

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 99 - 658
 :
 MICHAEL SEIBART :
 a/k/a Michael Seibert :

**GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS INDICTMENT
AND/OR IN THE ALTERNATIVE, MOTION TO PRECLUDE USE OF
WEAPON EVIDENCE**

The United States of America, by its attorneys, Michael R. Stiles, United States Attorney for the Eastern District of Pennsylvania, and Carol Meehan Sweeney, Special Assistant United States Attorney for that district, hereby moves the Court to deny the Defendant's Motion to Dismiss Indictment And/Or In The Alternative, Motion To Preclude Use Of Weapon Evidence, and in support thereof avers the following.

I. BACKGROUND

On May 7, 1999, at 2:30 a.m., the defendant was arrested by Philadelphia Police Officer Brian Boos and charged with state weapons and other offenses after Boos found an Astra nine millimeter semi-automatic pistol loaded with 11 live rounds of ammunition under the driver's seat of a white Ford Escort automobile - precisely where the defendant had been sitting. Officer Boos confiscated the weapon and the cartridges it contained and described this evidence on Property Receipt 2191551.

Also on May 7, 1999, at 2:30 a.m., Boos' partner, Officer John Erickson, pursued Aaron Carson when the latter fled from the

passenger side of the white Ford Escort. During the chase, Erickson heard Carson discard a metal object which proved to be a loaded semi-automatic firearm. Officer Erickson confiscated the weapon and the cartridges it contained and described this evidence on Property Receipt 2191550.

A few hours later, Boos and Erickson transported the evidence to the Police Department's Firearms Identification Unit ("FIU") for examination. Given his training and experience, assigned detective Edward Davis believed the surface of these firearms to contain nothing of evidentiary value. As a result, Detective Davis neither "dusted" these firearms for identifiable fingerprints nor marked them "guard for prints" before allowing them to be transported to FIU.¹

The defendant received his state preliminary arraignment on or about May 9, 1999. Private counsel, Meyer Rose, Esquire, thereafter entered his appearance, and the defendant's case began to work its way through the state criminal justice system.²

On August 3, 1999, Officer Ernest Bottomer conducted his examination of the firearm submitted by Officer Boos and prepared a report summarizing his observations and conclusions. He found this firearm to contain both a reddish rust-like substance and an excessive amount of dirt/grime. Because he had received no

¹ The defendant acknowledges that it is not standard police procedure to "dust" a firearm for fingerprints. Memorandum in Support of Motion to Dismiss at 6.

In abundance of caution, Detective Davis did warn other officers of the presence of a red substance on the weapon by ensuring that its property receipt bore the notion "Blood Contaminated." The basis for Detective Davis' opinion that the surface of neither firearm contained anything of evidentiary value is set forth in his Affidavit, which is attached hereto as Exhibit "A."

² After several defense continuances, on September 8, 1999 the defendant was held for trial in the Philadelphia Court of Common Pleas.

request or instruction from anyone to "preserve" the surface of the weapon, and because from his training and experience he, too, believed the surface of this weapon to contain nothing of evidentiary value, Officer Bottomer cleaned the surface of the weapon during his examination to prevent it from contaminating his work area.³

On October 5, 1999, the defendant's state case was adopted federally, when a grand jury issued a one count Indictment charging defendant Michael Seibart, a/k/a Michael Seibert, a convicted felon, with possession of a loaded Astra semi-automatic pistol, caliber nine millimeter Luger, Model A-100, serial number X8675, in violation of 18 U.S.C. § 922(g)(1). The case was assigned to this Court, which scheduled a hearing on pre-trial motions for January 13, 2000 and trial for January 18, 2000.

During pre-trial discussions in December 1999, the government informed defense counsel, Edson Bostic, Esquire, that Aaron Carson had been killed in a motor vehicle accident several months earlier.⁴ Several weeks later, on or about January 5, 2000, defense counsel inquired for the first time whether the firearm had been or could be "dusted" for fingerprints. The government replied that, pursuant to standard police procedure, this had not been done. The government also informed counsel that during the course of his examination, Officer Bottomer had cleaned the weapon.

