IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

JOHN B. GOODMAN,

Defendant.
_____/

CRIMINAL DIVISION "W"
CASE NO. 502010CF005829AXXXMB

ORDER DENYING DEFENDANT'S MOTION TO DISMISS CHARGES FOR STATE'S FLAGRANT VIOLATION OF DEFENDANT'S CONSTITUTIONAL DUE PROCESS RIGHTS BY RELEASING VEHICLES

THIS CAUSE came before the Court on Defendant's "Motion to Dismiss Charges for State's Flagrant Violation of Defendant's Constitutional Due Process Rights By Releasing Vehicles," ("Motion") filed on January 9, 2014 and the State's Response to Defendant's Motion to Dismiss, ("Response") filed February 11, 2014. Since Defendant seeks dismissal of charges due to the State's release of the vehicle he was driving at the time of the crash which gave rise to his charges, the Court interprets the Motion as being filed pursuant to Florida Rule of Criminal Procedure 3.220. After a review of the Motion, Response, the testimony from the hearing held on February 27, 2014, and continued on February 28, 2014 and March 6, 2014, and reviewing relevant case law, it is hereby **ORDERED AND ADJUDGED** as follows:

Findings of Fact

a. Trial

Defendant was involved in a motor vehicle crash at the intersection of 120 Ave South and Lake Worth Road in Wellington at approximately 1:00 a.m. on February 12, 2010. Defendant was driving a 2007 Bentley Continental GTC when he crashed into the 2006 Hyundai Sonata driven by the victim, Scott Patrick Wilson. The State of Florida charged Defendant by

Information with DUI Manslaughter and Failure to Render Aid (Count 1) and Vehicular Homicide-Fail to Give Aid/Information (Count 2). The case proceeded to trial by jury and Defendant was found guilty of both counts on March 23, 2012.

b. Post-trial

The chronology of events post-trial is important to the outcome of this Motion to Dismiss and therefore will be outlined in detail. On April 2, 2012, Defendant filed a Motion for New Trial, alleging among other grounds, that the Court should reconsider its rulings on the circumstances surrounding the testimony of the State expert witness Thomas Livernois and the tests conducted on the vehicles. (*See* Def. Ex. 6) This Motion was denied on April 12, 2012. Defendant filed another motion titled "Motion for New Trial And/Or to Vacate His Conviction Based on Jury Misconduct and Incorporated Memorandum of Law" on April 16, 2012 which first raised issues with the jury misconduct and specifically addressed the issue of juror Dennis DeMartin's self-published book about the trial. On April 20, 2012, the Court denied Defendant's second motion for new trial but granted in part a limited jury interview on one issue.

Defendant continued to file additional post-trial motions up until the date he was sentenced. On May 11, 2012, the Court sentenced Defendant to sixteen years with the Department of Corrections, with credit for 51 days. It was not until May 3, 2013 that Defendant was ultimately granted a new trial by this Court after additional investigation and hearings revealed the extent of juror Dennis DeMartin's misconduct during the first trial.

c. Preparations for Retrial Reveals Vehicles No Longer Available

On September 18, 2013, Defendant's new counsel, Douglas Duncan contacted Sherri Collins, one of the two assistant state attorneys assigned to Defendant's second trial. In the email, Mr. Duncan explained that he and Scott Richardson, co-counsel for Defendant, wished to view the Bentley and bring an expert along with them. The email sent in response by ASA

Collins stated simply that the vehicles were released post-sentence. On September 23, 2013, Defendant filed a "Motion for Production of All Communications Reference [sic] the State Attorney's Office Decision to Authorize the Release of the Two Vehicles from Evidence." On October 7, 2013 the Court entered an Agreed Order on the motion for production whereby the State Attorney's Office agreed to produce any and all correspondence between it and the Palm Beach County Sheriff's Office regarding the release of the vehicles. The Agreed Order also permitted taking depositions of former Assistant State Attorney Ellen Roberts and PBSO Traffic Homicide Investigator Troy Snelgrove on this topic.

Further investigation revealed that the Bentley had been released at the State's direction on April 25, 2012 to Chubb Insurance Company, the owner of the vehicle after the crash. The victim's vehicle had been released April 20, 2012. The Bentley was later sold at auction and eventually found in a private garage in Sugarland, Texas. Both the new defense team and the State have traveled to Texas to examine the Bentley in its current state. On January 9, 2014, Defendant filed the instant Motion and the State filed its Response on February 11, 2014. A hearing was conducted on February 27, 2014, February 28, 2014, and concluded on March 6, 2014.

d. Witness Testimony at Hearing for Motion to Dismiss

The State first called Ellen Roberts, the assistant state attorney who prosecuted the case and retired shortly after Defendant was convicted. Ms. Roberts explained that it was her personal policy to authorize the release of vehicles after a defendant was convicted and that she necessarily wait until after sentencing to do so. Ms. Roberts further testified that she believed the Bentley had no exculpatory evidence and neither did the victim's Hyundai. When presented with an email written by Defendant's expert witness Luka Serdar and sent to Defendant's former counsel, Mark Shapiro, which included other tests Mr. Serdar would have liked to perform on the

Bentley (*See* State Ex. 6), Ms. Roberts explained she had never seen the email before and would not have expected to since he was a defense expert.

