

NOT FOR PUBLICATION

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

	)	CASE NO. SX-09-CR-480
	)	
	)	
	)	NEGLIGENT HOMICIDE BY MEANS OF A
	)	VEHICLE
PEOPLE OF THE VIRGIN ISLANDS,	)	20 V.I.C. § 504;
	)	INVOLUNTARY MANSLAUGHTER
Plaintiff,	)	20 V.I. C. § 492;
	)	14 V.I.C. § 924(2);
v.	)	DRIVING UNDER THE INFLUENCE OF AN
	)	INTOXICATING LIQUOR
KENNETH G. MILLIGAN,	)	20 V.I.C. § 493(a)(1);
	)	DRIVING WITH A BLOOD ALCOHOL
Defendant.	)	CONTENT OF .08% OR MORE
	)	20 V.I.C. § 493(a)(2);
	)	RECKLESS DRIVING
	)	20 V.I.C. § 492;
	)	FAILURE TO REPORT AN ACCIDENT
	)	20 V.I.C. § 541.
	)	
	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's Motion to Dismiss for Spoliation of Evidence. (Def. Mot. Dismiss, filed June 4, 2012.) The People filed a Response on June 13, 2012 and a Supplement to the Response on July 18, 2012. The Defendant alleges two issues; (1) the People have violated his Constitutional rights under the *Brady v. Maryland* doctrine; (2) that the People have violated Federal Rule of Criminal Procedure 16. For the following reasons, Defendant's motion to dismiss will be denied. However, certain evidence related to the subject vehicle will be excluded pursuant to Fed. R. Crim. Proc. 16.

I. PROCEDURAL HISTORY

Defendant is accused of Negligent Homicide by Means of Motor Vehicle, Involuntary Manslaughter, Driving Under the Influence of an Intoxicating Liquor, Driving with a Blood Alcohol Content of .08% or More, Reckless Driving and Failure to Report an Accident. The People allege that on August 15, 2009 the Defendant ran his vehicle, a Silver Nissan Frontier,

off the road. Upon investigation, the police discovered the body of the victim, a Mr. August Alcindor, laying a hundred yards from the Defendant's vehicle. The police took pictures of the vehicle and the road and collected evidence, including measurements, paint samples and DNA from the hood of the vehicle. The police also took possession of the vehicle. On March 5, 2012 counsel for Defendant sent a letter to the People requesting access to the vehicle for inspection. (Def.'s Ex. 1, Mot. Dismiss.) The People did not respond. Another letter requesting inspection was sent on March 29, 2012. (*Id.* at Ex. 2.) The People responded on April 2, 2012. (*Id.* at Ex. 3.) In their response to the Defendant's requests, the People state that the vehicle was released to the Defendant's insurance company. (*Id.*) The letter also states that the People informed Defendant in 2009 that they had no objection to the inspection of the vehicle. However, in the instant motion, counsel for Defendant claims that while he did in fact send a letter to the People, dated December 11, 2009 the letter requested that the People allow the Defendant's insurance company to inspect the vehicle for insurance purposes only. After receiving the People's April 2, 2012 letter regarding the release of the vehicle to the insurance company, counsel for the Defendant contacted the insurance company, Crawford Inc. In response to counsel's inquiry, the insurance company informed him that the Defendant "... was paid the value of his Nissan Frontier and the salvage was sold to Officer Poleon." (*Id.* at Ex. 4.) Counsel states that neither he nor the Defendant was aware that the vehicle was sold and that it was counsel's belief that the vehicle was in the People's possession to be preserved as evidence at trial.

The Court set this matter for a hearing on Defendant's motion to dismiss for spoliation. At the hearing, police officer Arthur Joseph ("Joseph") testified on behalf of the People. Under oath, Joseph testified that he was in charge of the vehicle impound lot for the Virgin Islands police department. He also testified that he never authorized the release of the subject vehicle to Crawford Inc. After listening to the Parties arguments and the testimony of the witnesses, the Court ordered the People to further investigate how its office lost possession of the vehicle and where the vehicle was currently located. The Court then set this matter for another hearing. At the subsequent hearing, Joseph once again testified. He informed the Court that after additional investigation, it was discovered that the vehicle in question was purchased by police officer, Anderson Poleon. Joseph also testified that the damage to the vehicle had been repaired and the vehicle was now registered under Poleon's name. The

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Court informed Parties that it would take this matter under advisement. Shortly after the hearing, the People filed a Supplement to their Opposition to Plaintiff's Motion to Dismiss. The Supplement states in part that the People wished to inform the Court that after a review of the paperwork related to the subject vehicle, the People realized that it was more culpable for the loss of the car than previously realized. Attached to the Supplement is a letter to the Forensics Division of the Virgin Islands Police Department that states "The vehicle involved in the above case may be released. It is my understanding all processing and photographs have been done. Thank you." (Ex. 1, People's Supp.,) It is signed by assistant attorney general Melissa Ortiz. (*Id.*) The Defendant argues that this matter must be dismissed because of the People's failure to preserve the vehicle. Defendant claims that he would have had his expert examine the vehicle to determine the speed of the vehicle at the time of the alleged incident, whether his vehicle hit the victim and other relevant issues which could have exonerated him or rebutted the People's claims. The Defendant alleges that the People have both violated his Constitutional rights under the *Brady v. Maryland* doctrine and violated Federal Rule of Criminal Procedure 16. The Court will examine each argument below.

II. STANDARD

A. Due Process

Defendants must be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485 (1984). This includes access to certain discoverable evidence held by the prosecution. Prosecutors are ultimately responsible for ensuring that this discoverable evidence is properly preserved and can be produced in court. *Kyles v. Whitley*, 514 U.S. 419 (1995). This obligation extends to law enforcement officers, property clerks, evidence custodians, lab technicians, and all others directly responsible for the storage and retention of evidence. *Id.* The Supreme Court has held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld. *Brady v. Maryland*, 373 U.S. 83 (1963). In *California v. Trombetta*, the Supreme Court established that law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve exculpatory evidence " . . . that might be expected to play a significant role in the suspect's defense." *California v. Trombetta* 467 U.S. 479, 488 (1984). In

Arizona v. Youngblood, the Supreme Court distinguished an accusation of suppression on the part of the prosecutor under *Brady v. Maryland*, from an accusation that the prosecutor lost or destroyed evidence. *Arizona v. Youngblood*, 488 U.S. 51 (1988). *Youngblood* established that the Due Process Clause “requires a different result when we deal with the 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.” *Illinois v. Fisher*, 540 U.S. 544, 548 (2004)(quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988)). In that instance, the failure to preserve merely useful evidence does not violate due process “unless a criminal defendant can show bad faith on the part of the police.” *Id.* at 548 (quoting *Youngblood* 488 U.S. at 58).

B. Federal Rule of Criminal Procedure 16

Fed. R. Crim. Proc. 16 governs pre-trial discovery in criminal matters. This rule states in part,

Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and; (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

Fed. R. Crim. Proc. 16(a)(1)(E). The Court is empowered both by statute and by rule to impose sanctions for discovery violations in criminal matters. *See* 4 V.I.C. § 281(2) (“Every judicial officer shall have power . . . [t]o compel obedience to his lawful orders.”); *see also* Fed. R. Crim. Proc. 16(d)(2)). If a party fails to comply with discovery, the Court may order the party to permit discovery, grant a continuance, prohibit that party from introducing the undisclosed evidence or enter any other order that is just under the circumstances. *Id.* at (d)(2). The decision to impose sanction is discretionary. *United States v. Lopez*, 271 F.3d 472, 484 (3d Cir. 2001).

III. DISCUSSION

A. Under the *Youngblood* Standard, the evidence lost by the People was not exculpatory but merely useful.

Whether or not the bad faith requirement laid out in *Youngblood* applies in matters such as this depends not on the "... centrality of the contested evidence to the prosecutions' case or the defendant's defense but on the distinction between "... material exculpatory evidence and potentially useful evidence" *Id.* at 549 (quoting *Youngblood* 488 U.S. at 57 – 58). Where the evidence destroyed is "at best only potentially useful evidence" *Youngblood's* bad faith requirement applies. *Id.*

The People proffered to the Defendant, photographs of the scene and vehicle taken after the incident, the police report, measurement records taken at the scene, the autopsy report and DNA taken from the hood of the subject vehicle. (Def. Ex. 1, Crash Reconstruction Report.) Subsequently, the Defendant retained an expert, Mr. Bobby Jones ("Jones") to review the discovery given to him by the police and additional data from the National Highway Safety Administration related to incidents involving Nissan Frontier vehicles. *Id.* at 3. In the report, Jones touches on several issues that he states are crucial to the defense but unavailable because of the loss of the vehicle by the police. The report states that the method used by the police to measure tire patterns was not appropriate to ensure accurate measurements. *Id.* at 4. Jones explains that the police did not document how they took certain measurements at the scene, which raised serious concerns about the overall accuracy of the recorded measurements. *Id.* at 6. Jones illustrates this by noting that a police officer's measurement stating that there was sixteen inches between the pedestrian's right leg and the pickup truck did not correspond to the autopsy's report's measurement of the same injury as fourteen inches. *Id.* at 8. The report also states that the police did not document any information in relation to the vehicles tires and that the minimum suggested identification and measurements were not obtained or photographed. *Id.* at 9. Jones contends that this information would "... be crucial in comparing the pickup tires to the tire prints visible to the police photographs." *Id.* Despite Jones' ability to view the tire itself, he also advances the defense by stating that tire prints shown in the photographs do not match the tire tread pattern of the Nissan Frontier. *Id.* at 11. Which Jones claims indicates that the tire prints