On January 12, 2000, the defendant served upon the government a Motion to Dismiss the Indictment and/or in the

³ The basis for Officer Bottomer's belief that the surface of this firearm contained nothing of evidentiary value and the reasons for his decision to clean the weapon are set out in his Affidavit, which is attached hereto as Exhibit "B."

⁴ The government so informed the Court in its Response to the Defendant's Motion to Suppress which was filed and served upon the Court and counsel on January 5, 2000.

Alternative, Motion to Preclude Use of Weapon Evidence ("Motion to Dismiss"). There, the defense argues that the government's failure to preserve "crucial evidence of apparent exculpatory value" compels the Court to grant relief.

Because there is no reason to believe the government failed to preserve anything of evidentiary - let alone "apparent exculpatory" - value, the government respectfully submits that this motion is without factual support.⁵ Moreover, because there is no evidence that government actions here were the result of "bad faith," the government submits that the defendant's claims are without legal support as well. Accordingly, the government respectfully requests that the defendant's Motion to Dismiss be denied in its entirety.

II. STATEMENT OF FACTS

On May 7, 1999, at approximately 2:28 a.m., Police Officers Brian Boos and John Erickson responded to a radio call of drug sales by males in a white Ford Escort at Boyer and Stafford Streets in Philadelphia, a high drug area.⁶ The officers were dressed in full police uniform and assigned to an emergency patrol wagon ("EPW"). When they arrived at that location less than five minutes later, Officers Boos and Erickson observed just one vehicle which matched the description provided by police radio. Sitting in it were this defendant, who was behind the

⁵ That the likelihood of finding identifiable fingerprints of anyone on a firearm is very rare is explained in the Affidavit of Lieutenant Mark F. Fisher of the Crime Scene Unit, which is attached hereto as Exhibit "C."

⁶ The defendant asserts that these officers received a radio call merely of "suspicious activity." Defendant's Motion to Dismiss ¶ 5. The CAD Report, documenting that the radio call did pertain to "drugs - outside sales," is attached hereto as Exhibit "D."

wheel, and Aaron Carson, who was on the passenger side. No one else was in the area.

Boos, who was driving, pulled the EPW to the front of the defendant's car on an angle.⁷ He and Erickson both approached it on the driver's side. Boos noticed that the driver's window was down, there were keys in the ignition and the radio was on. Boos and Erickson both observed in the defendant's lap a clear plastic baggie containing a green leafy substance which the officers, from their training and experience, believed to be marijuana, and a bottle of beer. Boos, who was closest to the car, also detected the smell of marijuana in its vicinity.

Boos asked the defendant for a driver's license, but the defendant said he had none. He asked what the defendant was doing there at 2:30 a.m., and the defendant replied that he was just chilling out/drinking with a friend.⁸

Boos asked the defendant to step out of the car. He saw the defendant cover the bag of suspected marijuana with his hand. Boos told the defendant to drop the bag and put his hands on the top of the car. The defendant did so, and Boos patted him down for his own protection. He found no weapon. Boos told the defendant he was under arrest for possession of marijuana.⁹

⁷ At no time did Boos or Erickson detect any furtive movement on the part of either this defendant or Aaron Carson. The defendant's claim that Carson, upon noticing the arrival of the police, "threw the weapon he was holding in his hand towards the floor of the automobile," Motion to Dismiss ¶ 6, thus gives rise to a question of fact to be resolved by the fact-finder.

⁸ The defendant now claims that Carson "at gunpoint forced his way into Seibert's car" and "attempted to intimidate him," Motion to Dismiss ¶ ¶ 5,7. This also creates a question of fact to be resolved by the fact-finder.

⁹ Carson asked whether he should get out of the car. Both police officers said no. With that, Carson opened the door and fled. Officer Erickson pursued him northbound on Boyer

Boos attempted to cuff the defendant. He got one handcuff on when the defendant began to struggle. For approximately five minutes, the defendant ran around the EPW, worked his way down the block, and avoided pepper spray which Boos aimed at him three times. Several times the defendant stated that he wanted to talk about it.¹⁰ Eventually, Boos did succeed in cuffing the defendant in front of himself.

