COURT OF APPEALS OF VIRGINIA

Record No. 0353-25-1

KEVIN BRADFORD CHESNEY
v.
COMMONWEALTH OF VIRGINIA

Present: Judges O'Brien, Athey and White

Opinion Issued September 29, 2026[*]

FROM THE CIRCUIT COURT OF GLOUCESTER COUNTY
Jeffrey W. Shaw, Judge

(David B. Hargett; Hargett Law, PLC, on briefs), for appellant.

(Jason S. Miyares,[1] Attorney General; Shelly R. James, Senior Assistant Attorney General, on brief), for appellee.

MEMORANDUM OPINION
PER CURIAM

Following a jury trial, the circuit court convicted Kevin Bradford Chesney (appellant) of driving while intoxicated with a blood alcohol level between 0.15 and 0.20 grams per 210 liters of breath. On appeal, appellant argues that the court erred in denying his motion to dismiss on *Brady*[2] grounds and denying his motion to set aside the verdict due to insufficient evidence. He further

[*] This opinion is not designated for publication. *See* Code § 17.1-413(A).

[1] Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

[2] Referring to the seminal case, *Brady v. Maryland*, 373 U.S. 83 (1963), in which the Supreme Court of the United States held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Id.* at 87; *see also Arizona v. Youngblood*, 488 U.S. 51 (1988).

claims that the arresting officer destroyed exculpatory evidence and falsely testified at trial. Finding no error, we affirm the conviction.[3]

BACKGROUND

We recite the facts "in the 'light most favorable' to the Commonwealth, the prevailing party in the trial court." *Hammer v. Commonwealth*, 74 Va. App. 225, 231 (2022) (quoting *Commonwealth v. Cady*, 300 Va. 325, 329 (2021)). In doing so, we discard any evidence that conflicts with the Commonwealth's evidence and regard as true all the credible evidence favorable to the Commonwealth and all inferences that can be fairly drawn from that evidence. *Cady*, 300 Va. at 329.

Trooper Jean-Marie Sebatumitsi stopped appellant for driving 62 mph in a 45-mph zone. At the time, Trooper Sebatumitsi was not wearing a body-camera, but he was wearing an audio-recording device that transmitted to his dashcam, which was recording. Appellant explained that he was on his way to return the car, a rental, to the airport. Trooper Sebatumitsi smelled an odor of alcohol and asked appellant if he had been drinking. Appellant initially denied drinking but then admitted he had "a couple bourbons . . . an hour or two" earlier. Trooper Sebatumitsi conducted field sobriety tests and, based on appellant's poor performance, arrested him. When Trooper Sebatumitsi transported appellant to the precinct to administer a blood-alcohol breath test, appellant initially refused the test, asking to speak to an attorney. After appellant called his attorney, he agreed to submit to testing.

Trooper Sebatumitsi testified that he followed the standard procedure for the test, including a 20-minute observation period to ensure that appellant did not belch, eat, drink, or take any other actions that might impact the test.

[3] Having examined the briefs and record in this case, the panel unanimously agrees that oral argument is unnecessary because "the appeal is wholly without merit." *See* Code § 17.1-403(ii)(a); Rule 5A:27(a).

Appellant burped during the observation period, and Trooper Sebatumitsi restarted the period. Before the observation period, Trooper Sebatumitsi had not seen appellant burp. Trooper Sebatumitsi testified that appellant did not burp during the second observation period. The test indicated that appellant had a blood alcohol level of 0.19 grams per 210 liters of breath.

Following the arrest, Trooper Sebatumitsi removed his dashcam's storage disc and downloaded its contents, providing copies of the entire recording to the Commonwealth's attorney and the sheriff's office. These recordings were given to appellant as part of routine discovery. A portion of the recording, a file labeled "Title 16" by the dashcam system, was entirely blank or otherwise corrupted, making it unreadable. Title 16 encompassed about 37 minutes of the encounter and corresponded to the observation periods and eventual breath testing. Other segments of the incident were also missing or inaccessible. At trial, appellant testified that during that time frame he was burping and that he tried to hide his burping from Trooper Sebatumitsi because the officer had threatened to charge him for impeding the test if he burped again.

