State of New Hampshire
Supreme Court

NO. 97-164

2000 TERM

AUGUST SESSION

STATE OF NEW HAMPSHIRE

v.

JOHN WANG

DEFENDANT'S REPLY BRIEF

By: Joshua L. Gordon, Esq.
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SUMMARY OF ARGUMENT

The defendant first argues that the State's loss of irreplaceable exculpatory evidence was the product of bad faith, and even if there was no bad faith, the result is prejudice to the defendant such that he cannot possibly have a constitutional retrial. In the circumstances, dismissal is the appropriate remedy.

Mr. Wang then argues that the State's delay in providing names of witnesses that could have helped the accused, in a case where the allegedly illegal events are so mundane that they are not likely to impress themselves on the memories of witnesses, is tantamount to denial of material exculpatory evidence, and that dismissal is the appropriate remedy.

ARGUMENT

After confessing error, the State seeks to have this case remanded to the Nashua District Court for re-trial. The charges, however, should be dismissed at the appellate level without further procedure.

I. The State Lost Irreplaceable Exculpatory Evidence

During trial, the defendant requested that the court unwrap the still store-wrapped remote control and compare the serial numbers on the remote with the serial numbers on the VCR he uncontestedly owned. Because Mr. Wang's defense was that he took a remote he already owned, examination by the court of the remote would reveal the numbers matched and would be incontrovertible proof of his innocence. *Defendant's Brief* at 27; *Trial Transcript* at 123.

The remote control, however, is now lost. Counsel has detailed his efforts to locate the remote in a letter to this court. Counsel has been informed by the Nashua District Court, the Nashua Police, and Sears that each respectively are not in possession of the item and do not know its whereabouts.

The defendant has a due process right to offer physical evidence during trial. *State v. Cressey*, 137 N.H. 402 (1993). The defendant also has a right to present physical evidence that may constitute a favorable proof. *State v. Dukette*, 127 N.H. 540, 544 (1986); N.H. CONST., Pt. 1, Art. 15. Thus, "the right to due process is implicated when evidence in a criminal trial is destroyed." *State v. Woodman*, 125 N.H. 381, 385 (1984); *State v. Berry*, 124 NH 203, 209 (1983). U.S. CONST., Amds. 5 & 14; N.H. CONST., Pt. 1, Art. 15.

This Court has recently set forth the analysis to be used when the State loses or destroys evidence.

> "Once a defendant demonstrates that the State has failed to preserve apparently relevant evidence, the State has the burden of showing that it acted in good faith, in the sense that it had no intent to prejudice the defendant, and that it also acted without culpable negligence, which we have defined as less than gross negligence but more than ordinary negligence. If the State carries its burden, to claim relief the defendant must demonstrate that the lost evidence was material, to the degree that its introduction would probably have led to a verdict of not guilty, and that its loss prejudiced the defendant by precluding the introduction of evidence that would probably have led to a verdict in his favor."

State v. Smagula, 133 N.H. 600, 603 (1990) (quotations, citations, and brackets omitted).

In *Smagula*, the state was able to show lack of bad faith because the police officer there returned back to their storage file pictures used in a photo identification of the defendant. There was a standing police department policy that such pictures should be returned to conserve law enforcement resources.

Here there is evidence the State acted in bad faith. In its letter to counsel announcing that it did not have the remote control, the Nashua Police Department said that "[o]ur procedure is that at the time of trial we ask the store to bring their evidence to court with them." LETTER FROM CAPTAIN JAMES E. MULLIGAN TO ATTORNEY JOSHUA L. GORDON (March 23, 1998), *Appendix to Reply Brief* at 1. The Nashua Police Department also noted that the remote was introduced as exhibit number 2. *Id.* If that were all, this case would be like *Smagula*.

But, exhibit number 1 in Mr. Wang's case was a Sears video surveillance tape. (Tape is on file with this Court.) The tape purports to show Mr. Wang picking up an item at Sears, pocketing it, and attempting to leave the store. The Nashua Police Department managed to get the tape into the hands of the Attorney General, and ultimately to this court. The ownership and evidentiary status of the tape is identical to that of the remote. Neither the Nashua Police Department nor the Attorney General can claim a policy difference between the two pieces of

evidence. That the Department was able to preserve the inculpatory tape, but not the exculpatory remote shows the State's bad faith, and also belies any claim of a *Smagula*-type policy in operation.

Moreover, these events demonstrate more than culpable negligence, but rather show that the State may have felt that "accidently" losing the remote would be acceptable. Given the defendant's relationship with the Nashua Police – Mr. Wang alleged in pleadings that the prosecutor and his staff lied to the court, lied to the defendant, suborned perjury, met *ex parte* with the court, and made other nefarious allegations – such an attitude toward the defendant by the Nashua Police is understandable. It does not excuse the State's actions, however.

Even if the State can show that it did not act in bad faith in losing the remote, the charges against the defendant should be dismissed. The evidence was clearly material in that the serial numbers would corroborate the defendant's story to such an extent that a verdict of guilty would not be possible, and the defendant will be prejudiced by not being able to introduce the one piece of evidence that would invariable lead to a verdict in his favor.

This case is not like *State v. Giordano*, 138 N.H. 90 (1993), where the defendant was unable to show prejudice because other evidence was available. Here, the still-wrapped remote control is the only evidence to show the serial numbers on the back of it. Similarly, this case is not like *State v. Murray*, 129 N.H. 645 (1987), in which the State retained photos of the evidence to which the defendant wanted access. Here, the State made no effort to unwrap and photograph the remote or to otherwise note what the serial numbers were. *See also*, *State v. Berry*, 124 N.H. 203, 209 (1983) (photos of evidence sufficient).

This case is also not like *State v. Cornelius*, 122 N.H. 925 (1982), in which this court held

that when the State tests substances for the presence of contraband, if the tests result in the destruction of evidence the results of the test are nonetheless admissible. In such cases the State has a reasonable excuse for destroying the evidence. Here, no such excuse is apparent.

The State may criticize the defendant for raising this issue at the appellate level, rather than waiting for the case to be remanded and raising it in the District Court. The defendant, however, is compelled to raise it now. In *State v. Dukette*, 127 N.H. at 546, that case's path through the appellate courts was lengthy. At some point before the appeals were concluded, but at some point after which it was reasonable for the police to assume enough time had gone by, the evidence was destroyed. This court thus found that the police conducted themselves in good faith, as the State is not required to hold evidence indefinitely. One cannot predict the future procedural course of this case. Thus it appears that a defendant is required, on the basis of *Dukette*, to raise the issue at an early time, even if that happens to be in an appellate court.

When the State loses evidence to which the defendant has a right, the appropriate remedy is dismissal of the charges. *Commonwealth v. Henderson*, 582 N.E.2d 496 (Mass. 1991). Moreover, it is clear that the State cannot retry Mr. Wang without the ability of the defendant to introduce the remote control.[1] Thus, it would be an inefficient use of judicial resources to require the District Court to hold further proceedings on the matter.

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[1]The State itself may be required to introduce the remote as it is the object of the alleged theft. *State v. Gray*, 127 N.H. 348 (1985). *See also State v. Bassett*, 139 N.H. 493 (1995); *State v. Luce*, 137 N.H. 419 (1993);*State v. O'Neill*, 134 N.H. 182 (1991) *State v. Woods*, 130 N.H. 721 (1988) (cannot convict for sexual assault without physical evidence).

II. The State Delayed Giving the Defendant Evidence for So Long That He Cannot Be Constitutionally Retried

In its brief, the State contends that the remedy for the discovery abuses the defendant alleges is reversal and retrial. *State's Brief* at 8. Because of the impossibility of retrying Mr. Wang however, and because of the prejudice against the defendant, the charges against him should be dismissed at the appellate level.

In Mr. Wang's discovery motions, he requested the names of Sears employees who had probably witnessed the defendant's various transactions with the store and could provide corroboration of his story. *See Defendant's Brief* at 24, and citations therein. There were several witnesses with whom the defendant testified he had contact regarding the remote control; and there was at least one witness who the defendant testified could confirm his returning the electric toothbrush, cast doubt on the circumstantial evidence contained in the video tape, and corroborate the defendant's version of events.

Mr. Wang has not ever been given the information he requested. If the names of the store employees were provided, say, on the date of oral argument in this case, nearly two-and-a-half years since the date of the alleged crime will have passed; if he is re-tried, the amount of time from alleged crime to second trial will be even longer. Mr. Wang is charged with shoplifting. Shoplifting is a minor crime – not the type a lay witness is likely to remember. Moreover, the witnesses were all working in a busy department store during the Christmas shopping season. Had they been alerted shortly after the alleged crime that it had occurred, it is possible that a search of their memories would have been useful. If the charges were for a serious assault, a murder, or something which is likely to lodge in a witness's memory, perhaps a two or three year

delay would be reasonable. But given the nature of the crime, the mundane set of facts, and the lack of any compelling reason to remember the events, any evidence the witnesses may have been able to provide has long since evaporated. Such a delay is tantamount to denial.

For this reason, the law recognizes that material delay in complying with discovery orders requires dismissal of charges.

> "Delay in complying with a Court order to furnish evidence to the accused, for the purpose of making it less useful to him, cannot be condoned. Such conduct involving evidence favorable to the accused strikes at the very heart of the adversary system, due process, and the guarantee of effective assistance of counsel. However, such misconduct on the part of the prosecutor does not necessarily call for a new trial or the drastic remedy of dismissal of the charges. To warrant such remedies, the defendant must at least show that the evidence was favorable to him, and that he has been prejudiced."

State v. Arthur, 118 N.H. 561, 563 (1978).

It is not known why the State failed to give the defendant the names of the store employees. Mr. Wang made his requests repeatedly, starting very shortly after he was arrested and continually throughout the pendency of the case. The court granted his requests for the names of the salespeople. The State has never claimed that it did not have access to the information, that it was privileged, or any other reasonable excuse. Although the defendant need not show bad faith, *Arthur*, 118 N.H. at 563, given the relationship between the defendant and the Nashua Police, there is evidence of bad faith here.

Dismissal of the charges is an appropriate remedy when the delay results in prejudice. *State v. Watson*, 120 N.H. 950 (1980). *See also State v. Colbath*, 130 N.H. 316 (1988); *State v. Glidden*, 123 N.H. 126 (1983).

> "Whether the delay in turning over the name of the [witness] amounted to an unconstitutional suppression of evidence depends upon whether the delay in disclosure substantially prejudiced the defendant in the preparation of his defense."

Arthur, 118 N.H. at 563; U.S. CONST., Amds. 5 & 14; N.H. CONST., Pt. 1, Art. 15.

Here, there is now little likelihood that the witnesses will recall the incident. The various store clerks were the only available means for establishing the defendant's story, and their evidence would have been favorable to him. Without the witnesses, the defendant was unable to attack the circumstantial evidence contained on the video tape, and was thus unable to prepare and present his defense. The defendant was therefore prejudiced by the State's failure to give him timely access to material and relevant witnesses. In these circumstances, dismissal is the appropriate remedy.

CONCLUSION

Based on the forgoing, the defendant requests that this honorable court reverse his conviction and dismiss the charges against him without further procedure.

Respectfully submitted,

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Dated: August 20, 2000

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CERTIFICATION

I hereby certify that on August 20, 2000, a copy of the foregoing will be forwarded to Ann Rice, Esq., Assistant Attorney General.

Dated: August 20, 2000

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APPENDIX