shown in the photograph were created by another vehicle. *Id.* Jones next reviews photographs of damage to the vehicle and notes that the police did not clearly identify vehicle damage in relation to the victim's size or injury patterns. *Id.* at 7. Jones also reviewed DNA evidence taken from the hood of the vehicle and noted that certain things that would necessarily be expected at the point of impact between the vehicle and the victim were not indicated as having been found by the police such as cloth transfer and human tissue. Further, Jones propounded that the DNA taken from the vehicle was not conclusive as to prove contact. In addition to these issues, Jones claims the Defendant now faces an insurmountable hurdle of mounting a good defense because he cannot inspect the vehicle himself.

In addition to the report proffered by Jones, at the first suppression hearing on this matter, counsel for Defendant explained that the Nissan Frontier model is built with an event data recorder ("EDR"). An EDR is a device that is used to record technical vehicle and occupant information for a brief period of time before, during and after a crash. The Defendant argued that the EDR located in the vehicle could have confirmed the speed of the Defendant's vehicle and whether the vehicle suffered a mechanical failure at the time of the incident and that without access to the EDR, he was prejudiced in mounting his defense at trial.

To meet the standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable available means. *Trombetta*, 467 U.S. at 489. After a review of the instant motion, expert report and the record herein, the Court cannot find that the evidence lost by the police had exculpatory value. In his report, the expert indicates that the information from the vehicle would have been valuable to him in buttressing his opinion but the Court does not find that the report indicates that this information is such that the defendant could not obtain comparable evidence by reasonably available means. The expert conceded that he was given the arrest report, photographs and measurements from the scene. The report itself indicates that the expert was able to compare factory specifications and information about the Nissan Frontier and compare it to the evidence given to him by the police. While the loss of the EDR is important, the Court does not find that the EDR or the loss of the vehicle goes beyond the evidentiary standard set by the Supreme Court in *Youngblood*, i.e. the Court does not find that

the evidentiary material was such “ . . . that it could have been subjected to tests, the results of which might have exonerated the defendant.” *Illinois v. Fisher*, 540 U.S. at 549 (quoting *Youngblood* 488 U.S. at 57 – 58.) Where the evidence destroyed is “at best only potentially useful evidence, *Youngblood*’s bad faith requirement applies. *Id.*

B. The People did not act in bad faith.

Under *Youngblood*, a defendant must show bad faith on the part of the police in matters where merely useful evidence has been lost or destroyed. This requirement does two things; it limits the extent of the police’s obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it. *Youngblood* 488 U.S. at 338. *Id.* Courts examine the circumstances surrounding the loss or destruction of evidence for indications that the People have acted in bad faith. These factors include whether the police followed established procedure and guidelines¹, the People’s underlying rationale behind the loss or destruction of evidence², if there is an indication that negligence or carelessness resulted in the loss or destruction of the evidence³ or whether a third – party was involved in the destruction of the evidence. ⁴ At the suppression hearing, counsel for Defendant stated that he did not feel that the People acted in bad – faith by allowing the insurance company to sell the vehicle to a police officer. The Court agrees. There is no indication in the record that the prosecutors or police acted in a manner that indicated bad – faith, rather the Court finds that negligence was the issue here.

C. The People violated Federal Rule of Criminal Procedure 16

Upon a defendant’s request, the government must permit the defendant

¹ *California v. Trombetta*, 467 U. S. 479, 488 (1984).

² *U.S. v. Pirre*, 927 F. 2d 694, 697 (2d. Cir. 1991)(no bad faith where government discarded potentially exculpatory cocaine to free storage space)).

³ *Lovitt v. True*, 403 F.3d 171, 187 (4th Cir. 2005) (no bad faith where court clerk destroyed evidence after trial without consulting police or prosecutor)).

