

COMMONWEALTH OF PENNSYLVANIA *
*
CRIMINAL
VS. *
*
86 CR 2016
DAROLD WILLIAM PALMORE *
* * *

A P P E A R A N C E S:

ERICH SPESSARD, Esquire
appeared on behalf of the Defendant

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1 THE COURT: We have scheduled a hearing or argument
2 as the attorneys determine is appropriate in the
3 Commonwealth vs. Palmore case on the defendant's motion to
4 dismiss for due process violation.

5 Mr. Palmore is present with Attorney Erich
6 Spessard, and Assistant District Attorney Drew Welsh is
7 here for the Commonwealth.

8 So Mr. Spessard, you may proceed.

9 MR. SPESSARD: Thank you, Your Honor. With the
10 Court's permission, I have consulted with Assistant
11 District Attorney Welsh regarding the admission of some
12 stipulations into evidence in order to make the Court
13 aware of all factual circumstances in this matter.

14 So if I may, I will read off the stipulations at
15 this time, and make sure that the Commonwealth is ready to
16 consent.

17 THE COURT: Okay. Go ahead.

18 MR. SPESSARD: No. 1, in late 2015, the entirety of
19 the Clarion University surveillance footage was located at
20 the public safety building of Clarion University. This
21 same building contained the university police.

22 No. 2, for all intensive purposes, public safety
23 and university police are synonymous.

24 No. 3, the report of the sexual assault in this
25 matter was made on November 5, 2015, so that is the date

1 of the actual report.

2 THE COURT: November 5 of what year?

3 MR. SPESSARD: 2015.

4 THE COURT: '15.

5 MR. SPESSARD: This report date was less than 30
6 days from the date of the alleged incident.

7 THE COURT: Okay.

8 MR. SPESSARD: No. 4, Darold Palmore made a request
9 for surveillance footage within 60 days of the date of the
10 alleged incident.

11 THE COURT: Within 60 days?

12 MR. SPESSARD: Yes.

13 THE COURT: Okay.

14 MR. SPESSARD: No. 5, Officer Shane White testified
15 at trial in this matter that typical surveillance footage
16 was kept for a period of 30 to 60 days.

17 THE COURT: He testified at trial?

18 MR. SPESSARD: Yes.

19 THE COURT: Footage was kept --

20 MR. SPESSARD: For a period of 30 to 60 days.

21 THE COURT: Okay.

22 MR. SPESSARD: I believe this is No. 6: Officer
23 White made no effort to attempt to review the footage.

24 THE COURT: Okay.

25 MR. SPESSARD: No. 7, as of 2015, the video footage

1 at Clarion University was stored digitally and could have
2 been transferred in digital format to a storage device.

3 THE COURT: Could have been transferred how?

4 MR. SPESSARD: In a digital format to a storage
5 device.

6 THE COURT: Okay.

7 MR. SPESSARD: No. 8, neither the university
8 conduct board nor any other Clarion University agency has
9 access to the surveillance footage.

10 THE COURT: Nor any other what?

11 MR. SPESSARD: University agency.

12 THE COURT: Has access to surveillance footage.

13 MR. SPESSARD: Yes.

14 THE COURT: Okay.

15 MR. SPESSARD: No. 9, in a case involving a sexual
16 assault prosecuted in roughly the same time period,
17 Corporal White acquired video footage in that matter where
18 the victim indicated that she was an eyewitness to the
19 assault and where the victim also indicated that she
20 witnessed the defendant inside the residential hall. It
21 indicated that she was an eyewitness and indicated the
22 defendant was in the residence hall.

23 THE COURT: This is another incident?

24 MR. SPESSARD: Yes.

25 THE COURT: That is unrelated?

1 MR. SPESSARD: Yes.

2 THE COURT: Okay.

3 MR. SPESSARD: That video footage involving this
4 other incident contained the defendant entering a
5 residence hall and also entering an elevator.

6 As testimony at the time of trial, Officer White
7 indicated --

8 THE COURT: Is this No. 10?

9 MR. SPESSARD: Yes.

10 THE COURT: So what is ten?

11 MR. SPESSARD: At the time of trial, Officer White
12 indicated he did not acquire video footage with respect to
13 this incident because the victim was an eyewitness and
14 identified the defendant inside the residence hall.

15 THE COURT: She was an eyewitness and what?

16 MR. SPESSARD: She was able to identify that the
17 defendant was inside the residence hall.

18 THE COURT: Okay.

19 MR. SPESSARD: No. 11, we stipulated to the
20 authentication as admission of e-mails contained within
21 and previously marked Defense Exhibit Nos. 3 and 4.

22 THE COURT: From the trial?

23 MR. SPESSARD: No. These are extraneous e-mails.
24 The details which will be provided. I think they are
25 involved in the e-mails themselves, the subject's

1 contents.

