[Cite as *State v. Smith*, 2019-Ohio-4373.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 28207
	:	
v.	:	Trial Court Case No. 2015-CR-636
	:	
STORM SMITH	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 25th day of October, 2019.

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MATHIAS H. HECK, JR., by SARAH E. HUTNIK, Atty. Reg. No. 0095900, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, 301 West Third Street, 5th Floor, Dayton, Ohio 45422

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DONOVAN, J.

{¶ 1} Storm Smith appeals from a judgment entry of conviction, following a jury trial, on multiple drug-related charges.[1] He received an aggregate sentence of 36 months. We hereby affirm the judgment of the trial court.

{¶ 2} On April 1, 2015, Smith was indicted as follows: Count 1, possession of heroin (5g but less than 10g), a felony of the third degree; Count 2, possession of cocaine (less than 5g), a felony of the fifth degree; Count 3, aggravated possession of drugs (Sch. I or II), a felony of the fifth degree; and Count 4, possession of drugs (Sch. III, IV, V), a misdemeanor of the first degree. Each offense was in violation of R.C. 2925.11(A). Smith was sentenced to 36 months on Count 1, 12 months on Count 2, 12 months on Count 3, and 180 days on Count 4, all to be served concurrently.

{¶ 3} On May 1, 2015, Smith filed a motion to suppress all evidence and his statements to the deputies because they "lacked reasonable suspicion to detain him"; a hearing was held on August 13. 2015. At the hearing, Detective Brian Statzer of the Montgomery County Sheriff's Office ("MCSO") testified that he was assigned to a "community orientated policing task force" that targeted weapons offenses and drug trafficking within Montgomery County. Statzer testified that he had spent the majority of his 20-year career working in "high crime, high drug areas." He stated that in his earlier experience, drug transactions occurred on street corners or in drug houses, but currently they are "almost exclusively * * * done between the buyer and the seller usually door to door, by car, or a car meet up."

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[1] As reflected in the caption herein, this appeal involves multiple cases. A footnote in Smith's brief, however, provides that "by reason of involved pleas of guilty pursuant to a global resolution plea bargain, together with a review of applicable docket entries, it was determined that no meritorious argument" existed in Montgomery App. Nos. 28208, 28209, 28210, and 28211.

{¶ 4} Statzer testified that, on May 8, 2014, a little bit after midnight, he stopped at the Speedway gas station at the corner of Payne Avenue and Needmore Road in Harrison Township to purchase gas. He was in an unmarked vehicle and dressed in a t-shirt and jeans. Statzer testified that when he got back into his vehicle, he observed a newer-model Hyundai occupied by two young females enter the well-lit parking area of the gas station. He stated that he observed them utilizing their cell phones, and that neither of them exited their vehicle in the first 10 minutes that he observed them. According to Statzer, "[g]as stations are notorious for being good spots" for drug dealers and purchasers to meet"; he believed that the Hyundai may have been "waiting for a drug dealer to show up."

{¶ 5} Statzer stated that he was parked with the right side of his car against a fueling station; he observed Smith pull up and park with the left side of his red Hyundai Sonata against a fueling station. Statzer testified that Smith was using his cell phone, and that it is "common to see both parties [to a drug transaction] utilizing their phone" to arrange the exact location of a meeting. "Often the dealer or the purchaser will change up the spot based upon situations, to include if law enforcement is present or in the area." Statzer testified that Smith stopped for five or ten seconds by the gas pump and then pulled forward and parked beside the Hyundai with the two female occupants. Smith got out of his vehicle and quickly got into the right rear passenger side of the females' vehicle. Statzer testified that he believed there was going to be a drug transaction, that he radioed for assistance from available deputies, and that Deputies Schwieterman, Teague, and Stone responded. The deputies made contact with Smith while he was in the backseat of the women's vehicle.

{¶ 6} On cross-examination, Statzer testified that he learned through dispatch that the females' vehicle was a rental, and that buyers and sellers of drugs are often found to be driving rental vehicles. Statzer testified that, when the deputies made contact with the three individuals, they were detained for investigative purposes. At the conclusion of Statzer's testimony, the court continued the hearing to allow for the testimony of Deputy Gust Teague, who was on administrative leave at the time.