Several witnesses testified on appellant's behalf. A lay witness testified that she had been with appellant that day and did not see him drink anything. Appellant's friend, who picked him up from the sheriff's office when he was released that evening, testified that he did not notice anything unusual about appellant's behavior, nor did the attorney who appellant called that day. Another friend, Dr. Joel Feldman, a vascular surgeon who no longer had an active clinical practice, testified that appellant had GERD,[4] which caused him to burp frequently.

One of appellant's expert witnesses acknowledged that the breath-testing machine included safeguards to prevent residual alcohol in the stomach and mouth from artificially inflating the results. Another expert witness opined that a tainted reading would induce an

[4] Gastroesophageal reflux disease.

"enormous response" from the machine. The witnesses both testified about the effect of stomach alcohol from burping on a breath test. Both admitted that they had not examined the machine used and that they were not qualified to operate it.

The Commonwealth's expert witness, who led the breath testing division at the Department of Forensic Science, testified about the safeguards for the machine and stated that she had reviewed the results and saw nothing to invalidate this test. At the conclusion of the case, the jury found appellant guilty of driving under the influence.

Appellant moved to set aside the verdict. He argued that the jury was improperly instructed, the testing machine was unreliable, and the evidence was generally insufficient. The court denied the motion.

Appellant also moved for a dismissal or new trial on the grounds that the police had violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). He claimed that Trooper Sebatumitsi lied during his testimony and had destroyed evidence in violation of department policy. Appellant called Sergeant Jeffrey Teagle to testify to the Virginia State Police's evidence handling procedures. Sergeant Teagle testified that officers were expected to remove the original discs from their recording systems, make copies of the contents through a system called "WatchGuard," and then turn the original disc over to their supervisor. The WatchGuard system does not allow officers to edit or rename the recordings. Sergeant Teagle testified that the original discs were preserved for at least 30 days, but that department practice was to purge old discs at the beginning of a new year unless they involved a felony or "unusual event." Sergeant Teagle explained that appellant's arrest would not qualify for prolonged retention under department policy, so it was destroyed after the new year, some six or seven months later.

Appellant also tried to obtain a copy of an internal investigation report created in response to a complaint he filed against Trooper Sebatumitsi. The court reviewed the report in camera and determined that it contained no potentially exculpatory information. The court did release a single page summary of an interview with Communications Technician Ed Isak, describing the function of the recording system. Isak opined as to potential causes of the missing data, including a technical glitch or physical damage to the disc itself. The court denied a motion for dismissal or new trial, ruling that there was no evidence of any bad faith.

ANALYSIS

I. *The court did not err in denying appellant's motion to dismiss or grant a new trial.*

Appellant argues that the trial court erred in denying his motion to dismiss or grant a new trial, due to a *Brady* violation.

"The suppression of exculpatory evidence by the government violates due process if the evidence is material to either guilt or punishment . . . ." *Taylor v. Commonwealth*, 4 Va. App. 45, 48 (1987). Because appellant's due process claim raises a constitutional question, we review it de novo. *Wilkins v. Commonwealth*, 292 Va. 2, 7 (2016).

> [A] defendant seeking a new trial on the basis of missing evidence formerly in the Commonwealth's possession must show that (1) the evidence possessed an apparent exculpatory value, (2) the defendant could not obtain comparable evidence from other sources, and (3) the Commonwealth, in failing to preserve the evidence, acted in bad faith.

Gagelonia v. Commonwealth, 52 Va. App. 99, 115 (2008).

Appellant's claim fails because he has shown neither the apparent exculpatory value of the evidence nor bad faith on the part of the Commonwealth. "*Brady* and its progeny pertain to exculpatory evidence still in the government's possession, of which the exculpatory value is known." *Id.* at 114. But *Arizona v. Youngblood*, 488 U.S. 51 (1988), "pertain[s] to evidence that is no longer in the government's possession, whose exculpatory value, if any, is unknown."

