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NO. 49560-1-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

ZAKARY T. BAILEY,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

REPLY BRIEF OF APPELLANT

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**A. ARGUMENT IN REPLY**

**1. THE STATE HAD THE DUTY TO PRESERVE THE SYRINGES MR. BAILEY PERSONALIZED WITH THE MARK "XIV" BECAUSE THE MARKED SYRINGES WERE MATERIALLY EXCULPATORY EVIDENCE**

The Due Process Clause of the federal constitution requires that criminal prosecutions conform to fundamental notions of fairness and that criminal defendants are given "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *State v. Wittenbarger*, 124 Wn.2d 467, 880 P.2d 517 (1994). Due process requires that the prosecution disclose material exculpatory evidence to the defense. See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). To comport with due process, the prosecution has a duty not only to disclose material exculpatory evidence, but it also has a related duty to preserve the evidence. *Wittenbarger*, 124 Wn.2d at 475. If the evidence meets the standard as materially exculpatory, criminal charges against the defendant must be dismissed if the State fails to preserve it. *State v. Copeland*, 130 Wn.2d 244, 279, 922 P.2d 1304 (1996) (citing *Wittenbarger*, 124 Wash.2d at 475, 880 P.2d 517).

In *Trombetta* and *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), the U.S. Supreme Court developed a test to

determine whether the government's failure to preserve evidence violated a defendant's due process rights. Under the two-prong *Trombetta* test, the government violates a defendant's right to due process when: (1) it destroys evidence whose exculpatory significance is "apparent before" destruction; and (2) the defendant remains unable to "obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 489. In *Trombetta*, the appellants challenged convictions for drunk driving after the breath samples showing their blood alcohol content were destroyed before they could independently test the samples. *Trombetta*, 467 U.S. at 483. In upholding the convictions, the Supreme Court noted that the police officers had no apparent intent to destroy exculpatory evidence but rather acted in good faith and according to their protocol. *Id.* at 488. Further, the breath test evidence was not apparently exculpatory; "the chances [were] extremely low that preserved samples would have been exculpatory." *Id.* at 489. Finally, the respondents had "alternative means of demonstrating their innocence," such as attacking the reliability of the testing. *Id.* at 490.

Four years later, the Court in *Youngblood* extended *Trombetta* to provide that, if the exculpatory value of the evidence is indeterminate and all that can be confirmed is that the evidence was "potentially useful" for the defense, then a defendant must show that the government acted in bad

faith in destroying the evidence. *Youngblood*, 488 U.S. at 5. *Youngblood* “refined” the *Trombetta* rule, distinguishing between “potentially useful evidence” and “exculpatory evidence” and requiring a showing of bad faith when the police fail to preserve evidence that is merely potentially useful. *Youngblood*, 488 U.S. at 58.

*a. The syringes that Mr. Bailey marked with “XIV” had overt, readily apparent materially exculpatory value*

Evidence is materially exculpatory when its exculpatory value was apparent before the evidence was lost or destroyed and the defendant is unable to obtain comparable evidence by other reasonably available means. *Wittenbarger*, 124 Wn.2d at 475. When the State fails to preserve materially exculpatory evidence, the good or bad faith of the State agents is irrelevant. *Youngblood*, 488 U.S. at 57; *State v. Burden*, 104 Wn. App. 507, 514, 17 P.3d 1211 (2011).

Evidence is materially exculpatory only if it meets a two-fold test: (1) its exculpatory value must have been apparent before the evidence was destroyed, and (2) the nature of the evidence leaves the defendant unable to obtain comparable evidence by other reasonably available means. *Wittenbarger*, 124 Wn.2d at 475, 880 P.2d 517 (citing *Trombetta*, 467 U.S. at 489). If the evidence does not meet this test and is only “potentially useful” to the defense, failure to preserve the evidence does

not constitute a denial of due process unless the criminal defendant can show bad faith on the part of the State. *Wittenbarger*, 124 Wn.2d at 477.

The syringes that Mr. Bailey marked with “XIV,” denoting that the syringes were for his personal use and not distribution as claimed by the State, satisfies the standard for materially exculpatory evidence. Unlike DNA samples or blood samples which are not apparently exculpatory without testing or analysis and which therefore may not possess an exculpatory value apparent on its face, the “XIV” markings on the syringes were overt, and facially apparent as being materially exculpatory. Mr. Bailey was charged with intent to deliver heroin. His personal markings on the two loaded syringes were material because it was evidence of Mr. Bailey’s intent that the syringes were for his personal use, corroborating his testimony and refuting Deputy Schrader’s testimony that the syringes and heroin were intended to be sold.

