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CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA, APPELLEE, V.
RON R. HASHMAN, APPELLANT.
815 N.W.2d 658

Filed July 3, 2012. No. A-11-737.

1. **Pretrial Procedure: Appeal and Error.** The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Due Process: Evidence.** Suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment.
4. ____: ____. There are three components of a true violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963): The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.
5. **Constitutional Law: Trial: Evidence.** Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.
6. **Constitutional Law: Due Process: Evidence.** Under certain circumstances, the Due Process Clause of the 14th Amendment to the U.S. Constitution may require that the State preserve potentially exculpatory evidence on behalf of a defendant.
7. **Due Process: Evidence: Police Officers and Sheriffs.** 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.
8. **Judgments: Due Process: Evidence: Appeal and Error.** A trial court's conclusion that the government did not act in bad faith in destroying potentially useful evidence, so as to deny the defendant due process, is reviewed for clear error.

9. **Evidence: Proof.** Because of its obvious importance, where material exculpatory evidence is destroyed, a showing of bad faith is not necessary.
10. ____: ____. Where evidence that is destroyed is only potentially useful, a showing of bad faith under *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), is required.

Appeal from the District Court for Box Butte County: LEO DOBROVOLNY, Judge. Affirmed.

Bell Island, of Island & Huff, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

MOORE, Judge.

INTRODUCTION

Ron R. Hashman appeals his conviction in the district court for Box Butte County of driving under the influence (DUI), third offense, with a breath alcohol concentration of .15 or greater. On appeal, Hashman assigns error to the State's alleged failure to comply with a discovery order and Hashman also asserts that his due process rights were violated when the State failed to disclose the destruction of evidence prior to trial. Finding no abuse of discretion in the district court's determination of these claims, we affirm.

BACKGROUND

On March 28, 2009, Officer Jim Grumbles of the Alliance Police Department was on patrol, when he observed a pickup making a left turn. Because the pickup turned into the far outside lane, instead of turning into the inside lane and then merging over, Grumbles initiated a traffic stop of the pickup, which was being driven by Hashman. Upon making contact with Hashman, Grumbles noted that Hashman's eyes were watery and bloodshot, that he was somewhat slow in his reactions, and that he had the odor of an alcoholic beverage about his person. Hashman admitted to consuming alcohol. When Grumbles inquired about health issues, Hashman informed him that he was taking medication for high blood pressure and had

allergies and leukemia. Grumbles administered standardized field sobriety tests to Hashman. Grumbles observed six out of six indicators of impairment on the horizontal gaze nystagmus test. Grumbles observed three out of eight indicators on the nine-step walk-and-turn test and three out of four indicators on the one-leg stand maneuver. During the one-leg stand, Hashman informed Grumbles that he had equilibrium problems and had had several back surgeries, information that he failed to mention when Grumbles first inquired about medical issues. Grumbles then asked Hashman to recite the alphabet and also administered a preliminary breath test, which showed the presence of alcohol. Based on his observations of Hashman, his admission to consuming alcohol, and his performance on the field sobriety tests, Grumbles formed the opinion that Hashman was impaired and not safe to drive a motor vehicle. Grumbles arrested Hashman, read him the postarrest chemical test advisement, and transported him to a hospital for a blood draw after Hashman agreed to take a blood test.

On May 26, 2009, the State filed an information charging Hashman with DUI, over .15, third offense—a Class IIIA felony under Neb. Rev. Stat. § 60-6,197.03(6) (Cum. Supp. 2008). A jury trial was held on May 27 and 31, 2011.

Kimberly Galyen, a registered nurse at the hospital, drew blood from Hashman after his arrest. Galyen testified about the procedure she follows in blood draws. When she is notified that a police officer is coming in for a blood draw, Galyen obtains a legal blood draw kit and prepares a room. A police officer is present during the course of each legal blood draw. Either Galyen or the officer will break the seal on the kit, and Galyen signs the top of the kit to show that she was the one who drew the blood. Each kit contains a needle, a container for the needle, two vacutainer tubes, a Betadine swab, and seals for reclosing the kit. Galyen inspects the tubes to make sure they have anticoagulant in them, and she has never seen one that does not. After drawing the blood, Galyen fills out a blood draw certificate, documenting that she was the one who drew blood from a particular individual at a particular date and time. Once the blood is drawn, Galyen notes the individual's name and the date and time, and she places that information and her

initials on the tubes of blood. The officer then places the tubes in the kit and seals it. At trial, Galyen identified one exhibit as the tubes of Hashman's blood marked with Hashman's name; the date of March 28, 2009; the time of the blood draw; and Galyen's initials in her handwriting. The information on the blood tubes corresponded with the information documented by Galyen on the blood draw certificate she completed for Hashman's blood draw.