2 THE COURT: But my question relates to Exhibits 3
3 and 4.

4 MR. SPESSARD: I am sorry. Soon to be admitted,
5 not previously admitted.

6 THE COURT: Not previously marked?

7 MR. SPESSARD: Yes.

8 THE COURT: You are marking them now.

9 (Documents are marked as Defense Exhibit Nos. 3 and
10 4.)

11 And they will be admitted.

12 MR. SPESSARD: Correct.

13 MR. SPESSARD: And final stipulation to the
14 authentication and admission of the letter sent from
15 Clarion University to the defendant which we are marking
16 as Exhibits 1 and 2.

17 (Documents are marked as Defense Exhibit Nos. 1 and
18 2.)

19 THE COURT: Mr. Welsh, would you like to have that
20 repeated?

21 MR. WELSH: Yes. I would like -- on Stipulation
22 No. 9, the stipulation was the victim indicated she was an
23 eyewitness, and the second part indicated that the victim
24 identified the defendant or indicated that the defendant
25 was inside the residence hall?

1 THE COURT: This is the other incident?

2 MR. WELSH: Yes.

3 THE COURT: The victim said she was an eyewitness
4 to the assault and witnessed the defendant inside the
5 residence hall.

6 MR. WELSH: Okay.

7 THE COURT: That is what I wrote down.

8 MR. SPESSARD: I mean, I think that is accurate.

9 THE COURT: Does that answer your question?

10 MR. WELSH: It does.

11 I agree with every stipulation without amendment or
12 correction.

13 No. 9, related to the other case, I will stipulate
14 that is factually accurate; however, there are more
15 circumstances in that case that I'd either ask for him to
16 make the Court aware or make an argument based on if there
17 is going to be a direct parallel shown between that case
18 and this case, which it is not an apples to apples
19 comparison in the two cases.

20 THE COURT: Okay. Do you have additional facts
21 that you want to add to the stipulation?

22 MR. WELSH: I will offer some facts to the
23 stipulation.

24 The facts would be in that case, which is the Logan
25 Bernat Case, the Commonwealth versus Bernat Case. That

1 video footage was obtained. I agree.

2 The victim indicated that she was an eyewitness. I
3 agree.

4 And she indicated that the defendant was inside the
5 residence hall. I agree.

6 I also offer a fact that there was a specific and
7 narrow timeframe for which to pull the video from. That
8 would be one stipulation.

9 THE COURT: A specific and narrow timeframe to
10 what?

11 MR. WELSH: From which to pull the video from -- or
12 the time of the incident was clearly defined.

13 No. 2 --

14 THE COURT: But specific and narrow timeframe of
15 the incident?

16 MR. WELSH: Yes.

17 THE COURT: From which what did you say?

18 MR. WELSH: To retrieve the video.

19 THE COURT: Okay.

20 MR. WELSH: No. 2, the victim in that case
21 immediately reported this assault to the police.

22 THE COURT: Okay.

23 MR. WELSH: No. 3, at the time of the video's
24 retrieval, the suspect and, eventually, Defendant Logan
25 Bernat was unidentified by the victim.

1 THE COURT: She didn't know who he was?

2 MR. WELSH: Correct. I will add to that in another
3 note.

4 THE COURT: Okay.

5 MR. WELSH: No. 4, the victim had met Mr. Bernat
6 that night, and Mr. Bernat provided her with a false name
7 and a false telephone number to contact him.

8 THE COURT: Okay.

9 MR. WELSH: No. 5, the university police had a pair
10 of tennis shoes as well as a Pittsburgh Pirates hat that
11 was left behind at the scene to aid in identification.

12 I think that would summarize that.

13 THE COURT: Okay. Do you stipulate to those facts,
14 Mr. Spessard?

15 MR. SPESSARD: Can I just get No. 2 read back
16 quickly.

17 THE COURT: I have the victim in the Barnet case
18 immediately reported the assault to the police.

19 MR. WELSH: That is correct.

20 MR. SPESSARD: We will stipulate, Your Honor.

21 THE COURT: All right. So the 12 facts stated by
22 Defense Counsel Spessard by way of a proposed stipulation
23 are accepted and admitted by the Commonwealth, so those
24 facts are in evidence.

25 And the five facts offered by Mr. Welsh on behalf

1 of the Commonwealth are stipulated to and agreed to by
2 defense counsel.

3 So all of those facts are now part of the evidence
4 as it relates to the defendant's motion to dismiss.

5 Okay. So what is next, Mr. Spessard?

6 MR. SPESSARD: Well, I think that would conclude
7 formal evidence to present.

8 At this time, I'd move onto oral argument unless
9 the Commonwealth has anything more to present.

10 MR. WELSH: I don't have any evidence to present.

11 THE COURT: Okay. Go ahead.

12 MR. SPESSARD: I think the easiest way to handle
13 oral argument would be to do a back and forth on each
14 individual issue, so we don't have inundated with having
15 to back bounce back and forth with argument if that is
16 okay with the Commonwealth.

