

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. PORSC-08-2614

08-08-08/10

STATE OF MAINE

v.

ORDER

NICOLAS HUTCHINS

Hutchins is charged with a single count of Gross Sexual Assault (Class B), in violation of 17-A M.R.S.A. § 253(2)(D). Hutchins filed a motion to dismiss alleging that the destruction of audiotaped interviews of two key witnesses, including a nearly two hour interview of the alleged, constitutes destruction of impeachment evidence, a due process violation. According to the Law Court, a motion to dismiss “is not the appropriate way to challenge the impermissible destruction of evidence.” *State v. Bilynsky*, 2007 ME 107, ¶ 40, 932 A. 2d 1169, 1177. “[T]he suppression of that evidence is the appropriate remedy.” *Id.* Thus, this court will treat the motion to dismiss as a motion to suppress.

The state alleges that the assault occurred on August 24, 2008. Officer Twomey interviewed Melody Michaud and Shawn Laverdiere, four days later on August 28, 2008. The Laverdiere interview lasted twenty-five minutes. The Michaud interview lasted nearly two hours. Both witnesses were present for both interviews. At the end of the interviews, Twomey wrote the witness statements, read the statements back to the witnesses and asked whether they had any corrections to their statements. The witnesses

then initialed their statements and Twomey forwarded the statements to his supervisor. Twomey had no more involvement in the case.

The interviews were audiotaped. An auto recording runs all the time in the witness room. The audiotape runs in a continual loop and an officer must request within 30 days preservation of a particular interview. The interview is preserved by extracting the interview from the loop. If a timely request is not made, the interview is lost. Here, Twomey did not request preservation of the interview tape, but he did mention it in his report prepared the night of the interview, and he assumed that the detective-in-charge of the case would request the tape if it had any value. The detective-in-charge, Maryann Bailey, did not request preservation because she believed that officer who conducted the interview would have made the request.¹ Unfortunately, neither officer requested that the interviews be preserved. There is no evidence that either officer acted intentionally in failing to preserve the interviews.

Hutchins argues that failing to preserve equals destruction in violation of his due process rights, particularly here where the issue is whether the victim was incapable of consenting where there were 7-10 minutes between intercourse with the witness and victim and the defendant and the victim.

The Maine Law Court has adopted the two-part test developed by the United States Supreme Court “to determine whether a defendant’s right to due process is violated by the failure to preserve evidence, (1) the evidence must possess an exculpatory

¹ According to Bailey there is no standard operating policy regarding preservation of audio tapes but because of this case, she and other officers now e-mail officer who did the interview and advise them they must request preservation of the tape. There should be a standard operating procedure that preserves taped interviews conducted by the police.

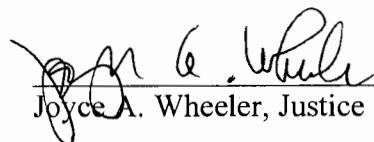
value that was apparent before the evidence was destroyed; and (2) the evidence must be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *State v. Bilynsky*, 2007 ME at ¶ 41 (citations and quotations omitted). Applying the first step, the State concedes that the destruction of the interviews deprived the defendant of impeachment evidence, and agrees that impeachment evidence is exculpatory evidence. See *Kyles v. Whitney*, 514 U.S. 419, 434 (1995). Applying the second step, there is no other way for the defendant to obtain comparable evidence; there simply is no other comparable evidence once the interviews were lost. Hutchins needs the interviews to impeach the testimony of the State’s key witnesses.

The next question then is whether the State acted in bad faith in failing to preserve the evidence. *State v. St. Louis*, 2008 ME 101, ¶ 7, 951 A. 2d 80, 81. Defendant argues that both officers knew that the tape was potentially useful and both knew that it would be lost if not preserved within 30 days, yet neither officer did anything to preserve the tape. The State counters that the officers failed to preserve the evidence. The defendant argues this is the same as destruction of the tape. Despite the State’s serious oversight in allowing the destruction of the interviews, the court cannot find that the state acted in bad faith; there was no deliberate misbehavior. Accordingly, the motion to suppress is denied.

