COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2284-CR **Cir. Ct. No. 2010CT944**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALGIS L. VILIUNAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

¶1 REILLY, J.[1] Algis L. Viliunas appeals his conviction for operating while intoxicated on the basis that because the police dash cam recording was

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

destroyed by police per department policy prior to trial, his conviction should be overturned and the case against him dismissed. He argues that because his testimony conflicted with that of officers, and because the video may have been able to resolve those conflicts in testimony in his favor, the evidence was "apparently exculpatory" at the time of destruction. *See* ***State v. Munford***, 2010 WI App 168, ¶20, 330 Wis. 2d 575, 794 N.W.2d 264. We disagree and affirm the trial court's decision.

¶2 Viliunas was charged with operating a motor vehicle while intoxicated, fourth offense, after he was found in the driver's seat of a vehicle in a ditch on July 9, 2010. His case did not go to trial until October 4, 2011, over one year later. The parties do not discuss the reason for this delay in their briefs but the record shows that Viliunas failed to appear for scheduled jury trials in November 2010 and May 2011.

¶3 Deputy Kelly Schmitz testified at trial that when she found the vehicle with Viliunas in the driver's seat, it was running and she observed no one other than Viliunas in the vicinity. She also mentioned that she thought she heard Viliunas make a comment about a dog, but it was difficult to understand him because of his slurred speech.

¶4 Viliunas has not claimed that he was not intoxicated. Rather, he contends that the car was not running when the police arrived and that despite being in the driver's seat, he was never the driver of the vehicle. He claims that his friend Doug was driving at his request because it was his birthday and he wished to drink alcohol. When they ended up in the ditch, Doug left the vehicle and Viliunas moved to the driver's seat. Viliunas denies making any comment

about a dog and instead claims he asked where his friend Doug was when police arrived.

¶5 Schmitz testified that her police vehicle was equipped with a dash cam. She further testified that the camera would automatically begin recording any time the squad lights are activated, so it would have recorded the encounter with Viliunas. Nonetheless, Schmitz was not able to produce the video at trial or after trial because it was destroyed per department policy six months after the recording was made.[2] After he was convicted, Viliunas filed a postconviction motion alleging that the evidence should not have been destroyed because its exculpatory value was apparent. *See* ***id***, ¶20. That motion was denied, and Viliunas now appeals.

¶6 The State's destruction of evidence violates a defendant's due process rights if the police (1) failed to preserve evidence that is apparently exculpatory or (2) acted in bad faith by failing to preserve potentially exculpatory evidence. ***Id.*** Since Viliunas does not argue that the police acted in bad faith, he must show that the evidence was *apparently* exculpatory as opposed to *potentially* exculpatory. *See* ***id.*** In order to do so, he must demonstrate that "(1) the evidence destroyed 'possess[ed] an exculpatory value that was apparent to those who had custody of the evidence … before the evidence was destroyed,' and (2) the evidence is 'of such a nature that the defendant [is] unable to obtain comparable evidence by other reasonably available means.'" ***Id.***, ¶21 (citation omitted). When we review a claim that exculpatory evidence was destroyed in violation of

[2] Although it is not relevant to the issue of whether the video was apparently exculpatory at the time of its destruction, we note that if Viliunas had appeared at the trial that was scheduled for November 2010, the video would still have been in existence.

due process, we determine de novo whether the facts as found by the trial court constitute a violation.[3] ***Id.***, ¶20.

¶7 Viliunas argues that the exculpatory value of the evidence was apparent based on his testimony conflicting with Schmitz's testimony. The problem with Viliunas' argument is that the conflicting testimony occurred *after* the video was destroyed by police. As the trial court noted in its decision, while the dash cam video might have shown whether the car was running when the police arrived, it would not have shown whether the keys were in the ignition. And even if the car was not running, finding Viliunas in the driver's seat of his vehicle in a ditch with the keys in the ignition would be sufficient to circumstantially prove that Viliunas drove the vehicle into the ditch. *See* ***State v. Mertes***, 2008 WI App 179, ¶16, 315 Wis. 2d 756, 762 N.W.2d 813. In other words, there was nothing apparently exculpatory about the video at the time of its destruction.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[3] Viliunas has not alleged that the trial court's factual findings are clearly erroneous.