⁴ *U.S. v. Hughes*, 211 F.3d 676, 689 (1st. Cir. 2000)(government not liable for missing photos of crime scene because FBI repeatedly requested photos under control of Mexican photos)).

to *inspect* and to copy or photograph books, papers, documents, data, photographs, *tangible objects*, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

(*emphasis added*) Fed. R. Crim. Proc. 16(a)(1)(E). The record in this matter clearly evidences that the People have violated this rule. The Defendant repeatedly requested access to the subject vehicle for inspection. The People at first ignored Defendant's request before informing him that the car was no longer in police custody. At the suppression hearing, Officer Joseph testified that while there were no written procedural guidelines; the release of the vehicle to the insurance company and its subsequent sale to another police officer was not normal procedure. Initially, at the second suppression hearing, the People attempted to explain away the incident by laying the blame on the Defendant. Counsel for the People argued that because the Defendant signed an insurance release form, the vehicle was his responsibility.

This excuse is disingenuous because it attempts to relieve the People of its responsibility for the negligent conduct of the police. Further, to lay the blame on the Defendant in this matter would require the Court to completely ignore both law and common sense. The People have charged the Defendant with a litany of serious crimes including negligent homicide by means of a vehicle in violation of section 504 of title 20 of the Virgin Islands Code. The instrument used to accomplish the offenses that the Defendant is charged with is a motor vehicle. A vehicle which was kept in the police impound lot. When the Defendant signed his insurance release form, he released ownership of the vehicle for insurance purposes. This private insurance matter has nothing to do with the People's obligation to preserve evidence in a criminal investigation and prosecution. After a review of the record herein, the Court finds that the People have violated Fed. R. Crim. Proc. 16.

The Court turns to Rule 16(d)(2), which addresses a party failure to comply with a discovery request. Under Rule 16(d)(2) upon the court becoming aware of the failure, it "may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems

just under the circumstances." *Id.* In this instance, the first two options are foreclosed. The vehicle is no longer in possession of the police so no discovery or inspection could take place and a continuance of this matter would not remedy the failure to disclose as the vehicle has been repaired and is no longer in the custody of the People. The only option that remains is the exclusion of evidence. The exclusion of evidence is a rare remedy that should only be employed after a review of the following factors; (1) the reasons for the government's delay in producing the requested materials, including whether or not the government acted in bad faith when it failed to comply with the discovery request; (2) the extent of prejudice to the defendant as a result of the government's delay; and (3) the feasibility of curing the prejudice with a continuance. *Government of the Virgin Islands v. Ubiles*, 317 F. Supp. 2d 605, 608 (D.V.I. 2004); see *United States v. Wicker*, 848 F.2d 1059, 1061 (10th Cir. 1988).

Simply put, there is no justifiable reason that the People did not comply with Defendant's request for inspection of the vehicle. They could not comply because of their own negligence. As noted earlier, the Court did not find that the People acted in bad faith, however the exclusion of bad – faith does not foreclose the exclusion of evidence as a sanction. See *Gov't of the V.I. v. Blake*, 118 F.3d 972, 978 n.5 (3d Cir. 1997) ("Although the discovery sanctions may penalize the government for the 'carelessness and confusion' of one prosecutor who failed to follow discovery rules, this is entirely appropriate under Rule 16."). The level of negligence demonstrated by the police in this matter weighs heavily. As does the People's attempt to blame the Defendant for the loss of the vehicle in this matter. The Defendant is also prejudiced by the People's violation of the discovery rule; and while this prejudice does not rise to the level of a constitutional violation the Defendant has demonstrated that the People have prejudiced him in his defense. He is accused of negligent homicide by means of a motor vehicle but does not have access to the vehicle. His expert cannot inspect or investigate this so that he might draw his own conclusions in support of the defense. Finally, as discussed earlier, a continuance of this matter would do nothing. After a review of the above factors, the Court finds that the exclusion of evidence in this matter is warranted.

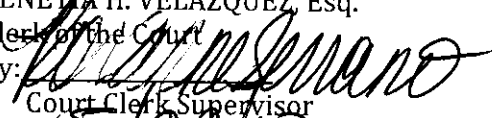
IV. CONCLUSION

After a review of the record herein; the Court finds that Defendant's right under the due process clause of the U.S. Constitution were not violated per the *Youngblood* standard. Thus, Defendant's motion to dismiss for spoliation of evidence must be denied. However, the

People have failed to comply with Fed. R. Crim. Proc. 16. After a review of the law, the Court finds that justice demands that certain evidence in this matter be excluded. As the subject evidence is extensive, this Court will set a hearing in this matter to determine what evidence will be excluded. An order consistent with this opinion will follow.

DONE AND SO ORDERED this 21 day of May, 2013


DARRYL DEAN DONOHUE, SR.
Presiding Judge of the Superior Court

ATTEST:
VENETIA H. VELAZQUEZ, Esq.
Clerk of the Court
By: 
Court Clerk Supervisor
Dated: 5/22/13