17 MR. WELSH: Works for me.

18 MR. SPESSARD: With respect to timing or questions
19 of potential behavior or not, as indicated in my brief --
20 and certainly, the Court has read it, I don't want to
21 rehash the entire brief -- my initial argument would be
22 that this motion should not be classified as formal
23 omnibus pretrial motion given its nature of requesting a
24 dismissal of the case specifically on due process grounds,
25 instead more into formal motion to dismiss under Rule 587.

1 Alternatively, if the Court does not feel it is more akin
2 to that way, I think I would consider it more appropriate
3 for an omnibus pretrial motion pursuant to Rule 579 as
4 averred in the defendant's motion.

5 It is unclear how long prior counsel, Mr. Stiffler,
6 had this information. As best as I can recall based on my
7 notes, the existence of this e-mail, specifically Exhibit
8 4, we were not aware of until the notice of appeal had
9 been filed or right around there giving no reason for Mr.
10 Palmore or myself to litigate this motion given that this
11 Court didn't have jurisdiction at that point to hear a
12 matter with that.

13 So as that would fall under 579(a) as an exception
14 to the Rule for Timeliness, I believe this motion is now
15 properly before the Court.

16 And with respect to that issue, I would rest on the
17 brief.

18 THE COURT: You offered these exhibits by way of
19 the stipulation.

20 MR. SPESSARD: Correct.

21 THE COURT: So they are admitted. Thank you.

22 (Defense Exhibit Nos. 1, 2, 3, and 4 are admitted
23 into evidence.)

24 THE COURT: Exhibit 4 is an e-mail from Officer
25 White to Tracy Park of the District Attorney's Office, and

1 so you are saying that is what you didn't have until after
2 the appeal had already been filed.

3 MR. SPESSARD: Correct, Your Honor.

4 I should be more specific. I was unaware I had
5 that until that point.

6 THE COURT: Unaware you had it?

7 MR. SPESSARD: Correct.

8 As stated in the original petition, this was found
9 in, sort of, just a bulk stack of files with no indication
10 from Mr. Stiffler or anything else that was contained in
11 the file of its origin. I don't know how it got there,
12 when it got there, or how long it had been there; but I
13 found it at that point.

14 I consulted with the Commonwealth. To this day, we
15 don't have a satisfactory answer to why this wasn't
16 divulged. There was no indication of any discovery or
17 disclosure that delays this being provided.

18 THE COURT: Okay. On that issue, Mr. Welsh?

19 MR. WELSH: I don't have much on argument. As far
20 as the timing goes given when -- because I did some
21 research trying to find out how does the procedural clock
22 work when you have something on remand from the Superior
23 Court, and I didn't find anything satisfactory to hang
24 my hat on.

25 As far as when this e-mail in question came out, I

1 don't think anyone knows the specific answer to that, but
2 it is only reasonable that it came out and that it was in
3 discovery and was copied and provided to the defense. We
4 certainly didn't provide any discovery after the
5 conviction or prior to appeal or anything of that nature.
6 I think it was just part of the file got copied, and it
7 got sent as well.

8 As far as the specific e-mail, we don't know, but
9 we do know that Attorney Stiffler was aware of
10 Mr. Palmore's request. He was copied on the original
11 e-mail to Matthew Shaffer, which Corporal White was copied
12 on as well. He was aware that this video wasn't provided
13 at any sort of period of time, so he was certainly aware
14 at that time.

15 It is not clear-cut factually, but I couldn't find
16 anything to hang my hat on after something gets remanded.

17 THE COURT: Okay. We will move on to the next
18 issue, Mr. Spessard.

19 MR. SPESSARD: Thank you, Your Honor.

20 The next issue would be for the purpose of
21 organization. I will just call this Rule 573/Brady claim
22 regarding discovery and providing evidence, things of that
23 nature.

24 Essentially, our argument is that the Commonwealth
25 either willfully or inadvertently lost or permitted the

1 destruction of evidence that Mr. Palmore was specifically
2 seeking. As best as I can understand -- and I will
3 confess that I am no expert -- the Brady Rule and progeny
4 tend to essentially ask three main questions of any
5 evidence that is presented in this situation: Is it
6 favorable to the accused? Was it in some fashion
7 suppressed? And did prejudice arise from that
8 suppression?

9 That is it. There is no other question that needed
10 to be asked. I anticipate the Commonwealth's argument
11 will essentially be that this was a court case, so 573
12 does not apply. But 573 is a complication of our
13 discovery rules where Brady is more of a federal
14 protection of those rules or enforcement of these rules.
15 They are related, but I don't think that being favorable
16 to one does not necessarily mean you are favorable on the
17 other.

18 So in terms of the first question of favorability,
19 the evidence based on stipulation and within the exhibits
20 clearly demonstrates that Mr. Palmore had an objectionably
21 reasonable belief that the evidence was favorable. He had
22 multiple exchanges with both Mr. Shaffer in e-mail form.
23 There is an indication where there is a phone call between
24 them based on the contents in Exhibit 3. His entire
25 desire was to get this footage. And I would submit that

1 the only reason that he would have been so adamant about
2 acquiring this footage was given his favorability.