Boos returned to the car to retrieve the defendant's bag of marijuana and his own flashlight and notebook, which he had dropped during the struggle. Boos glanced into the car through the open car door and saw under the driver's seat, just where the defendant's feet had been, the rear sight and part of the grip of a semi-automatic pistol. He reached in and recovered from under the seat where the defendant had been sitting an Astra semi-automatic pistol, caliber nine millimeter Luger, Model A-100, serial number X8675, loaded with 11 live rounds of ammunition.¹¹

Officer Boos searched the defendant incident to arrest a short time later and found a second small bag of marijuana in the

Street. The defendant, speaking in the present tense, then said "he's got a gun, that's why he's running." Carson was arrested moments later after Officer Erickson saw him discard a loaded semi-automatic handgun. In an oral statement to Detective Davis after receiving Miranda warnings, Aaron Carson said that he carried his gun because he had heard the defendant had been shooting the other day.

¹⁰ The defendant did not attempt to speak to Officer Boos until the latter placed him under arrest for possession of marijuana. At no time did the defendant tell or attempt to tell Officer Boos that Carson "had been attempting to intimidate him." Motion to Dismiss ¶ 7. The defendant's representation to the contrary gives rise to yet another question of fact to be resolved by the fact-finder.

¹¹ This weapon was recovered because its sight and handle were in plain view, and not because the defendant's car was "searched," as the defendant suggests. Motion to Dismiss ¶ 8.

defendant's back pants pocket.

Ten days later, on May 17, 1999, Officers Boos and Erickson both saw the defendant driving the white Ford Escort away from the police station after his preliminary hearing had been continued. Both also observed that riding in the back seat of the vehicle at that time was the alleged "intimidator," the now-deceased Aaron Carson.

III. ANALYSIS

This case is not one where the government suppressed material exculpatory evidence notwithstanding a defense request for its production. Brady v. Maryland, 373 U.S. 83 (1963). Nor is it one where the government failed to comply with its duty to disclose material exculpatory evidence even absent a request for such evidence. United States v. Agurs, 427 U.S. 97 (1976). Rather, reduced to its essence, this case involves an allegation that the government failed "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." Arizona v. Youngblood, 488 U.S. 51, 57 (1988) (emphasis added). This allegation requires the Court to consider "what might loosely be called the area of constitutionally guaranteed access to evidence." United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).

In California v. Trombetta, 467 U.S. 479 (1984) the Supreme Court declared that the Constitution requires preservation only of "evidence that might be expected to play a significant role in the suspect's defense," and this exculpatory value must be apparent before the evidence is destroyed. Id. at 488-89.

In Arizona v. Youngblood, supra, Supreme Court expounded upon this principle by explaining that the "fundamental fairness" requirement of the Due Process Clause does not impose on the

police "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." Id. at 58. As a result, "a criminal defendant does not have the right under due process to have all potentially exculpatory evidence preserved for trial or for testing." Griffin v. Spratt, 969 F.2d 16, 20 n.1 (3d Cir. 1992).

To establish a due process claim arising out of the loss or destruction of evidence which is "potentially useful" for the defense, as alleged here, the defendant must prove that the government destroyed or failed to preserve the evidence in bad faith. Arizona v. Youngblood, supra, at 58.

We think that requiring a defendant to show bad faith on the part of the police both 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, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Id. at 58. See also United States v. Deaner, 1 F.3d 192, 200 (3d Cir. 1993) ("Without a showing of bad faith, failure to preserve evidence that might be of use to a criminal defendant after testing is not a denial of due process.").

In seeking relief here, the defendant bottoms his argument upon the assumption that the government destroyed or mishandled evidence - namely, identifiable fingerprints or blood on the surface of the firearm. He then assumes that this evidence would have been exculpatory. Finally, he assumes that in failing to preserve this alleged exculpatory evidence that government acted in bad faith. This "analysis by assumption" fails at each step to satisfy the defendant's burden of proof both factually and legally.