Also key was her testimony as to the documentation concerning the release of the vehicles in this case. The office generates "closeout letters" which alert concerned parties of the resolution of a criminal case and include a contact phone number for any questions. (*See, e.g.* State Ex. 7; Def. Ex. 8) Notably, each closeout letter includes a note to the respective evidence custodian regarding the status of any evidence in the case. The note can direct the evidence custodian to retain evidence for appellate purposes. Ms. Roberts testified that in this case, her assistant, Ms. Sophie Brown, prepared the closeout letter dated May 31, 2012 and it was she who unilaterally included the language about retaining the evidence for appellate purposes.

Ms. Brown testified the office would release vehicles before closeout letters had been drafted (and typically before sentencing had occurred). In this instance, both vehicles were released a little over a month before the closeout letter was generated. Ms. Brown explained that the standard language about retaining evidence for purposes of appeal is an option that can be selected by a click of a mouse when composing the template letter. She stated it was she who made the font bold and larger on the text of the note of closeout letter in the instant case. The letter was dated, May 31, 2012, the last day of Ms. Roberts' tenure at the office. Ms. Brown testified that it was Ms. Roberts directed her to include the language about retaining evidence for appellate purposes in the note section. Ms. Brown surmised that the closeout letter included the language because of the juror misconduct issue which came to light after Defendant was convicted.

Investigator Troy Snelgrove testified as to the storage and maintenance of vehicles stored in the traffic homicide "C" lot at the PBSO impound lot. He explained that he contacts the assistant state attorney on the case to obtain authorization to release a vehicle impounded in the

lot to its proper owners. Once he receives a vehicle release form, he then transmits it to the impound lot staff to prepare the release of the vehicle. Tracey Siciliano, who works at the PBSO impound lot corroborated this characterization of the release of cars procedure.

Investigator Snelgrove also testified as to his involvement in the inspection of the Bentley by the State and the defense before the first trial in March 2012. He explained that he was present during any inspection by either side to ensure that the evidence was preserved. Investigator Snelgrove recounted that he remembered Mr. Serdar's one-and-a-half day inspection since it was extensive and longer than the usual time taken. Just like Ms. Roberts, Investigator Snelgrove was also unaware of the private email from Mr. Serdar to Mr. Shapiro which stated other tests he would have liked to perform.

Another witnesses called by the State was Markus Tuerk who inspected Defendant's Bentley in August 2010 but did not testify at trial. In brief, Mr. Tuerk explained what he checked on the Bentley, including downloading the error codes from the electronic control module and checking the engine compartment. He opined that the damage to the throttle body appeared to be due to impact at the time of the accident. The other witnesses called were to support the State's theory that Investigator Snelgrove received numerous calls from parties purporting to be Chubb Insurance. Therefore, multiple traffic homicide investigators who work in the same office suite as Investigator Snelgrove testified as to their recollection of his receipt of calls from Chubb Insurance. The State also called an individual to explain the functionality of the county-wide phone system for government offices.

Defendant's expert witness from the first trial, Luka Serdar, a forensic engineer, also testified as to his inspection of the Bentley after it was located in Texas in late 2013. Mr. Serdar began his testimony by explaining in great detail his inspection of the Bentley in January 2011 before the first trial and his initial impressions of what he believed the different malfunctions of

the Bentley were at the time. Mr. Serdar also recounted how he had wanted to perform additional tests on the vehicle at the time, as memorialized in the email shown to Ms. Roberts and Investigator Snelgrove. Mr. Serdar testified that he was frustrated after hearing the State's expert witness, Mr. Livernois testify during the first trial as to the tests he was permitted to perform on the Bentley, some of which were mentioned in the email he had written to Mr. Shapiro. Mr. Serdar concluded that as of this date, he could no longer perform the tests desired by the defense without the hood of the vehicle and the electronic throttle control modules in the Bentley.

