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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3516-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EMMANUEL RUIZ PAGAN,

Defendant-Appellant.

Submitted July 5, 2017 – Decided September 15, 2017

Before Judges Nugent and Accurso.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No.
13-05-1143.

Joseph E. Krakora, Public Defender, attorney
for appellant (Margaret McLane, Assistant
Deputy Public Defender, of counsel and on
the brief).

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (Frank
J. Ducoat, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Emmanuel Ruiz Pagan pled guilty to first-degree
robbery, N.J.S.A. 2C:15-1 and second-degree unlawful possession

of a weapon, N.J.S.A. 2C:39-5b. Pursuant to a negotiated plea agreement, he reserved his right to challenge the denial of his motion to dismiss the indictment based on the State's failure to preserve the hard drive of the surveillance system that supposedly captured the crime. The judge sentenced defendant in accordance with the plea agreement to an aggregate prison term of fifteen years subject to the periods of parole ineligibility and supervision required by the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant now appeals, raising the following issues:

POINT I

DUE TO THE STATE'S LOSS OF THE SURVEILLANCE VIDEO HARD DRIVE, THE INDICTMENT MUST BE DISMISSED.

POINT II

THE FIFTEEN-YEAR SENTENCE, WITH 85% TO BE SERVED WITHOUT PAROLE, IS MANIFESTLY EXCESSIVE.

Finding no error in defendant's conviction or sentence, we affirm.

Defendant and a confederate, both armed with handguns, entered the El Bachatipico restaurant in Newark at about one o'clock in the morning on September 11, 2012. Defendant drew his gun and announced to the several people present, "This is a stick up." One of the patrons identified himself as a police officer and drew his service weapon. Defendant and his partner

shot at the officer, and he returned fire. The robbers fled outside, where more shots were exchanged. Although the officer shot defendant in his shoulder, leg, low back and left hand, he managed to escape. He was later apprehended at a local hospital. No one else was injured. The police took statements from several witnesses relating those events and the off-duty officer identified defendant as the robber he shot.

The court conducted an evidentiary hearing on defendant's motion to dismiss the indictment three years after the robbery. The owner of the restaurant testified it had a surveillance system. When he went to retrieve the video of the incident shortly after the robbery, however, he found nothing had been recorded. A detective with the crime scene/technical services unit of the Essex County Prosecutor's Office testified he likewise tried to retrieve video from the system later that same night without success.

The following day, the owner called the man who installed the system to inspect it. The owner testified the technician advised the hard drive had malfunctioned and swapped it out for a new unit. The owner took the old hard drive to the prosecutor's office that afternoon. The technical services unit detective again tried to retrieve video from the unit but could not even get it to fully power up. Determining the unit was

damaged and of no evidential value, the supervising detectives claim they immediately returned it to the restaurant owner. The owner claimed he left it with the prosecutor's office and never got it back.

After hearing the testimony, the judge found "no concrete evidence . . . that the hard drive was returned to [the restaurant owner]." The judge found the State had an obligation to preserve the hard drive for inspection by defendant and negligently failed to do so. She found defendant had produced no evidence of bad faith. Although finding no question but that defendant was deprived of the opportunity to inspect the unit and determine for himself that no images were captured, the court found the absence of the unit made it impossible to determine "whether any images that may have been captured on that hard drive would have been a value to the defense." Rejecting defendant's claim that the evidence supported dismissing the indictment, the judge determined the appropriate sanction was an adverse inference charge against the State at trial.

"[D]ismissal of an indictment due to loss of discoverable evidence is a drastic remedy that should be sparingly employed." State v. Montijo, 320 N.J. Super. 483, 490 (Law Div. 1998). The decision is addressed to the discretion of the trial court,

State v. Feliciano, 224 N.J. 351, 380 (2016), and the exercise of its authority will not be disturbed in the absence of clear abuse, State v. Hoqan, 144 N.J. 216, 229 (1996).

A court considering whether a defendant's due process rights have been violated by the State's failure to preserve physical evidence must focus on "(1) whether there was bad faith or connivance on the part of the government, (2) whether the evidence . . . was sufficiently material to the defense, [and] (3) whether [the] defendant was prejudiced by the loss or destruction of the evidence." State v. Hollander, 201 N.J. Super. 453, 479 (App. Div.) (internal citations omitted), certif. denied, 101 N.J. 335 (1985). "Without bad faith on the part of the State, 'failure to preserve potentially useful evidence does not constitute a denial of due process of law.'" George v. City of Newark, 384 N.J. Super. 232, 243 (App. Div. 2006) (quoting Arizona v. Youngblood, 488 U.S. 51, 57, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988)); see also State v. Marshall, 123 N.J. 1, 109 (1991) (applying Youngblood bad faith standard); State v. Mustaro, 411 N.J. Super. 91, 103-05 (App. Div. 2009) (same).¹

¹ We reject defendant's argument that we can dispense with the bad faith requirement of Youngblood by resort to our own State Constitution. Our Supreme Court follows Youngblood, and we are
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Our review of the record satisfies us the trial judge was correct in finding defendant failed to adduce any evidence of bad faith. The detective from the technical services unit was not the only witness to testify the restaurant's surveillance system had not recorded the incident. The restaurant owner also testified there was nothing recorded and further claimed the technician who installed the system made the same finding. Defendant offered no reason why police would deliberately suppress or destroy a hard drive an independent witness testified had not recorded anything.

Although defendant was deprived of the opportunity to confirm the absence of a video recording of the events in the restaurant, we have no basis to believe the video would have undermined, as opposed to supported, the witnesses' statements identifying defendant as the robber. Indeed, defense counsel never proffered how the video might exculpate his client. Because defendant did not establish the videotape had exculpatory value apparent to the State when it was lost or destroyed or that the State failed to preserve its potentially

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not free to deviate from its direction. See Marshall, supra, 123 N.J. at 109; Mustaro, supra, 411 N.J. Super. at 103 n.4 (declining to follow other states eschewing bad faith as a matter of state constitutional law in light of Marshall and State v. Reynolds, 124 N.J. 559, 569 (1991)).

exculpatory value in bad faith, defendant could not establish a due process violation or any entitlement to relief.²

We have considered the arguments defendant has offered to establish his aggregate fifteen-year sentence is excessive and determined they present no basis for reversal. Defendant was sentenced in accordance with his negotiated plea agreement. The judge characterized his violent stick up of the restaurant, "a brazen crime, more in the fashion of a high noon at the O.K. Corral. Committed in a manner showing utter disregard for the safety or sensibilities of the public."

The judge found aggravating factors three, the risk that the defendant will commit another offense, N.J.S.A. 2C:44-1a(3); and nine, the need for deterring the defendant and others from violating the law, N.J.S.A. 2C:44-1a(9), and no mitigating factors. She further noted defendant had completed an eight-year prison term in Puerto Rico for robbery and weapons offenses within a year of committing this offense.

Having reviewed the record, we conclude defendant's fifteen-year sentence is neither inconsistent with sentencing provisions of the Code of Criminal Justice nor shocking to the judicial

² As defendant failed to establish a due process violation, we surmise the adverse inference against the State was a sanction for a discovery violation under Rule 3:13-3, although that is not clear from the record.

conscience. See State v. Fuentes, 217 N.J. 57, 70-71 (2014); State v. Bieniek, 200 N.J. 601, 608 (2010); State v. Cassady, 198 N.J. 165, 180-81 (2009).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION