

**IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE
DIVISION V**

STATE OF TENNESSEE,

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Case No. 2019-A-26

v.

ANDREW DELKE

2021 JUN 28 AM 10:18
CRIMINAL COURT CLERK
FILED

REVISED ORDER

I. Introduction

This Court heard motions in limine on June 4th, June 7th, and June 15th, 2021. The Court took the Defense Motion in Limine No. 16 “Regarding Missing Evidence which the State failed to Preserve and For the Court to Impose Certain Remedies Given the Constitutional Violation” under advisement and now issues this Order regarding the Motion in Limine and the requested relief.

II. Factual Background

After careful review of the evidence submitted and the testimony provided, the Court finds the following facts as alleged to be relevant. On July 26th, 2018 at approximately 7:00 pm, Officer Andrew Delke witnessed a white Chevrolet Impala travelling at a high rate of speed. Officer Delke pursued the vehicle and followed it into the Henry Hale Housing Complex. Occupants of the white Chevrolet Impala exited the vehicle. Officer Delke observed one individual running away from the vehicle and pursued this individual on foot. The individual was later identified as Daniel Hambrick. During the foot chase, Mr. Hambrick fell and dropped something on the pavement of the Henry Hale parking lot which turned out to be a cell phone. Mr. Hambrick proceeded to stand

up and continue running out of the Henry Hale complex and onto Jo Johnston Avenue. During this time, Officer Delke fired his weapon, shooting Mr. Hambrick, who succumbed to his injuries.

The Metropolitan Development and Housing Agency (MDHA) maintains nearly 84 security cameras in and around the Henry Hale Complex where the shooting occurred. On the night of the incident, Joseph Edenfeld, a former police officer, and then a MDHA employee, was asked to retrieve footage from the complex between 7:00pm and 7:15pm. Edenfeld retrieved this footage and turned it over via jump drive to the Metropolitan Nashville Police Department (MNPd), the District Attorney's Office, and TBI agent Steven Kennard. Agent Kennard reviewed this footage once, and then went back a second time to obtain any additional footage. MDHA has access to these cameras and this footage, but the TBI, MNPd, and District Attorney's Office do not.

The Defendant contends that there are gaps in the surveillance footage where relevant events may have occurred because these security cameras do not record every square inch of the housing complex. The Defendant asserts that all footage of this incident that was recorded on the security cameras was initially saved on the government's computer system. However, footage that is not manually saved after 30 days is deleted from the system. The Defendant contends that because defense counsel did not receive the video footage until approximately five months later, there is a possibility that relevant footage may have been deleted. The Defendant asserts that the preserved video footage does not include roughly 36 feet of the area in which Officer Delke is chasing Mr. Hambrick on foot. The Defendant alleges that it was within this 36 feet of "void area" that Mr. Hambrick brandished his pistol in a manner in which caused Officer Delke to become fearful and brandish his own service pistol. The Defendant contends that the State had a duty to

preserve all relevant footage. However, Defendant also contends that it cannot be known what exactly would have been on this footage of the “void area”.

The defendant contends that because this case will rely heavily on video footage, the court should suppress all video evidence or impose a jury instruction on the alleged “lost evidence.” In order to protect his right to a fair trial, the Court will examine this claim.

III. Legal Analysis

Pursuant to the Fifth Amendment to the United States Constitution and Article I § 8 of the Tennessee Constitution, a defendant is guaranteed the right to Due Process. The Tennessee Supreme Court sets out in *State v. Ferguson* that the State has a duty to preserve evidence that is potentially exculpatory for a defendant. *Ferguson*, 2 S.W. 3d 912, 917 (Tenn. 1999). When the State fails to preserve evidence that is potentially exculpatory for a defendant, a balancing test must be considered to determine if a defendant’s rights have been violated. *Ferguson*, 2 S.W. 3d 912, 917 (Tenn. 1999). In determining the State’s duty to preserve evidence, the Court must consider whether the evidence “might be expected to play a significant role in the suspect’s defense.” *Ferguson* at 917 (quoting *California v. Trombetta*, 467 U.S. 479, 488-89, 104 S.Ct. 2528, 2533-34, 81 L.Ed. 2d 413 (1984)). “To meet this standard... 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.” *Id.*

If the Court determines the State had a duty to preserve the evidence, it must then apply the following factors set forth in *Ferguson*:

- (1) the degree of negligence involved;
- (2) the significance of the destroyed evidence, considered in light of the probative value and reliability or substitute evidence that remains available; and

(3) the sufficiency of the other evidence used at trial to support the conviction.