***b. Mr. Bailey cannot obtain evidence of the marked syringes by other means.***

When the syringes were destroyed, Mr. Bailey was deprived of a crucial opportunity to corroborate his testimony that the contents of the syringes were for his personal use and to rebut the deputy’s testimony that the syringes were intended for delivery. Furthermore, there were no other reasonably available means for the defense to obtain the lost

evidence; the identifying markings on the syringes did not exist anywhere else. Since the State's failure to preserve the evidence denied Mr. Bailey due process the charge against him should have been dismissed.

*c. The trial court erred in denying the defense motion for dismissal under CrR 8.3.*

Mr. Bailey's ability to obtain a fair trial, confront the witnesses and present a defense was severely compromised by the loss of the evidence. Mr. Bailey's case is similar to *State v. Burden*, 104 Wn.App. 507, 17 P.3d 1211 (2001). In *Burden*, the police arrested Burden for driving under the influence and discovered a paper bag containing cocaine in the pocket of his coat. *Burden*, 104 Wn.App. at 509. At trial, Burden presented an unwitting possession defense, claiming that he had borrowed the coat when he left a lounge to ride his motorcycle home on a cold night. *Burden*, 104 Wn.App. at 509. Burden argued during closing that a different person's name was in the coat. *Burden*, 104 Wn.App. at 510.

The jury was unable to reach a verdict and the court declared a mistrial. *Burden*, 104 Wn.App. at 511. During retrial the State could not locate exhibits, including the coat. The court declared a second mistrial. *Burden*, 104 Wn.App. at 511. Burden moved to dismiss the charges based on the State's destruction of evidence. *Burden*, 104 Wn.App. at 511. The trial court granted the motion, concluding that 'the appearance and

physical nature of the missing exhibits assisted the jury in assessing the credibility of Burden and his witnesses.’ *Burden*, 104 Wn.App. at 511.

This Court affirmed the trial court's dismissal, holding that the missing evidence was materially exculpatory. *Burden*, 104 Wn.App. at 514. This Court determined that:

There was no testimony at the trial regarding some of the specifics about the coat, since the coat was physically present as an exhibit. Even with a stipulation, a jury would have no foundation to determine whether the thickness and fit of a substitute coat were the same as the original.

*Burden*, 104 Wn.App. at 514.

In the instant case, just as the defense was unable to show the jacket to the jury in *Burden*, the defense was unable to show the actual syringes to the jury although the court precluded the State from refuting Mr. Bailey’s testimony that he marked the loaded syringes with “XIV.” RP (9/7/16) at 27. Like the jacket in *Burden*, the syringes would have corroborated Mr. Bailey’s testimony by illustrating precisely what he stated: that he marked the syringes with “XIV” to denote his personal property, just as he marked several other items seized by Deputy Steiner with “XIV.” 2RP at 248, 253, 254. This corroboration was especially critical because Mr. Bailey frankly identified himself as a drug user and

someone involved in the "drug world,"<sup>1</sup> and therefore his credibility was presumably a significant question for the jury. The syringes showed that despite Mr. Bailey's admission that he used heroin, he was truthful in his testimony that he marked his own syringes and that they were for personal use.

The evidence was especially crucial due to the lack of the usual indicia of drug dealing presented at trial. Mr. Bailey's testimony was an inadequate substitute for the actual syringes. The failure to preserve the marked syringes for which there was no comparable evidence violated Mr. Bailey's right to due process.

*d. The proper remedy is dismissal.*

Dismissal is required when law enforcement fails to preserve material exculpatory evidence. *State v. Copeland*, 130 Wn.2d 244, 279, 922 P.2d 1304 (1996). Dismissal is also required when officers fail to preserve potentially exculpatory in bad faith. *Wittenbarger*, 124 Wn.2d at 477. "It is clear that if the State has failed to preserve 'material exculpatory evidence' criminal charges must be dismissed." *Wittenbarger*, 124 Wn.2d at 475. The exculpatory value of the syringes was overt and readily apparent to police prior to its destruction, and Mr. Bailey had no other means to obtain the identifying evidence. Because the state failed to

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<sup>1</sup>2RP at 241, 243, 251, 252, 253, 254.

preserve this materially exculpatory evidence, the charges against Mr. Bailey must be dismissed.