Discussion

Defendant asserts that in prematurely releasing the vehicles involved in the crash, the State has "destroyed constitutionally material evidence of a known/established exculpatory value to the Defense" and relies on the decision of the Supreme Court of the United States in *California v. Trombetta*, 467 U.S. 479 (1984). (Mot. at 2, 37-38.) The State's counterargument centers on the standard established by *Brady v. Maryland*, 373 U.S. 83 (1963) and expanded through subsequent cases decided applying its principle. Essential to a determination of the proper sanction in this case is a clarification on the application of these tests and their respective remedies to the facts of the instant case.

1. Discovery and Due Process

The "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To meet the requirements of *Brady*, a defendant must show "(1) favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced." *Parker v. State*, 89 So. 2d

844, 865 (Fla. 2011) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-10 (1976). To meet the materiality prong, the defendant must demonstrate "a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." *Smith v. State*, 931 So. 2d 790, 796 (Fla. 2006) (citing *Strickler* 527 U.S. at 296) "The burden is on the defendant to demonstrate what he claims is *Brady* material satisfies each of these elements." *Wright v. State*, 857 So. 2d 861, 870 (Fla. 2003). "In applying these elements, the evidence must be considered in the context of the entire record." *Carroll v. State*, 815 So. 2d. 601, 619 (Fla. 2002).

In *California v. Trombetta*, 467 U.S. 479 (1984), the Supreme Court of the United States recognized that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." *Id.* at 486. The *Trombetta* court refused to impose the same high standard of *Brady* materially exculpatory evidence on "potentially useful" evidence. Instead, the holding explained that the duty on the State to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." *Id.* at 488. To meet the standard of constitutional materiality, "evidence must possess both 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." *Id.* at 489.

Unresolved by *Trombetta* was the issue of <u>what</u> standard to apply when evidence is only potentially useful to the defense. This issue was not addressed until several years later in the Court's decision in *Arizona v. Youngblood*, 488 U.S. 51 (1988). In *Youngblood* the Court concluded "the Due Process Clause requires a different result [from *Brady*] when we deal with

the failure of the State to preserve evidentiary material of which no more can be said that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* at 57. The Court held that "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.* at 58. In reaching this conclusion, the Court stated that this requirement would limit the police obligation "to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.* those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Id.*; *see Guzman v. State*, 868 So. 2d 498, 509 (Fla. 2003) ("[U]nder *Youngblood* and this Court's precedent, the determination of bad faith does not turn on whether law enforcement officers followed established procedures. Instead, bad faith exists only when law enforcement officers intentionally destroy evidence they believe would exonerate a defendant.")

2. Application of *Brady* and *Youngblood* to the facts of the instant case

The Court finds that Defendant has not carried his burden in establishing a *Brady* violation. Defendant has not demonstrated that further testing on the Bentley provides a reasonable probability that the jury verdict would have been different. *Smith*, 931 So. 2d at 796. In applying the elements of *Brady* to consider the evidence in the context of the entire record, as suggested by *Carroll*, Defendant has already obtained the benefit of subjecting the Bentley to testing in preparation for the first trial and continues to be in possession of the results. The defense theory during the first trial centered on the concept of the Bentley's malfunction and based on the arguments presented by counsel on the instant Motion, it appears as if that theory will be used in the retrial. Defendant relied on the expertise of Luka Serdar at the first trial and engaged him as an expert witness for the retrial. Accordingly, Mr. Serdar, by his own former testimony, has already formed an opinion of the malfunction and that his opinion on the state of

the Bentley at the time of the crash is complete. The "mere possibility of helping the defense" by conducting even more testing on the Bentley which was already subjected to extensive testing by three different experts does not rise to the level of constitutional materiality as defined in *Agurs*.

Therefore, any additional evidence which the vehicles may have revealed only rises to the level of "potentially useful" evidence, as explained in *Trombetta*. Therefore, in order to succeed in proving a due process violation, Defendant must prove bad faith on the part of the State to release the vehicles. *Youngblood*, 488 U.S. at 58. The Court finds that Defendant did not prove the actions of the State in releasing the Bentley post-trial rose to the level of bad faith.

Admittedly, there is no procedure in place at the Office of the State Attorney for the post-trial release of vehicles involved in vehicular homicide, such as in the case of Defendant's DUI manslaughter. The State's "practice" of releasing vehicles to their proper owner after conviction, but before appeal, is problematic but does not rise to the level of bad faith. There was no evidence presented during the hearing to indicate that the State disposed of the vehicles to conceal whatever purported exculpatory evidence Defendant now claims the vehicle would have revealed, especially after the vehicle was already subjected to significant levels of inspections by various experts during the first trial. Instead, Defendant offered the mere hypotheses of Luka Serdar, whose testimony the Court does not credit, as to what he believes was damaged in the transport and sale of the Bentley after the first trial. Much was made by the defense of the email sent by Mr. Serdar to Mark Shapiro, one of Defendant's trial counsel, detailing some other proposed tests he would have liked to perform. The Court does not see how showing a confidential email during the pendency of the first trial is persuasive evidence to show the State knew the defense wished to conduct additional testing and somehow disposed of the Bentley in bad faith. (*See* State Ex. 5)

