

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
CANNON, MAURICE,)	CAUSE NO. IP05-0052-CR-01-T/F
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) IP 05-52-CR-01-T/F
)
 MAURICE CANNON,)
)
 Defendant.)

**ENTRY ON DEFENDANT'S MOTION TO DISMISS BASED ON DESTRUCTION OF
EVIDENCE (Doc. No. 64)¹**

On April 5, 2005, a grand jury issued a one-count indictment alleging that the Defendant, Maurice Cannon, having previously been convicted of a crime punishable for a term exceeding one year, did knowingly possess firearms in violation of 18 U.S.C. § 922(g)(1). This cause comes before the court on the Defendant's motion to dismiss the indictment based upon the Government's allegedly intentional or negligent destruction of material evidence that is potentially useful for the Defendant's defense. Specifically, the Defendant alleges that the Government intentionally or negligently destroyed (1) the complete audio recording of the radio dispatch communications associated with the Defendant's arrest, and (2) two police incident reports also relating

¹ This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

to the arrest. The Government opposes the motion. Having reviewed the parties' briefs and heard evidence and oral argument on the motion, the court now rules as follows:

I. FINDINGS OF FACT²

The bulk of the facts relevant to this motion were determined by a preponderance of the evidence submitted and are discussed in the Entry on Defendant's Motion to Suppress Evidence (Doc. No. 80) and will not be repeated here. The other facts germane to this motion follow below.

On December 8, 2004, at 4:02 P.M., Officer Carrier radioed to the control center (or dispatch) that he was performing a traffic stop. In doing so, he automatically initiated two records of the events that were to follow: an audio record and a Computer Aided Dispatch ("CAD") report. The audio record is a recording of the actual police audio communications over the radio relating to this incident. The CAD report is a transcribed record of the events. The transcribed information contained in the CAD report originates from two sources: the dispatcher and the officer. The dispatcher listens to the radio communication during the incident and enters into the CAD report the information the dispatcher believes should be included in the history. Some information entered into the CAD report by the dispatcher is standard information (e.g., identifying which officers arrive at the scene). However, other information is more subjectively

² Any portion of this discussion labeled as a finding of fact that would more appropriately be considered a conclusion of law is so deemed, and vice versa regarding the subsequent section. Similarly, any statement contained in this entry that is actually a mixed determination of fact and law is just that, regardless of how it is labeled.

entered by the dispatcher, perhaps describing the events as he or she hears them over the radio. The officer also has the ability to enter information on the CAD report from the mobile data unit (“MDT”) located in the officer’s car. Again, some information is more objective, like information indicating that an officer ran a vehicle registration check. While other information may be more subjective, describing the events as they occur.

Neither the audio record nor the CAD report constitutes a complete historical record of an event. The audio record does not include information entered by the officers in their MDTs. The CAD report does not include every radio communication, but only those the dispatcher chooses to include in the report. Likewise, the CAD report may not include information an officer enters into his or her MDT because the officer has discretion in determining whether to include the information in the CAD report.

The Defendant alleges that the CAD report and the officers’ testimonies do not accurately depict the events surrounding the arrest. Instead, the Defendant suggests that the audio recordings may provide some support for his version of the incident.

The Marion County Sheriff’s Communications Center (the “Communications Center”) retains the audio recordings for a period of one year. After one year, the Communications Center recycles the tapes, effectively erasing the previous recordings. On December 8, 2005, the Communications Center erased the audio recordings for the relevant incident. However, on April 5, 2005, the Defendant—through Mr. Miller, an investigator for his legal counsel at the time, the Office of the Indiana Federal Community Defender—made a request to the Communications Center for a copy of the

audio recordings of the incident. Ms. Viva Shaw, audio analyst for the Communications Center, completed the requested audio recording (the "Preserved Recording") for the Defendant on May 4, 2005. Unfortunately for the Defendant, the Preserved Recording began at the start time of the incident (4:02 P.M.), but only ran until the time of the apprehension of the Defendant (4:07 P.M.). Although the Defendant was apprehended at 4:07 P.M., the incident was not closed until 6:55 P.M. Ms. Shaw limited the Preserved Recording in this manner because Mr. Miller failed to list a specific ending time on his request for the recording. Ms. Shaw never attempted to contact Mr. Miller in order to specify an ending time. It is apparently Ms. Shaw's custom to provide a recording up to apprehension unless the request states otherwise. So, the Preserved Recording does not contain any radio communication after 4:07 P.M.