**2. EVEN IF THE MARKED SYRINGES ARE CONSIDERED ONLY "POTENTIALLY USEFUL" EVIDENCE, DISMISSAL IS REQUIRED BECAUSE THE POLICE ACTED IN BAD FAITH BY FAILING TO PRESERVE THE SYRINGES**

In the alternative, Mr. Bailey need not prove the destroyed evidence was materially exculpatory in order to prevail on a due process claim. Assuming *arguendo*, that the evidence does not meet this test because it is only "potentially useful" to the defense, failure to preserve the evidence does not constitute a denial of due process unless there was bad faith on the part of the State. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 12 L.Ed.2d 281 (1988). He has met his burden if he proves the police acted in bad faith in failing to preserve potentially useful evidence. See *Youngblood*, 488 U.S. at 57; *Wittenbarger*, 124 Wn.2d at 477. As argued *supra*, the record in this case demonstrates the bad faith of the police in failing to preserve the syringes, and Mr. Bailey has been denied due process. Mr. Bailey's testimony regarding the markings on the syringes was not an adequate substitute for the syringes themselves.

The presence or absence of bad faith by the police for purposes of the due process clause necessarily turns on the officers' knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.

*Youngblood*, 488 U.S. at 56. Thus, police failure to preserve evidence they recognize as potentially exculpatory constitutes bad faith.

Here, even assuming *arguendo* that the exculpatory value of the syringes were not apparent to the police, there can be no doubt that the deputy recognized its potential exculpatory value. Deputy Steiner's report referred to Mr. Bailey's statement regarding conducting "business" and that the "items in the black box are related to using/distributing drugs on the street." CP 45. The deputy's reference in his report that Mr. Bailey claimed to be conducting a "business" and therefore the syringes were evidence of distribution, not mere possession of heroin shows that he intended that Mr. Bailey be charged with possession of heroin with intent to deliver, and that the "XIV" marks on the syringes—a mark found on other items in his possession— clearly showed a possessive interest in the syringes and contents. Therefore, the police were fully aware that the syringes might exculpate Mr. Bailey under this version of events. The State's argument, contained at page 12 of the Brief of Respondent, that the marks were not apparent to the deputy before their destruction, would lead to a situation where law enforcement was rewarded to turning a blind eye to any distinguishing or unusual characteristics or features of seized evidence. Moreover, if the markings were not observed by the arresting officer at the time of the arrest, the syringes were handled a second time

when Deputy Steiner emptied the contents from the syringe into glass vials for testing by the Washington State Crime lab. 1RP at 119. Therefore, the syringes were not merely put into a biohazard container and destroyed; law enforcement had at least two opportunities to view the markings on each syringe.

The State's argument, at pages 13-14, that the syringes presented such dangerousness that they are comparable to unexploded pipe bombs and ordinance strains credulity; law enforcement routinely preserves dangerous items including guns, ammunition, knives, and other sharp objects for trial. Similarly, evidence in cases involving items contaminated with potentially hazardous fluids, i.e., weapons with blood on the surface, blood, or other fluids, are also safely stored by law enforcement for trial.

In this case the State argues that Deputy Steiner complied with protocol regarding destruction of dangerous hypodermic needles. Respondent's Brief at 13. Deputy Steiner testified that the WSP Crime Lab will not accept syringes. However, nothing prevented the deputy from placing the liquid in a vial for testing by the WSP Crime Lab and keeping the syringes in a secured setting. In other words, the argument that the WSP would not accept the syringes is a red herring; the syringes could have easily been emptied of their contents and properly retained as evidence separately and secured as any other biohazard evidence would

have been stored..

The police destroyed evidence corroborating Mr. Bailey's claim of personal use and the evidence was lost to the defense. This constitutes bad faith failure to preserve potentially useful evidence defined Mr. Bailey's due process, and his conviction must be reversed.

**B. CONCLUSION**

For the reasons stated herein, and in the opening brief, Mr. Bailey respectfully requests this Court to dismiss the conviction and dismiss the charge against him.

DATED: January 2, 2018.

Respectfully submitted,  
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', written over a horizontal line.

PETER B. TILLER-WSBA 20835  
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**CERTIFICATE**

I certify that I sent by JIS a copy of the Reply Brief of Petitioner to Clerk of Court of Appeals and to Ms. Katherine Lee Svoboda Grays Harbor Deputy Prosecuting Attorney, and mailed copies, postage prepaid on January 2, 2018, to appellant, Zakary Bailey:

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