (R. 150:223-24.) Roque's testimony required the jury to resolve whether Roque clearly identified the person who was leaving the restaurant as Miles. (See R. 82-84 (eyewitness instruction); see also 151:316.)

Deputy Allen Morrical testified that he stopped Miles while Miles was walking down the street a short distance from the bagel restaurant, and arrested him. (R. 150:232.) Morrical testified that he observed several small cuts on Miles' hands. (R. 150:234-35.) Morrical did not find a cap at the arrest scene or at the restaurant. (R. 150:239-40; see also 150:135.)

Officer Collins testified that he responded to the call from dispatch and collected witness statements. (R. 150:244-46.) He observed small, fresh abrasions on Miles' knuckles (R. 150:246-47), and significant areas of blood in the restaurant. (R. 150:250-51.) He also testified that Miles' hands were not bleeding, and did not require medical attention. (R. 150:247-48.)

Collins testified that he made an attempt to collect blood samples, but was unable to successfully gather a sample that would be of any evidentiary value. (R. 150:253-54, 262-63.) Thus, he had photographs taken of areas where fresh blood was smeared or dropped. (R. 150:254.) Collins also testified that he requested an evidence technician to lift fingerprints from the scene, but was told at the time that the technician could not

successfully lift latent prints. (R. 150:255.) Collins requested that an officer take photographs of a footprint, but made no attempt to compare it to Miles' footprint. (R. 150:256.)

On the second day of trial, evidence technician John Bell testified outside the presence of the jury that he collected blood samples from the scene on two swatches, properly preserved the swatches, and "turned everything over to Deputy Collins." (R. 151:292-93, 296; see also 151:324-25.) Bell informed Collins that he did not know if the samples would be sufficient for testing and Collins would "have to turn it over to the State Crime Lab, because we don't do that kind of work." (R. 151:293.)

Bell also testified that he "left that decision up to Detective Collins as to whether or not [the samples] would be submitted to the Crime Lab." (R. 151:294; see also 151:327.) Bell did not know if the samples still existed since he left them in Collins' care. (R. 151:295.) Also, he could not say if a sample of the size he collected at the restaurant could be tested by the Crime Lab. (R. 151:295.) Since Collins was not in attendance at the trial on the second day, the prosecutor represented that apparently Collins "decided that he wasn't going to submit [the samples]. I mean, that's a decision he has to live with as far as his investigation goes." (R. 151:307.)

During the defense's case, Miles' mother testified that Miles is right-handed, and that when he was released from jail she observed he had only a small cut on his left hand on his pinky finger. (R. 151:334-35.)

Inasmuch as counsel for the defense was unaware until after Collins testified on the first day of trial that blood samples were taken from the scene, counsel made a motion in open court to continue the matter (R. 151:287-88, 302), and subsequently moved to dismiss the case based on the state's wrongful destruction of the blood samples. (R. 100-110.) After the trial, the court denied the motion in a memorandum decision, wherein the court stated that there was no evidence of bad faith on Collins' part in destroying the samples. (R. 124.) Miles asserts on appeal that the trial court erred in its ruling.

SUMMARY OF THE ARGUMENT

The United States Supreme Court has recognized that the government violates a criminal defendant's due process rights when it destroys evidence that is potentially useful. Arizona v. Youngblood, 488 U.S. 51, 58 (1988). To establish a violation under Youngblood, defendant must show that the government acted in bad faith. In this case, Collins destroyed blood samples that Bell collected from the scene of the crime. The samples were destroyed before tests could be conducted on them. Miles maintains that the samples would have exonerated him of the charged offenses. Thus, he made a motion in the trial court to continue the trial or dismiss the charges on the grounds that Collins destroyed the samples in bad faith.

The trial court denied Miles' motion and found that Collins and Bell apparently had a miscommunication with respect to whether the samples could be tested. According to the trial

court, Collins did not act in bad faith.