Furthermore, the Indiana Federal Community Defender's Officer no longer represents the Defendant. In fact, the Defendant is currently represented by his fourth different legal counsel in this matter. During the changes in representation, the Preserved Recording has been misplaced and the Defendant no longer has a copy of the Preserved Recording.

Finally, the Defendant has been able to obtain only one police incident report relating to his arrest. Officer Carrier prepared the incident report of which the Defendant has a copy. However, an on-line electronic search for incident reports relating to the incident with the Defendant on December 8, 2004 returns a search result listing three reports. (Def. Ex. B.) The case number is the same for all three reports appearing on the search results, and the listing does not suggest that there is any difference with any

of these items listed (such as describing one of them as a “supplemental” report). (*Id.*) However, there is only one incident report available. The Defendant appears to assert that, at some point, two other incident reports had existed but are now either destroyed or no longer available.

II. CONCLUSIONS OF LAW

The Defendant argues that the court should dismiss the Indictment against him due to the alleged destruction of two pieces of evidence: the complete audio recording of the police radio communications on December 8, 2004 from 4:02 P.M. until 6:55 P.M.; and two purported additional incident reports.

A. The Destruction of the Complete Audio Recording Does Not Merit Dismissal of the Indictment

The Defendant claims that the Government failed to preserve the complete audio recording of the events on December 8, 2004. A claim that the Government failed to preserve evidence is governed by the standard established in *Arizona v. Youngblood*, 488 U.S. 51, 56-58 (1988). This requires a defendant to demonstrate: “(1) bad faith on the part of the government; (2) that the exculpatory value of the evidence was apparent before the evidence was destroyed; and (3) that the evidence was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *United States v. Stewart*, 388 F.3d 1079, 1085 (7th Cir. 2004) (quoting *United States v. Aldaco*, 201 F.3d 979, 982-83 (7th Cir. 2000)). With regards

to the destruction of the audio recording, the Defendant has failed to meet all three prongs of this standard.

First, the Defendant concedes that it can make no showing of bad faith on the part of the Government. Instead, the Defendant argues that the court should apply the reasoning suggested in several Indiana cases³ and in Justice Stevens's concurring opinion in *Youngblood* in which Justice Stevens observed that "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." *Youngblood*, 488 U.S. at 61. Justice Stevens's observation is simply not the controlling law on this point. The Supreme Court has unambiguously stated that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. "The presence or absence of bad faith by the police for purposes 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." *Id.* at 56. The Seventh Circuit acknowledges the bad faith standard, adding that the defendant must prove "'official animus' or a 'conscious effort to suppress exculpatory evidence'" on the part of the police or Government. *United States v. Chaparro-Alcantara*, 226 F.3d 616, 624 (7th Cir. 2000) (quoting *Jones v. McCaughtry*, 965 F.2d 473, 477 (7th Cir. 1992)).

³ The Indiana state cases have no relevance in the discussion of the Defendant's federal rights.

The Defendant properly concedes that it can make no bad faith showing on the part of the Government or the police. The Communications Center keeps all audio recordings for a one-year period before destroying the recordings. In this case, the audio recording was available to the Defendant for the one-year period before the Communications Center routinely destroyed it on December 8, 2005. In fact, in April 2005, the Defendant, through his counsel at the time, requested a copy of the recording from the Communications Center. The Communications Center provided a copy beginning with the start time of the incident (4:02 P.M.) and ending at the apprehension of the Defendant (4:07 P.M.). The copy did not include recordings beyond the apprehension simply because the Defendant failed to request it. The evidence suggests that had the Defendant requested the ending time that he desired, the Communications Center would have made a more extensive copy of the audio recording. There is no evidence that the recording-over process, which eliminated the recordings he requested, was anything but routine. It is clear from the record that no attorney, agent of the federal law enforcement, or local police officer associated with the case requested that recording (or anything else, for that matter) be destroyed. Nothing in the evidence suggests “official animus” or a “conscious effort to suppress exculpatory evidence” on the part of the police or the Government. Without such a showing, the motion to dismiss based on destruction of evidence must be denied.

Even if the Defendant were not required to demonstrate bad faith, he has failed to satisfy the additional two prongs of the *Youngblood* standard. In particular, the Defendant makes no showing that the audio recording contained exculpatory value and

that the exculpatory value was apparent to the Government before the audio recording was destroyed. Instead, the Defendant suggests the mere possibility that the destroyed audio recording might have contained exculpatory value. Of course, this suggestion comes far short of meeting the standard set forth in *Youngblood* and its Seventh Circuit progeny.

Finally, the Defendant fails to demonstrate that the audio recording “was of such nature that [he] would be unable to obtain comparable evidence by other reasonably available means.” *Stewart*, 388 F.3d at 1085. The Defendant has the ability and right to call as a witness in his case each individual who was included in the audio recording to testify as to what happened. Indeed, as part of the evidentiary hearing associated with this motion, many of these individuals (Officers Carrier, Lamle, Adams, Miller, and Hayes) testified as to the events as they occurred on December 8, 2004.⁴ With just a couple very minor inconsistencies, their testimonies appear to be consistent and paint the same picture as to what occurred on December 8, 2004. The court finds this evidence, along with the CAD report, to be very comparable to what the audio recording may have shown.

Because the Defendant fails to meet each prong of the *Youngblood* standard, his motion to dismiss the Indictment based on the destruction of the audio recording will be denied.

⁴ The Defendant has also presented his own testimony and that of his wife regarding their version of certain of the December 8, 2004 events, and he has hinted in his January 30, 2006 testimony that he is aware of the identities of other civilians who were witnesses to critical events near the Audubon site.

B. The Alleged Destruction of Additional Incident Reports Does Not Merit Dismissal of the Indictment

The Defendant alleges that the police prepared three incident reports of the December 8, 2004 arrest, but that two of those reports have been destroyed. The Defendant has obtained a copy of a single incident report prepared by Officer Carrier. However, an on-line electronic search for incident reports associated with the Defendant's arrest returns a search result listing three reports.⁵ (Def. Ex. B.) The three results list identical information, including the same case number. However, there is only one incident report available. The Defendant believes that two other incident reports were destroyed.

The court first notes that the evidence does not necessarily support the Defendant's inference that there are (or were) three different incident reports. For example, the Defendant has produced no evidence that the return of three search results on the "civicnet" website necessarily means that there is more than one incident report. It is very possible that the three search results refer to the same, single incident report. Though not evidence in this case, the court has used a number of computer data 'search engines' such as Google, which often produce what appear to be multiple references to what turn out to be a single source. This is not at all uncommon.

Even assuming *arguendo* that there was at one time three different incident reports and that only one is now available, the Defendant still must satisfy the

⁵ The search was apparently performed at www.civicnet.net.

Youngblood requirements before the alleged destruction of evidence merits dismissal of the Indictment. Once again, he fails on all three prongs of the standard. First, he makes no showing of bad faith on the part of the police or the Government. Second, he fails to show that the missing incident reports contain exculpatory value and that the exculpatory value was apparent prior to their destruction. Finally, he fails to demonstrate how the existing incident report does not constitute comparable evidence. As such, the Defendant's motion, as far as it seeks dismissal based on the alleged destruction of two additional incident reports, will be denied.

III. CONCLUSION

For the foregoing reasons, the Defendant's Motion to Dismiss based on Destruction of Evidence (Doc. No. 64) is **DENIED**.

ALL OF WHICH IS ENTERED this 7th day of April 2006.

John Daniel Tinder, Judge
United States District Court

Copies to:

Timothy M. Morrison
United States Attorney's Office
10 West Market Street, Suite 2100
Indianapolis, IN 46204-3048

Theodore J. Minch
Sovich Minch LLP
10099 Chesapeake Drive, Suite 100
McCordsville, IN 46055