STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Lexington County
The Honorable Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2023-000467

THE STATE, Respondent,

v.

VICTORIA COXE THREATT, Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

ANDREW D. POWELL
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

S.R. RICK HUBBARD, III
Solicitor, Eleventh Judicial Circuit

205 East Main Street
Suite 309
Lexington, SC 29072

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court correctly found the State did not act in bad faith in its failure to preserve body cam footage.

II. The trial court correctly denied Appellant's motion to dismiss because agent Lugos had reasonable suspicion to justify a search.

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant Victoria Threatt for trafficking methamphetamine, possession with the intent to distribute marijuana, and possession of oxycodone. She proceeded to a jury trial on March 13-15, 2023, before the Honorable Walton J. McLeod, IV. Appellant was convicted as charged. Appellant was sentenced to twenty-five years' incarceration for trafficking methamphetamine and five years for each of the remaining charges. This direct appeal follows.

STATEMENT OF FACTS

Prior to this incident, Appellant plead guilty to the distribution of methamphetamine and received a probationary sentence. (Tr. p. 102). As a condition of her probation, Appellant consented to allow her agent to visit in her home at any time. (Court's Exhibit 8). Agent Lugos, with the South Carolina Department of Probation, visited Appellant's home on March 8, 2022. (Tr. p. 164; 167). Appellant was under high level supervision, meaning one home visit per month was required. (Tr. p. 168). Additionally, Lugos received an anonymous tip that Appellant was engaged in illegal drug sales. (Tr. p. 66). Lugos' version of the events are as follows. Lugos knocked on the door and announced himself. (Tr. p. 169). Gary Rowell, a friend, slightly opened the door; Lugos asked if he would open the door completely and he complied. (Tr. p. 169-70). Appellant was sitting on the couch inside. (Tr. p. 171). Also at the home was Melissa Gainey and Appellant's boyfriend Helms. (Tr. p. 171). At this point Rowell and Gainey excused themselves. (Tr. p. 173). Appellant was sitting with a blue purse, and she opened it for Lugos to look inside. (Tr. p. 180). Inside the purse was a large amount of cash; Appellant then opened a black bag for Lugos to look into. (Tr. p. 181). Inside the black bag was a marijuana grinder, small bags containing a white substance, and a digital scale. (Tr. p. 182). Lugos testified he did not threaten or coerce Appellant to open these bags. (Tr. p. 181). Lugos stated he cleared the residence and called the sheriff's department for assistance. (Tr. p. 183). Lugos was wearing a body camera throughout this interaction and that camera was recording. (Tr. p. 184). Lugos failed to flag the recording, which caused the video to be automatically deleted. (Tr. p. 52; 184).

Before trial, Appellant testified that she did not own the bag containing the drugs and other evidence seized. (Tr. p. 95). Appellant testified Lugos was able to get her to open the bag by telling Appellant she could not refuse. (Tr. p. 96). Appellant testified the drugs were not hers

and that she only claimed the drugs so that her boyfriend Helms would not go back to prison. (Tr. p. 99; 100). Rowell also testified that the black bag belonged to Melissa. (Tr. p. 325-6).

Agents Carter, Youmans, and Gladman arrived at the scene to assist Lugos. (Tr. p. 202). A search warrant for Appellant's residence was obtained and executed. (Tr. p. 224-5). When searching the house Youmans found plastic bags with a substance consistent with methamphetamine, bags with a substance consistent with marijuana, pills, a meth pipe, digital scales, and packaging materials. (Tr. p. 228). Agent Weyandt testified Appellant claimed ownership of the drugs. (Tr. p. 271). The court instructed the jury that when evidence is lost or destroyed, they could infer the evidence was adverse to the party who destroyed or lost it. (Tr. p. 398). Ultimately, Appellant was found guilty as charged.