Gagelonia, 52 Va. App. at 114. Appellant argues that "Title 16" would have shown that he burped during the observation period, potentially impacting the accuracy of the test. Without any evidence, appellant assumes that Title 16 was uncorrupted on the original disc. Further, Trooper Sebatumitsi testified that he did not observe appellant burp. Without corroboration of his own self-serving testimony, appellant's argument raises no more than the speculative possibility that the unviewed evidence could have exculpated him: he has not established that any burping would have circumvented the test's numerous safeguards against falsely elevated readings. "[T]he possibility that evidence could have exculpated a defendant depending on future testing results is not enough to satisfy the constitutional standard of materiality." *Lovitt v. Warden*, 266 Va. 216, 241 (2003). For that reason, we find that the evidence on the destroyed original disc did not possess "apparent exculpatory value." *Gagelonia*, 52 Va. App. at 115.

Further, appellant was also unable to show any bad faith underlying the Commonwealth's destruction of the evidence. "[U]nless 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." *Prieto v. Commonwealth*, 278 Va. 366, 396 (2009) (alteration in original) (quoting *Youngblood*, 488 U.S. at 58). "[T]he presence or absence of bad faith by the police . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Gagelonia*, 52 Va. App. at 115 (quoting *Youngblood*, 488 U.S. at 56 n.*). Trooper Sebatumitsi testified that he had no control over the recording system beyond his limited ability to remove the storage disc and copy it. This testimony was supported by the testimony of Sergeant Teagle and the released interview of Communications Technician Isak. After hearing the testimony and reviewing the internal police investigation in camera, the court found no evidence of bad faith. This finding is not plainly wrong, and accordingly, we do not

upset it. *See Wilkins*, 292 Va. at 7 (explaining that "the factual findings of the circuit court are not to be disturbed unless they are plainly wrong or are without evidence to support them").

II. *The court did not err in finding sufficient evidence to support the jury's conclusion that appellant was driving under the influence.*

Appellant argues that the evidence was insufficient to prove he was driving under the influence with a blood alcohol level between 0.15 and 0.20 grams per 210 liters of breath.

"When an appellate court reviews the sufficiency of the evidence underlying a criminal conviction, its role is a limited one." *Commonwealth v. Garrick*, 303 Va. 176, 182 (2024). "The judgment of the trial court is presumed correct and will not be disturbed unless it is 'plainly wrong or without evidence to support it.'" *Pijor v. Commonwealth*, 294 Va. 502, 512 (2017) (quoting Code § 8.01-680). "Thus, 'it is not for this [C]ourt to say that the evidence does or does not establish [the defendant's] guilt beyond a reasonable doubt because as an original proposition it might have reached a different conclusion.'" *Commonwealth v. Barney*, 302 Va. 84, 97 (2023) (alterations in original) (quoting *Cobb v. Commonwealth*, 152 Va. 941, 953 (1929)).

The only relevant question for this Court on review "is, after reviewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *Sullivan v. Commonwealth*, 280 Va. 672, 676 (2010)).

A driver who has a blood alcohol content of above 0.08 grams per 210 liters of breath is guilty of driving under the influence of alcohol and faces enhanced penalties if the blood alcohol content exceeds 0.15 grams per 210 liters of breath. Code §§ 18.2-266, -270.

Here, the evidence was sufficient to prove that appellant was operating a vehicle while intoxicated. He was speeding and smelled of alcohol. He initially denied drinking but quickly admitted having bourbon earlier that day. He performed poorly on field sobriety tests, and when

taken to the sheriff's office, his breath test revealed a 0.19 blood alcohol content. Though he presented evidence that he had GERD, which could have impacted the test under certain circumstances, the Commonwealth countered that evidence with testimony that the testing machine had safeguards against such interference. Further, Trooper Sebatumitsi testified that he did not notice any burping in the 20-minute observation period. Appellant's own experts were not trained to operate the specific machine used, and even then, their testimony bolstered the Commonwealth's evidence by admitting that the machines included safety standards to prevent false readings. In summary, the evidence proved that appellant was driving under the influence of alcohol, with a blood alcohol content of 0.19 grams per 210 liters of breath. We find no error.

CONCLUSION

For these reasons, we affirm the circuit court's judgment.

Affirmed.