

No. 1-12-2652

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 11 CR 9429
	)	
FRANK MCGHEE,	)	
	)	Honorable
Defendant-Appellant.	)	Charles P. Burns,
	)	Judge Presiding.

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JUSTICE REYES delivered the judgment of the court.  
Presiding Justice Palmer and Justice McBride concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Affirming the judgment of the circuit court of Cook County denying defendant's motion to dismiss on the grounds of a due process violation where defendant failed to establish the State destroyed evidence in bad faith.
- ¶ 2 Following a jury trial in the circuit court of Cook County, defendant Frank McGhee was convicted of aggravated fleeing and eluding a peace officer pursuant to section 11-204.1(a)(4) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-204.1(a)(4) (West 2010), and was sentenced to

four and a half years in the Illinois Department of Corrections. On appeal, McGhee contends the trial court abused its discretion when denying his motion to dismiss the indictment because it applied the incorrect legal standard. Specifically, McGhee asserts the trial court "erroneously believed that, in order to establish a due process violation, McGhee needed to prove that the evidence was materially exculpatory rather than potentially useful." For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On May 19, 2011, McGhee was charged by information with three counts of aggravated fleeing and eluding a peace officer: (1) while traveling at a speed at least 21 miles per hour above the legal speed limit; (2) causing property damage in excess of \$300; and (3) failing to obey two or more traffic control devices. The charges were based on a May 13, 2011, incident wherein McGhee was observed failing to obey stop signs while operating an automobile at a high rate of speed, colliding with two other vehicles and a tree, and then fleeing the scene on foot.

¶ 5 During multiple status hearings in the trial court McGhee indicated he failed to stop the automobile because it "malfunctioned." He further asserted this case was "a police brutality cover[-]up" and that "the police blew [his] car up."

¶ 6 On December 22, 2011, McGhee informed the court that he wished to represent himself. The trial court administered the requisite admonishments, found defendant's waiver of his right to counsel to be knowing, intelligent, and voluntary, and granted McGhee's request.

¶ 7 On January 13, 2012, the State tendered discovery to McGhee and stated discovery was complete. McGhee again asserted, "They had the car crushed. They had the car crushed because an expert is going to show that my car malfunctioned. The brakes went out." The trial court then asked the assistant State's Attorney whether the car had been destroyed, to which the

assistant State's Attorney replied, "I'm not sure, Judge," and indicated she would investigate the matter. At the next court date, the assistant State's Attorney informed the court that McGhee's vehicle had been destroyed on June 17, 2011.

¶ 8 Thereafter, in a *pro se* motion to dismiss that is included in the record on appeal with no file stamp, McGhee argued:

"1. In this three counts of aggravated fleeing and eluding, to support state case there most [*sic*] be a car.

2. In this case there is no car because they had the car in this case crushed.

3. How can I McGhee prove my side of this case that my car malfunctioned [*sic*] and that the police blow my car up if the car is crushed and exports [*sic*] can't do research.

Relief Requested: I[']m asking that this case be dismiss[ed] simply because the state have [*sic*] no case of a fleeing and eluding without a car."

¶ 9 At the February 22, 2012, hearing on McGhee's motion to dismiss the State argued the following:

"[T]his car was processed, it was then, because nobody claimed it, sent to the Illinois Chicago pound pursuant to their procedures, and they went through the proper procedures of notifying whoever they could. It was not claimed. They [*sic*] were fees on it in regards to it being held there. There were fees each day accumulating. There was no order holding that car, and pursuant to their proper procedures the car was undriveable and was crushed."

McGhee responded:

"That the car was crushed because an expert was going to proof [*sic*] beyond a

reasonable doubt that it malfunctioned, the brakes went out, and the police blew the car up afterwards. After the original fire went out, they shook the car down, then they stood in front of the police car deciding if they going to pen [sic] a gun on me or not. Then they blew the car up and he tapped on—he came back and tapped on the window like, hey, buddy, your car is history; we just restarted the fire. They out there high five-ing each other laughing about it."

¶ 10 The trial court then denied the motion to dismiss, stating:

"With regards to the motion to dismiss, it's a due process analysis when you are asking for the extreme sanction of having the charge dismissed against you.