The entry is:

Motion to Suppress Denied.

Date: December 16, 2009



Joyce A. Wheeler, Justice

STATE OF MAINE
vs
NICOLAS C HUTCHINS
150 SPRING ST #7
PORTLAND ME 04103

SUPERIOR COURT
CUMBERLAND, ss.
Docket No PORSC-CR-2008-02614

DOCKET RECORD

DOB: 05/14/1982

Attorney: TIMOTHY ZERILLO
ZERILLO LAW OFFICES
103 EXCHANGE STREET
PO BOX 17721
PORTLAND ME 04112
RETAINED 01/23/2009

State's Attorney: STEPHANIE ANDERSON

Attorney: AMY ROBIDAS
ZERILLO LAW OFFICES
103 EXCHANGE STREET
PO BOX 17721
PORTLAND ME 04112
RETAINED 09/25/2009

Filing Document: CRIMINAL COMPLAINT
Filing Date: 10/17/2008

Major Case Type: FELONY (CLASS A,B,C)

Charge (s)

1 GROSS SEXUAL ASSAULT
Seq 596 17-A 253(2)(D)
BAILEY / POR

08/24/2008 PORTLAND
Class B Charged with INDICTMENT on Supplem

Docket Events:

10/20/2008 FILING DOCUMENT - CRIMINAL COMPLAINT FILED ON 10/17/2008

10/20/2008 WARRANT - ON COMP/INDICTMENT ISSUED ON 10/20/2008

CERTIFIED COPY TO WARRANT REPOSITORY

ST

11/12/2008 Charge(s): 1

SUPPLEMENTAL FILING - INDICTMENT FILED ON 11/05/2008

01/21/2009 WARRANT - ON COMP/INDICTMENT EXECUTED ON 01/21/2009

BRENDA OLEARY , ASSISTANT CLERK-E

01/21/2009 Charge(s): 1

HEARING - ARRAIGNMENT SCHEDULED FOR 02/12/2009 @ 8:30 in Room No. 1

NOTICE TO PARTIES/COUNSEL

01/21/2009 BAIL BOND - \$10,000.00 CASH BAIL BOND FILED ON 01/21/2009

Bail Receipt Type: CR

Bail Amt: \$10,000

Receipt Type: CK

Date Bailed: 01/18/2009

Prvdr Name: NICOLAS C HUTCHINS

Rtrn Name:

988

01/23/2009 WARRANT - ON COMP/INDICTMENT RETURNED ON 01/20/2009

01/23/2009 Party(s): NICOLAS C HUTCHINS
ATTORNEY - RETAINED ENTERED ON 01/23/2009

Attorney: TIMOTHY ZERILLO

02/25/2009 Charge(s): 1
HEARING - ARRAIGNMENT HELD ON 02/12/2009
ROBERT E CROWLEY , JUSTICE
READING WAIVED. DEFENDANT INFORMED OF CHARGES. COPY OF INDICTMENT/INFORMATION GIVEN TO
DEFENDANT. 21 DAYS TO FILE MOTIONS

02/25/2009 BAIL BOND - CASH BAIL BOND COND RELEASE ISSUED ON 02/12/2009

Date Bailed: 01/18/2009
988

02/25/2009 Charge(s): 1
PLEA - NOT GUILTY ENTERED BY DEFENDANT ON 02/25/2009

02/25/2009 HEARING - DISPOSITIONAL CONFERENCE SCHEDULED FOR 04/15/2009 @ 10:30 in Room No. 7

02/25/2009 TRIAL - JURY TRIAL SCHEDULED FOR 05/04/2009 @ 8:30 in Room No. 11

NOTICE TO PARTIES/COUNSEL

04/15/2009 HEARING - DISPOSITIONAL CONFERENCE HELD ON 04/15/2009

ROLAND A COLE , JUSTICE

Attorney: TIMOTHY ZERILLO

DA: DEBORAH CHMIELEWSKI

WAITINF FOR REPORTS, RESET DISPOSITIONAL CONF. 7-15-09

04/15/2009 TRIAL - JURY TRIAL NOT HELD ON 04/15/2009

NEW DATES GIVEN.

