IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-KM-01250-SCT

WILLIAM BILBO **APPELLANT**

V.

STATE OF MISSISSIPPI, by the CITY OF RIDGELAND **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the justices of this court may evaluate possible disqualifications or recusal.

1. William Bilbo, Appellant
2. William P. Featherston, Jr., Attorney for Appellant
3. Honorable William E. Chapman, III, Madison County Circuit Court Judge
4. Honorable William Agin, Madison County Court Judge, retired
5. Boty McDonald, Attorney for Appellee and Ridgeland City Prosecutor

Respectfully submitted,

Boty McDonald

Boty McDonald, Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

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STATEMENT OF THE CASE

On Saturday, November 15, 2008, at around 10:00 p.m. (R.10), Ridgeland Police Officer Brad Sullivan was running stationary radar on Lake Harbour Drive. (R.5) Officer Sullivan was monitoring the eastbound traffic and witnessed a vehicle traveling over the speed limit. (R.5) Officer Sullivan testified his radar indicated the Appellant was driving 57 m.p.h. in a 40 m.p.h. zone. (R.9)

At that point, Officer Sullivan initiated pursuit, stopped the vehicle, and identified the driver – the Appellant. (R.6.)

Officer Sullivan testified that while standing at the driver's side, with the window down, "I could smell the odor of an intoxicating beverage." (R.7)

In the ensuing exchange, Officer Sullivan asked the Appellant for his license and proof of insurance, explained he had stopped the Appellant for speeding, and, "I asked him if he had had anything to drink during the night." (R.7)

Officer Sullivan testified the Appellant stated he had one or two beers earlier in the evening in Oxford, Mississippi. (R.7)

At that point, Officer Sullivan contacted Ridgeland Police Department's DUI Enforcement officer, Officer Daniel Soto, to come to the scene and investigate the Appellant for DUI. (R.7)

Officer Soto arrived, conducted a field investigation (R.20 -24) and, based upon that field investigation, Officer Soto placed the Appellant in custody for DUI. (R.24)

Officer Soto then transported the Appellant to the Ridgeland Police Department, observed the Appellant for twenty minutes, read the Appellant the implied consent warning, then offered the Appellant the Intoxilyzer 8000. (R.24)

The Appellant chose to take the test and the result was a B.A.C. of 0.12. (R.29)

SUMMARY OF THE ARGUMENT

The Appellant stakes his entire assignment of error on his claim that possible video recorded by Officer Sullivan's patrol car during his observation and stop of the Appellant was not preserved and produced. And, that said video would be "material and exculpatory."

However. . . there was no such video.

And, assuming *arguendo* such a video ever existed, said video would not be "material and exculpatory" – which is the standard established by the United States Supreme Court and the Mississippi Supreme Court for a reversal based on "spoilation of evidence."

ARGUMENT

I. The City Has *NOT* Failed to Preserve or Produce Evidence.

No video existed of the observation and stop by Officer Sullivan of the Appellant for the speeding violation.

Here is the exchange between Officer Sullivan and Appellant's counsel during

cross-examination at trial:

Q. And when you locked in on this vehicle that you said was exceeding the speed limit, what did you do at that point?

A. I initiated my emergency equipment and turned around to get in behind the vehicle.

Q. Okay. So by initiating your emergency equipment, you mean you turned your blue lights on?

A. Yes, sir.

Q. Okay. Did that activate your camera at that time?

A. If the camera was working, it would have activated it.

Q. All right. Do you know whether your camera was working?

A. Sir, I believe it was, but I have not watched any video or anything.

Q. All right. Did you save that video?

A. If the video camera was working, I save all videos.

Q. All right. Have you viewed a video of this stop?

A. No, sir. I just stated I have not viewed a video.

(R.10-11)

Officer Sullivan testifies that he did not know if a patrol-car video of his observation of the Appellant speeding ever existed.

Prior to trial, Appellant made a demand for discovery which included any and all materials related to the observation, investigation and arrest of the Appellant. Of course, this discovery demand included any and all video recordings in possession of

the City. The City responded to that discovery demand. In its response, the City produced the only video in its possession – the video of the Appellant being administered the Intoxilyzer 8000.

The major premise in Appellant's argument – i.e., discovery has not been preserved and produced - has no basis in fact. As such, Appellant was not denied due process. The assignment of error alleged by the Appellant is without merit.

II. Even Assuming *Arguendo* the alleged Patrol-Video Evidence Ever Existed, (1) It Would *Not* be Exculpatory; (2) Appellant Could have used Other Comparable Evidence to Mount a Defense; (3) the City Did NOT Act in Bad Faith in Failing to Preserve said Evidence.