ARGUMENT

I. The trial court correctly found the State did not fail to preserve the evidence in an act of bad faith.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law. State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). Questions of law are reviewed de novo. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

RELEVANT FACTS

Lugos was wearing a body camera throughout his interaction with Appellant and that camera was recording. (Tr. p. 184). The video was accidentally deleted when Lugos failed to flag it on the system. (Tr. p. 52; 184). The court found Appellant failed to meet her burden in establishing bad faith. (Tr. p. 126). The court reasoned that the prejudicial effect had been mitigated by the shortness in lapse of time and that the video would not be exculpatory in the nature of guilt. (Tr. p. 126-7). The court instructed the jury that when evidence is lost or destroyed, they could infer the evidence was adverse to the party who destroyed or lost it[1]. (Tr. p. 398).

DISCUSSION

When it comes to the State's failure to preserve evidence, South Carolina law requires a showing of bad faith or an apparent exculpatory value to establish a violation of due process.

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[1] "When evidence is lost or destroyed by a party, you may infer that the evidence which was lost or destroyed by that party would have been adverse to that party. If you find first that evidence was spoiled or destroyed, and if you further find that the evidence could help establish the innocence of the defendant, you may then consider those facts in deciding whether or not the State has met its burden of proof." (Tr. p. 389).

Here, the court correctly found neither where the deleted video was accidentally unpreserved. This Court should affirm.

The Due Process Clause of the Fourteenth Amendment ensures the State comports with prevailing notions of fundamental fairness. California v. Trombetta, 467 U.S. 479, 485 (1984). Yet, the State does not have an absolute duty to preserve useful evidence that might vindicate a defendant. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001); Arizona v. Youngblood, 109 S.Ct. 333 (1988).

To show ones Due Process rights have been violated, one must establish either the State destroyed the evidence in bad faith, or the State destroyed evidence that possessed an exculpatory value that was apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991); State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010).

In Arizona v. Youngblood, The United States Supreme Court held that one must show bad faith to establish a due process violation. Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("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").

Appellant cites several cases where state courts have expanded upon the due process analysis in Youngblood. Namely, these states do not require a showing of bad faith to establish a due process violation under state law. Lee v. State, 503 P.3d 811, 818 (Alaska Ct. App. 2021) ("Unlike the federal constitution, the Alaska Constitution does not require a finding of bad faith"); State v. Ferguson, 2 S.W.3d 912, 914 (Tenn. 1999) ("[w]e now must determine whether the bad faith analysis of Youngblood adequately protects the right to a fair trial under the due process clause of the Tennessee Constitution"); Hammond v. State, 569 A.2d 81, 87 (Del. 1989)

("We reaffirm our prior holdings, pursuant to the 'due process' requirements of the Delaware Constitution").

Some states have determined that their state constitution does not offer protections that expand beyond Youngblood. The Supreme Court of Kentucky held that bad faith was required to establish a due process violation. Collins v. Com., 951 S.W.2d 569, 572 (Ky. 1997). The court explained that appellant urged the court to reject the bad faith standard in Youngblood simply because the Kentucky Constitution used slightly different wording than our Federal Constitution. Id. Ultimately, the court found that bad faith must be shown to satisfy the standard recognized by the Commonwealth. Id. See also State v. Luedtke, 851 N.W.2d 837, 843 (WI App. 2014)("to prevail on a due process challenge regarding the destruction of potentially exculpatory evidence, the defendant must show that the evidence was apparently exculpatory at the time it was destroyed or that it was destroyed in bad faith); State v. Hawkinson, 829 N.W.2d 367, 372 (Minn. 2013)("our court has previously applied Youngblood's bad-faith standard for determining whether the destruction of evidence violates a defendant's right to due process").