Grumbles testified that he inspected the blood kit at the hospital to make sure it had not expired, opened it, and provided the contents to Galyen. Grumbles was present when Galyen drew Hashman's blood and marked the tubes. Once the tubes were marked, Grumbles sealed the tubes and placed them inside a plastic bag, which he also sealed. He placed the sealed bag into the kit and sealed the kit. Grumbles also completed a blood collection report and test sheet. Grumbles kept the kit with him until he could place it in the evidence refrigerator, which he did on March 28, 2009.

Colleen Busch, a police officer and criminal investigator with the Alliance Police Department, testified about her duties with respect to handling blood kits and other evidence. Busch checks the log on the front of the secure refrigerator in her office area in the mornings to see if any new blood kits have been placed inside. If there are any new blood kits, she unlocks the refrigerator and secures them in a second refrigerator to which only she has access. Then, at the appropriate time, she packages the kits and sends them to the state crime laboratory by certified mail, return receipt requested. The blood kits are not returned to Busch. Busch retains possession of the receipts to show that the kits were mailed. She also documents, on the evidence card associated with each item, when it was shipped to the laboratory. The certified mail receipts and evidence property reports are marked with the relevant police report number. Hashman's blood kit was in a secured refrigerator unit from the time Grumbles logged it in on March 28, 2009, until Busch mailed it to the laboratory on March 31. Busch inspects each kit before she mails it to make sure it is properly sealed. She also places two extra pieces of tape on every blood kit before mailing it to ensure that it will not open. If

a kit was not properly sealed when she inspected it, Busch would contact the officer involved and work with that officer to repackage and properly submit the kit. According to Busch, she has never actually had to contact an officer to repackage a blood kit.

Jamie Mraz, a forensic scientist at the Nebraska Department of Health and Human Services laboratory, tested the blood drawn from Hashman. Mraz' duties include maintaining the chain of custody on samples and evidence that come into the laboratory and analyzing blood samples for alcohol content. Mraz has a Class A permit from the State of Nebraska, authorizing her to analyze blood samples using automated headspace gas chromatography. Gas chromatography is a technique for separating and testing for compounds, such as ethanol, in their gas forms. Mraz tested Hashman's blood on April 1, 2009, following the Nebraska Administrative Code's title 177 protocol that was in effect on that date. See 177 Neb. Admin. Code, ch. 1 (2009). Mraz identified the return receipt slip from the post office, showing that she signed for the blood kit containing Hashman's blood on April 1. Mraz also identified the container holding the blood tubes she received for Hashman.

Mraz testified that at the laboratory, the kits, or boxes, in which blood tubes are sent are stored separately from the tubes. Blood tubes are stored in a locked refrigerator in the laboratory when they are not being tested, and the kits are stored separately in a room attached to the laboratory. The laboratory holds the kits for 2 years, and then they are destroyed. According to Mraz, the laboratory receives between 2,500 and 2,800 blood kits each year. Mraz did not realize that Hashman's case was still ongoing at the end of the 2-year storage period, and the kit in which Hashman's blood was sent to the laboratory was destroyed prior to trial. Mraz testified that upon receiving the kit containing the tubes of Hashman's blood, she took the tubes from the kit and placed them in the secure refrigerator.

At this point in Mraz' testimony, Hashman's attorney asked that the jury be excused in order to raise his concerns about the destruction of the blood kit. Outside of the jury's presence,

Hashman's attorney questioned Mraz further. Mraz became aware of the kit's destruction in April 2011, when she received an order to have one of the tubes of Hashman's blood sent out for independent testing. Mraz still had the blood, so she was able to send it off for an independent test. The night before trial, Mraz told the county attorney about the destruction of the blood kit.

The following exchange then occurred between the district court and Hashman's attorney:

> [Hashman's attorney]: My motion, Your Honor, is I need some time remedy for the failure to disclose exculpatory evidence. This is a *Brady* [*v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963),] violation. Under *Kyles versus Whitley*[, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995),] it doesn't matter that she's not directly with the county attorney, she has a duty to disclose, they have a duty to provide. The county attorney knew yesterday at least; they didn't tell me this morning, hey, better let you know so we could ask for —
>
> THE COURT: Well, . . . what exculpatory evidence do you believe was hidden from you?
>
> [Hashman's attorney]: The box, the container, that it was destroyed and that they can no longer demonstrate that the blood was in that box, how that box was done, and the necessary chain of custody events.
>
> THE COURT: How is that exculpatory?
>
> [Hashman's attorney]: How is it exculpatory? It goes to the credibility of the process, Your Honor, and whether or not they can make their proof.