As stated above, the allegation by the Appellant of patrol-video from Officer Sullivan's stop of the Appellant has no basis in fact. However, for the sake of argument, assuming such patrol-video did exist and was not preserved or produced to Appellant, based on holdings by both the United States Supreme Court and the Mississippi Supreme Court, still, as a matter of law, the Appellant has *not* been denied due process.

In a series of holdings by both the United States Supreme Court and the Mississippi Supreme Court, a three-prong test has been established in cases of alleged spoilation of evidence. The Mississippi Supreme Court, this past May, restated this three-prong test and addressed this issue of preservation and production of evidence in Harness v. State, Cause No. 2007-CT-01415-SCT, (¶ 7) (issued May 27, 2010):

> In Trombetta, the United States Supreme Court held that when preservation of evidence is at issue, due process of

law is denied only where the destroyed evidence was expected to play a significant role in the defense. *Id.*, 467 U.S. at 488-90. **The Supreme Court noted** that evidence plays a significant role in the defense only where **(1) the** evidence possessed exculpatory value prior to its **destruction**, and **(2) the evidence was of such a nature that the defendant could not have used other comparable evidence to mount a defense**. *Id.* Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), added a **third factor: the defendant must also demonstrate that the State acted in bad faith in failing to preserve the evidence in question**. This Court has applied this three-prong federal standard in several cases. *See e.g.*, McGrone v. State, 798 So.2d 519, 522-23 (Miss. 2001); Banks v. State, 725 So.2d 711 (Miss. 1997); Taylor v. State, 672 So.2d 1246 (Miss. 1996); Holland v. State, 587 So.2d 848, 869 (Miss. 1991); Tolbert v. State, 511 So.2d 1368 (Miss. 1987).

(Emphasis added.)

1. The Alleged Patrol-Video Evidence would NOT be Exculpatory

Appellant through counsel argued at trial that the alleged patrol-video "would possibly be exculpatory about whether there were other vehicles around this particular vehicle that could have been a vehicle that may have been speeding other than (the

Appellant's) vehicle." (R.17) Already, standing alone, that tenuous argument, falls short of the "possessed exculpatory value" standard required.

And, the Appellant's argument is further diminished by his own testimony: on direct examination and on cross-examination, Appellant admits: (1) he didn't know the speed limit on the road, and (2) when his radar detector went off, he looked at his speedometer and he was doing "40, 45, and my girlfriend was following me; and she said she wasn't speeding." (R.48 and R.50) Then, again on direct examination, the Appellant testified: "Well, I told him [Officer Sullivan] I didn't think I was speeding, but he said I was." (R.49)

The alleged patrol-video evidence would not be exculpatory.

2. The Alleged Patrol-Video Evidence was of Such A Nature that the Appellant Could have used other comparable evidence to mount a defense.

At trial, Appellant in argument (R.17) and testimony (R.48) refers to his girlfriend being in a car directly behind him. In order to contradict the testimony of Officer Sullivan regarding "whether there were other vehicles around this particular vehicle," the Appellant could have used the testimony of his girlfriend; however, she did not testify. Her eyewitness testimony could have been used by the Appellant as comparable evidence in mounting his defense and in support of his claim regarding other vehicles. But, the girlfriend did not testify.

3. Even Assuming *Arguendo* the alleged Patrol-Video Evidence Ever Existed, the City did *NOT* act in Bad Faith in Failing to Preserve the Evidence in Question.

Again, assuming for the sake of argument the alleged patrol-video evidence ever existed, the City did not act in bad faith in failing to preserve such evidence. Officer

Sullivan testified as to the procedures he commonly followed, his routine, his understanding of how the patrol-car video system operates – including, the limitations of his control on the video – and, that he had never viewed any patrol video from this stop by him of the Appellant. Nothing from Officer Sullivan's testimony indicated any indicia at all of bad faith on his part with regard to any possible patrol-video in this matter; nor was there any other evidence elicited that remotely suggested the City had acted in bad faith regarding alleged patrol-video in this matter.

None of the three-prongs required are supported by the evidence in the trial of this matter. The assignment of error alleged by the appellant is without merit.

CONCLUSION

For the reasons set forth above, the City of Ridgeland respectfully requests this Court affirm the conviction of the Appellant.

Respectfully submitted,

CITY OF RIDGELAND, Appellee

By: 

Boty McDonald,
Attorney for Appellee

CERTIFICATE OF SERVICE

I, Boty McDonald, hereby certify I have this day served a true and correct copy by U.S. Mail of the above and foregoing *Brief Of Appellee* to:

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Twentieth Circuit Court District
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This the 7th day of January, 2011.

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