"Rules concerning [the] preservation of evidence are generally matters of state, not federal constitutional, law." California v. Trombetta, 467 U.S. 479, 491 (1984) (O'Connor, J., concurring) (citation omitted)). Thus, the question becomes whether our state law expands upon the protections outlined in the Youngblood analysis. South Carolina case law does expand upon the analysis; to establish a violation one must show bad faith or an apparent exculpatory value that cannot obtained by other means. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) (Destruction of murder weapon did not require suppression where there was no bad faith and the gun was incriminating rather than exculpatory); State v. Mabe, 306 S.C. 355, 358–59, 412 S.E.2d 386, 388 (1991) ("A defendant must demonstrate either that the state destroyed evidence in bad

faith, or that the state destroyed evidence that possessed an exculpatory value that is apparent before the evidence was destroyed "). In State v. Moses this Court explained:

> South Carolina has adopted the duty to preserve analysis of Arizona v. Youngblood in its jurisprudence. While recognizing that the State does not possess an absolute duty to preserve potentially useful evidence, our state Supreme Court has held that a defendant must demonstrate either that the State destroyed evidence in bad faith, or the state destroyed evidence that possessed an exculpatory value that is apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.

State v. Moses, 390 S.C. 502, 518, 702 S.E.2d 395, 404 (Ct. App. 2010).

Here, Lugos was wearing a body camera throughout his interaction with Appellant. (Tr. p. 184). Regrettably, the agent failed to flag the video and it was automatically deleted. (Tr. p. 52; 184). Nonetheless, the accidental deletion of this video was not an act of bad faith, as noted by the court. (Tr. p. 126). Additionally, the evidence did not have exculpatory value that was apparent at the time the video was accidentally deleted. Witnesses that observed the events at trial were able to establish the evidence through other means[2]. Cf. Moses, 390 S.C. 502, 518, 702 S.E.2d 395, 404 (Ct. App. 2010). (The State's failure to preserve a tape that could have allowed defendant to identify witnesses alone was insufficient when the state provided a high school yearbook to help Moses in identifying potential witnesses). Appellant has failed to establish the State's failure to preserve the video was in bad faith or was apparently exculpatory with no opportunity to obtain comparable evidence in other means. This court should affirm.

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[2] Additionally, the court instructed the jury that they may infer any evidence lost was averse to the State. See State v. Reaves, 414 S.C. 118, 128, 777 S.E.2d 213, 218 (2015)(Defendant's due process rights were not violated where there was no indication of bad faith, defendant was able to cross-examine police officers, and the trial court instructed the jury they could infer lost evidence would have been adverse to the State).

II. The trial court correctly denied Appellant's motion to dismiss because agent Lugos had reasonable suspicion to justify a search.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law. State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997). Appellate review of a motion to suppress based on the Fourth Amendment is a two-step analysis. The appellate court reviews the trial court's factual findings for any evidentiary support, but the legal conclusion of whether reasonable suspicion exists is a question of law reviewed de novo. State v. Frasier, 437 S.C. 625, 634, 879 S.E.2d 762, 766 (2022).

RELAVANT FACTS

Lugos received an anonymous tip that Appellant was engaged in illegal drug sales. (Tr. p. 66). Lugos testified he knocked on the door and Rowell initially opened the door partially and told him Appellant was in the bathroom. (Tr. p. 61-2). He stated shortly thereafter, Rowell opened the door fully and Lugos saw Appellant on the couch. (Tr. p. 61-2). Lugos was on the premises to conduct a home visit, not to search the home. (Tr. p. 47; 60). He saw Appellant's purse and asked for her consent to search it; Lugos testified she let him search freely and voluntarily. (Tr. p. 47). Inside the bag was a large amount of cash. (Tr. p. 181).

Lugos further testified that before he looked in the black bag Appellant told him the bag contained a marijuana grinder and showed it to Lugos. (Tr. p. 49; 68). Lugos testified he did not force or threaten Appellant to open the bag. (Tr. p. 68). Lugos stated that once she opened the bag he saw the grinder as well as bags with a white substance and a scale. (Tr. p. 68). At that point he stopped and called narcotics officers. (Tr. p. 69). Appellant volunteered to Officer Weyandt that she owned the drugs. (Tr. p. 108-9).

Appellant testified that she did not own the bag containing the drugs and other evidence seized. (Tr. p. 95). Appellant also testified Lugos was able to get her to open the bag by telling Appellant she could not refuse. (Tr. p. 96).