{¶ 7} The suppression hearing resumed on January 7, 2016, and the State called Teague to testify. Teague testified that he was employed at the MCSO, had almost 19 years of law enforcement experience, and had worked on "thousands" of drug cases. Teague testified that in his experience, "there is a connection" between drugs and weapons. He stated that on May 8, 2014, he was assigned to road patrol in Harrison Township in a marked cruiser, and that Statzer requested available deputies to respond to a possible drug deal at the Speedway at the corner of Needmore Road and Payne Avenue. Teague arrived at the area five to six minutes after Statzer's transmission, and Stone and Schwieterman were already present. Teague stated that Stone was talking to the driver of the vehicle, and he (Teague) approached and spoke to Smith in passenger side backseat. Teague testified that "prior to getting up to see inside the vehicle, I could smell marijuana coming from the car. As I got to his side of the vehicle, [Smith] was putting a plastic bag, or it looked like he was stuffing a plastic bag deeper into his right front pocket, and I immediately ordered him to take his hands out of his pockets or keep his hands from his pockets." When asked why he was concerned about Stone's handling of the plastic bag, Teague explained that, based on the nature of the call (a drug complaint), Stone could have been concealing evidence, and Teague also "had no idea

if there was anything else in his pocket" that could pose a danger, like a weapon.

{¶ 8} Teague asked Smith to step out of the car. He stated that, as Smith was exiting the vehicle, Smith handed Teague his identification. Teague advised Smith that Teague was going to pat him down for weapons, and Teague asked him if he "had anything on him that would hurt me"; Stone said no, and he placed his hands on the side of the vehicle. Teague stated that, during the pat-down, Smith "was very compliant." He testified that in Smith's right front pocket he felt "a large, lumpy substance, which was very consistent with narcotics"; as soon as Teague felt the substance, Smith "began grunting, almost * * * as if he was nervous, * * * and his body tensed up real tight." Teague testified that Smith's conduct suggested that he was "preparing to do something; he's either preparing to assault me, preparing to run * * * he's not staying relaxed * * * to allow me to conduct my job." Teague placed Smith in handcuffs, telling Stone that his behavior was "causing concern for me and my safety." Teague testified that after Smith was handcuffed, he removed what he believed were narcotics from his pocket; he testified that the plastic bag contained "multiple individual bags" of what appeared to be heroin. Teague advised Smith that he was under arrest. Teague retrieved Smith's wallet from his person and a "baggie with a bunch of prescription pills" from his left front pocket. Teague testified that the evidence was tagged, and that Smith was transported to jail.

{¶ 9} On February 3, 2016, the court overruled Smith's motion to suppress. The court determined that Statzer possessed reasonable and articulable suspicion that the parties he observed were engaged in a drug transaction. His observation of the lingering females in their vehicle "began the chain of suspicion." The court found that the smell of marijuana "converted the reasonable and articulable suspicion to probable cause of

criminality." The court concluded that Teague's pat-down of Smith was reasonable under the circumstances for officer safety. The court found that Teague's immediate recognition by feel of narcotics was consistent with the totality of the circumstances, namely, Statzer's observations, the smell of marijuana, and Teague having witnessed Smith's attempt to stuff a plastic bag into his pocket; "[h]ence, Deputy Teague could enter the pocket and seize the drugs." Given Smith's conduct in becoming tense, the court concluded that "the use of force here was reasonable." Finally, the court found that the opening of Smith's wallet and the search of his left-side pants pocket, revealing potential drugs, occurred incident to arrest.

{¶ 10} In March and April 2016, Counsel representing Smith changed multiple times. On March 23, 2016, Smith filed a pro se motion for another suppression hearing, claiming that exculpatory evidence was being withheld by the State; Smith sought "the dispatch audio recording, cruiser camera video of all officers and cruise[r]s involved and dispatch logs." Smith also filed a pro se motion for separation of his cases, asserting that he did not want Case Nos. 2015 CR 636 and 2016 CR 434 to be tried together.

{¶ 11} On June 9, 2016, Smith, represented by new counsel, filed a receipt for non-electronic supplemental discovery, which indicated that the State had provided the defense with a DVD of photographs.

{¶ 12} On June 10, 2016, counsel for Smith filed an amended motion to suppress. On June 20, 2016, counsel for Smith filed a motion to compel discovery, which sought cruiser-camera footage from Smith's arrest; the State filed a response on the same day, asserting that the footage had only been retained "for a limited period of time" and was no longer available.

{¶ 13} On June 24, 2016, the State filed a motion to amend the indictment, striking specific controlled substances listed in Counts 3 and 4, without changing the name, degree, or identity of the crimes charged. The State asserted that striking "the surplusage" would not prejudice Smith's defense, and the defense "had had more than ample notice of all of the controlled substances found on the Defendant."

{¶ 14} Also on June 24, 2016, the court denied Stone's pro se motion for the "separation" of cases. It also denied his motion to compel discovery, noting that at the final pretrial conference, the State asserted that "no cruiser cam video presently exists concerning this case." The same day, Smith filed a request for an amended bill of particulars to reflect the amended indictment, and the State filed a bill of particulars. The court also overruled Stone's amended motion to suppress. The court noted that, at the suppression hearing, Smith was represented by competent counsel who did not "indicate that he lacked the discovery or other materials to proceed," and that Stone's desire to present additional evidence after the Court's initial ruling, without more, was "not well grounded. The efficiency of the Court, with limited time and resources, prevents the re-visiting of decided issues."

{¶ 15} The Court also overruled Stone's pro se motion to suppress based on exculpatory evidence being withheld by the State. The court noted that it had held numerous conferences on this issue, and the State had verified that all existing evidence had been produced in discovery pursuant to Crim.R. 16. Therefore, the court declined to revisit Stone's motion to suppress.

{¶ 16} Trial commenced on June 27, 2016. After opening statements, outside the presence of the jury, the court granted the State's motion to amend the indictment

without objection.

{¶ 17} Statzer provided testimony duplicative of his testimony at the suppression hearing regarding his observations of Smith and resulting suspicion and actions. On cross-examination, when asked if he videotaped Smith's arrest, he responded, "I don't have any photographing or videography equipment on my vehicle." Teague also provided testimony duplicative of his testimony at the suppression hearing. He testified that his cruiser was equipped with a camera that is "activated when we activate the lights." He testified that he can also manually activate the camera. Teague stated that when he arrived at the scene, his overhead lights were not on, and he never activated his camera.

{¶ 18} Deputy Joseph Schwieterman of the MCSO testified that he encountered Smith on May 8, 2014, after being radioed by Statzer to respond to the Speedway. When Schwieterman arrived, Teague had removed Smith from the vehicle and was patting him down. Schwieterman testified that Teague advised him that he retrieved drugs and cash from Smith, and Schwieterman identified photos taken by him of the items removed from Smith's person. On cross-examination, Schwieterman testified that his overhead lights were not activated when he arrived and parked at the scene. He testified that his "mobile camera" did not work and had not worked "in a very long time," and that his camera would only have activated if his "full lights" had been on, which they were not.

{¶ 19} Todd Yoak, a forensic chemist with the Miami Valley Regional Crime Lab, identified the report he generated after analyzing the items Teague obtained in the course of his pat-down of Smith. He testified that he identified heroin, cocaine, Oxycodone, amphetamine, Alprazolam, Tapentadol, and Hydrocodone.

{¶ 20} On the second day of trial, Smith failed to appear, and the trial continued in

his absence. The defense called Sergeant Andrew Flagg of the MCSO. Flagg testified that all members of the sheriff's department are covered by the "general orders of the Montgomery County Sheriff's Department." Flagg identified, as Exhibit A, "General Orders Manual 5.1.14, that applies to the mobile data terminals, the in-car computers." He testified that a mobile data terminal is "basically a laptop computer that's hooked up inside the cruiser." Flagg testified that "Harrison Township is still on an MPH system, which is a rewritable DVD." Flagg testified that the "MPH is the manufacturer. It's a lot like a computer disk drive. You have a Blu Ray player on your computer or CD rom, same type of thing. There's a vault that's installed into the back of the cruiser and each shift the deputy will come out and put in a disc that corresponds to that day." Flagg testified that all "of the data that's recorded, instead of going to an SD card like it does on the new system, goes to that disc." Deputies then retrieve that disc at the end of each shift and return it to a binder of discs assigned to them. "Those are on a 31-day cycle. Each deputy gets 31 discs that correspond to the day of the month and * * * they reuse the disc for that day of the month." Flagg stated that the discs have "a life span. Some of them have been known to wear out after five cycles of writing and erasing." Discs are kept until they no longer work or until they are "pulled for evidence purposes of some sort or until the system is replaced."