The trial court's findings are incorrect. The record reflects that Collins misrepresented facts at trial concerning collection of the blood samples, the state improperly withheld evidence from the defense concerning the samples, Collins destroyed the samples before testing and apparently in violation of normal practices, and Collins reasonably knew of the evidentiary value of the samples at the time that he destroyed them. Collins acted in bad faith. The constitutional violation prejudiced Miles, requiring reversal of this matter for a new trial.

ARGUMENT

THE RECORD SUPPORTS THAT COLLINS ACTED IN BAD FAITH WHEN HE DESTROYED THE BLOOD SAMPLES.

A. THE DUE PROCESS CLAUSE PROHIBITS THE PROSECUTION TEAM FROM DESTROYING CERTAIN EVIDENCE RELEVANT TO THE CASE.

The Due Process Clause of the Fourteenth Amendment to the Federal Constitution requires the prosecution team to disclose all evidence to the criminal defendant that is material either to guilt or punishment.[1] California v. Trombetta, 467 U.S. 479, 481 (1984). In addition, that clause prohibits the state and officers investigating the case from destroying certain evidence prior to trial.

The principles articulated by the United States Supreme

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1 Miles asserts that Article I, Section 7 of the Utah Constitution requires the same disclosure. See also State v. Thomas, 361 Utah Adv. Rep. 3, 6 (Utah 1999) (recognizing that prosecution's open file policy requires complete disclosure of inculpatory and exculpatory information). Miles is not seeking a separate analysis under the state constitution.

Court in Trombetta and Arizona v. Youngblood, 488 U.S. 51 (1988), concern the wrongful destruction of evidence. In Trombetta, the Court considered whether the prosecution was constitutionally required to preserve breath samples used to obtain intoxication test results that were provided to the defense during pre-trial discovery. The test results supported defendants' convictions.

According to the Court, the constitutional duty to preserve evidence "must be limited to evidence that might be expected to play a significant role in the suspect's defense." Trombetta, 467 U.S. at 488. "To meet this standard of constitutional materiality, [] 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 489 (cites omitted).

In Trombetta, the Court determined that the state did not violate defendants' due process rights by destroying the breath samples. The Court ruled that (1) in light of the procedures used to obtain the test results, it was unlikely that preserved samples would have exculpated the defendants; (2) defendants were "perfectly capable of raising" issues concerning the validity of the testing process without the actual breath samples; and (3) the officers acted in good faith in destroying the samples, since destruction was in accordance with their normal practice. Id. at 488-90; see also State v. Garcia, 965 P.2d 508, 516-17 (Utah App. 1998) (recognizing Trombetta ruling); State v. Lovato, 702 P.2d

101, 106 (Utah 1985) (defendant must show that evidence destroyed by prosecution was material to guilt or innocence for destruction to constitute a due process violation); State v. Stewart, 544 P.2d 477, 479 (Utah 1975).

> Under the two-prong Trombetta test, the government violates a defendant's right to due process when: (1) it destroys evidence whose exculpatory significance is "apparent before" destruction; and (2) the defendant remains unable to "obtain comparable evidence by other reasonably available means."

U.S. v. Bohl, 25 F.3d 904, 909-10 (10th Cir. 1994) (quoting Trombetta, 467 U.S. at 489).

In Youngblood, the Supreme Court extended the Trombetta analysis. The Court determined that if destroyed evidence was "potentially useful" -- that is, its exculpatory value had not yet been determined -- the defendant must show that the government acted in bad faith in destroying the evidence to establish a due process violation. See Bohl, 25 F.3d at 910.

In Youngblood, the victim of a sexual assault was taken to the hospital where a physician used a "sexual assault kit" to collect evidence of the assault, including saliva, blood and hair samples. The physician did not examine the samples, but placed them in a secure refrigerator. Later, another officer examined the samples, determined an assault had occurred and placed the samples back in the refrigerator. Youngblood 488 U.S. at 52-54. Two months after the assault, the state tried to collect semen samples from the victim's clothing, but was unsuccessful. Id.

During pre-trial discovery, "[t]he State disclosed relevant police reports to [defendant], which contained information about

the existence of the swab and the clothing, and the boy's examination at the hospital. The State provided [defendant's] expert with the laboratory reports and notes prepared by the police criminologist, and [defendant's] expert had access to the swab and to the clothing." Id. at 55. Notwithstanding the information made available to defendant, he maintained that the state violated his due process rights by failing to make timely efforts to collect "semen samples from the victim's body and clothing." Id. at 52.

