

IN THE COURT OF COMMON PLEAS IN THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE)
)
) Case No.: 1309005317
)
 v.)
)
)
 THOMAS WRIGHT)
)
 Defendant.)

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Submitted: May 15, 2014
Resubmitted: August 5, 2014
Decided: September 25, 2014

DECISION ON DEFENDANT'S MOTION TO DISMISS

The defendant, Thomas Wright, has been charged with Failure to Remain in a Single Lane in violation of title 21, section 4122(1), Operating a Motor Vehicle on a Public Roadway Bearing an Invalid or Expired Temporary Registration Plate in violation of title 21, section 2133(a)(3) and Driving a Vehicle Under the Influence ("DUI") in violation of title 21, section 4177(a)(1). Prior to trial, the defendant moved to dismiss the DUI charge pursuant to Court of Common Pleas Criminal Rule 12(b) on the grounds that the State failed to preserve case dispositive evidence consisting of a Motor Vehicle

Recording (“MVR”). After carefully considering the arguments made by the defendant and the State for the defendant’s motion to dismiss, the defendant’s motion to dismiss is denied. Additionally, the Court will not consider whether to provide the *Deberry* lost evidence instruction to the trier of fact until after it has heard all evidence provided at a suppression hearing or trial.

FACTS

The defendant is charged with multiple violations of title 21 of the Delaware Code, including DUI. A MVR existed of the incident. The State concedes that the MVR no longer exists due to human error. The State admits that the MVR would show “significant portions” of the defendant’s actions while driving and his arrest. No testimony was presented to the Court surrounding the circumstances of the destroyed evidence and neither party requested an evidentiary hearing.

PARTY CONTENTIONS

The defendant contends that pursuant to *Johnson v. State*, 27 A.2d 541 (Del. 2011), the DUI against him should be dismissed on the grounds that the State failed to preserve case dispositive evidence that was in its possession. It is the defendant’s position that the MVR would be case dispositive as to whether (1) the arresting police office had a reasonable and articulable suspicion that the defendant was committing a crime or was about to commit a crime when he stopped the defendant and (2) the police officer had probable cause to arrest the defendant for the DUI.

The defendant alleges that the MVR would be case dispositive for a number of reasons. First, a substantial period of time has passed since the stop took place and the

police officer has had numerous encounters with individual defendants since that time which may interfere with his ability to recollect the specifics of this particular event. The defendant proffered that the reason for the traffic stop was that the police officer saw the defendant's wheel cross the center line of the roadway at least once. The secondary or substitute evidence available for the State is simply that of the police officer's testimony and this testimony would not be nearly as probative as the video. Furthermore, the defendant contends that the critical issue of whether he was acting impaired would be shown on the MVR. The MVR would show the nature of the defendant's movements and actions when he was outside of his car. The defendant also proffered that there is nothing in the police report indicating the quality of his movements, and the video, if available, would show specifically whether he was walking around in a normal manner.

The State contends that the police officer's testimony is the only evidence that it needs to prove that the defendant is guilty of DUI.

LEGAL STANDARD

In a motion to dismiss a pending criminal charge, the defendant bears the burden of proving, by a preponderance of the evidence, that he or she is entitled to the dismissal as a matter of law. When deciding a defendant's motion to dismiss in a criminal matter, the Court must view any evidence offered in a light most favorable to the State in order to determine if an issue of material fact exists. *State v. Jackson*, 2000 WL 33113958, at *3 (Del. Super. Nov. 27, 2000). If the Court finds that an issue of material fact exists, it will be precluded from granting a defendant's motion to dismiss. *State v. Yoder*, 2010 WL 1987844, at *1 (Del. Com. Pl. Apr. 30, 2010).

DISCUSSION

The defendant contends that the State had a duty to preserve the MVR and breached that duty when it lost it. The defendant argues that, as a result, the Court should dismiss the DUI charge against him or, alternatively, give exculpatory weight to the MVR.

In *Deberry v. State*, the Delaware Supreme Court recognized “that the State’s duty to disclose evidence includes a duty to preserve it as well. The obligation to preserve evidence is rooted in the due process provisions of the fourteenth amendment to the United States Constitution and the Delaware Constitution, article I, section 7.” 457 A.2d 744, 751-52 (Del. 1983). In *Deberry*, the Court developed a three-part test to examine claims that the State either failed to preserve evidence once in its possession or failed to collect evidence. *Id.* at 750; *Johnson v. State*, 27 A.3d 541, 545 (Del. 2011) (citing *Lolly v. State*, 611 A.2d 956 (Del. 1992)). In reviewing a claim that the State lost or destroyed exculpatory evidence, the Court must consider:

- 1) would the requested material, if extant in the possession of the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or *Brady [v. Maryland]*?¹
- 2) if so, did the government have a duty to preserve the material?
- 3) if there was a duty to preserve, was the duty breached, and what consequences should flow from a breach?

Deberry, 457 A.2d at 750 (citations omitted). The *Deberry* “analysis draws a balance between the nature of the State’s conduct and the degree of prejudice to the accused.” *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989). “The State must justify the conduct of

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

the police or prosecutor, and the defendant must show how his defense was impaired by loss of the evidence.” *Deberry*, 457 A.2d at 752.