04/15/2009 HEARING - DISPOSITIONAL CONFERENCE SCHEDULED FOR 07/15/2009 @ 2:00

04/15/2009 TRIAL - JURY TRIAL SCHEDULED FOR 08/03/2009 @ 8:30 in Room No. 11

NOTICE TO PARTIES/COUNSEL

06/17/2009 HEARING - DISPOSITIONAL CONFERENCE NOTICE SENT ON 06/17/2009

06/24/2009 MOTION - MOTION TO CONTINUE FILED BY DEFENDANT ON 06/24/2009

Attorney: TIMOTHY ZERILLO

06/26/2009 MOTION - MOTION TO CONTINUE GRANTED ON 06/25/2009

THOMAS D WARREN , JUSTICE

COPY TO PARTIES/COUNSEL

JH

06/26/2009 TRIAL - JURY TRIAL CONTINUED ON 06/25/2009

06/26/2009 HEARING - DISPOSITIONAL CONFERENCE CONTINUED ON 06/25/2009

06/26/2009 HEARING - DISPOSITIONAL CONFERENCE SCHEDULED FOR 09/09/2009 @ 2:00 in Room No. 7

06/26/2009 HEARING - DISPOSITIONAL CONFERENCE NOTICE SENT ON 06/26/2009

JH

ANOTHER NOTICE

SENT 8-20-09 DD

06/26/2009 Charge(s): 1

TRIAL - JURY TRIAL SCHEDULED FOR 10/05/2009 @ 8:30 in Room No. 11

NOTICE TO PARTIES/COUNSEL

06/26/2009 Charge(s): 1

TRIAL - JURY TRIAL NOTICE SENT ON 06/26/2009

JH

08/31/2009 MOTION - MOTION TO CONTINUE FILED BY DEFENDANT ON 08/31/2009

Attorney: TIMOTHY ZERILLO

09/02/2009 MOTION - MOTION TO CONTINUE DENIED ON 08/31/2009

JOYCE A WHEELER , JUSTICE

COPY TO PARTIES/COUNSEL

JH

09/09/2009 HEARING - DISPOSITIONAL CONFERENCE HELD ON 09/09/2009

JEFF MOSKOWITZ , JUDGE

Attorney: TIMOTHY ZERILLO

DA: DEBORAH CHMIELEWSKI

09/09/2009 Charge(s): 1

TRIAL - JURY TRIAL NOT HELD ON 09/09/2009

TRIAL MOVED TO 12/7

09/09/2009 TRIAL - JURY TRIAL SCHEDULED FOR 12/07/2009 @ 8:30 in Room No. 11

NOTICE TO PARTIES/COUNSEL

09/09/2009 TRIAL - JURY TRIAL NOTICE SENT ON 09/09/2009

09/11/2009 Charge(s): 1

MOTION - MOTION FOR DISCOVERY FILED BY DEFENDANT ON 09/10/2009

AND FOR EXERT WITNESS PRODUCTION

09/11/2009 Charge(s): 1

HEARING - MOTION FOR DISCOVERY SCHEDULED FOR 09/22/2009 @ 1:00 in Room No. 8

NOTICE TO PARTIES/COUNSEL

09/11/2009 Charge(s): 1

HEARING - MOTION FOR DISCOVERY NOTICE SENT ON 09/11/2009

09/22/2009 Charge(s): 1

HEARING - MOTION FOR DISCOVERY CONTINUED ON 09/22/2009

JEFF MOSKOWITZ , JUDGE

LAB RESULTS NOT BACK YET

09/22/2009 HEARING - MOTION FOR DISCOVERY SCHEDULED FOR 10/27/2009 @ 1:00 in Room No. 8

NOTICE TO PARTIES/COUNSEL

09/25/2009 Charge(s): 1