In considering the matter, the Supreme Court determined that the evidence supported that the officers' failure to refrigerate the clothing and to perform earlier tests on the semen samples constituted negligence. Further, "[n]one of this information was concealed from [defendant] at trial, and the evidence -- such as it was -- was made available to [defendant's] expert who declined to perform any tests on the samples." Id. at 58.

The Court recognized that the unpreserved semen samples may have exonerated defendant. Id. at 56. However, because "no more can be said [of the evidence other] than that it could have been subjected to tests, the results of which might have exonerated the defendant," id. at 57, the Court ruled that defendant must show that the police acted in "bad faith" in failing to preserve the potentially useful evidence. Id. at 58. Because the officers in Youngblood made full disclosure with respect to the evidence in their possession, and they provided the defendant with the opportunity to assess that information, defendant was

unable to show bad faith on the part of the officers for failing to preserve the samples. Id.

After Youngblood, this Court considered the issue of police misconduct in destroying potentially useful evidence in State v. Holden, 964 P.2d 318, 323 (Utah App. 1998). In that case, this Court identified the defendant's burden as follows:

> Regarding cases when the state has failed "to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," [Youngblood, 488 U.S. at 57], a defendant must show "bad faith on the part of the police," [id. at 58]. 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." Id.

Holden, 964 P.2d at 323.

In Miles' case, the samples apparently were destroyed before their usefulness could be determined. Thus, the analysis set forth in Youngblood and Holden applies, as set forth below.

B. THE TRIAL COURT'S FINDINGS REGARDING BAD FAITH ARE CLEARLY ERRONEOUS AND THEY DISREGARD IMPORTANT EVIDENCE CONCERNING COLLINS' CONDUCT.

In the Findings of Fact and Conclusions of Law entered in this matter, the relevant finding concerning whether Collins' acted in good/bad faith in destroying the evidence reflected the following: "There was an apparent miscommunication between the officers as to the sufficiency of the blood samples." (R. 128; see also.)[2] That finding is clearly erroneous. In addition, the

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2 The "findings" portion of the order contained four "findings of fact." The first and fourth findings do not relate to Collins' conduct. The first finding states, "The destroyed blood samples, at best, have only a mere possibility of being exculpatory in (continued...)

trial court disregarded evidence of bad faith, including the following: The record supports that (1) the state improperly withheld information during pre-trial discovery that officers collected blood samples from the crime scene; (2) Collins misrepresented facts about the blood samples when he testified, thereby avoiding cross-examination on the matter; (3) Collins destroyed the samples apparently in violation of normal practices; and (4) Collins' knew that the samples could be exculpatory at the time he destroyed them. Under Youngblood, the facts reflect bad faith.

Specifically, on the second day of trial, defense counsel discovered that the state withheld police reports during pre-trial discovery that would have disclosed that officers collected blood samples from the crime scene. (R. 151:287-88, 302-304, 310 (court recognized that if the state had disclosed reports to defense counsel during pre-trial discovery, "she would have known when Deputy Collins was testifying that there was apparently a

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(...continued)
nature." (R. 128.) The fourth finding recognizes that the blood samples had not yet been tested. Both findings 1 and 4 support application of the Youngblood analysis to this case.

The second "finding" may be more appropriately characterized as a conclusion. It states: "There exists no evidence of bad faith on the part of Officer Collins." (Id.) "Bad faith" is the conclusion to the mixed question of law and fact; the conclusion must be based in the facts. See State v. Nielsen, 727 P.2d 188, 191 (Utah 1986) (court "conclude[s]" as a "matter of law" that conduct constituted "bad faith"); see also Trulis v. Barton, 107 F.3d 685, 694 (9th Cir. 1995) (recognizing that uncontroverted facts demonstrate "bad faith as a matter of law"). The conclusory determination of "bad faith" set forth in the findings is similar to "conclusions" 2 and 6, which concern "bad faith." (R. 129.)

sample taken").)[3] The defense alerted the trial judge to the matter, and the prosecutor responded that he "thought" he had disclosed the reports although he could not confirm that fact. (R. 151:289; see note 3, herein supra.) The state's failure to disclose the report supports bad faith.