Therefore, the first step in the *Deberry* analysis is to determine whether the MVR, if extant in the possession of the State, would have been subject to disclosure under Court of Common Pleas Criminal Rule 16 or *Brady*. *Deberry*, 457 A.2d at 750. Because the MVR is not available for review, this Court need not address whether it would have been discoverable under *Brady*. *Id.* at 751 n.5 (stating that it is an “artificial exercise” to determine whether lost evidence would have been discoverable under *Brady*). Pursuant to Criminal Rule 16(b), “a defendant need only show that an item may be material to the preparation of his defense to be discoverable.” *Johnson*, 27 A.3d at 546 (internal quotation marks omitted) (citing *Deberry*, 457 A.2d at 752).

In this case, the defendant filed a Criminal Rule 16 request for the MVR recording. He alleges that the tape would have shown that he did not cross the center line while driving or change lanes in an unsafe manner. Assuming this allegation goes unchallenged, it is clear that the MVR would have been subject to disclosure to the defendant pursuant to Criminal Rule 16.² See *Hunter v. State*, 55 A.3d 360, 369 (Del. 2012) (holding that a video recording of a defendant at the police station subsequent to his arrest would have been subject to disclosure pursuant to Criminal Rule 16.).

The second step in the *Deberry* analysis is to determine whether the State had a duty to preserve the MVR. *Deberry*, 457 A.2d at 751-52. “[I]n fulfilling its duty to preserve evidence, law enforcement agencies should create rules broad enough to encompass any material that could be favorable to a defendant.” *Hunter*, 55 A.3d at 369

² The State has conceded that the MVR would have shown “significant portions” of the defendant’s driving and arrest; however, the Court has not heard any testimony regarding when the video began recording or how much of the incident would have been caught on video.

(citing *Deberry*, 457 A.2d at 751-52). In *Hunter v. State*, the Delaware Supreme Court held that the State had a duty to preserve a video recorded by the police that depicted the defendant engaging in behavior that resulted in the criminal charges at issue. *Hunter*, 55 A.3d at 369. The Court held that “increased diligence is required when a recording is made of an alleged event and the defendant is subsequently charged in connection with the event.” *Id.* However, the Delaware Superior Court has held that “the State has no duty to create video tape recordings of traffic stops and, therefore, no duty to preserve such evidence the State fails to collect.” *State v. Lanouette*, 2012 WL 4857820, at *6 (Del. Com. Pl. Aug. 27, 2012) (citing *DeLoach v. State*, 2012 WL 2948188, at *4 (Del. Super. July 16, 2012)).

In this case, State has not alleged that the MVR was not operating properly or that it failed to record the defendant’s driving, stop and arrest. Instead, the State concedes that the MVR was initiated and that it did record and collect evidence of the events at issue. The State does not contend that it failed to collect the evidence or that the MVR equipment underwent a mechanical malfunction. While the State does not have an affirmative duty to record all traffic stops, the State does have an obligation to preserve a recording in the event that the State successfully collects such evidence. As a result, the Court concludes that the State did have a duty to preserve the MVR and that duty was breached when the MVR was subsequently lost.

The third step in the *Deberry* analysis is a three-part inquiry to determine the consequences that should flow from the State’s breach of its duty to preserve evidence. *Deberry*, 457 A.2d at 752. The first factor is “the degree of negligence or bad faith involved.” *Johnson*, 27 A.3d at 546 (quoting *Bailey v. State*, 521 A.2d 1069, 1091 (Del.

1987)). In this case, the State concedes that it was negligent in failing to save the MVR on an alternative form of media, the consequence of which was that the MVR was ultimately lost. The defendant does not contend that the State failed to preserve the MVR in bad faith.

The second factor the Court must consider in determining the consequences that should flow from the State's breach is "the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available." *Johnson*, 27 A.3d at 546 (quoting *Bailey*, 521 A.2d at 1091). The defendant contends that the MVR was case dispositive evidence because it would have shown that he did not cross the center line in an unsafe manner. Therefore, the arresting officer lacked reasonable and articulable suspicion to conduct the stop. The other evidence that remains available in this case is the testimony of the arresting officer. The defendant argues that the arresting officer's memory is nowhere near as probative as the MVR would have been if it had been preserved.

The final factor the Court must consider in determining the consequences that should flow from the State's breach is "the sufficiency of other evidence produced at the trial to sustain [a] conviction." *Johnson*, 27 A.3d at 546 (quoting *Bailey*, 521 A.2d at 1091). The defendant argues that the MVR is case dispositive evidence. The defendant contends that the Court must give exculpatory effect to the MVR, which would preclude the State from establishing that there was a reasonable and articulable suspicion or probable cause to arrest him for an improper lane change or DUI.


Without testimony from the arresting officer as to when the MVR began recording and whether it would have captured the defendant allegedly crossing the center

line, the Court is precluded from determining the appropriate weight to give to the State's failure to preserve the evidence. The Court acknowledges that "the State must bear the responsibility for the loss of evidence, and the defendant therefore enjoys the inference that [the MVR] would be exculpatory in nature. . . ." *Deberry*, 457 A.2d at 754. However, the Court is unable to determine at this time the appropriate weight without testimony from the arresting officer, provided either at a suppression hearing or at trial.

CONCLUSION

The defendant's motion to dismiss is denied. However, if the defendant desires to pursue a motion to suppress evidence or goes to trial, the Court will consider whether the lost MVR should be considered exculpatory in nature.

IT IS SO ORDERED this 25th day of SEPTEMBER, 2014.



CHARLES W. WELCH
JUDGE