Id. The Court must then balance the factors and weigh whether a trial without the evidence would not be fundamentally fair to the defendant. *Id.* If the Court finds that a trial without evidence would be fundamentally unfair to the defendant, then it may dismiss the charges or craft an otherwise appropriate remedy. *Id.*

The Tennessee Supreme Court applied *Ferguson* in *State v. Merriman*, 410 S.W.3d 779, 784 (Tenn. 2013). In *Merriman*, the defendant was pulled over by police for a suspected DUI. The officer activated his video equipment prior to stopping the defendant, capturing the stop and subsequent field sobriety tasks. The officer testified about the encounter and the video, but the State did not surrender the video to the defendant during the discovery phase of her case. Upon request by the defendant, the State was unable to locate the video. The trial court held a *Ferguson* hearing and the case was dismissed. The State subsequently appealed the decision and the Tennessee Supreme Court affirmed the dismissal. *Id.*

Of note in the *Merriman* decision is the trial court's summation and basis for dismissal. The trial court found the only testimony on behalf of the State would be that of the officer who made the stop and the Sargent who was unable to locate the video. *Id.* at 789. The *Merriman* Court noted the missing "video recording captured Ms. Merriman's conduct in its entirety. Therefore, the video recording was relevant evidence as to all of Ms. Merriman's charges." *Id.* at 792 (emphasis added). The Court further stated that had the case proceeded to trial the trier of fact could have made its own determinations about the actions contained therein. *Id.*

Applying *Ferguson* as set forth above, the Court is of the opinion that the State met its duty to preserve relevant video footage. MNPD contacted the MDHA to retrieve all relevant video footage from the incident. Video footage was collected from over 70 cameras over the span of 15

minutes. The incident between the defendant and Mr. Hambrick lasted between 3-5 minutes. All footage that was collected by the MNPD was provided to the TBI, the District Attorney's Office, and to defense counsel. There was no lost or damaged footage that was not turned over the defense counsel.

Like *Merriman*, the preserved surveillance footage video from July 26th, 2018 contains in its entirety the encounter between Mr. Delke and Mr. Hambrick. A loss of all of the surveillance videos would be detrimental to this case, but the unavailability of the footage from the 36 feet of "void area" is not. There is significant video footage from nearly 70 other cameras that recorded the incident. The actions of Mr. Delke or Mr. Hambrick that could possibly be contained on this missing footage is entirely speculative. The State has a duty to preserve the video footage of this incident, and the State met this duty. The Court will now weigh the subsequent factors set forth in *Ferguson*.

The first factor in the *Ferguson* balancing test is the degree of negligence involved. As mentioned above, the State preserved all video footage that it believed to be relevant to this case. The State successfully preserved video footage from the 71 cameras that were working on the day of this incident. The fact that 13 video cameras did not capture the incident on this day, and therefore footage from these cameras cannot be preserved, does not make the State's actions negligent. It is not certain whether these 13 cameras that did not contain footage of the incident were even operable on this day. The State is not responsible for preserving footage that it never obtained. All video footage that was collected by the State was provided to the Defendant.

The second factor in *Ferguson* examines the significance of the destroyed evidence in light of the probative value and reliability of the remaining secondary or substitute evidence. The "lost" evidence in this case is not significant in light of the other available evidence. There is video

evidence from over 70 other surveillance cameras on the day of this incident. The defendant contends that the significance of this missing video is profound because no other videos show Mr. Hambrick pointing a gun at Mr. Delke, and there is a possibility that this missing footage shows this encounter. However, this is entirely speculative and completely hypothetical. There is no proof to support that Mr. Hambrick did in fact brandish his weapon during this 36 feet that the surveillance cameras failed to capture. The Defendant has failed to show that this missing evidence is either exculpatory or material to the preparation of the defendant's defense because the assertion of what occurred within the "void area" is entirely speculative and can never be known for certain.

The final *Ferguson* factor requires the Court to consider the sufficiency of the remaining evidence to support the defendant's charges. The evidence supporting the charges against Mr. Delke includes footage from 71 video cameras that were in operation on the day of the incident. In light of the remaining evidence against the defendant, the missing surveillance footage from the "void area" is not significant. As previously mentioned, the video that may or may not have been captured from this 36 feet of "void area" is entirely speculative. As a result, the loss of this specific surveillance footage would not result in a deprivation of Mr. Delke's right to a fair trial. The preserved video footage is substantial and shows the entirety of the incident between Mr. Delke and Mr. Hambrick. A trier of fact will be able to reach a conclusion based on the available evidence. Therefore, the Court finds that the State met its duty to preserve the relevant exculpatory evidence and this missing footage does not rise to the level as to prejudice the Defendant pursuant to *Ferguson*.

IV. Conclusion

Based on the foregoing, the Court finds no Ferguson violation as to the surveillance video pertaining to the alleged incident on July 26th, 2018.

Defendant's motion in limine No. 16 is, therefore, DENIED.

IT IS SO ORDERED.

ENTERED this the 28th day of June, 2021.



MONTE D. WATKINS, JUDGE
DIVISION V

CC: David Raybin
Roger Moore