A. The Defendant Has Not Demonstrated That The Government Destroyed Evidence of Apparent Exculpatory Value.

In Trombetta, defendants convicted of drunk driving sought to suppress results of blood alcohol tests on the grounds that the state had destroyed the breath samples used in the tests. The Trombetta Court found no constitutional violation as a result of the destruction of the evidence. Finding the chances were "extremely low" that the breath samples would have been exculpatory, and that the defendants had alternative means of demonstrating their innocence, the Court denied them relief. The government submits that the identical conclusion is warranted here.

The government acknowledges that Officer Bottomer cleaned the surface of the firearm while examining it. There is no proof, however, that any identifiable fingerprint or blood evidence - let alone exculpatory fingerprint or blood evidence - existed there prior to this cleaning. As the Affidavit of Lieutenant Fisher makes clear, the likelihood that any identifiable fingerprint could be found on the surface of a firearm is very rare. Indeed, to the best of his recollection, although he watched the "dusting" of a firearm on 100-200 occasions, he never witnessed the discovery of an identifiable fingerprint. This case differs significantly, therefore, from those in which the defendant begins his due process argument by demonstrating that the government inadvertently or even routinely destroyed evidence material to the case - such as breath, urine, or blood samples, rape kits, or controlled substances which formed the basis of criminal charges and whose test results were admitted in the government's case.

Assuming arguendo that identifiable fingerprint or other evidence did exist on the surface of this firearm, its alleged exculpatory value was not apparent prior to its destruction. As

both Detective Davis and Officer Bottomer explain in their Affidavits, it is precisely because of the "extremely low" chance that any identifiable fingerprints would be found on a firearm that no test for them was conducted.¹² The sound basis for these opinions is confirmed by Lieutenant Fisher and by common sense - if law enforcement officials believed "dusting" the firearm for fingerprints could reasonably be expected to produce useful evidence, it would be routinely done in all cases where a firearm is recovered. The fact that this is not done routinely is a reflection of the reality that it very rarely produces any useable evidence.

Moreover, during the three months between his arrest for state weapons charges and Officer Bottomer's examination of the firearm, the defendant's private attorney, Meyer Rose, Esquire, never requested that the surface of the firearm be "dusted" for identifiable fingerprints - or even that it be preserved to permit "dusting" or other testing at some future date.¹³ While the defendant clearly had no obligation to assist the government in amassing evidence against him, he did have the right to request that evidence he believed helpful be preserved for his future examination. He did not do so. Thus, the alleged exculpatory nature of this hypothetical evidence on the surface of the firearm was not "apparent" to defense counsel as well - at

¹² As the defense concedes, the Third Circuit has recognized that the officers' combined experience is entitled to great weight. See Memorandum in Support of Motion to Dismiss at 7, n.3, citing Griffin v. Spratt, 969 F.2d 16 (3d Cir. 1992).

¹³ In this regard, as discussed below, this case differs significantly from United States v. Bohl, 25 F.3d 904 (10th Cir. 1994), upon which the defense relies. In Bohl, defendants repeatedly sent letters to, and met with, the government requesting access to the evidence subsequently destroyed by the government.

least until after Aaron Carson died.

B. There Is No Evidence That The Government Acted In Bad Faith in Failing to Preserve Evidence.

Recognizing that he must prove the government acted in bad faith to prevail on his due process claim, the defendant baldly asserts "[b]ad faith is evident here." Memorandum in Support of Motion to Dismiss at 9. Review of this case leaves no doubt, however, that there is no evidence that the government acted in bad faith when, three months after its confiscation, Officer Bottomer cleaned the surface of the firearm while conducting an examination.¹⁴

This record contains no allegation of "official animus towards [the defendant] or of a conscious effort to suppress exculpatory evidence." California v. Trombetta, *supra*, at 488. Nor could it. Neither Detective Davis nor Officer Bottomer had any prior contact with either this defendant or Aaron Carson. Bottomer to this day does not know the facts surrounding the confiscation of the firearm he examined. There simply is no reason to believe that either Davis or Bottomer took or failed to take action in an effort to destroy evidence helpful to this defendant. Rather, Officer Bottomer merely followed his routine practice of protecting his work area from excess dirt and grime by cleaning the surface of a firearm, since there was no indication that the surface of the firearm was to be "guarded for prints."

