

**FILED**  
**02-12-2024**  
**CIRCUIT COURT**  
**DANE COUNTY, WI**  
**2022CF002481**

**STATE OF WISCONSIN**

**CIRCUIT COURT  
BRANCH 13**

**DANE COUNTY**

STATE OF WISCONSIN,

Court Case No.: 2022CF002481

Plaintiff,

vs.

MARK WAGNER,

Defendant.

*For Official Use*

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**THE STATE OF WISCONSIN’S RESPONSE TO THE DEFENDANT’S MOTION TO DISMISS**

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Defendant Mark Wanger moves to dismiss this matter based on what he claims was the State’s “substantial alteration of apparently exculpatory evidence” of the vehicle the victim was driving in this matter. See Doc. 80. Specifically, Wagner claims that the State inappropriately altered evidence of the Hyundai Tucson that the victim was driving when shot at by Wagner and other law enforcement agents when the State conducted a reconstruction of the events of the shooting. Wagner claims that these repairs resulted in the removal or concealment of marks made by a Halligan tool used by a law enforcement agent to strike the vehicle and prevent proper analysis of the marks by the defense. See *id.*

This Court should deny Wagner’s motion. The State does not believe any apparently exculpatory evidence was destroyed and does not believe any potentially exculpatory evidence was destroyed in bad faith.

**ARGUMENT**

**1. The general law regarding evidence preservation and destruction.**

The United States and Wisconsin Constitutions provide coterminous due process rights related to the preservation or destruction of evidence. See *State v. Luedtke*, 2015 WI 42, ¶ 7, 362 Wis.2d 1, 863 N.W.2d 592. In order to prove a due process violation under the Fifth or

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Fourteenth Amendment to the United States Constitution, or under Article 1, Section 8, Clause 1, of the Wisconsin Constitution, a defendant must show that the State failed to preserve evidence that was apparently exculpatory or that the State acted in bad faith by failing to preserve evidence that was potentially exculpatory. See *State v. Greenwold*, 189 Wis.2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994) (*Greenwold II*).

For evidence to be apparently exculpatory, that evidence must possess an exculpatory value that was **apparent before the evidence was destroyed** and be of such a nature that a defendant would be unable to obtain comparable evidence by other reasonably available means. See *California v. Trombetta*, 467 U.S. 479, 488-89 (1984).

Evidence is potentially exculpatory if it offers “an avenue of investigation that might have led in any number of directions.” *Arizona v. Youngblood*, 488 U.S. 51, 56, n.\* (1988). To prove that the State destroyed potentially exculpatory evidence in bad faith, a defendant must show that:

(1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; and (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence.

*Greenwold II* at 69.

Furthermore:

The presence or absence of bad faith by the police for purpose of the Due Process clause must necessarily turn on the police’s knowledge of the exculpatory value of the evidence **at the time it was lost or destroyed**.

*Youngblood*, 488 U.S. at 56, n\* (1988)(citation omitted)(**emphasis supplied**).

The destruction of evidence alone does not create a due process violation. See *Luedtke*, ¶ 47.

## **2. No “destroyed” evidence was apparently exculpatory.**

Wagner claims he will show at trial that the Halligan tool hit the Tucson’s window, slid down into the molding, and became lodged in the window or molding frame. See Doc. 80.

Wagner claims that repairs done to allow a shooting reconstruction prevent his expert—whose

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qualifications the State has disputed—from making proper measurements of the alleged indentation. Wagner, however, never explains what was apparently exculpatory about this indentation or its measurements. More significantly, Wagner omits the facts known to the State at the time of the reconstruction when this alleged evidence destruction occurred.

As indicated in the criminal complaint, Wagner approached the victim's vehicle on February 3, 2022, followed by two other Division of Criminal Investigation Special Agents: Nate Peskie and Brian Hawley. See Criminal Complaint, p. 2. The order of the agents was Wagner first, Peskie second, and Hawley third. Hawley was carrying a Halligan tool to use for breaking out windows if needed. See *id.* Wagner, Peskie, and Hawley—and many others—were all interviewed by detectives from outside agencies prior to the any reenactment using the victim's Tucson. See February 9, 2022, Detective Chris Grunewald report of Peskie Interview attached to Declaration of Matthew Moeser ("Moeser Dec'l.") as Exhibit 1; February 4, 2022, Detective Chris Grunewald report of Peskie scene walkthrough attached to Moeser Dec'l. as Exhibit 2; February 9, 2022, Detective Cheryl Patty report of Wagner Interview attached to Moeser Dec'l. as Exhibit 3; February 16, 2022, Detective David Hall report of Hawley interview attached to Moeser Dec'l. as Exhibit 4.<sup>1</sup>

As can be seen in the statements of Wagner, Peskie, and Hawley, one critical investigative issue was to determine what these agents—or others—could have seen inside the victim's vehicle. Similarly, it was also significant to understand what the victim could see out. At no point did Wagner, Peskie, or Hawley suggest that Hawley's Halligan tool struck Wagner or Peskie, or their equipment. As summarized in Detective Hall's report, Hawley provided a detailed description of what occurred with the Halligan:

SA Hawley observed SA Wagner (shield) and SA Peskie (rifle) at the driver's door of the Hyundai Tucson. SA Hawley heard SA Peskie repeatedly giving

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<sup>1</sup> The State is redacting portions of reports filed with this response to what it believes are the facts relevant to the motion to dismiss. The State will provide unredacted reports to the Court if requested. All reports provided bear the State's discovery numbering.