The court overruled Hashman's motion, and the prosecutor resumed questioning Mraz after the jury returned to the courtroom.

Mraz described the normal procedure she follows upon receiving a blood kit. Mraz obtains the blood kit from the post office and takes it to the laboratory, where she logs the kit in. Mraz did not specifically remember doing that with the blood kit in this case but testified that she follows the same procedure every time. Mraz did not recall whether the kit containing the tubes of Hashman's blood was sealed when

she received it, but she testified that she wrote on the tubes to indicate that they were sealed when she received them. When Mraz receives a blood kit, she examines the tubes for cracking, makes sure they are sealed, checks for signs of clotting, and compares any information written on the tubes to the blood alcohol test form that comes with the kit to make sure that it is consistent.

Mraz testified that she followed the laboratory's normal protocol and procedure upon receiving Hashman's blood in 2009, and she testified to her belief that the kit was intact, the tubes and the blood were in good condition, and the information on the tubes was consistent with the information on the kit. Mraz testified that after opening the kit with Hashman's blood and checking the contents, she would have assigned a laboratory number to the kit, written the number on the outside of the kit along with her initials as the person opening it, and written whether it was sealed and the date she opened it. Mraz then would have written the laboratory number and the date the kit was received on the blood alcohol test form and would have noted the laboratory number on any other sealed portions of the kit, along with the fact that she was the one who opened that portion of the kit. After she checked the blood tubes and marked them with the laboratory number, the fact that they were sealed, and her initials, Mraz placed one tube in a test tube rack and one tube on a "rocker" in preparation for testing Hashman's blood. After Mraz completed testing Hashman's blood, the tubes were kept in the secure refrigerator in the laboratory. Mraz testified that although there is certain information recorded on the kit, or box, that the blood comes in for testing, much of that information is documented in other places. She testified that the box itself does not have anything to do with the results of the blood test.

Mraz described in considerable detail the process of testing blood using automated headspace gas chromatography, which she used to test Hashman's blood. Once the gas chromatograph has completed the testing process, it produces a chromatogram, which is the recorded graphic printout of the measured amount of alcohol. Mraz checks the chromatogram to make sure that the standards and the quality control samples

used in the testing were within their ranges. If they are all correct, she then determines the blood alcohol content for the unknown sample being tested. Mraz writes the blood alcohol content on the blood alcohol test form that comes with the kit and sends copies to the arresting agency and the county attorney's office.

Mraz testified that after testing Hashman's blood, she received a result of the blood alcohol content. When the prosecutor asked Mraz what the result was, Hashman's attorney objected and asked to voir dire the witness. Based on this questioning, Mraz testified that the computer attached to the instrument used for blood testing prints off a chromatogram from every sample she analyzes, which printout is the result of the analysis performed by the machine. Mraz must then analyze the chromatogram to determine whether it shows a reportable amount. The blood alcohol content that is reported and documented on the blood alcohol test form reflects Mraz' interpretation of the chromatogram. Hashman's attorney then asked to conduct further voir dire outside of the jury's presence.

Once the jury was removed from the courtroom, Hashman's attorney questioned Mraz further about chromatograms in general and offered a sample chromatogram for demonstrative purposes. The following exchange then occurred:

> [Hashman's attorney]: . . . And my objection now is pursuant to 29-1912, the State is required to disclose the results of a test if they intend to use it at trial — only if they intend to use it. They have now indicated clearly they intend to use it, they have not disclosed the chromatogram which is the actual equivalent to the breath test strip in a breath test, Your Honor. And, therefore, I'd ask for a remedy, either a disallowance of the information or some other method in which to deal with it because that's not been disclosed to me, Your Honor.
>
> THE COURT: So what you are saying is something akin to [the sample chromatogram] in this case should have been disclosed to you?
>
> [Hashman's attorney]: Exactly. Something akin to [the sample chromatogram] should have been disclosed by the . . . State in this case for me to use to analyze because

> it's the actual results, it's the printout, it's — for lack of a better word, it's the breath test strip in a breath case. They print it out and then they transcribe it over to a different piece of paper, Your Honor.
>
> THE COURT: I'll consider [the sample chromatogram] for that purpose. But your — whatever your request for relief is, it's denied.

Hashman's attorney clarified that he was asking to "strike the evidence," and the court again denied the request. After the jury returned to the courtroom, the State offered exhibit 14, the blood alcohol test form on which Mraz documented Hashman's blood alcohol content of .219. The court overruled Hashman's objections on the bases of foundation and best evidence and received exhibit 14 into evidence.