{¶ 21} Flagg identified Exhibit B as "General Order 5.1.13," which applies to the "in-car camera recording equipment," including the MPH system. The following exchange occurred:

> [Defense Counsel] Q. * * * So is there a requirement of the policies that there must be video taken in certain situations?

A. There is some requirements. * * *

Q. * * * And what would that be?

A. Traffic stops, for example, they're recorded. If a deputy is encountering a known dangerous situation, video is required. * * *

Q. * * * So perhaps a felony drug transaction? Or assistance; would that be required to be recorded?

A. I don't think that a drug transaction per se is required to be recorded. It does ask for self-initiated activity to be recorded, which you know, the difference there is it's something the officer generates versus a dispatch. I don't think it's broken down to classify a drug offense.

Q. * * * So the camera system, if I understand it correctly, the MPH System, does it activate immediately if the overhead lights are on?

A. The way the lights are wired, there's three stages. If anybody has ever passed an officer sitting on the interstate and they may have their lights on to the rear of the vehicle, but not the front. That's typically how Stage 1 of the lights are wired.

When you hit Stage 2, you're looking at activating the full overhead lights. Typically, your recording starts with the Stage 2 lights and will also start with the Stage 3 lights, which the Stage 3 is the same as Stage 2 only it adds wig-wags on the end of the light bar for additional lighting.

So if it's Stage 1, no, it would not activate; Stage 2 and above, it would.

* * *

Q. * * * But the deputy could manually activate it?

A. He could.

{¶ 22} After Flagg's testimony, defense counsel moved for a mistrial and an acquittal; the court overruled those motions.

{¶ 23} The State then called Statzer in rebuttal. He testified that in his lengthy experience in Harrison Township, "[t]his type of incident, contact with people out on the street, we usually don't - - when we step from our cars initiate our mobile camera systems." Stetzer testified that he "[e]ventually" looked for cruiser footage of the arrest. When asked why he stated that he eventually did so, Stetzer testified that the MCSO "is not allowed to file a case with the Prosecutor's Office on a felony filing until we get back lab results" from the Miami Valley Regional Crime Laboratory. Statzer testified that "in this case there was a plethora of evidence," and the lab results herein were received 11 months after Smith's arrest. On cross-examination, Statzer testified that he did not observe the deputies activate their overhead or rear lights in detaining Smith, so that manual activation of any cruiser camera would be required to obtain a recording. He testified that when he checked for any recordings, none were available, and that "nobody had actuated their system according to * * * my contact with them."

{¶ 24} Smith asserts two assignments of error with subparts. His first assignment of error is as follows:

THE TASK FORCE STOP OF APPELLANT'S VEHICLE VIOLATED 4TH AMENDMENT BECAUSE DETECTIVE STA[T]ZER HAD NOT FIRST OBSERVED ANY REASONABLY OBJECTIVE FACTS COMPRISING ANY SPECIFIC UNLAWFUL ACTIVITY AND UNDER SUCH CIRCUMSTANCE,

THE AVAILABLE RECOURSE WOULD HAVE BEEN THE PURSUIT OF A CONSENSUAL ENCOUNTER.

1. The trial court erred and violated the Fourth Amendment when it denied Appellant's suppression motion(s).

2. The trial court erred as a matter of law to the prejudice of Appellant when it made a finding that Detective Statzer possessed reasonable and articulable suspicion that Appellant was engaged in a drug transaction.

3. The trial court erred in denying the Appellant's motion(s) to suppress statements and evidence seized incident to, and subsequent to, his arrest.

{¶ 25} Smith asserts that Detective Statzer had no reasonable articulable suspicion that criminal activity was taking place, and "the subsequent conduct of the responding deputies * * * all resulted in an unconstitutional detention * * *." According to Smith, when he was patted down, the "search exceeded the scope of a *Terry* pat down." He argues that his legally-parked vehicle "merely contained three occupants peacefully engaged in the contemporaneous use of their cell phones, in front of a well-lit, well peopled, public convenience store." Smith asserts that statements, contraband, and any other evidence should have been suppressed by the trial court.

{¶ 26} As this Court has noted:

In ruling on a motion to suppress, the trial court "assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate the credibility of the witnesses." *State v. Retherford,* 93

Ohio App.3d 586, 592, 639 N.E.2d 498 (2d Dist.1994); *State v. Knisley,* 2d Dist. Montgomery No. 22897, 2010-Ohio-116, ¶ 30. Accordingly, when we review suppression decisions, we must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Retherford* at 592, 639 N.E.2d 498. "Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *Id.*

State v. Rigel, 2d Dist. Clark No. 2016-CA-50, 2017-Ohio-6906, ¶ 19.

{¶ 27} As this Court has further noted:

The Fourth Amendment, as well as the Ohio Constitution, Article I, Section 14, guarantees the right to be free from unreasonable searches and seizures. Generally, a warrantless search and seizure is unreasonable unless an exception applies. *State v. Westover*, 2014-Ohio-1959, 10 N.E.3d 211, ¶ 12 (10th Dist.). However, not every encounter with the police constitutes a seizure. *Id*. The United States Supreme Court has delineated three types of contact to be utilized in determining whether an individual's Fourth Amendment rights are implicated. These include consensual encounters, investigatory detentions known as *Terry* stops, and seizures equivalent to arrest. *Id.,* at ¶ 14.

Encounters are consensual when the police merely approach a person in a public place, engage the person in conversation, request information, and the person remains free not to answer and to walk away. *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d

497 (1980). This type of encounter does not implicate the Fourth Amendment.

The investigatory detention, known as a *Terry* stop, is more intrusive than a consensual encounter, but less so than an arrest. *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). This type of encounter occurs when the officer has by either physical force or a show of authority restrained the person in such a way that a reasonable person would not feel free to terminate the contact. *Id*. The police may detain an individual when the officer has a reasonable suspicion, based upon specific, articulable facts that criminal activity is occurring. *Id*. at 21-22. This detention must be limited in duration and purpose, and can only take as long as necessary for the officer to confirm or dispel his suspicions. *Id*.

Thus, if there is a reasonable, articulable suspicion of criminal activity, and the stop lasts no longer than necessary to effectuate its purpose, the Fourth Amendment is not violated.

The final encounter, a seizure that is the equivalent of a formal arrest, can only occur when the police have probable cause. *State v. Barker*, 53 Ohio St.2d 135, 372 N.E.2d 1324 (1978). A seizure is equivalent to an arrest when there is an intent to arrest, the seizure is made under real or pretended authority, it is accompanied by actual or construction [sic] detention, and it is understood by the person arrested. *Id*. at syllabus.

State v. Baker, 2d Dist. Montgomery No. 26547, 2015-Ohio-4709, ¶ 9-12.

{¶ 28} We conclude that the trial court did not err in overruling Smith's motion to

suppress. Experienced Detective Statzer, who had spent the majority of his career working in "high crime, high drug areas," testified that on May 8, 2014, while assigned to a task force specifically addressed to curbing drug trafficking, he observed what he believed to be a drug transaction in the parking area of the Speedway at the corner of Payne Avenue and Needmore Road. Statzer explained that while drug transactions used to commonly occur on street corners or in drug houses, they are now "almost exclusively done * * * by car, or a car meet up."

{¶ 29} Statzer testified that he observed the female occupants of the Hyundai enter the parking area of the gas station and utilize their cell phones without entering the convenience store for ten minutes. According to Statzer, "[g]as stations are notorious for being good spots" for drug dealers and purchasers to meet. He testified that he believed the women were perhaps waiting for a drug dealer to meet them. Statzer testified that, when Smith arrived, he too was utilizing his cell phone, and that it is common for parties to drug transactions to arrange the location thereof via cell phones. He stated that depending on the circumstances, such as the presence of law enforcement, the parties also use their cell phones to change the initial location for the transaction. Statzer testified that after a brief pause by the gas pump, Smith parked beside the females' vehicle and quickly got into the rear passenger side of their car. Statzer testified that he learned that the females' vehicle was a rental, and that buyers and sellers of drugs are often found to be driving rental vehicles. Based upon his observations and suspicion, Statzer requested assistance.