3 The second main question would be: Was it
4 suppressed? I'd submit, Your Honor, that given two main
5 points: One, in Exhibit No. 4, Mr. White makes the
6 specific statement referring to Palmore, quote, "He will
7 get nothing from me," end quote.

8 I would suggest that is tantamount to a specific
9 mission that he is not going to be providing this
10 evidence. It is specifically an admission of suppression.
11 Even if that is not, the Commonwealth, the timing of this
12 incident is that the reports proceed November 5; and by
13 that point, they were still within 30 to 60 day range
14 referred to in stipulation.

15 As the Commonwealth will inevitably point out,
16 Mr. Palmore, at this point, is not formerly charged with
17 anything.

18 On November 6 as Exhibit No. 1 indicates, Palmore
19 receives the first indication regarding the university
20 conduct board of an ongoing investigation. This is then
21 updated on November 26 where more information about the
22 investigation and the specific allegations in it are
23 revealed to Mr. Palmore.

24 This then leads to Exhibit No. 3 where Mr. Palmore
25 makes the formal request for the evidence.

1 To put this another way, the Commonwealth --
2 specifically, it's agent, Officer White, was aware of
3 specific allegations as November 5 given his experience
4 was also aware of the existence of video footage that
5 could have been accessed. He makes no effort to review
6 it. But then the charges are not formerly filed until
7 December 11.

8 THE COURT: That is the date the charges were
9 filed?

10 MR. SPESSARD: Correct. December 11 according to
11 the complaint.

12 So by this time as of December 11, we are past 30
13 days. We can't say for sure if the footage still exists,
14 but because of Mr. White's delay in filing the charges if
15 we assume the Commonwealth's argument is that this is not
16 a formal court case, that Mr. Palmore had no ability to
17 request this evidence because there were no charges. The
18 Commonwealth only formerly charges him after 30 days
19 anyway. In fact, if it is December 11, we are already
20 closing in on potentially the 60-day mark. Before the
21 Commonwealth even makes -- to put another way -- grants
22 the ability of Mr. Palmore to request the footage that he
23 had been asking for.

24 Nonetheless given his e-mail in Exhibit 3, the
25 Commonwealth, through it's agent, is put on notice that

1 this evidence, not only exists, but that it is being
2 specially requested by the defendant.

3 From there, we know that Exhibit 4 indicates that
4 the Commonwealth, through the district attorney's office,
5 was specifically and unequivocally informed that the
6 defendant also requested this information. So now we have
7 the Commonwealth's agent and the Commonwealth as an entity
8 both had been informed of the defendant's request of this
9 information. And it is not preserved. There is no
10 indication that this footage is ever sought out.

11 THE COURT: So Exhibit 4 is an e-mail from
12 Mr. Palmore to Matthew Shaffer and then an e-mail from
13 Corporal White to Tracy Park. Both of them are dated
14 December 3.

15 MR. SPESSARD: Right.

16 And that it appears that the e-mail from Palmore to
17 Shaffer was forwarded to Tracy Park with the first line
18 says, "Can you let Drew know?", something like that.

19 So I'd argue no effort at this point is ever made
20 to check to see if this footage even exists. I argue that
21 is clear evidence of suppression, whether willfully or
22 inadvertently.

23 That brings us to the last element here which is
24 prejudice is, Mr. Palmore suffered prejudice due to the
25 loss of this information.

1 In reviewing the case law in this question, it
2 ultimately is whether or not the evidence within the
3 material, specifically the material in the effect of: Is
4 there reasonable probability for alternating the outcome?

5 I would submit, Your Honor, Mr. Palmore attempted
6 to, through his defense, provide an alibi that he was not
7 present at the scene at the time. Things were said to
8 have occurred. And had he had access to this evidence and
9 been able to present it, he would have been able to make
10 this claim. Assuming it was available to him, it would
11 have essentially made this claim irrefutable.

12 Lastly, on this point, I anticipate that the
13 Commonwealth would say that in Mr. Palmore's e-mail from
14 Exhibit 3, Mr. Palmore gives an incorrect date for the
15 alleged incident. I believe he refers to October 6 to the
16 8 for video footage.

17 In terms of that, I'd argue that is not favorable
18 to his argument based on Exhibit 2 specifically indicating
19 to Mr. Palmore that the -- I think it is a misstatement
20 here -- but Exhibit 2 indicates that the date of the
21 offense seems to be in that timeframe.

22 Secondly, even with Mr. Palmore's incorrect date, I
23 think it hardly can be argued that the Commonwealth is
24 still on notice that he is specifically requesting video
25 footage that would assist in his defense whether it be at

1 the university conduct board hearing or in the case of a
2 criminal trial.

3 So the intent, I believe, was manifested through
4 that e-mail regardless of whether the date was correct or
5 incorrect. To hold it against Mr. Palmore that he didn't
6 know the exact date before charges had been filed, before
7 a preliminary hearing, and before pretrial discovery had
8 been completed, it would basically be putting the burden
9 of foresight on him and making a request for evidence,
10 which, of course, he couldn't have had.

11 So with respect to a Brady violation in Rule 573,
12 I'd argue that the three main elements: The capability,
13 suppression, and prejudice have been met; and therefore,
14 Mr. Palmore was entitled to relief as provided for, I
15 believe, it is 573 (e).

16 And I'll rest on my brief with respect to that
17 argument, Your Honor.

18 THE COURT: Mr. Welsh?

19 MR. WELSH: All right. Looking at -- I think
20 Attorney Spessard points out there is a difference between
21 a Rule 573 discovery claim and Brady issues. The Brady
22 issues -- as I addressed in my brief -- Rule 573 relates
23 specifically to a criminal case.

24 At the time of this request, a criminal case had
25 not been initiated against Mr. Palmore, so I think that

1 the Court can very easily swipe this aside in that it
2 doesn't fall within 573.

3 The question then comes to Brady. I agree with
4 Attorney Spessard's outlining the three areas.
5 Predominantly, I'd focus on whether or not the evidence is
6 exculpatory and whether or not there is any prejudice.

7 There is a lot of information that we don't have
8 here to determine whether this is exculpatory, not what is
9 certainty that whether this would be exculpatory.

10 Attorney Spessard was correct that I based a lot of
11 evidence on Mr. Palmore making a specific request. That
12 request was the video footage from October 6 at 12:00 a.m.
13 until October 9 at 12:00 a.m. Even if this video footage
14 had been preserved in that date range and been provided to
15 Mr. Palmore, that would have meant nothing. It had no
16 relevance with what the ultimate issue would have been at
17 trial because the date range, according to the testimony
18 at trial and according to the criminal complaint, was a
19 week after that. So whether or not Mr. Palmore was ever
20 in the lobby of that dorm hall during those dates was
21 completely irrelevant. It would not have been exculpatory
22 for anything.

23 Secondly, we have a stipulation in evidence whether
24 there is video surveillance of the lobby and looking into
25 the elevator as was pertained in the Bernat case. We do

1 not have any evidence that says that is the only way to
2 get into the dorms. We do not have evidence that says
3 there are other entrances which are not covered by video
4 surveillance, whether or not there is surveillance in the
5 stairways, whether or not there is surveillance in the
6 hallways of the dormitories, none of that would show that.

7 Even if you were saying that Corporal White or the
8 district attorney's office should have known that
9 Mr. Palmore wanted a different date range than what he
10 asked for, even had they given him that, that would have
11 been exculpatory.

12 Attorney Stiffler, at the time of trial, was kind
13 of blunt to the prejudice and exculpatory area and
14 cross-examined Corporal White about the video. He
15 cross-examined Corporal White saying that he would have
16 gotten the video, and he didn't get the video.
17 Corporal White admitted to that.

18 Attorney Stiffler, as part of his case in defense,
19 already pointed to the fact that there was no supporting
20 video evidence which was used. Attorney Stiffler
21 cross-examined Corporal White further regarding swipe
22 cards for access, and other things that could have been
23 attained but was not acknowledged.

24 When we are looking at whether or not there was
25 prejudice here, there is just one prejudice mainly because

1 of the date range that he asked for a specific date range,
2 and I am not sure which -- I think it is marked as Exhibit
3 No. 2 which is the revised letter from November 23.

4 MR. SPESSARD: That is two.

5 MR. WELSH: Now the wording on that is vague.

6 No. 1 is where Attorney Spessard is talking about
7 -- it talks about the claim in this case which would be
8 Kaitlin Housler (spelled phonetically), who was the
9 alleged victim in this case, and it says October 6 is the
10 date range.

11 It goes on to say, Sexual harassment asking her to
12 provide you oral sex when you confronted her outside of
13 the area of Regal Commons.

14 That is, according to all testimony that there was
15 at the preliminary hearing and the investigation, that was
16 in that October 6 to 8 date range. That is when that
17 would have happened.

18 It goes on to say, You later contacted her and
19 requested her to come to your room. She alleged that you
20 put your hand down her pants, touching her vagina. It
21 goes on to say that constitutes sexual assault and sexual
22 harassment.

23 There wasn't reference even in that paragraph to a
24 later date when the indecent assault would have happened.
25 So we just don't have that solid evidence to say this was

1 exculpatory evidence or this definitely would have been
2 exculpatory evidence especially with the date range
3 provided or that it provided some sort of prejudice in
4 this case. For that reason, he doesn't meet the Brady
5 requirements.

6 And I won't comment on the suppression. Attorney
7 Spessard says it was either intentional or unintentional.
8 The fact is that the video wasn't preserved. I don't
9 dispute that. I don't think that -- the motivation behind
10 that -- I don't think there is sufficient evidence on that
11 to be indicative one way or the other.