In addition, Collins specifically left the impression from his trial testimony that *no blood samples were collected*, thereby effectively preventing the defense from examining him with

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3 On February 12, 1998, counsel for Miles requested discovery of "all physical evidence taken and all investigative analy[ses] done on any evidence in the above-entitled case." (R. 9-10.) Counsel also requested evidence relating to Miles' hands. (R. 12.) On the second day of trial, counsel for the defense discovered that the state failed to disclose reports reflecting the fact that Bell collected blood samples at the crime scene. Counsel raised this issue to the trial court. (R. 151:287-88; 152:4.) In response, the prosecutor, Ernie Jones, stated that he "thought" his office had provided the reports along with other papers to the defense, and even if he had not provided the reports, "what's the prejudice here?" (R. 151:289.) The judge declined to rule on whether the prosecutor failed in his duty to disclose the reports to the defense during pre-trial discovery. (See R. 151:290.)

In State v. Thomas, 361 Utah Adv. Rep. 3, 6 (Utah 1999), the Utah Supreme Court reiterated the importance of the prosecution's duty to provide full disclosure in discovery. In that case, the state similarly believed it had provided a particular document to the defense in response to discovery requests, although no record of the disclosure existed in the file. The Utah Supreme Court declined to find that the disclosure had been made, absent something in the record supporting the state's position: "Despite the State's beliefs and its insistence to the contrary, we have no documentary evidence before us that indicates [defendant's] counsel - either past or present - ever received the [document]. We therefore find that the State acted improperly in not furnishing a copy of [the document] to [defendant's] subsequent counsel." Thomas, 361 Utah Adv. Rep. at 6.

In this matter, there is no documentary evidence that the state disclosed the reports to the defense prior to trial. In accordance with the Utah Supreme Court's decision in Thomas, "the State acted improperly in not furnishing a copy of [the document] to [defendant's] subsequent counsel." Id.

respect to his unilateral decision to destroy the samples after he had been directed to submit them to the crime lab for testing. Collins' testimony was as follows:

> [Prosecutor]: Let me ask you: Did you try to collect any of this blood, any of the physical evidence there at the scene?
>
> [Collins]: We did.
>
> [Prosecutor]: And were you able to do that at all?
>
> [Collins]: Not successfully where we felt it would have any evidentiary value. It was so cold outside and we took - I had called out an evidence tech to the scene for photographs, possible processing of any latent and any collection of any other evidence he deemed necessary.
>
> He had taken a napkin and wiped it along the ice - the blood-stained ice on the sill - and nothing came off.
>
> We went to the wall, tried to collect some of that; nothing came off. I - we - we pondered whether maybe we could scrape something off the wall and be able to get anything like that, and it was a consensus amongst all of us that were there that it probably wouldn't be worth any evidentiary value at that time.
>
> [Prosecutor]: So you're saying you attempted to try to collect some of this blood but -
>
> [Collins]: Uh-huh. (Affirmative.) That's why we photographed it.
>
> [Prosecutor]: Let me ask you: Did the blood that you saw inside of Einsteins, did that appear to be fresh?
>
> [Collins]: It did. It appeared to be fresh insofar as there was no dust on it, there was no snow on it, it didn't appear to be iced over or any foreign particle or matter on top of it.

(R. 150:254-55.) Collins also testified as follows:

> [Defense Counsel]: [I]t was your collective opinion that you couldn't take any blood samples from this scene?
>
> [Collins]: That's correct.
>
> [Defense Counsel]: So you weren't able to determine what blood type the blood was.
>
> [Collins]: Well, understand, it was not my attempt,

necessarily, to try to collect blood. That's what our evidence technician was for. It was his opinion that he articulated to me that he felt he couldn't successfully take a blood sample that the State Lab would be able to do anything with.