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orders to [the victim] to show his hands. SA Hawley got into position at the rear driver's window (window directly behind the driver's door) and could see [the victim] leaning slightly to the right. It appeared that [the victim]'s hands were in front of him, but SA Hawley could not see his hands. SA Hawley wondered what [the victim] was doing with his hands.

SA Peskie continued yelling orders to [the victim] to show his hands. SA Hawley knew that this repeated command when he arrived in position was the queue that [the victim] was not following lawful commands and it was SA Hawley's responsibility to breach the rear driver's window (window directly behind the driver's door).

SA Hawley stood in a stance where he faced the driver's side of the vehicle. SA Wagner and SA Peskie were to SA Hawley's left side. SA Hawley has professional training in window breaching techniques. SA Hawley used the spiked end of the [Halligan] to strike the lower left corner of the rear driver's window. The spiked end that he used on the [Halligan] to break the window deflected, forcing the metal point into the same plane as the window into the area between the window and outside door panel. He had to hit the [Halligan] upward to free the tool from the door/window panel. He swung a second time at the same lower left corner, shattering the window.

SA Hawley said the rear driver's window completely shattered. If a window has after-market window tinting or laminated glass, he would have raked the tool to clear the intact window. The raking motion would have been SA Hawley pulling the [Halligan] through the intact glass pane from the lower left corner to the lower right corner and pulling the sheet away from the vehicle.

*(Later, SA Hawley explained other DCI agents had difficulty breaking the driver and front passenger windows due to after-market window tinting. The windows did not shatter. A break and rake method described above would have been utilized on those two windows to clear the glass. SA Hawley believed the factory and after-market window tinting was the reason he observed a different shade of tinting from the two front side windows from the rest of the window tinting.)*

SA Hawley could more easily see the passenger compartment without the tinted rear driver's side window intact. He saw [the victim] turn to the left toward SA Wagner and SA Peskie.

SA Hawley had to free his hands from the [Halligan]. He knelt down next to the rear driver's side down and grounded the [Halligan], making sure the prongs on the [Halligan] faced the ground (avoiding injury in case someone stepped on it). He believed he knelt to one knee and focused his eyesight to the ground while he downed the tool. He was either facing the driver's rear door or SA Peskie. At the same time he heard multiple gunshots.

SA Hawley was certain the gunshots were from a handgun and rifle. He did not recall which fired first nor the exact number of gunshots from each. However, he

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estimated there were two handgun and four rifle rounds fired. He believed the last gunshot he heard was from a rifle

Moeser Dec'l., Exhibit 4, pp. 6-7.

The State is aware that Hawley and other DCI personnel present may have made different statements to Wagner's investigators well after the reenactment occurred, but the issue for this motion is what the State knew prior to the alleged destruction of evidence.

During the shooting of and arrest of the victim, the arresting agents smashed out windows of the Tucson. See February 12, 2024, Affidavit of William Hendrickson ("Hendrickson Aff."), ¶ 3. Many photos of the Tucson were taken at the shooting scene and in the Sheriff's Office garage, including of potential defects from a Halligan tool. See *id.*, ¶¶ 4, 5; See Moeser Dec'l., Exhibits 5-6. Ultimately, the Dane County Sheriff's Office—in consultation with the Dane County District Attorney—did obtain replacement windows for the victim's Tucson and coat them with tint to match the conditions the agents experienced on February 3, 2022. See February 25, 2022, Detective William Hendrickson report attached to Moeser Dec'l. as Exhibit 7; March 15, 2022, Deputy Scott Kuntz report attached to Moeser Dec'l. as Exhibit 8; reenactment photos attached to Moeser Dec'l. as Exhibits 9-22. This occurred only after the Sheriff's Office could not obtain a stand-in vehicle. See February 25, 2022, report of Detective Daniel Feeney attached to Moeser Dec'l. as Exhibit 23.

For purposes of the reenactment, non-functional replacement windows were coated with window tint in an effort to match the conditions of the Tucson windows on February 3, 2022. See Hendrickson Aff., ¶ 7. When needed, the windows were set into the Tucson to document visibility into and out of the Tucson. See *id.*, ¶ 8. The State does not believe that any effort was made to restore the windows to full functionality or to replace seals or molding associated with the windows. See *id.*, ¶ 9.

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The State therefore disputes that any purported destroyed evidence was actually destroyed or that it was apparently exculpatory based on information prior to any handling of the evidence. Even if either of these things occurred, comparable evidence exists in the form of photographs and scene documentation.

**3. No potentially exculpatory evidence was “destroyed” in bad faith.**

As indicated above, the State disputes whether any evidence was destroyed or had any apparent exculpatory value. The State also does not believe that there was any potentially exculpatory value or usefulness of the evidence but, under the broader “potentially exculpatory” test, to prevail on his due process claim Wagner would also have to demonstrate the State acted in bad faith in failing to preserve it. Wagner cannot do that. The State acted reasonably to investigate a critical issue in this case with minimal handling of the victim’s Tucson after being unable to locate a stand-in vehicle and after extensive documentation of the Tucson’s condition.

**CONCLUSION**

For the reasons stated above, the State requests that the Court deny Wagner’s motion to dismiss.

Date Signed: 02/12/24

Electronically Signed By:

Matthew Moeser

Assistant District Attorney

State Bar #: 1034198

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