MOTION - MOTION FOR ENLARGEMENT OF TIME FILED BY DEFENDANT ON 09/25/2009

09/25/2009 Charge(s): 1

MOTION - MOTION TO DISMISS FILED BY DEFENDANT ON 09/25/2009

09/25/2009 Party(s): NICOLAS C HUTCHINS

ATTORNEY - RETAINED ENTERED ON 09/25/2009

Attorney: AMY ROBIDAS

09/29/2009 Charge(s): 1

MOTION - MOTION FOR ENLARGEMENT OF TIME GRANTED ON 09/29/2009
ROLAND A COLE , JUSTICE
COPY TO PARTIES/COUNSEL

10/28/2009 Charge(s): 1

HEARING - MOTION TO DISMISS SCHEDULED FOR 11/10/2009 @ 1:00 in Room No. 7

NOTICE TO PARTIES/COUNSEL

10/28/2009 Charge(s): 1

HEARING - MOTION TO DISMISS NOTICE SENT ON 10/27/2009

10/28/2009 HEARING - MOTION FOR DISCOVERY HELD ON 10/27/2009

AGREED TO.

11/02/2009 OTHER FILING - OTHER DOCUMENT FILED ON 11/02/2009

NOTICE FILED FROM ATTY THAT HE MAY BE LATE FOR HIS HEARING.

11/03/2009 MOTION - MOTION TO CONTINUE FILED BY STATE ON 11/02/2009

DA: DEBORAH CHMIELEWSKI

JH

11/03/2009 MOTION - MOTION TO CONTINUE GRANTED ON 11/03/2009

THOMAS D WARREN , JUSTICE

COPY TO PARTIES/COUNSEL

JH

11/03/2009 Charge(s): 1

HEARING - MOTION TO DISMISS CONTINUED ON 11/03/2009

11/03/2009 HEARING - MOTION TO DISMISS SCHEDULED FOR 11/24/2009 @ 1:00 in Room No. 8

NOTICE TO PARTIES/COUNSEL

11/03/2009 HEARING - MOTION TO DISMISS NOTICE SENT ON 11/03/2009

JH

11/06/2009 LETTER - FROM PARTY FILED ON 11/02/2009

Attorney: TIMOTHY ZERILLO

INFORMING US THAT HE WILL BE LATE FOR MOTION TO DISMISS HEARING.

11/25/2009 OTHER FILING - OTHER DOCUMENT FILED ON 11/25/2009

POST-HEARING MEMO FILED BY ATTY ZERILLO

12/04/2009 HEARING - MOTION TO DISMISS HELD ON 11/24/2009

JOYCE A WHEELER , JUSTICE

TAPE 3532

STATE'S WITNESSES HEARD

12/04/2009 Charge(s): 1

MOTION - MOTION TO DISMISS UNDER ADVISEMENT ON 11/24/2009

JOYCE A WHEELER , JUSTICE

12/14/2009 ORDER - TRANSCRIPT ORDER FILED ON 12/14/2009

Attorney: TIMOTHY ZERILLO

COPY OF TRANSCRIPT ORDER AND DOCKET ENTREIS SENT TO ELECTRONIC RECORDING DIVISION.

JH

12/18/2009 ORDER - COURT ORDER FILED ON 12/16/2009
JOYCE A WHEELER , JUSTICE
THE ENTRY IS: MOTION TO SUPPRESS IS DENIED

12/18/2009 Charge(s): 1
MOTION - MOTION TO DISMISS DENIED ON 12/16/2009
JOYCE A WHEELER , JUSTICE
COPY TO PARTIES/COUNSEL

A TRUE COPY

ATTEST: _____
Clerk