[Defense Counsel]: Okay. So, based on that opinion, there were no blood samples taken?

[Collins]: There were no blood samples booked into evidence, that's correct.

[Defense Counsel]: All right. So there's no way of knowing what blood type that blood was?

[Collins]: Obviously, if we don't have it, we can't match it.

[Defense Counsel]: And if you had it, I guess, you could have at least checked the blood type, right?

[Collins]: If the district attorney ordered so and the State Lab was able to do it, then I suppose, yes, maybe that would be true.

(R. 150:263-64.) Collins' testimony supports that no samples were taken.

According to the record, he avoided the question as to whether samples were collected, by responding that no samples were "booked into evidence," and by representing that blood samples could not be taken from the scene. As an experienced law officer, Collins knew that his answers were misleading. In response to an additional question concerning whether there was any way of knowing the blood type without samples, Collins went one step further by affirmatively representing the "obvious" -- that without samples there is no way to match the blood type. The appropriate responses to the questions would have revealed that the samples were collected and that he destroyed them.

Collins never disclosed that information. Instead, he provided misleading testimony.

"*It is well settled* that deliberate deception of a court and jurors by the presentation of known false evidence cannot be reconciled with the rudimentary demands of justice." Campbell v. Reed, 594 F.2d 4, 7 (4th Cir. 1979) (citing Pyle v. Kansas, 317 U.S. 213 (1942)) (emphasis added). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)); see also Walker v. State, 624 P.2d 687, 690 (Utah 1981) (allowing false impressions to go forward involves a corruption of the truth-seeking function of the trial process). Here, "the prosecution allowed a false impression to be created at trial." Campbell, 594 F.2d at 8.

In State v. Nielsen, 727 P.2d 188, 191 (Utah 1986), the Utah Supreme Court stated that a law enforcement officer must be aware of the need for accuracy in making representations for the purpose of obtaining a warrant. An officer must also be aware of "the importance of absolute truthfulness in any statements made under oath." Id. In that case, an officer left false impressions when he made incorrect statements to a magistrate in support of obtaining a search warrant. The Utah Supreme Court ruled that where an officer provides knowingly false information under oath, "as a matter of law, he acted in bad faith." Id.

In Youngblood, the Supreme Court found no "bad faith" in the fact that the state made full disclosure with respect to relevant

police reports and collected samples, and made samples available to the defendant and his experts for testing. "None of this information was concealed from [defendant] at trial." Youngblood, 488 U.S. at 58. In Miles' case, Collins' misrepresentations and the state's failure to disclose reports relating to blood samples reflects bad faith.

Further, the marshaled evidence, which includes Bell's testimony and Collins' testimony taken together, does not support "an apparent miscommunication," as set forth in the findings. (See R. 128; note 2, herein supra.) Rather, the fact that Collins misrepresented the matter at trial supports the determination that he understood Bell's directions, but made the unilateral decision to destroy the samples, then tried to hide that fact. That is all that can be said about the conflict in testimony. Collins' carefully structured answers to questions at trial left a knowingly false impression that no blood samples were collected. They do not reflect a "miscommunication."

Next, the evidence supports that Collins destroyed the samples apparently in violation of normal practices. Bell testified that he directed Collins "to turn [the samples] over to the State Crime Lab" for testing, and that there may be enough for testing. (R. 151:293.) Specifically, Bell testified as follows:

> [Counsel for Defense]: So you did not tell Deputy Collins that there was no way that the State Crime Lab could test these samples; is that correct?
>
> [Bell]: I did not, no.

[Counsel for Defense]: Because that would be a call that the State Crime Lab would have to make; isn't that right?

[Bell]: Yes.

[Counsel for Defense]: And as far as you knew, there was a possibility that they could test that blood; isn't that right?

[Bell]: There was a possibility.

[Counsel for Defense]: And a decision as to whether or not to send that sample to the State Crime Lab was with Deputy Collins; isn't that correct?

[Bell]: Yes.

[Counsel for Defense]: It was not your decision.

[Bell]: No, it was not.

(R. 151:327-29.) The trial judge summarized the matter as follows:

I don't know what to believe about Deputy Collins now. He's told us one thing and apparently this witness has a different recollection, that a sample was taken and the sample wasn't submitted. Now, is that something we're going to allow police officers to make the decision?

If a competent technician collects a sample and says, "I don't know if this is going to be enough for the state lab to do it, but here it is," and the officer decides, "Well, I'm not going to do it," for whatever reason, I don't think that's a police officer's decision.

(R. 151:307-08.) The prosecutor agreed: "Well, it may not be. And I think the defense can argue that to the jury." (R. 151:308.)

In addition, Collins' testimony supports that his unilateral decision to destroy samples apparently was contrary to department practices. Collins stated the following earlier at trial:

[Defense Counsel]: And if you had [collected samples], I guess, you could have at least checked the blood type, right?

[Collins]: If the district attorney ordered so and the State Lab was able to do it, then I suppose, yes, maybe that would

be true.

(R. 150:263-64.)

In Youngblood, the Court found that destroying evidence in accordance with normal practices supported a showing of good faith. In Miles' case, Collins' unilateral decision to destroy the samples was contrary to Bell's instructions, and to Collins' understanding as to how samples would be handled, where he testified that if he had samples, he would await the district attorney's orders and a determination from the State Lab as to whether testing could be accomplished. The record supports bad faith conduct on Collins' part in destroying the samples.

Finally, with respect to the trial court's determination that "Collins did not have knowledge of the exculpatory value of the blood samples at the time he discarded them" (R. 129; see also 124), that is not supported by facts based in the record. Indeed, it is impossible to know from the record when Collins destroyed the samples since he never disclosed that fact. In the event he destroyed them after the defense served the discovery requests on the state, see note 3, supra, Collins was on notice that the samples could have exculpatory value for the defense. If Collins destroyed the samples at that time he acted in bad faith. See Bohl, 25 F.3d at 911 (destruction of evidence was in bad faith where government destroyed evidence after it was specifically placed on notice that defense requested inspection of the information).

In addition, at the time the blood samples were collected,

Collins was on notice that Bell was unable to collect any other evidentiary samples from the crime scene. (R. 150:264-68.) Thus, the only evidence consisted of eyewitness identifications.

To the extent Collins believed blood tests would be cumulative evidence of guilt given the eyewitness identification testimony from Winberg and Roque, Collins also would have been aware that eyewitness identifications are fallible. He knew that in this case, the crime occurred at 4:00 a.m., Winberg observed the offense in the dark from across the highway, Winberg's description of what the actor was wearing did not match what Miles was wearing, and Roque would have observed the actor only briefly in the dark as he was exiting the building and turning his back to her. As an experienced officer, Collins would have realized that with respect to eyewitness identification, the "human perception is inexact and that human memory is both limited and fallible." State v. Long, 721 P.2d 483, 488 (Utah 1986).

> Anyone who stops to consider [eyewitness identification] will recognize that the process of perceiving events and remembering them is not as simple or as certain as turning on a camera and recording everything the camera sees on tape or film for later replay.

Id. On the other hand, test results from blood samples would provide important information to both parties. Given the fallibility of eyewitness identification, Collins would have realized the importance of testing the blood samples and the possibility that the "evidence could form a basis for exonerating the defendant." Holden, 964 P.2d at 323.

Instead, Collins destroyed the samples in violation of

department practices as he understood them. Thereafter, the state withheld information about the blood samples during pre-trial discovery and prior to Collins' testimony, and Collins misrepresented the matter under oath on the witness stand. Collins' conduct supports that he understood "the evidence could form a basis for exonerating the defendant," when he destroyed the samples.

The record supports that Collins acted in bad faith. His destruction of the samples before obtaining test results violated Miles' due process rights under Youngblood.

C. MILES IS ENTITLED TO A NEW TRIAL FOR THE REVERSIBLE ERROR.

Upon discovering that Collins destroyed the blood samples, the defense made a motion for a continuance or in the alternative for a dismissal of the matter. (R. 151:287-88, 302.) The trial court refused the continuance and asked the parties to submit memoranda of points and authority in support of their respective positions. (R. 151:313-15.) Since the papers were filed after the trial, the defense requested a dismissal of the matter. (R. 100-110.)