In United States v. Bohl, 25 F.3d 904 (10th Cir. 1994),

¹⁴ It must be remembered that the alleged improper conduct was committed by state police officials. There is no allegation that the federal government in any way was a party to this alleged impropriety. Cf. United States v. Loud Hawk, 628 F.2d 1139 (9th Cir. 1979). Moreover, there is no allegation that any government attorney participated in the failure to preserve evidence. Cf. United States v. Tercero, 640 F.2d 190 (9th Cir. 1980).

upon which the defendant relies, the Court considered numerous factors germane to the question whether the government acted in bad faith when destroying evidence.¹⁵ Consideration of those factors here leads inexorably to the conclusion that no one acted in bad faith. Unlike in Bohl, here: (1) the government did not destroy evidence in the face of repeated defense requests to preserve it; (2) the defendant's assertion that the firearm's surface possessed evidence of potentially exculpatory value - identifiable fingerprints or blood - is "merely conclusory, [and not] backed up with objective, independent evidence giving the government reason to believe that further tests on the [firearm's surface] might lead to exculpatory evidence," 25 F.3d at 91; (3) the government did not have the ability to preserve the surface of the firearm at the time the defense notified it of its alleged potential exculpatory value (in January 2000); (4) the "evidence" disposed of here was not central to the government's case (which will have no testimony that fingerprints or blood linking the defendant to the firearm was discovered on its surface); and (5) the government does offer an innocent explanation for failing to preserve the surface of the firearm - given years of experience and training, neither police officer who came in contact with it believed it to have any evidentiary value, and Officer Bottomer, following his standard practice, desired to remove excess dirt and grime to avoid contaminating his work area. While this may be regrettable in hindsight, as Bohl itself emphasized, "mere negligence on the government's part in failing to preserve such evidence is inadequate for a showing of bad faith." 25 F.3d at 912 (citations omitted).

As made clear in Arizona v. Youngblood, that the defendant

¹⁵ As noted above, the instant case concerns the alleged failure to preserve evidence, rather than the destruction of evidence.

now claims to have been prejudiced due to the cleaning of the firearm is not determinative. The Court of Appeals for the Third Circuit recognized as much in Griffin v. Spratt, *supra*. In Griffin, a state prisoner disciplined for possessing or consuming intoxicating beverages brought an action against state corrections officials under 42 U.S.C. § 1983 for allegedly violating his due process rights by failing to preserve the beverages found in his cell until the time of the disciplinary hearing. The district court, attempting to distinguish the case from Arizona v. Youngblood, found that the due process rights of the prisoner had been violated because the beverages had not been preserved. On appeal, the Third Circuit reversed, noting:

The district court wrote that the defendant in Youngblood unlike Griffin, "was not prejudiced by the police's failure to conduct tests." The Supreme Court's decision in Youngblood, however, was not based on lack of prejudice. On the contrary, the Court acknowledged (488 U.S. at 57, 109 S.Ct. at 337) that the tests at issue there "might have exonerated the defendant."

969 F.2d at 21. See also, United States v. Deaner, 1 F.3d 192, 200 (3d Cir. 1993) ("A defendant who claims destroyed evidence might have proved exculpatory if it could have been subjected to tests has to show the prosecution's bad faith in ordering or permitting its destruction."); United States v. Boyd, 961 F.2d 434, 437 (3d Cir. 1992) (government's failure to preserve urine sample before defendant was able to examine it does not make out a due process claim nor preclude its admission at trial).

In sum, "[although it is unfortunate that [the defendant's] expert never had the opportunity to examine the sample, this does not rise to the magnitude of a constitutional violation under Trombetta and Youngblood." United States v. Boyd, *supra*, at

437.

WHEREFORE, the United States of America respectfully requests that the Court deny the defendant's Motion to Dismiss the Indictment and/or in the Alternative, Motion to Preclude Use of Weapon Evidence, and enter the attached order.

Respectfully submitted,

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Date: February , 2000

CERTIFICATE OF SERVICE

I certify that on this day I caused a copy of the
government's detention motion to be served by hand addressed to:

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