According to the case law in the matter, there has to be a showing by the Petitioner or the Movant that the evidence that was to support my [sic] motion to dismiss, that evidence was materially exculpatory and not just potentially useful.

I don't know what the situation is here. The facts with regard to when and how and according to what procedure the car was dismissed [sic] can be raised come time of trial. However, I do not believe that the Petitioner has shown the initial *prima facie* case to show that there was a due process violation here. Respectfully, the motion to dismiss is going to be denied."

¶ 11 The State's evidence at trial established that on May 13, 2011, McGhee was observed by a Chicago police officer Chris Gacek disobeying a stop sign while operating a Dodge Intrepid on Michigan Avenue. Officer Gacek then activated the emergency lights and sirens and followed McGhee in excess of 40 miles an hour (20 miles an hour over the legal speed limit) while McGhee continued to disobey at least five stop signs and execute multiple turns. McGhee then collided with a parked automobile and a moving minivan, the force of which propelled the

Intrepid over a curb where it struck a tree. Upon the Intrepid striking the tree, Officer Gacek immediately exited his vehicle and observed McGhee look in his direction then run from the scene westbound. Officer Gacek and other officers pursued McGhee on foot. McGhee was apprehended, handcuffed, and placed into the back seat of a police vehicle. Shortly thereafter, a fire ignited in the engine compartment of the Intrepid. The fire department arrived on the scene and extinguished the fire. The Intrepid was then searched. A second fire ignited in the engine compartment five to ten minutes after police had concluded their search of the vehicle.

¶ 12 James Karamamis, an attorney who previously represented McGhee in a civil matter, testified for the defense. Karamamis testified that in March 2011 he negotiated a contract with a local automobile dealer for the purchase of the Intrepid and that the vehicle was to be purchased with the proceeds from McGhee's civil lawsuit. The Intrepid was sold in as-is condition, however if there was "something that was wrong with the car immediately, then there would be some kind of remedy." Shortly before the May 13, 2011 incident, McGhee telephoned Karamamis. After an objection by the State, the trial court excluded the testimony of Karamamis regarding his telephone conversation with McGhee, finding it to be inadmissible hearsay.

¶ 13 The State declined to cross-examine Karamamis and the defense rested. After closing arguments and jury instructions, the jury retired to deliberate the verdict. Subsequently, the jury found defendant guilty of aggravated fleeing and eluding a peace officer. Thereafter, McGhee, through an appointed public defender, filed a "boilerplate" motion for a new trial in which he generally asserted he was denied due process of law. The day of the hearing, McGhee filed a supplemental motion for a new trial in which he alleged that reversible error was committed because his vehicle was not available for use as material evidence. McGhee asserted the vehicle "would have provided proof that defendant did not purposefully fail to stop, thereby negating a

necessary element of the offense."

¶ 14 At hearing on the motion, defense counsel did not present any argument and rested on the written motion. The State responded that McGhee was not the registered owner of the vehicle that was impounded and, "through proper procedures," the vehicle was destroyed. The trial court denied McGhee's motion for a new trial, finding McGhee was not prevented from presenting a defense that the vehicle malfunctioned.

¶ 15 On August 27, 2012, after hearing factors in aggravation and mitigation, the trial court sentenced McGhee to four years and six months imprisonment. McGhee moved the court to reconsider his sentence; that request was denied. This appeal followed.

¶ 16 ANALYSIS

¶ 17 McGhee argues that the destruction of the vehicle violated his right to due process. Specifically, McGhee asserts the trial court applied an improper standard when denying his motion to dismiss as it did not consider whether the automobile would be "potentially useful" to his defense. Whether the trial court applied the proper legal standard is a question of law that we review *de novo*. *People v. Voltaire*, 406 Ill. App. 3d 179, 182 (2010); *People v. Baylock*, 311 Ill. App. 3d 399, 404 (2000) (finding that the standard of review regarding a trial court's ruling on a motion to dismiss an indictment on the basis of lost or missing evidence is whether the trial judge was correct as a matter of law). Accordingly, we turn to consider whether the trial court applied the proper legal standard when rendering its determination on the motion to dismiss.<sup>1</sup>

¶ 18 "A trial court has an inherent authority to dismiss charges where its failure to do so would result in a deprivation of a defendant's due process rights." *People v. Nunn*, 2014 IL App (3d)

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<sup>1</sup> We note that both parties on appeal incorrectly assert that the standard of review is an abuse of discretion. McGhee's argument, however, revolves around whether the trial court employed the correct legal standard when rendering its determination regarding the motion to dismiss and is, therefore, reviewed *de novo*. *Voltaire*, 406 Ill. App. 3d 179, 182 (2010).