12 THE COURT: Okay. Is there another issue?

13 MR. SPESSARD: Well, I have a quick response.

14 THE COURT: Okay.

15 MR. SPESSARD: Just regarding whether it is
16 exculpatory or not. I don't believe the rule requires that
17 it is favorability or its ability to execute the defendant
18 is limited to pure unadulterated -- requiring dismissal.
19 I'd argue that as long as it corroborates the defense
20 being offered that is favorability, so I don't think it is
21 a requirement that it is perfect evidence. That is all I
22 have for that.

23 But my final issue would be due process generally.
24 Under the 14th Amendment, the requirement here is
25 essentially the defendant has to show that there was

1 potentially exculpatory evidence, and that evidence was
2 lost through bad faith of the Commonwealth.

3 Again a lot of --

4 THE COURT: I am sorry. Is this the next issue?

5 MR. SPESSARD: Yes. I am sorry. Due process under
6 the 14th Amendment.

7 THE COURT: Okay. So bad faith.

8 MR. SPESSARD: Bad faith and that the footage was
9 potentially exculpatory.

10 There is another way to analyze it, but I'd have to
11 see. The evidence is only potentially exculpatory. I'd
12 have to see the specifics of the footage.

13 I don't believe the Commonwealth can reasonably
14 contend that the evidence wasn't potentially exculpatory.
15 Given Mr. Palmore's request before, after it, and based on
16 that it would provide corroboration for a defense, and I
17 think that is fair and material for being presented
18 corroboration.

19 Further, that evidence was not in any way able to
20 be duplicated. As compelling as video evidence would have
21 been regarding whether Mr. Palmore entered or did not
22 enter a residence hall would have been the most compelling
23 evidence particularly when it comes to the alibi defense.

24 That would just leave the main question of bad
25 faith. I'd argue that Exhibit 4 is a smoking gun. The

1 specific phrase, "He will not get nothing from me," is I
2 think it can't be more clear. The Commonwealth's agent,
3 through university police, specifically was not going to
4 review the footage, was not going to provide it, was not
5 going to store it any meaningful way that Mr. Palmore was
6 going to get access to it.

7 Given such, I would argue clearly demonstrative bad
8 faith. There has to be a due process violation here.
9 Mr. Palmore was providing a defense with one arm behind
10 his back because of the actions of the Commonwealth after
11 it was utterly clear that they had a duty to at least look
12 into this.

13 I think that the case that is most closely
14 associated or most closely aligns with this would be Zara
15 Goza-Moreira, and the specific citation would be 780
16 Federal 3rd 971 (2015). In that case, the defendant was
17 accused of attempting to smuggle drugs into the United
18 States at a customs check point and was stopped by the
19 police.

20 The defendant gets interviewed by homeland security
21 officials indicating that she was under duress, and she
22 was acted in a manner to be noticed by security officials.
23 The security officials are aware that this is her defense
24 essentially, and yet, there was video footage available
25 that the homeland security was aware of. A request was

1 made to preserve it prior to the video being deleted, a
2 motion to compel discovery later was filed in order to
3 direct that be turned over. And the footage had already
4 been lost.

5 In that case, I assume the Court of Appeals -- yes.
6 In that case, the Court of Appeals found that given the
7 conduct of the defendant at the time of her initial
8 interview based on what the homeland security knew, based
9 on her conduct, based on her request from her defense
10 counsel, the Government in that case had a burden to not
11 only preserve the evidence, but I mean to verify it and to
12 make sure it was still there to require exculpatory
13 evidence.

14 Because they failed to follow through in that
15 conduct, it was most assuredly a due process violation
16 under the 14th Amendment and requirements on the case.
17 I'd argue that the circumstances here are certainly
18 similar to such a degree that, while Zara's case is
19 precedent, I think it is extremely persuasive.

20 And otherwise, I'd rest on the brief with respect
21 to the due process.

22 THE COURT: Was there a question in that federal
23 case about whether the video evidence was exculpatory or
24 not?

25 MR. SPESSARD: It was determined to be potentially

1 exculpatory in that matter because no one knew what the
2 specific footage showed, but given the defendant's defense
3 from that point, essentially from the investigation, was,
4 I was trying to be obvious. I was trying to let you guys
5 know something was wrong. That was the -- that is the way
6 the Court of Appeals indicated, You are on notice now.
7 This is related to that her actions were trying to -- I
8 guess -- were objective evidence regarding her being under
9 duress is, kind of, how they viewed it.

10 The rule was potentially exculpatory because we
11 didn't know the specifics of it, and they didn't know it.
12 Given what the defense offered in defense and what the
13 measures that not only -- no. Given the measures that
14 defense counsel took in order to get that footage,
15 essentially the government was on notice at that point,
16 and it would have to be considered as potentially
17 exculpatory.

18 THE COURT: How are you distinguishing your Brady
19 argument from this last due process? Why are they
20 different issues?

21 MR. SPESSARD: So Brady is more of a question of
22 discovery and fair play in providing it in evidence. The
23 due process is really towards the destruction of evidence
24 and the ability to present the evidence at the trial. I
25 think there are some there, but I think the analogies are

1 technically different. The Brady violation isn't
2 technically required that day, whereas the due process
3 violation does. And there is a couple other obvious
4 differences between them. That is the main thing. They
5 have to be separated, Your Honor.

