

**COURT OF APPEALS
DECISION
DATED AND FILED
December 8, 2005**

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See WIS. STAT. § 808.10 and RULE 809.62.*

Appeal No. 2005AP135

Cir. Ct. No. 2004FO36

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

VILLAGE OF PLOVER,

PLAINTIFF-APPELLANT,

v.

DOROTHEA W. BINAGI,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Portage County:
FREDERIC FLEISHAUER, Judge. *Reversed and remanded.*

Before Lundsten, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. The Village of Plover appeals an order dismissing its civil forfeiture action against Dorothea Binagi. The Village charged Binagi under its shoplifting ordinance. The court vacated a jury's verdict of guilty on the charge and dismissed the action as a sanction for the Village's destruction of

evidence. We conclude that the trial court erred by imposing this sanction, and reverse with directions to reinstate the verdict and grant judgment on it.

¶2 The evidence at trial included the following testimony. A security officer saw Binagi take a package of hair ties from the shelves of a Copps grocery, without paying for it. Two security officers confronted her, and she confessed orally and in writing to stealing the package. When she emptied her purse for the officers, they discovered hair ties among the contents. She subsequently confessed the theft to a Village police officer as well.

¶3 The Village had a photograph of the hair ties, but did not offer the actual hair ties into evidence because the investigating officer gave them back to the store after issuing the citation to Binagi. The store, in turn, threw them away because Binagi had opened the package and used two of the ties.

¶4 In a post-verdict motion, Binagi moved to set aside the verdict and dismiss the action, asserting that the destruction of the hair ties violated her due process right of access to material evidence. She further asserted that the due process test that applies to criminal prosecutions should also apply in municipal forfeiture prosecutions. The Village countered that the civil action standard on destruction of evidence applies to a civil forfeiture action, which standard requires a finding of egregious conduct in the destruction. *See Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d 707, 724, 599 N.W.2d 411 (Ct. App. 1999).

¶5 Under the criminal standard, a due process violation occurs if the destroyed evidence is apparently exculpatory or if the State acted in bad faith by failing to preserve evidence which is potentially exculpatory. *State v. Greenwold*, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994). The trial court concluded that the criminal standard applied and set aside the verdict and dismissed the

Village's complaint. Although the court found that the discarded hair ties were only potentially exculpatory, the court concluded that the Village policy of routinely not preserving shoplifting evidence is, by itself, bad faith. The court also noted that the policy and its application in this case would not meet the civil standard of egregious conduct.

¶6 The relevant facts are not in dispute. Therefore, we review *de novo* whether the trial court erred in applying the constitutional standard to those facts. *Greenwold*, 189 Wis. 2d at 66.

¶7 We need not determine whether the criminal standard or the civil standard applies in this case because, even under the criminal standard, the trial court erred by dismissing the action. We agree with the trial court that the hair ties were only potentially exculpatory. Binagi offered nothing more than speculation as to their benefit to her defense. Consequently, a bad faith showing was necessary. Bad faith is present only when the actors involved knew of the potentially exculpatory nature of the evidence and, in destroying it, acted with official animus or made a conscious effort to suppress the evidence. *Id.* at 68-69. Here, the policy of returning stolen items to the owner in shoplifting cases apparently derives from WIS. STAT. § 943.50(3m), which provides that authenticated photographs of shoplifted merchandise may be used as evidence in lieu of producing the merchandise. A neutral Village policy of general application, deriving from this statute, does not establish official animus, or a conscious effort to suppress exculpatory evidence.

¶8 Our decision makes it unnecessary to address the Village's alternative arguments in support of its appeal. On remand the trial court shall enter judgment on the jury's verdict.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