{¶ 30} Deputy Teague, having worked on "thousands" of drug cases, testified that as he approached the vehicle, he could smell marijuana emanating from it. He stated

that as he got closer, he observed Smith stuffing a plastic bag into his right front pocket. Teague testified that drugs and weapons are often found together, and that based upon the fact that he was investigating a potential drug transaction, he was concerned that Smith was either concealing evidence of a drug offense or reaching for a weapon. After removing Smith from the vehicle, in the course of the pat-down, and without manipulating Smith's clothing, Teague felt a lumpy substance that in his experience was consistent with narcotics. Upon feeling the substance, Smith tensed up and began grunting, suggesting to Teague that Smith may assault him or flee, so Teague placed him in handcuffs. Thereafter, Teague retrieved "multiple individual bags" of drugs from Smith and placed him under arrest. He then retrieved a baggie "with a bunch of prescription pills" from Smith's left front pocket.

{¶ 31} The trial court clearly credited the testimony of the officers, and we defer to the trial court's assessment of credibility. We conclude that the trial court correctly found, based upon the totality of the circumstances, that Statzer had a reasonable, articulable suspicion that he was observing a drug transaction when he requested assistance. We further conclude that after Teague approached the rental vehicle, smelled marijuana, and observed Smith shoving a plastic bag into his pocket, he properly removed Smith from the vehicle for further investigation, patting him down for officer safety. The pat-down revealed the presence of suspected narcotics and probable cause for arrest. Smith's first assignment of error lacks merit, and it is accordingly overruled.

{¶ 32} Smith's second assignment of error is as follows:

> THE STATE'S FAILURE TO PROVIDE CRUISER CAM VIDEO OF THE TASK FORCE STOP OF APPELLANT'S VEHICLE RESULTED IN A

FORESEEABLE INABILITY OF APPELLANT'S DEFENSE TO PRESENT MATERIALLY EXCULPATORY/IMPEACHMENT EVIDENCE.

1. The State did not comply with due process requirements of the Constitution when it failed to provide Appellant with all *Brady* discovery material.

2. Appellant suffered prejudicial error by means of the State's unreasonable delay in his indictment and failure to comply with video retention policy, resulting in a foreseeable inability to take advantage of materially exculpatory/impeachment evidence.

3. The cumulative effect of the errors violated Appellant's rights to a fair trial and due process, in all his cases herein under appeal, and therefore warrant a reversal un[d]er a cumulative error doctrine.

{¶ 33} Smith asserts that it "is well settled law that the government has an obligation to disclose favorable material and information to a person accused of a crime." He asserts that the testimony of Sheriff's deputies made clear that, at pertinent times, there existed a regulatory policy "that required [cruiser camera videos] to be in place for drug trafficking felony responses, and that same should be preserved and maintained for a certain period of years." Smith argues that "any analysis into whether there was failure to maintain proper evidence of any cruiser cam videos can be reasonably summarized to be based on a failure to comply with expressed, applicable regulatory authority as set forth in defendant's Exhibit A which was admitted at trial." Smith argues that video evidence would have confirmed the arguments in his motion to suppress "that there in fact existed no reasonable objective facts comprising any specific unlawful activity * * *."

{¶ 34} The State responds that Smith did not provide evidence to establish that the cruiser camera footage would have been materially exculpatory and did not present any alternate facts about what happened or how the camera footage would be used to establish his guilt or innocence; he simply relied "on vague speculations and unsubstantiated assertions." The State asserts that the record more fully supports the position that cruiser camera footage was not taken of his incident, and that "[a]s such, the nonexistent footage could not be destroyed at all, let alone in bad faith."

{¶ 35} Regarding alleged pre-indictment delay, the State again asserts that, because it is unclear whether camera footage ever existed, Smith has not demonstrated "how he was prejudiced by the destruction of non-existent evidence." The State asserts that Smith does not support his cumulative error argument "in any meaningful way."

