

NO. 34236-7-II  
Cowlitz Co. Cause NO. 05-1-01060-3  
JUN 11 2006  
M

NO. 34236-7-II  
Cowlitz Co. Cause NO. 05-1-01060-3

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

Appellant/Cross Respondent,

v.

**KATHLEEN IRIS HARRSCH,**

Respondent/Cross Appellant

---

**AMENDED BRIEF OF  
APPELLANT/CROSS-RESPONDENT**

---

SUSAN I. BAUR  
Prosecuting Attorney  
MIKE NGUYEN/ #31641  
Deputy Prosecuting Attorney  
Attorney for Appellant

Office and P. O. Address:  
Hall of Justice  
312 S. W. First Avenue  
Kelso, WA 98626  
Telephone: 360/577-3080

PM 7/10/06

**TABLE OF CONTENTS**

Page

**I. ASSIGNMENTS OF ERROR..... 1**

**1. THE TRIAL COURT ERRED IN HOLDING THAT AN OFFICER’S GOOD FAITH CONDUCT IS IMMATERIAL AS A MATTER OF LAW IN DETERMINING WHETHER THE FAILURE TO PRESERVE POTENTIALLY USEFUL EVIDENCE BY AN OFFICER ACTING IN GOOD FAITH IS A DENIAL OF DUE PROCESS OF LAW..... 1**

**2. THE TRIAL COURT ERRED IN ASSUMING THAT THE MINUTE AMOUNT OF BLOOD COLLECTED WAS MATERIAL AND FAVORABLE AS THERE WAS NO EVIDENCE TO SUPPORT THIS FINDING..... 1**

**3. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT’S MOTION TO DISMISS THE DRIVING WHILE UNDER THE INFLUENCE CHARGE BECAUSE THE FAILURE TO PRESERVE POTENTIALLY USEFUL EVIDENCE BY AN OFFICER ACTING IN GOOD FAITH DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW..... 1**

**II. ISSUE ..... 1**

**1. IS THE FAILURE TO PRESERVE POTENTIALLY USEFUL EVIDENCE BY AN OFFICER ACTING IN GOOD FAITH A DENIAL OF DUE PROCESS OF LAW?..... 1**

**III. SHORT ANSWER..... 1**

**IV. FACTS ..... 1**

**V. ARGUMENT..... 6**

**1. THE FAILURE TO PRESERVE POTENTIALLY USEFUL  
EVIDENCE BY AN OFFICER ACTING IN GOOD FAITH DOES NOT  
CONSTITUTE A DENIAL OF DUE PROCESS OF LAW..... 6**

**VI. CONCLUSION ..... 9**

## TABLE OF AUTHORITIES

Page

### Cases

<i>Arizona v. Youngblood</i> , 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).....	8
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963) .....	6
<i>State v. Gilcrist</i> , 91 Wash.2d 603 (1979).....	7
<i>State v. Straka</i> , 116 Wash.2d 859 (1991).....	8
<i>State v. Vaster</i> , 99 Wash.2d 44 (1983)76	
<i>State v Wright</i> , 87 Wash.2d 783 (1976).....	5, 6, 7
<i>State v. Yates</i> , 64 Wash.App. 345 (1992) .....	7

## **I. ASSIGNMENTS OF ERROR**

- 1. THE TRIAL COURT ERRED IN HOLDING THAT AN OFFICER'S GOOD FAITH CONDUCT IS IMMATERIAL AS A MATTER OF LAW IN DETERMINING WHETHER THE FAILURE TO PRESERVE POTENTIALLY USEFUL EVIDENCE BY AN OFFICER ACTING IN GOOD FAITH IS A DENIAL OF DUE PROCESS OF LAW.**
- 2. THE TRIAL COURT ERRED IN ASSUMING THAT THE MINUTE AMOUNT OF BLOOD COLLECTED WAS MATERIAL AND FAVORABLE AS THERE WAS NO EVIDENCE TO SUPPORT THIS FINDING.**
- 3. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT'S MOTION TO DISMISS THE DRIVING WHILE UNDER THE INFLUENCE CHARGE BECAUSE THE FAILURE TO PRESERVE POTENTIALLY USEFUL EVIDENCE BY AN OFFICER ACTING IN GOOD FAITH DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.**

## **II. ISSUE**

- 1. IS THE FAILURE TO PRESERVE POTENTIALLY USEFUL EVIDENCE BY AN OFFICER ACTING IN GOOD FAITH A DENIAL OF DUE PROCESS OF LAW?**

## **III. SHORT ANSWER**

1. No. The failure to preserve potentially useful evidence by an officer acting in good faith does not constitute a denial of due process of law.