On appeal, this Court may order a new trial with directions that the prosecution's secondary evidence of blood at the scene be suppressed, or dismissal of the matter for the Youngblood violation. In considering appropriate remedies, the Court of Appeals for the Tenth Circuit Court has stated the following: "[A]fter concluding that there has been a violation of

Youngblood, the decision to either suppress the government's secondary evidence describing the destroyed material or to dismiss the indictment turns on the prejudice that resulted to the defendant at trial." U.S. v. Bohl, 25 F.3d 904, 914 (10th Cir. 1994). In that regard, "[such] factors as the centrality of the evidence at trial the reliability of the secondary evidence, and the effect such destruction had on the defendant's ability to present a defense, must be considered in the calculus." Id.

In this case, the state produced secondary evidence concerning blood at the crime scene and cuts on Miles' hands through the following witnesses: Heaston testified that blood was found throughout the restaurant at various locations (see R. 150:121-29, 131-34); and Collins, Bell, and Morrical testified that they observed blood inside the restaurant, and small cuts with dried blood on Miles' hands. (See e.g. R. 150:234-35, 246-47, 250-54; 151:292-93, 296, 324-25.) Miles maintains that the due process clause would require suppression of the testimony of those witnesses concerning the matter, as well as suppression of the related photographs. See Bohl, 25 F.3d at 914.

Since the state's case also consisted of eyewitness identification testimony from Winberg and Roque, the analysis does not end here.

Pursuant to Chapman v. California, 386 U.S. 18, 24 (1967), a conviction tainted by constitutional error must be set aside unless the error was "harmless beyond a reasonable doubt." Id.; see also State v. Genovesi, 909 P.2d 916, 922 (Utah App. 1995).

That analysis requires this Court to decide whether other credible evidence was before the jury and if it was, whether it was so compelling that this Court can conclude, beyond a reasonable doubt, that the jury would have reached the same verdict without the objectionable evidence. See State v. Dahlquist, 931 P.2d 862, 867 (Utah App. 1997).

"It is not enough that we would find sufficient evidence to support the conviction even if the [offensive evidence] is excised from the record. It is inconsequential that a retrial will most likely result in a conviction. `Beyond a reasonable doubt' requires the highest level of certainty known to our legal system in the resolution of a disputed factual matter." Id.

If the remaining evidence is clouded with credibility issues, and/or it concerns problematic identification testimony, this Court "simply cannot conclude, beyond a reasonable doubt, that the error in admitting the [offensive evidence] was harmless." Id. at 868.

In this matter, the trial judge recognized the possibility that the jury may not believe the eyewitness identification testimony, and that identification testimony required the jury to resolve credibility issues. (R. 151:311, 316.) "The Long instruction - Long in name as well as length - the Supreme Court mandates, which I, of course, will be giving in this case, may well suggest to the jury that they can't put much credibility in the testimony of an eyewitness." (R. 151: 316-17.)

The jury instructions in this case directed jurors to

consider matters affecting Winberg's and Roque's observations, such as the lack of light available to the witnesses, the length of time each witness observed the actor, whether identification of the actor was a product of each witness' own memory, and the emotional and physical strains on each witness, including fatigue and whether the witness was experiencing stress. (See R. 82-84); see also State v. Long, 721 P.2d 483, 488-489 (Utah 1986). Those factors and more affected Winberg's and Roque's testimony in this case. (See e.g. R. 150:154, 169 (observations were made at 4:00 a.m.); 150:165-68 (Winberg was preoccupied and stressed); 150:221-24 (Roque's identification testimony was enhanced by the prosecutor showing a photograph to her before she testified).) Thus, reliability concerns surrounded the identification testimony of the eyewitnesses in this case.