{¶ 36} As this Court has previously noted:

> Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the state must disclose material evidence favorable to the defendant. *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; *State v. Yarbrough,* 104 Ohio St.3d 1, 12-13, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 69. Evidence is material within the meaning of *Brady* only if there exists a reasonable probability that the result would have been different had the evidence been disclosed to the defendant. *Yarbrough,* 104 Ohio St.3d at 12-13, 817 N.E.2d 845. The Due Process Clause further protects a criminal defendant from being convicted where the state has failed to preserve materially exculpatory evidence or destroys in bad faith potentially useful evidence. *State v. Bolden,*

> Montgomery App. No. 19943, 2004-Ohio-2315, at ¶ 51; *State v. Franklin,* Montgomery App. No. 19041, 2002-Ohio-2370. In order to be materially exculpatory, "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." *Franklin,* supra, quoting [*California v.*] *Trombetta,* 467 U.S. [479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)]. When evidence is only potentially exculpatory, the destruction of such evidence does not violate due process unless the police acted in bad faith. *Id.* "The term 'bad faith' generally implies something more than bad judgment or negligence. 'It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.' " *Franklin,* supra, quoting *State v. Buhrman* (Sept.12, 1997), Greene App. No. 96 CA 145.

State v. Smith, 2d Dist. Montgomery No. 20247, 2005-Ohio-1374, ¶ 7.

{¶ 37} We agree with the State, and we see no due process violation. We initially note that Smith mischaracterizes the record. Exhibit A is an order relating to mobile data terminals and does not contain a retention policy relating to cruiser camera video. Exhibit B is an order addressed to "in-car recording equipment," and consistent with Flagg's testimony, it provides that deputies are provided 31 "tapes or DVDs, depending on the system," and that at "the beginning of each watch, the deputy erases/reformats the non-server based recordable medium that corresponds to the current day of the month."

Exhibit B provides that "Deputies operating patrol vehicles equipped with in-car recording equipment must record all emergency runs, traffic stops, pursuits, officer initiated contacts, and other events of a serious nature."

{¶ 38} As noted above, the court overruled Smith's motion to compel, noting that the State represented that no video of his arrest exists, and the court overruled Smith's pro se motion to suppress, again noting that the State verified that all existing evidence was produced in discovery.

{¶ 39} Statzer testified that he did not have a camera in his vehicle. Teague testified that he never activated his camera. Schwieterman testified that the camera in his cruiser was not functional. In rebuttal, Statzer testified that there was a "plethora of evidence" herein, that the lab results were not received for 11 months after Smith's arrest, and that the MCSO was not allowed "to file a case with the Prosecutor's Office on a felony filing until we get back lab results." He testified that he did not observe any of the responding deputies activate their overhead or rear lights in the course of Smith's arrest, and that when he checked for any recordings, there were none. He testified that "nobody had actuated their system according to my contact with them."

{¶ 40} We find no basis to conclude that materially exculpatory evidence existed in the form of cruiser video, nor is there evidence that the State acted in bad faith, with a dishonest purpose, to destroy it. Further, based upon the overwhelming evidence of Smith's guilt, we find no basis to conclude that a reasonable probability exists that Smith would have been found not guilty had cruiser video of his arrest been obtained.

{¶ 41} Finally, regarding alleged cumulative error, as this Court has noted:

> Under the doctrine of cumulative error, "[s]eparately harmless errors

> may violate a defendant's right to a fair trial when the errors are considered together. * * * In order to find cumulative error, we first must find that multiple errors were committed at trial." *State v. Harris,* 2d Dist. Montgomery No. 19796, 2004-Ohio-3570, ¶ 40. "A conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal." *State v. Powell,* 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 223, citing *State v. DeMarco,* 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus.

State v. Griffith, 2d Dist. Montgomery No. 26451, 2015-Ohio-4112, ¶ 49.

{¶ 42} Having concluded that the trial court did not err in overruling Smith's motion to suppress, and that Smith's due process rights were not violated, and there being no errors apparent in the record, Smith's cumulative error argument fails. Smith's second assignment of error is overruled.

{¶ 43} The judgment of the trial court is affirmed.

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HALL, J. and TUCKER, J., concur.

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