## **IV. FACTS**

On August 26, 2005, Officer Brandon McNew of the Castle Rock Police Department observed a vehicle ahead of him with a cracked taillight exposing

white light on Huntington Avenue, in the City of Castle Rock. RP1<sup>1</sup> 25-28 and 55. Officer McNew initiated a traffic stop and contacted the driver, the defendant. Officer McNew noticed defendant's limbs and head moving uncontrollably outside of defendant's control. RP1 28. Defendant was not able to sit still and her movements were very apparent and obvious. Defendant's speech was quick, fast, and repetitive. RP1 29. Defendant indicated that she had one glass of wine several hours prior to being stopped. RP1 29-30.

Officer McNew asked defendant to perform voluntary field sobriety tests because her movements and speech were consistent with someone being under the influence of a drug. RP1 29-30. Defendant agreed to perform field sobriety tests. RP1 30. Defendant staggered and used the car for balance as she walked from the car to perform the field sobriety tests. RP1 38-39. The tests were performed on a paved surface with a slight grade. RP1 31. Defendant did not indicate any physical disability that would prevent her from performing the field sobriety tests. RP1 32.

Prior to the field sobriety tests being conducted, Officer Jeff Gann of the Castle Rock Police Department responded to assist Officer McNew. RP1 6-8. Officer Gann observed Officer McNew administer field sobriety tests to the defendant and noticed the defendant's movements were slow and jerky. RP1 8.

---

<sup>1</sup> RP1 refers to the Report of Proceedings for Friday, December 2, 2005.

Defendant appeared very excited, anxious, and nervous. Defendant was fidgeting, moving around, rocking back and forth, and playing with her hands. RP1 10.

On the horizontal gaze nystagmus test, defendant did not exhibit any horizontal gaze nystagmus, but had difficulty performing the test because she struggled to hold her head still and follow the stimulus with just her eyes. RP1 33. On the walk and turn test, defendant performed poorly because she was not able to maintain her balance during the instructional phase, started the test too soon, missed touching heel to toe several times, stepped off line several times, stopped walking on one occasion, and used her arms for balance. RP1 34-38. On the one leg stand test, defendant performed poorly as she swayed, used her arms for balance, and dropped her foot several times. RP1 39-41. On the finger to nose test, defendant failed to touch her finger to her nose on all six attempts. RP1 41-42.

Officer McNew arrested defendant for driving under the influence and read defendant her Miranda rights. RP1 43. Defendant understood her rights and agreed to speak with Officer McNew. Defendant indicated that she had used methamphetamine within the last 24 hours of being stopped. RP1 43-44. Officer Gann searched the vehicle incident to the defendant's arrest and found a black purse in the front passenger compartment next to the driver's seat. Inside the purse, there was a social security card belonging to the defendant and an Altoid

container with a white crystal substance. RP1 12-13 and 44. The substance tested positive for methamphetamine and defendant stipulated to the substance being methamphetamine. Defendant admitted to owning the purse, but denied owning the Altoid container. RP1 45.

Officer McNew transported defendant to the Hall of Justice to complete the driving under the influence investigation. Defendant was again read her rights and agreed to talk to Officer McNew. Defendant indicated that she had been a long-term drug user and had some deterioration of her veins due to several years of drug use. RP1 46. A drug recognition expert was called and Trooper Frank Black of the Washington State Patrol administered a drug recognition evaluation of the defendant. RP1 49-50. Following Trooper Black's evaluation, defendant consented to a blood draw and was transported to the St. John's Hospital for a blood draw. RP1 50-51.

At the hospital, defendant indicated that there was not a good vein left in her body and that it was not going to be easy to get blood from her. RP1 52. A laboratory technician attempted unsuccessfully to draw blood from the defendant on three separate occasions. Each time the technician attempted to draw blood, the defendant experienced pain and expressed reservations about giving a blood draw. RP1 53-54. The technician indicated that "this is not working; [defendant is] in a lot of pain; [defendant is] really, really uncomfortable." RP1 68.