120614, ¶ 15. The State violates due process if it loses or destroys evidence having exculpatory value. *Illinois v. Fisher*, 540 U.S. 544, 547 (2004). In such cases, the good or bad faith of the State is irrelevant, as a due process violation occurs whenever such evidence is withheld. *Id.* On the other hand, if the destroyed evidence is merely "potentially useful," the State's failure to preserve that evidence does not violate due process unless a criminal defendant can affirmatively demonstrate bad faith on the part of the State. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *Nunn*, 2014 IL App (3d) 120614, ¶ 16; *People v. Hopley*, 159 Ill. 2d 272, 307 (1994); *Fisher*, 540 U.S. at 549.

¶ 19 In this case, McGhee failed to demonstrate the vehicle was destroyed by the State in bad faith. *People v. Gentry*, 351 Ill. App. 3d 872, 878 (2004) ("If the State destroys evidence that is potentially useful to the defense (instead of obviously exculpatory), the defendant must show the State did so in bad faith."). As explained in *Nunn*:

"Bad faith 'implies a furtive design, dishonesty, or ill will.' [Citation.] Factors to consider when examining the State's duty to preserve evidence include whether the State acted in good faith and per its normal practice and whether the evidence was significant in defendant's defense and was such that comparable evidence could not be obtained by other reasonable and available means. [Citation.]" *Nunn*, 2014 IL App (3d) 120614, ¶ 17 (citing *People v. Danielly*, 274 Ill. App. 3d 358, 364 (1995); *Trombetta*, 467 U.S. at 488-89).

A mere showing of negligence by the police in losing evidence in the absence of bad faith is insufficient to create a due process violation. *People v. Sutherland*, 223 Ill. 2d 187, 237 (applying the *Youngblood* analysis); *People v. Ward*, 154 Ill. 2d 272, 298 (1992). In addition, our supreme court has commented on the underlying policy considerations present in

*Youngblood*:

"In order to promote the preservation of exculpatory evidence, there must be the possibility of a sanction where evidence is lost or destroyed. On the other hand, a defendant should not be rewarded for the inadvertent loss of a piece of evidence where other evidence sufficient to support his conviction remains. The proper balance between these competing interests can be accomplished through careful consideration of (1) the degree of negligence or bad faith by the State in losing the evidence, and (2) the importance of the lost evidence relative to the evidence presented against the defendant at trial." *Hobley*, 159 Ill. 2d at 307.

In sum, the defendant must affirmatively demonstrate that the police acted in bad faith in losing potentially useful evidence before a due process violation can be said to exist. *Youngblood*, 488 U.S. at 58; *Danielly*, 274 Ill. App. 3d at 363.

¶ 20 McGhee argues on appeal that he "adamantly claimed throughout his case [in the trial court] that the police purposefully destroyed his car, thereby alleging their bad faith." This argument, however, misstates how a defendant is to demonstrate whether the State acted in bad faith. As the defendant, McGhee has the burden of establishing that the State acted with a "sinister motive" or "ill will" when destroying the evidence, he cannot merely argue that the evidence was destroyed. See *Danielly*, 274 Ill. App. 3d at 364 (the defendant failed to affirmatively demonstrate bad faith where there was no evidence that the police acted with a sinister motive or ill will).

¶ 21 Applying these principles, we conclude McGhee's due process claim is without merit. First, McGhee failed to argue in his written motion to dismiss as well as at the hearing on the motion that the State acted in bad faith when the automobile was "crushed," nor did he assert the



State failed to follow proper procedures when impounding and disposing of the vehicle. Second, McGhee presented no evidence at the hearing on the motion that the State destroyed his vehicle with a sinister motive or ill will. See *id.* In fact, the State argued it followed procedures and it was only when the car remained unclaimed by its registered owner that the vehicle was destroyed.

¶ 22 Accordingly, we conclude the trial court did not err as McGhee failed to establish the State acted in bad faith in destroying the vehicle.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 25 Affirmed.