

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-149

NOVEMBER TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Orleans Circuit
	}	
Alfred Poutre	}	DOCKET NO. 771-12-05 Oscr

Trial Judge: Edward J. Cashman

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

Defendant Alfred Poutre appeals from a conviction of driving under the influence (DUI), in violation of 23 V.S.A. § 1201(a)(1). He contends the trial court erred in denying his motion to suppress a blood alcohol test as a sanction for the State's failure to produce a videotaped recording of the processing and breath test which occurred at the police barracks. We affirm.

At approximately 10:00 p.m. on the evening of December 16, 2005, a police officer responding to the report of an accident discovered a vehicle off the road, lying on its side. The officer spoke with the driver, later identified as defendant, who reported that the accident had occurred about half an hour earlier. As indicated in his affidavit, the officer detected an odor of alcohol on defendant's breath and observed that defendant's eyes were bloodshot and watery. When questioned, defendant acknowledged consuming four cans of beer, most recently within the last hour and a half. The officer administered several field sobriety tests, observing that defendant could not maintain his balance, walk heel to toe, or stand on one leg. Defendant failed all six eye tests. Based on these observations and a preliminary breath test, the officer arrested defendant on suspicion of DUI and transported him to the police station. Defendant voluntarily submitted to a Datamaster breath test. The test result indicated that, at the time of the accident, defendant's blood alcohol content (BAC) was .188 percent.

Defendant later moved to suppress the test result on the ground that, despite several requests, the State had been unable to produce a videotape made by the police of defendant's processing and testing at the station. Based on a stipulated set of facts, the court denied the motion, finding that, on the facts presented, it could not determine that the videotape "would materially add [to] or detract" from the evidence. Defendant then entered into a conditional plea of guilty, preserving his right to challenge the court's ruling. This appeal followed.

Defendant maintains that his due process rights were violated by the State's failure to produce the videotape, and that the violation required exclusion of the Datamaster test result. The parties agree that the proper standard to analyze the claim is that set forth in State v. Bailey, 144 Vt. 86, 94-96 (1984), recently reaffirmed and applied in State v. Gibney, 2003 VT 26, 175 Vt. 180. Under this test, the defendant must first demonstrate a "reasonable possibility" that the lost evidence would have been favorable to his case. Gibney, 2003 VT 23, ¶ 38. If the defendant makes such a showing, the court must then perform a "pragmatic balancing" of three factors: (1) the degree of negligence or bad faith on the part of the government; (2) the importance of the evidence lost; and (3) other evidence of guilt adduced at trial. Id.

To establish the first element of the test, defendant claims that the arresting officer's affidavit demonstrates that defendant was "cogent and articulate" and gave "detailed and intelligent" responses to questions during the processing and test administration. Thus, defendant argues that the videotape would have supported a claim that he was not impaired. The affidavit, however, consists largely of a series of standardized questions and boxes to be either checked or left blank, plus several additional notes by the officer recounting defendant's brief responses as to where he had been, the number of drinks he had consumed, and when he had last consumed them. Indulging all reasonable inferences in favor of defendant, the affidavit simply does not support defendant's claim that his demeanor was composed or his responses particularly "cogent" or "articulate." Indeed, the affidavit contains information making it equally, if not more likely, that the videotape would have been unfavorable to defendant, if his physical condition at the station remained consistent with the officer's field observations. Defendant also cites two checked boxes on the DUI processing form indicating that he was "cooperative" and "polite," but these unadorned behavioral descriptions are hardly inconsistent with being under the influence of alcohol.

Although we have not had occasion to explore the showing necessary to establish a "reasonable possibility," other courts applying a similar standard have stressed that it must be "based on concrete evidence and not on mere speculation, that the [government's] actions deprived [the defendant] of evidence that would have been favorable to his case." Commonwealth v. Olszewski, 625 N.E.2d 529, 535 (Mass. 1993); see also State v. Eugene, 340 N.W.2d 18, 28 (N.D. 1983) (rejecting the idea that "defendant's speculative version of the favorability and materiality of lost evidence must be uncritically accepted and prejudice assessed as if the nature of the evidence were as the defendant claims it might have been"); State v. Michener, 550 P.2d 449, 454 (Or. Ct. App. 1976) (defendant claiming a denial of due process based on lost or destroyed evidence must raise a "reasonable possibility based on concrete evidence rather than a fertile imagination"); State v. Mine, 671 P.2d 273, 279 (Wash. Ct. App. 1983) ("Imaginative speculation may lead to a conclusion that destroyed evidence could be material and favorable, but such a possibility may not be reasonable.") (quotation and citation omitted). As these cases suggest, the "reasonable possibility" standard may be low, but it is not meaningless. The evidence on which defendant relies here does not establish, in any concrete sense, a reasonable possibility that the videotape would have shown what he claims.

Even assuming the videotape is as defendant supposes, however, the balance of other factors does not warrant the finding of a due process violation. First, defendant makes no claim that the State's failure to produce the videotape was in bad faith or improperly motivated. And as to the videotape's importance, the record at this stage of the proceedings provides little or no

basis to establish its probative value at trial. There is nothing to suggest, for example, that the officer would have testified that defendant was anything other than composed during the processing, so the tape's impeachment value is, at best, uncertain. Although defendant also maintains that the tape might have been useful to raise doubts about the test's reliability, there is little reason to believe that it would have been effective absent any other evidence that the test was improperly administered or that the machine was defective, and there is no evidence to support either of these claims. Accordingly, we discern no grounds for a due process violation, and therefore no basis to disturb the judgment.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice