**[Cite as *State v. Glunt*, 2010-Ohio-3024.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| | | No. 09AP-962 |
| v. | : | (M.C. No. 2008 TRC 203047) |
| Michelle L. Glunt, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on June 30, 2010

*Richard C. Pfeiffer, Jr.,* City Attorney, *Lara N. Baker*, City Prosecutor*,* and *Melanie R. Tobias*, for appellee.

*Shaw & Miller, Mark Miller*, and *J. Andrew Stevens*, for appellant.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

**{¶1}** Appellant, Michelle L. Glunt ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Municipal Court convicting her of operating a vehicle under the influence of alcohol ("OVI"). For the reasons that follow, we affirm.

**{¶2}** On November 1, 2008, appellant was arrested for OVI and was taken to the police station at the Ohio State University ("OSU") for administration of a breath test. Appellant's breath tested above the proscribed limit for alcohol, and appellant was charged with both driving with a proscribed level of alcohol in the breath ("OVI per se") and with driving under the influence of alcohol ("OVI impaired"). During the time that appellant was at the police station, videotape recordings of appellant were made. On November 5, 2008, appellant's counsel filed a general request for discovery, pursuant to Crim. R. 16, with the prosecuting attorney. At some point after the discovery request was served, the videotape recording from the OSU police station was erased pursuant to OSU's record retention policy.

**{¶3}** Appellant filed a motion seeking to have the charge against her dismissed, arguing that her right to due process had been violated by the destruction of the videotape. The trial court held a hearing on the motion, during which testimony was offered by Daniel F. Mackey, the OSU employee responsible for the videotaping system in the police station.

**{¶4}** Mackey explained that the camera records any activity within the range of its lens that occurs in the room in which breath testing is conducted at the OSU police station, including the breath testing itself. An analog camera records the activity, which is then converted to a digital signal that is recorded on a hard drive. Under OSU's record retention policy, the system is set up to ensure that the recordings are kept on the hard drive for a minimum of 96 hours, after which time older recordings are automatically

overwritten as newer recordings are made. Under some circumstances, some recordings might be retained on the hard drive for longer than 96 hours if they have not yet been overwritten by newer recordings.

**{¶5}** Mackey further testified that he is responsible for making copies of the recordings when requested. Mackey stated that if a copy of a recording is requested within the 96-hour period a copy will be produced, but that after 96 hours it becomes more likely that the recording will be overwritten, even if a criminal case arising from the subject matter of a recording is pending.

**{¶6}** Upon questioning by the prosecuting attorney, Mackey testified that he had not viewed the specific recording from the time period during which appellant was at the OSU police station, and that the recording had not been overwritten outside the normal course of the system's operation. Mackey also testified that he had not received a specific request to preserve the recording of appellant until at least two weeks after the event, by which time the recording was no longer available.

**{¶7}** The trial court overruled appellant's motion to dismiss, finding that the evidence from the recording was only potentially useful, and not materially exculpatory, and further finding that the video recording was not destroyed in bad faith. Appellant entered a plea of no contest, and the trial court found appellant guilty of the OVI charges.

**{¶8}** Appellant then filed this appeal, and asserts three assignments of error:

**ASSIGNMENT OF ERROR I**

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS, BECAUSE THE COURT

DETERMINED THAT THE EVIDENCE IN QUESTION WAS ONLY POTENTIALLY USEFUL WITHOUT FIRST PLACING THE BURDEN ON THE STATE TO SHOW THAT THE EVIDENCE IS NOT MATERIALLY EXCULPATORY.

**ASSIGNMENT OF ERROR II**

THE TRIAL COURT ERRED IN FINDING THAT THE EVIDENCE IN QUESTION WAS ONLY POTENTIALLY USEFUL.

**ASSIGNMENT OF ERROR III**

THE TRIAL COURT ERRED IN CONCLUDING THAT THE EVIDENCE IN QUESTION WAS NOT DESTROYED IN BAD FAITH UNDER OSU'S 96-HOUR RETENTION POLICY.