The court found the totality of the circumstances were more than sufficient grounds to establish Lugos had reasonable suspicion. (Tr. p. 137). The court pointed to the way the door was opened, seeing the large amount of cash, and his understanding of who Appellant was. (Tr. p. 137).

DISCUSSION

The United States Supreme Court has established that "probationers and parolees have a significantly diminished expectation of privacy." Com. v. Moore, 473 Mass. 481, 485, 43 N.E.3d 294, 299 (2016). According to S.C. Code Ann. § 24-21-410 a defendant on probation agrees to a search based on reasonable suspicion. Before a defendant may be placed on probation, he must consent in writing to be subject to a search or seizure, without a search warrant, based on reasonable suspicions. The statute provides remedy in the form of discipline to law enforcement officers.

"The term reasonable suspicion requires a particularized and objective basis that would lead one to suspect another of criminal activity." State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001). Reasonable suspicion exists when an officer can identify "specific and articulable facts that, when taken together with rational inferences from those facts, reasonably warrant the search and seizure." United States v. Estrada, 459 F.3d 627, 631 (5th Cir. 2006). Reasonable suspicion is a less demanding standard than probable cause in that it may be established with a lower quantity of evidence or even less reliable evidence. Alabama v. White, 496 U.S. 325 (1990). When making reasonable-suspicion determinations "courts must look at the 'totality of the circumstances' of each case." United States v. Arvizu, 534 U.S. 266, 274 (2002).

A homeowner may grant consent to search the premises on which a criminal defendant resides if the homeowner possesses common authority over or sufficient relationship to the premises or effects to be inspected. State v. Pressley, 288 S.C. 128, 130, 341 S.E.2d 626, 627 (1986). Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977).

Here, Lugos had consent and reasonable suspicion to search the relevant articles. Lugos had received an anonymous tip that Appellant was engaged in illegal drug sales. (Tr. p. 66). Lugos testified he knocked on the door and Rowell initially opened the door partially and told him Appellant was in the bathroom. (Tr. p. 61-2). Lugos testified he received consent to search Appellant's purse. (Tr. p. 47). The purse contained a large amount of cash. (Tr. p. 181).

Lugos testified Appellant told him a marijuana grinder was in the black bag. (Tr. p. 49; 68). Lugos testified he did not force or threaten Appellant to open the bag. (Tr. p. 68). Lugos stated that once she opened the bag, he saw the grinder as well as some bags with a white substance and a scale. (Tr. p. 68). Lugos recalled specific and articulable facts that supported the court's finding of reasonable suspicion. Appellant has failed to show the court erred in finding Lugos had reasonable suspicion. This Court should affirm.

CONCLUSION

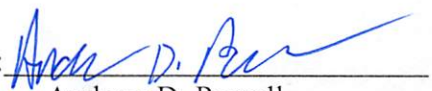
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

ANDREW D. POWELL
Assistant Attorney General

S.R. RICK HUBBARD, III
Solicitor, Eleventh Judicial Circuit

BY: 
Andrew D. Powell
Bar # 106415

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 29, 2024

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Lexington County
The Honorable Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2023-000467

THE STATE, Respondent,

v.

VICTORIA COXE THREATT, Appellant.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following matter as Appellant to be included in the Record on Appeal:

1) Transcript pages Tr. p. 1-10; Tr. p. 38-150; Tr. p. 164-410;
2) State's Exhibits 3-8

To facilitate the preparation of the Initial Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers. The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

ANDREW D. POWELL
Assistant Attorney General

S.R. RICK HUBBARD, III
Solicitor, Eleventh Judicial Circuit

By: _____
Andrew D. Powell
Bar # 106415

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 743-3727

ATTORNEYS FOR RESPONDENT

March 29, 2024

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VICTORIA COXE THREATT, Appellant.

PROOF OF SERVICE

I, Grace Sommer, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Gary H. Johnson, II, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 29th day of March, 2024.

Grace Sommer
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727