Officer McNew felt bad for the defendant and reminded the defendant that she had a right to refuse the blood draw. After the third unsuccessful attempt to withdraw blood, defendant terminated the blood draw and no other attempts were made to withdraw blood from the defendant. RP1 54. The technician was only able to withdraw a very minute amount of blood from the defendant. The amount drawn was just a tiny, tiny bit, a speck. RP1 52-53. The blood drawn was less than a teaspoon, just a drop, just a really small amount. RP1 54. The technician kept and disposed of the blood. RP1 54. Officer McNew did not direct the technician what to do with the blood, but knew that the vial with the speck of blood was being thrown away. RP1 69. The State stipulated that the circumstances did not amount to a refusal of a blood draw for the purposes of the driving under the influence charge. RP2<sup>2</sup> 4.

On December 2, 2005, the Honorable Stephen Warning of the Cowlitz County Superior Court presided over the defendant's bench trial. Defendant brought a motion to dismiss the driving under the influence charge pursuant to *State v Wright*, 87 Wash.2d 783 (1976). Defendant argued that the minute amount of blood drawn could be tested; thus, it was potentially material and favorable evidence for the defendant. Defendant did not present any testimony to

---

<sup>2</sup> RP2 refers to Report of Proceedings for November 3, 2005

support his position and argued that it is self evident that the minute amount of blood is material and favorable evidence. RP1 76.

The court found that there was an observable amount of blood that was collected, that Officer McNew acted in good faith at all times in reminding defendant of her right to refuse the blood draw and in not asking the hospital to retain the blood drawn, and that there was no evidence that the blood collected was not testable. RP1 78. “I assume it was not testable using the standardized methodology currently prescribed for most of these cases, because there wasn’t the standard amount collected. That doesn’t indicate that it was not testable.” RP1 78. The court held that Officer McNew’s good faith conduct is immaterial as a matter of law and dismissed the driving under the influence charge because it was self evident that the blood drawn was material and potentially exculpatory. RP1 79-80. Defendant was convicted of possession of methamphetamine. RP1 91.

## V. ARGUMENT

### 1. **THE FAILURE TO PRESERVE POTENTIALLY USEFUL EVIDENCE BY AN OFFICER ACTING IN GOOD FAITH DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.**

The duty of the State to preserve material evidence is derived from the duty to disclose exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963). In *State v. Wright*, the Court held that the motivation of the party responsible for

the suppression of evidence is irrelevant and that the state has a duty to preserve all potentially material and favorable evidence. *State v. Wright*, 87 Wash.2d 783, 787 and 793 (1976). In *State v. Gilcrist*, the Court held that defendants bear the burden of showing that the evidence lost “was material to guilt or innocence and favorable to (the) [defendants].” *State v. Gilcrist*, 91 Wash.2d 603, 609 (1979). In *State v. Vaster*, the Court adopted “a reasonable balance for those cases in which there has been an inadvertent or good faith loss or destruction of evidence.” *State v. Vaster*, 99 Wash.2d 44, 52 (1983).

The rulings in *Wright* and in *Vaster* were later overruled in *State v. Straka*, 116 Wash.2d 859 (1991). *State v. Yates*, 64 Wash.App. 345, 350-351 (1992). In *Straka*, four defendants were charged with driving under the influence and each defendant provided a breath test over the legal limit. Counsel for each of the defendants moved for dismissal of the charges or for suppression of the breath test results because of the State’s failure to preserve evidence, a record of the code messages, and violation of the defendants’ due process rights. 116 Wash.2d at 896-897. The trial court held that motive was immaterial as a matter of law and suppressed the results of the breath tests because the code messages that were lost “might cast doubt in the mind of the jury as to whether the State had proven that the machine was working beyond a reasonable doubt.” *Id.* at 880. The State

sought review and the Supreme Court of Washington accepted review of the four consolidated cases. *Id.* at 881.