**{¶9}** Courts considering the effect of the loss or destruction of evidence in a criminal case have distinguished between evidence that is materially exculpatory and that which is only potentially useful. If evidence is materially exculpatory, its suppression violates a defendant's due process rights, and requires dismissal of the charge. *State v. Johnston* (1988), 39 Ohio St.3d 48. On the other hand, if the evidence is only potentially useful, the defendant must show bad faith on the part of the state in order to show that the defendant's due process rights have been violated. *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239; *Arizona v. Youngblood* (1988), 488 U.S. 51, 109 S.Ct. 333.

**{¶10}** In her first assignment of error, appellant argues that the trial court erred in its allocation of the burden of proof on the question of whether the videotape in question was materially exculpatory or only potentially useful. Generally, the burden of showing that lost or destroyed evidence was materially exculpatory lies with the defendant. *State v. Acosta*, 1st Dist. No. C-020767, 2003-Ohio-6503. In cases where a defendant has

made a specific request for preservation of a particular piece of evidence and the evidence has been subsequently lost or destroyed, whether inadvertently or not, the burden shifts to the state to show that the evidence was not materially exculpatory. *Columbus v. Forest* (1987), 36 Ohio App.3d 169. However, in cases in which a defendant has made only a general request for discovery, but has not made a specific request regarding the particular piece of evidence, the burden remains with the defendant. *State v. Woodson*, 10th Dist. No. 03AP-736, 2004-Ohio-5713. See also *Acosta*; *State v. Lupardus*, 4th Dist. No. 08CA31, 2008-Ohio-5960.

**{¶11}** In this case, appellant's initial request for discovery was a general request, and did not specifically identify the recording made at the OSU police station. According to Mackey's testimony, the specific request for the recording was received at least two weeks after appellant's arrest, after the recording had already been overwritten. Therefore, appellant had the burden of proving that the recording would have been materially exculpatory, and the trial court did not err when it declined to shift the burden of proof to the state to show that the evidence would not have been materially exculpatory.

**{¶12}** Accordingly, appellant's first assignment of error is overruled.

**{¶13}** In her second assignment of error, appellant argues that the trial court erred by concluding that the recording was only potentially useful, rather than materially exculpatory. Evidence is materially exculpatory if " 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Woodson* at ¶25, quoting *Johnston*, paragraph five of the syllabus.

Videotape evidence is less likely to be materially exculpatory where the evidence does not go to the substance of the charges. See *Geeslin* at ¶13.

**{¶14}** Appellant argues that the missing videotape would have allowed her to defend the OVI charges against her because the videotape would have shown by her demeanor on the tape that she was not impaired, and would have allowed her to challenge the result of the breath test by showing that the test was conducted improperly. However, these claims are purely speculative, and such speculation is not sufficient to establish that withheld evidence is material. *State v. Rivas*, 121 Ohio St.3d 469, 2009-Ohio-1354, ¶14. The trial court did not err when it concluded that the recording would only have been potentially useful, rather than materially exculpatory.

**{¶15}** Accordingly, appellant's second assignment of error is overruled.

**{¶16}** In her third assignment of error, appellant argues that the trial court erred by concluding that the overwriting of the videotape from the OSU police station was done in bad faith. Bad faith implies something more than mere bad judgment or negligence; rather, "[i]t 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." *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, ¶14 (citations omitted).

**{¶17}** Appellant argues that the state's bad faith in this case is demonstrated by OSU's policy of overwriting recordings after 96 hours because no defendant can be expected to file a specific motion requesting the recording within 96 hours. We disagree. Although it may be somewhat burdensome to make a specific request for recordings

within 96 hours, we cannot say that that time period is so burdensome as to constitute bad faith on the part of the state, as demonstrated by the fact that in this case appellant was able to make a general discovery request prior to the time the recording was overwritten.[1] Thus, the trial court did not err in concluding that the state did not act in bad faith by its policy of overwriting recordings after 96 hours.

**{¶18}** Accordingly, appellant's third assignment of error is overruled.

**{¶19}** Having overruled appellant's assignments of error, we affirm the judgment of the Franklin County Municipal Court.

*Judgment affirmed.*

TYACK, P.J., and FRENCH, J., concur.

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[1] As noted by the Eighth District Court of Appeals, other states have enacted legislation requiring the preservation of videotaped evidence, regardless of whether a discovery request has been made, but the Ohio General Assembly has not enacted any such requirement. *State v. Durham*, 8th Dist. No. 92681, 2010-Ohio-1416, ¶26.