

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-208

JANUARY TERM, 2002

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| State of Vermont | } | APPEALED FROM: |
| | } | |
| v. | } | District Court of Vermont, |
| | } | |
| Cheryl A. Burak | } | Unit No. 3, Caledonia Circuit |
| | } | |
| | } | DOCKET NO. 81-2-01 Cacr & 4-1-01 |
| | } | Cacr |
| | } | |
| | } | Trial Judge: Mark J. Keller |
| | } | |

In the above-entitled cause, the Clerk will enter:

Defendant appeals a criminal conviction for driving while intoxicated (DWI) and the civil suspension of her driver's license, arguing that the failure of state police to videotape her DWI processing at the state police barracks violated statutory law and deprived her of due process, thereby requiring the suppression of evidence concerning the administration of her rights under 23 V.S.A. 1202. Because there is neither a statutory nor a constitutional right to police videotaping of DWI processing, we affirm defendant's conviction and license suspension.

On January 19, 2001, a state trooper observed defendant's vehicle cross the center line of a two-lane highway and strike a guardrail. When the officer approached the vehicle, he noticed several indicia of intoxication based on his observations of defendant. Eventually, defendant was arrested and taken to the state police barracks for processing. The processing at the barracks was not videotaped because there were no blank videotapes available. At her civil suspension hearing, defendant filed a motion to suppress based on the absence of a videotape of the processing. After the court denied the motion, defendant entered a conditional plea concerning the criminal DWI charge, and her license was suspended. On appeal, defendant argues that the failure of police to videotape encounters with citizens stemming from suspected major motor vehicle offenses violates statutory law and the citizens' constitutional right to due process.

Recently, in State v. Dimick, No. 01-152 (Vt. Dec. 26, 2001) (mem.), this Court held that there is neither an explicit nor an implicit statutory duty to videotape major motor vehicle and criminal enforcement stops. That decision plainly extends to DWI processing at police barracks, for which there is not even an established state police policy requiring videotaping.

Further, although the defendant had withdrawn his constitutional argument in Dimick, we noted that his concession concerning the absence of any constitutional videotape requirement was consistent with this Court's holding in State v. Groton, 149 Vt. 602, 606 (1988) ("This Court has never previously held that the Vermont Constitution mandates tape-recording of a suspect's voluntary statements as a requirement of due process, nor does our reading of the Vermont Constitution find any support for defendant's position."). See Dimick, entry order at 2 n.1. We reiterated that "[t]he most appropriate means of prescribing rules to augment citizens' due process rights is through legislation," and that we would not create a videotape requirement by "judicial fiat." Dimick, entry order at 3-4 (quoting Gordon, 149 Vt. at 606).

Here, defendant's due process argument - and his attempt to distinguish Gordon - is predicated on his claim that the Legislature has created a statutory duty to videotape police encounters with citizens concerning suspected major motor vehicle violations. As noted, Dimick has already rejected this argument. "Rules concerning preservation of evidence are generally matters of state, not federal constitutional, law." See California v. Trombetta, 467 U.S. 479, 491 (1984) (O'Connor, J., concurring). In any event, defendant has failed to demonstrate either bad faith on the part of the police or constitutional materiality as to the nature of the evidence, and thus her arguments are unavailing under federal constitutional law. See Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("unless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process"); Trombetta, 467 U.S. at 488-89 ("Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this 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 reasonably available means.") (footnote and citation omitted).

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

James L. Morse, Associate Justice

Denise R. Johnson, Associate Justice