Since the jurors were weighing evidence susceptible of differing interpretations and/or evidence presenting reliability concerns, see State v. Long, 721 P.2d 483, 488-89 (Utah 1986) (eyewitness identification testimony should be considered with care given reliability concerns), there was a greater likelihood that the jurors were influenced by the offensive, secondary evidence concerning blood. "[T]here is a reasonable possibility that the evidence complained of might have contributed to the conviction." State v. Byrd, 937 P.2d 532, 537 (Utah App. 1997) (quoting Passman v. Blackburn, 797 F.2d 1335, 1349 (5th Cir. 1986) and quoting Fahy v. Connecticut, 375 U.S. 85 (1963)). Thus, use of the offensive evidence was harmful, requiring

reversal of this matter for a new trial.

CONCLUSION

For the reasons set forth herein, Miles respectfully requests reversal of the convictions in this matter, and remand for further proceedings, as this Court may deem appropriate.

SUBMITTED this 30th day of March, 1999.

LINDA M. JONES
Counsel for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, 140230, Salt Lake City, Utah 84114-0230 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 30th day of March, 1999.

LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals Court as indicated above this ____ day of March, 1999.

ADDENDA

ADDENDUM A

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

AMENDMENT XIV

Section
1. [Citizenship — Due process of law — Equal protection.]
2. [Representatives — Power to reduce appointment.]
3. [Disqualification to hold office.]
4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
5. [Power to enforce amendment.]

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives — Power to reduce appointment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ADDENDUM B

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 prserve 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 breathalyser 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

[1]Youngblood 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 then 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.

Rodwicke Ybarra
Deputy District Attorney
Attorney for Plaintiff
231 East 400 South, Suite 300
Salt Lake City, Utah 84111

Rebecca Hyde
Attorney for Defendant
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

ADDENDUM C

E. NEAL GUNNARSON
Salt Lake District Attorney
ERNEST W. JONES, Bar No. 1736
Deputy District Attorney
231 East 400 South,
Salt Lake City, Utah 84111
Phone: (801) 363-7900

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

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

130

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 16th day of October, 1998 to:

Rebecca C. Hyde
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Michelle Watson

ADDENDUM D

THIRD DISTRICT COURT - SLC COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 971922700 FS
HOWARD LLOYD MILES, Defendant.	:	Judge: TIMOTHY R HANSON Date: September 25, 1998

PRESENT
Clerk: matellew
Prosecutor: ERNEST W. JONES
Defendant
Defendant's Attorney(s): REBECCA C HYDE

DEFENDANT INFORMATION
Date of birth: July 21, 1964
Video
Tape Number: 9:42 am

CHARGES

1. BURGLARY OF A BUILDING - 3rd Degree Felony
   Plea: Guilty - Disposition: 08/12/1998 Guilty
2. CRIMINAL MISCHIEF - Class B Misdemeanor
   Plea: Guilty - Disposition: 08/12/1998 Guilty

SENTENCE PRISON

Based on the defendant's conviction of BURGLARY OF A BUILDING a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

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ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 3 month(s) jail.
Defendant is to report to the Salt Lake County Jai.

Defendant is to pay a fine of $2312.50 where the surcharge has been added to the fine.
Pay fine to THIRD DISTRICT COURT - SLC.

Commitment is to begin immediately.

PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult Probation & Parole.
Submit to searches of person and property upon the request of any Law Enforcement Officer.
Do not use, consume or possess alcohol or illegal drugs, nor associate with any people using, possessing or consuming alcohol or illegal drugs.
Submit to tests of breath and urine upon the request of any Law Enforcement Officer.
Participate in and complete any educational; and/or vocational training as directed by the Department of Adult Probation and Parole.
Violate no laws.
Enter, participate in, and complete any program, counseling, or treatment as directed by the Department of Adult Probation and Parole.
Submit to drug testing.
Not frequent any place where drugs are used, sold, or otherwise distributed illegally.
Refrain from the use of alcoholic beverages.
Defendant is to pay restitution to Einstein Bagel's in the amount of $200. Defendant is to stay away from Einstein Bagels.
Maintain full-time employment or school. Obtain GED or plumbing education.

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Also, all terms and conditions imposed by Judge Stirba in case 971021484 are imposed on this case.

Dated this 25 day of Sept, 1998.

TIMOTHY R HANSON
District Court Judge