On cross-examination, Hashman's attorney questioned Mraz further about the science of gas chromatography and problems that can occur in the process. Hashman's attorney also questioned Mraz about what she looks for when analyzing a chromatogram. Mraz had Hashman's chromatogram with her in court, and Hashman's attorney questioned her in great detail about what the chromatogram showed. The chromatogram was also received into evidence.

The jury found Hashman guilty of DUI, over .15, and on August 31, 2011, the district court found that Hashman had two prior DUI convictions, making his offense a third offense. The court sentenced him to 5 years of supervised probation, ordered him to pay a $1,000 fine, revoked his driver's license for 5 years, and ordered him to spend 60 days in jail. Hashman subsequently perfected the present appeal to this court.

ASSIGNMENTS OF ERROR

Hashman asserts that the district court erred in (1) failing to provide a remedy for the State's failure to comply with a discovery order and (2) finding that his due process rights were not violated when the State failed to disclose the destruction of evidence prior to trial.

STANDARD OF REVIEW

[1,2] The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion. *State*

v. Norman, 282 Neb. 990, 808 N.W.2d 48 (2012). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012).

ANALYSIS

Failure to Disclose Chromatogram.

Hashman asserts that the district court erred in failing to provide a remedy for the State's failure to comply with a discovery order. Specifically, he argues that the State did not comply with discovery because the chromatogram, the printout graph of the blood test result, was not provided in discovery. Neb. Rev. Stat. § 29-1912(1)(e) (Cum. Supp. 2010) provides that the State must disclose "[t]he results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case, or copies thereof."

The record shows that prior to trial, Hashman was provided with a copy of the Nebraska Department of Health and Human Services laboratory result, which is presumably the same document as exhibit 14, the test result form prepared by Mraz. Although the chromatogram shows a graphic printout of the test result and the controlled items tested, it must be interpreted by Mraz to determine its validity and the process is not complete until Mraz fills out the test form. Mraz brought the chromatogram with her to court, and Hashman's attorney questioned her in great detail about the information shown in the chromatogram. Hashman has not shown that the State failed to comply with the discovery statute. We find no abuse of discretion in the district court's denial of Hashman's request for a remedy for the State's failure to provide Hashman with the chromatogram prior to trial.

Destruction of Blood Kit.

Hashman asserts that the district court erred in finding that his due process rights were not violated when the State failed to disclose the destruction of evidence, specifically, the blood kit, prior to trial.

[3-5] In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the U.S. Supreme Court held that "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." There are three components of a true *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). The Nebraska Supreme Court has stated that favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011). A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial. *Id.*

[6-10] Under certain circumstances, the Due Process Clause of the 14th Amendment to the U.S. Constitution may require that the State preserve potentially exculpatory evidence on behalf of a defendant. *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011). 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.* A trial court's conclusion that the government did not act in bad faith in destroying potentially useful evidence, so as to deny the defendant due process, is reviewed for clear error. *Id.* Because of its obvious importance, where material exculpatory evidence is destroyed, a showing of bad faith is not necessary. *Id.* Where evidence that is destroyed is only potentially useful, a showing of bad faith under *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), is required. *State v. Nelson, supra.*

In this case, the blood kit box, or container, used to transport the vials of blood from the hospital, to the evidence vault, and finally to the laboratory was not material exculpatory evidence.

The blood kit box had no effect on the test performed on the blood or the results of the test. And while the box itself contains information regarding the chain of custody, much of this information is documented in other places, including on the blood vials. The State established an ample chain of custody for the blood drawn from Hashman through the testimony of Galyen, Grumbles, Busch, and Mraz. Hashman's attorney cross-examined each of these witnesses thoroughly regarding the collection, transport, and storage of Hashman's blood. Hashman has not shown a reasonable probability that, had the destruction of the blood kit box been disclosed to the defense prior to trial, the result of the proceeding would have been different. Nor has he shown that the State acted in bad faith in destroying the blood kit. The kits are stored separately from the blood vials, and the kits are routinely destroyed after a 2-year period. We conclude that there was no *Brady* violation. The district court did not err in finding that Hashman's due process rights were not violated. Hashman's assignment of error is without merit.

CONCLUSION

The district court did not abuse its discretion in denying Hashman's request for a discovery violation or in denying his *Brady* challenge.

AFFIRMED.

IN RE ESTATE OF SHIRLEY A. WEBB, DECEASED. ROGER WEBB AND MARK WEBB, APPELLEES, V. DANNY L. WEBB, PERSONAL REPRESENTATIVE OF THE ESTATE OF SHIRLEY A. WEBB, APPELLANT.

817 N.W.2d 304

Filed July 17, 2012. No. A-11-721.

1. **Decedents' Estates: Appeal and Error.** Absent an equity question, an appellate court reviews probate matters for error appearing on the record made by the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law,