In *Straka*, the Court applied the holding in *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), and concluded that the trial court erred in suppressing the breath test results. *Id.* at 899. When there is a “failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant,” *Id.* at 884, 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 884. The Court concluded, “that the trial court erred in suppressing the test results,” *Id.* at 899, and held that “the destruction of or failure to preserve such evidence does not violate defendants’ due process rights if the police did not act in bad faith.” *Id.* at 886.

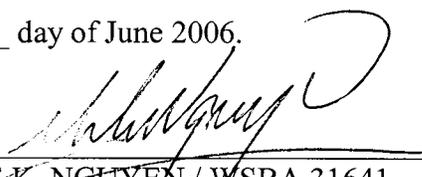
As in *Straka*, there is no showing by the defendant that Officer McNew acted with bad faith in failing to preserve the minute amount of blood drawn and the court found that Officer McNew acted with good faith at all times. Defendant did not present any evidence to indicate that the minute amount of blood was testable and that the results of the blood test would likely be favorable. Defendant’s argument that it is self evident that the blood was material and

favorable is purely conjectural and unsupported by the evidence. To the contrary, the evidence indicates that if the blood was able to be tested, the results would likely be adverse to the defendant as the defendant admitted to using methamphetamine within twenty-four hours of being stopped. Therefore, the driving under the influence charge should not have been dismissed. Alternatively, should the court find that Officer McNew acted with bad faith and the minute amount of blood was material and favorable to the defendant, the suppression of defendant's refusal to the blood draw is the proper recourse and not the dismissal of the driving under the influence charge.

## VI. CONCLUSION

The Superior Court's dismissal of the driving under the influence charge should be reversed because Officer McNew acted with good faith at all times and there is no showing by the defendant that the evidence was material and likely would have been favorable to the defendant.

Respectfully submitted this \_\_\_\_\_ day of June 2006.



---

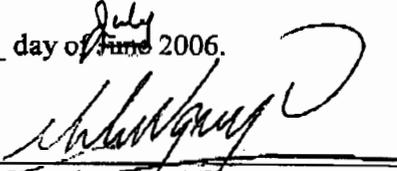
MIKE K. NGUYEN / WSBA 31641  
Deputy Prosecuting Attorney  
Attorney for Respondent

favorable is purely conjectural and unsupported by the evidence. To the contrary, the evidence indicates that if the blood was able to be tested, the results would likely be adverse to the defendant as the defendant admitted to using methamphetamine within twenty-four hours of being stopped. Therefore, the driving under the influence charge should not have been dismissed. Alternatively, should the court find that Officer McNew acted with bad faith and the minute amount of blood was material and favorable to the defendant, the suppression of defendant's refusal to the blood draw is the proper recourse and not the dismissal of the driving under the influence charge.

**VI. CONCLUSION**

The Superior Court's dismissal of the driving under the influence charge should be reversed because Officer McNew acted with good faith at all times and there is no showing by the defendant that the evidence was material and likely would have been favorable to the defendant.

Respectfully submitted this 10 day of <sup>July</sup>~~June~~ 2006.

  
 MIKE K. NGUYEN / WSBA 31641  
 Deputy Prosecuting Attorney  
 Attorney for Respondent

Post-it® Fax Note	7671	Date	# of pages ▶
To	<i>[Handwritten]</i>	From	
Phone #		Co.	
Fax #		Phone #	<i>Re: Harold</i>
		Fax #	

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
)  
Appellant/Cross-Respondent, )  
v. ) NO. 34236-7  
) 05-1-01060-3  
KATHLEEN HARRSCH, ) AFFIDAVIT OF MAILING  
)  
Respondent/Cross-Appellant. )

RECEIVED  
JUL 12 2006  
COURT OF APPEALS  
DIVISION II

AUDREY J. GILLIAM, being first duly sworn, on oath deposes and says: That on July 10, 2006, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

JOHN HAYS  
ATTORNEY AT LAW  
1402 BROADWAY  
LONGVIEW, WA 98632

CLERK, COURT OF APPEALS  
950 BROADWAY, SUITE 300  
TACOMA, WA 98402

each envelope containing a copy of the following documents:

1. AMENDED BRIEF OF APPELLANT/CROSS-RESPONDENT
2. Affidavit of Mailing.



SUBSCRIBED AND SWORN to before me this July 10, 2006.

  
Notary Public in and for the State  
of Washington residing in Cowlitz  
Co. My commission expires: 10.18.09