6 THE COURT: And getting back to Rule 573/Brady
7 issue, you heard Mr. Welsh say 573 doesn't apply because
8 the criminal case had not been initiated. So are you
9 still making an argument that 573 does apply or no?

10 MR. SPESSARD: I think it has to just given the
11 nature that Brady is the Commonwealth equivalent of what
12 573 purports to be codified for. If 573 is our written
13 down rules to follow and Brady happened to be the federal
14 equivalent of common law, I think they kind of have to be
15 viewed together in that a Brady violation requires as
16 afforded to 573.

17 To answer more specifically, I guess I'd have to
18 see that Rule 573 does require a court case in that
19 respect given that both of the issues involve the turning
20 over of evidence. They seem to be intermingled in that
21 way.

22 The specific answer -- I have no specific way to
23 refute that part of the Commonwealth's argument that 573
24 doesn't apply. I think that these two sections work
25 closely, or I should say Brady and 573 are so close that

1 they should be used as --

2 THE COURT: But 573 as it relates to the
3 Commonwealth's mandatory disclosure or production really
4 requires that the Commonwealth have possession or access
5 to that information at the time of the request.

6 MR. SPESSARD: Correct. These are all examples
7 that require the Commonwealth's evidence within the files
8 of the Commonwealth's agents for which the Commonwealth is
9 aware of must also be preserved, which is why the Exhibit
10 4 is so important because that demonstrates bad faith.

11 But with respect to 573, it demonstrates knowledge
12 on the part of the district attorney's office being aware
13 that this evidence could and does exist within the direct
14 control of the university police, and they are the only
15 ones with access to it.

16 THE COURT: One of the practical questions that I
17 am dealing with and I guess right from the start of this
18 consideration of this motion was when an individual such
19 as Mr. Palmore makes a request that I guess indirectly is
20 to law enforcement for potentially relevant evidence in a
21 criminal case before the case is filed and before he has
22 an attorney and before the district attorney is involved
23 to the extent of at least filing criminal cases, is the
24 Commonwealth bound by a pre-criminal charge filing or
25 request by an individual? Is that the equivalent of the

1 defense counsel asking the Commonwealth's counsel after
2 charges have been filed for discovery?

3 There seems to me there needs to be a distinction.
4 If some individual asks, you know, campus police or
5 security for information before charges are filed, how is
6 that binding on the Commonwealth by way of being able to
7 enforce Rule 573?

8 MR. SPESSARD: Well, I think that the main issue is
9 that point. We look at it in reverse. How would a
10 defendant ever get exculpatory evidence if there is never
11 a court case filed? In any instance, the police could
12 delay filing long enough until evidence was inadvertently
13 lost.

14 Then files charges, and the Commonwealth, who had
15 no idea, says, "We have complied with all of our rules."

16 Meanwhile, the defendant only now gets to assert
17 any rights and says, "I want that evidence."

18 The Commonwealth says, "We don't have it."

19 And the police say, "Sorry. It was lost, and you
20 didn't have a right to ask for it," or, "We lost it."

21 THE COURT: It seems to me you are asserting sort
22 of the evidence argument that we see on the civil side.
23 That is if the same principle applies in a criminal case.
24 Okay.

25 Mr. Welsh, what do you say about due process?

1 MR. WELSH: What is the page number on the case
2 that you cited? That wasn't in your brief.

3 MR. SPESSARD: I am sorry.

4 THE COURT: 971.

5 MR. SPESSARD: 971.

6 MR. WELSH: I don't think it was in the brief, so I
7 haven't read it to review it.

8 I think the due process issue is very much the same
9 as the Brady issue. If you have a police agency that is
10 delaying filing things until things are unintentionally
11 destroyed, that is not an unintentional act.

12 That could be potentially a due process violation
13 if a delay is purposely done to destroy evidence. There
14 is no evidence that that happened here. That was the
15 reason that things were filed when they were.

16 I also disagree with Attorney Spessard that the
17 e-mail from Corporal White to Tracy Park is a smoking gun.
18 He indicates that, "He will get nothing from me," to refer
19 to Mr. Palmore. If you read the e-mail, he is indicating
20 Mr. Shaffer will not get anything. And I don't have that
21 exhibit directly in front of me.

22 I think it is an, I told Matt, Matt Shaffer, he
23 will get nothing from me. I guess you could interpret it
24 either way, but the request was to Matt Shaffer.

25 Also, there was no evidence that Corporal White at

1 that time to say that was bad faith for him to say, even
2 if we assume that he was saying Mr. Palmore will get
3 nothing from me, there is no evidence, one, that Corporal
4 White had any obligation in preparation for a university
5 conduct board hearing to provide Mr. Palmore with the
6 video or anything of that nature. I think that even
7 Corporal White indicates that his understanding is he
8 provides the report, and they don't provide anything else.