Additional circumstances support the Court's conclusion that the Bentley only presented Defendant with at most, potentially useful evidence. First, the Court further notes that Defendant had ample opportunity during the first trial to find whatever evidence in the Bentley he had hoped to find and did not find it. Second, the Court was liberal in its granting Defendant leave to submit additional discovery requests leading up to the first trial, and even during it. If the "wish list" of tests of Mr. Serdar's email was known to Defendant and his counsel, and not pursued, then they are waived. *See Peek v. State*, 395 So. 2d 492, 495 (Fla. 1980) (holding subsequent loss of hair samples which prevented defendant's independent inspection was waived when defendant was aware of the samples yet never moved the trial court to inspect or test them). The "potentially useful" nature of any additional information possibly contained in the Bentley post-trial is minimal to non-existent and is solely based on conveniently timed speculation.

3. Spoof Calls Theory

Unpersuasive to the Court's decision but noted in this Order nonetheless due to its extensive coverage during the hearing is the theory of "spoof calls." In anticipation of Defendant's likely assertion of bad faith conduct on its part, the State advanced a theory of the chance that there was an unknown party purporting to be from Chubb Insurance who called Investigator Snelgrove on more occasions that could be proven by phone records and Chubb Insurance's own records, referred to as "spoof calls." The State posited that these spoof calls pressured Investigator Snelgrove into repeatedly informing Assistant State Attorney Ellen Roberts about the urgency of the vehicle's status which influenced her eventual decision to release it. The records obtained by Defendant from Chubb Insurance were also inconclusive to refute the State's theory that some unknown party was repeatedly calling Investigator Snelgrove. The Court finds this concept was a red herring which detracted from the fact that the ultimate decision to release the Bentley was made by the State, through ASA Roberts who testified she

released vehicles as a matter of course whenever she obtained a conviction. Accordingly the substantial time devoted to developing and defending the spoof calls theory was unnecessary and duplicative.[1]

4. Remedy

Defendant requests that this Court dismiss the charges against him based on the loss of evidence which he contended was materially exculpatory pursuant to *Brady*. "The dismissal of a [criminal] charge is the most severe sanction a court can impose for the destruction of evidence; it is to be used with the greatest caution and deliberation.: *State v. Thomas*, 826 So. 2d 1048, 1049 (Fla. 2d DCA 2002) (citing *State v. Westerman*, 688 So. 2d 979 (Fla. 2d DCA 1997)). This Court's finding that the Bentley did not rise to the level of materially exculpatory evidence and instead was only potentially useful evidence renders dismissal too harsh a sanction in the absence of evidence of bad faith on the part of the State. The Court finds that since the State has conceded it will not call Thomas Livernois as an expert in the retrial, there remains no prejudice to Defendant in his ability to present the expert testimony and findings he has collected. *See Stipp v. State*, 371 So. 2d 712 (Fla. 4th DCA 1979) (holding violation of due process when State destroyed critical inculpatory evidence and permitted to introduce irrefutable and damaging testimony predicated upon that evidence). Furthermore, the Court notes that Defendant is not precluded from sharing with the jury the fact that the Bentley (and the victim's vehicle) are no longer available for inspection since they were prematurely released by the State.

[1] The State asked Investigator Snelgrove questions about the calls he received but also called three of his co-workers in the Traffic Homicide Unit of PBSO to testify solely as to their knowledge of his having received calls from Chubb Insurance. The State also questioned the supervisor of the PBSO impound lot and called an information specialist with Palm Beach County Government to testify as to the phone functionality for the county-wide system.

Accordingly, Defendant's Motion to Dismiss Charges for State's Flagrant Violation of Defendant's Constitutional Due Process Rights By Releasing Vehicles is hereby **DENIED**.

DONE AND ORDERED, in Chambers at West Palm Beach, Palm Beach County, Florida this 17 day of March, 2014.

JEFFREY COLBATH
CIRCUIT JUDGE

Copy provided to:
Al Johnson, Esq., 401 North Dixie Highway, West Palm Beach, Florida 33401
Sherri Collins, Esq., 401 North Dixie Highway, West Palm Beach, Florida 33401
Douglas Duncan, Esq., P.O. Box 770, West Palm Beach, Florida, 33402
Elizabeth Parker, Esq., 515 N. Flagler Drive, Suite 325, West Palm Beach, Florida 33401
Scott Richardson, Esq., 1401 Forum Way, Suite 720, West Palm Beach, Florida 33401