9 Two, there is no evidence here to say that in any
10 course that anyone has to have access to that video. That
11 any citizen -- any student can ask the university for a
12 copy of a video at any point, and they give that to them.
13 There is no evidence. That is not an obligation.

14 So if you are looking at bad faith, saying that the
15 corporal had bad faith in this case, you have to have some
16 sort of obligation that Corporal White was obliged to give
17 him this video in preparation and that he intentionally
18 refuted that obligation. He chose that he wasn't going to
19 comply with anything that was supposed to be done for the
20 purpose of violating an obligation, which he had none.

21 And finally, with the Zara Case, we are looking at
22 a specific timeframe to point to and look at. Here is a
23 person that you can look at, here is a video, which is not
24 what we have here. Again, we have a different timeframe
25 that is asked for the video.

1 Attorney Spessard makes the argument that the
2 Commonwealth can't possibly argue that this is not
3 exculpatory because Mr. Palmore wanted that video so much
4 it had to be exculpatory.

5 You are creating a strong man there, but there is
6 also an equally likely scenario that if you go under the
7 hypothesis that Mr. Palmore is guilty and that he knows
8 when he would have assaulted somebody and he knows that it
9 wasn't October 6 through 9, he would have thought: I got
10 one over on the police. They think I did it this week. I
11 did it this other week. I'll get the video for the week
12 that I know I didn't do anything, and that is going to
13 look great for me.

14 He asks for that week. That week had nothing to do
15 with what was also the dates of the incident. Even if it
16 was preserved, it made no difference whatsoever.

17 THE COURT: Any other issues?

18 MR. SPESSARD: No other issues, Your Honor.

19 I'd have to concede that there was no obligation to
20 provide the footage. That is a separate question from the
21 preservation of it.

22 Corporal White was on notice as of December 3 that
23 this was intentionally important to the defendant that
24 this video footage was important for his university
25 conduct board hearing.

1 Yes, I'll concede that Mr. Palmore didn't know that
2 there a criminal case being filed because how could he?
3 But Mr. White did, who sent the e-mail to the
4 Commonwealth, so Mr. White, Corporal White, was clearly
5 aware of what the intentions were regarding the case.
6 Otherwise, there be no need to send an e-mail to the
7 Commonwealth or to the district attorney's office.

8 That all I have.

9 MR. WELSH: Can I respond to the response?

10 We are looking at a situation -- you say there is
11 an obligation for -- if a police officer at the university
12 who knows that there could be potential for video as there
13 are cameras throughout the campus, in any criminal case if
14 the police don't preserve the video in that case,
15 regardless of a request because any police officer is
16 going to know that there could be video evidence
17 somewhere, if they don't preserve that, that is always a
18 due process violation.

19 Every case can go through and be dismissed because
20 that is putting an obligation on the police to preserve
21 any sort of evidence that could potentially be out there,
22 even if there is no showing exculpatory.

23 You can expand that: The Court was saying you are
24 putting an obligation on the police to essentially do more
25 than they are necessarily required to do. They have to do

1 extra steps in an investigation; and if they don't do
2 these extra steps of the investigation, then it is a due
3 process violation. Then, charges are going to be
4 dismissed.

5 That is why we have a trial. That is why we have a
6 jury. The police didn't do X, Y, and Z; it is pointed out
7 all of the time.

8 MR. SPESSARD: But the requirement is bad faith.
9 That is the initial requirement of why that issue comes
10 up. That comes up here because Mr. Palmore did make that
11 request and because it is not in any way honored to
12 provide the preservation.

13 THE COURT: I think an element of bad faith in this
14 situation would be that Mr. Palmore was entitled to the
15 information, and I think that is your argument, in part
16 anyway. At that stage of the proceedings with the
17 university, he can't demonstrate that he was entitled to
18 it.

19 MR. WELSH: Correct.

20 THE COURT: So how could that be bad faith if they
21 didn't give it to him?

22 MR. WELSH: Right.

23 THE COURT: All right. Well, I certainly will
24 consider the stipulations and the arguments and the briefs
25 and the evidence, and do my very best to get you my

1 decision as soon as I can.

2 MR. WELSH: Thank you, Your Honor.

3 MR. SPESSARD: Thank you, Your Honor.

4 THE COURT: Thank you.

5 Court is adjourned.

6 (The proceedings were concluded at 4:19 p.m.)

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1 CERTIFICATE OF COURT RECORDER

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3 I hereby certify that the

4 proceedings, evidence and rulings of the Court are

5 contained fully and accurately, to the best of my ability,

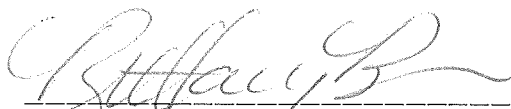
6 in the recording and notes taken by me on the hearing of

7 the above petition and that it is a correct transcript of

8 the same.

9

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12 _____
13 Brittany Lynn Beaver
14 Court Recorder & Notary Public

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DATE: 05/08/2019