IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS/ST. JOHN

THE PEOPLE OF THE VIRGIN ISLANDS
Plaintiff

Vs.

EARL YHAN
Defendant

CASE NO. SX-08-CR-402

ACTION FOR: 14 VIC 1083

NOTICE
OF
ENTRY OF JUDGMENT/ORDER

TO: JESSE M. BETHEL Esquire

H. HANNIBAL O'BRYAN Esquire

GARFIELD BLOODMAN, Esquire
Chief of the Criminal Division

JUDGES AND MAGISTRATES OF THE SUPERIOR COURT

ORDER BOOK, LAW LIBRARY STT-STX

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Please take notice that on AUGUST 6, 2010 a Memorandum Opinion and Order was entered by this Court in the above-entitled matter.

Dated: August 11, 2010

VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Superior Court

By: Rosalie Griffith
Court Clerk Supervisor

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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PEOPLE OF THE VIRGIN ISLANDS,	)	CRIMINAL NO. SX-08-CR-402
Plaintiff,	)	
v.	)	V.I. CODE ANN. tit. 14, §§ 1083(1), 11(a) (5 Counts); 2101(a), 11(a) (5 counts)
EARL YHAN,	)	
Defendant.	)	
PEOPLE OF THE VIRGIN ISLANDS,	)	CRIMINAL NO. SX-08-CR-403
Plaintiff,	)	
v.	)	V.I. CODE ANN. tit. 14, §§ 1083(1), 11(a) (5 Counts); 2101(a), 11(a) (5 counts)
CARL YHAN JR.,	)	
Defendant.	)	

MEMORANDUM OPINION

THIS MATTER is before the Court upon Defendant Earl Yhan's Motion to Dismiss, filed on May 20, 2010, which Defendant Carl Yhan Jr. joined on May 25, 2010. The Court held a hearing on the Motion on July 26, 2010. Assistant Attorney General Jesse M. Bethel, Esq., appeared on behalf of Plaintiff People of the Virgin Islands ("People"). Earl Yhan was present at the hearing, and was represented by H. Hannibal O'Bryan, Esq., Territorial Public Defender. Carl Yhan Jr. was present and was represented by Darwin Carr, Esq. For the reasons that follow, the Court will deny the Motion to Dismiss.

FACTS

Both Defendants are charged with a number of offenses related to an alleged burglary that occurred in the early-morning hours of August 18, 2008. The People allege that Earl Yhan

and Carl Yhan together stole a number of items from the Gallows Bay Hardware Store in Christiansted, St. Croix. On May 25, 2010, Earl Yhan moved to dismiss the Information against him because, although the People notified the Defendants on October 21, 2008, that they had video footage of the alleged incident, they had not provided it at the time of the Motion, despite an earlier Motion to Compel. At the July 26, 2010 hearing, Earl Yhan stated that he had received the footage, but that the footage was of such a poor quality that the matter should be dismissed because the People's failure to preserve the evidence violated his right to Due Process. Carl Yhan Jr. stated at the hearing that he joined Earl Yhan's converted Motion. The People have stated that they do not intend to use the footage itself at trial, intimating that they would have witnesses testify from what they observed on the video.

The People concede that the video footage provided to the Defendants is not of a usable quality. However, all of the People's witnesses at the hearing—Kenneth Oxbrough ("Oxbrough"), Detective Frankie Ortiz ("Ortiz"), and Detective Jeffrey Nisbett ("Nisbett")—testified that the original video recording was clear. The People state that they no longer have a clear copy of the footage. The People presented testimony regarding how the evidence was lost or destroyed, which the Court must consider in determining whether the People violated the Yhans' Due Process rights.

The People's first witness, Oxbrough, was the Gallows Bay Hardware Store's employee responsible for reviewing security camera footage. He testified that when he came to work on August 18, 2010, he reviewed the footage from the previous two days' recordings. According to Oxbrough, he saw on the video two men arrive at the hardware store. One broke off a piece of a pallet and used that to try and adjust the angle of one of the cameras. He saw that, between 2:00

a.m. and 5:00 a.m., the men removed a number of boxes from the premises, loading them into a sports utility vehicle. Oxbrough was able to discern from the recording the type and color of the men's clothing and the color and general description of the men's vehicles. However, he was unable to make out what it was the men were carrying, other than that they were large boxes.

The manager of the store, Stefanie Crosier, contacted the police around 11:00 a.m. on August 18, 2008, to report the crime. Detectives Nisbett and Ortiz, along with some forensic officers, arrived on the scene that morning.[1] In the security room of the store, Oxbrough played the camera footage for the detectives. Nisbett testified that, during this viewing, Oxbrough sat in a chair, Ortiz stood behind him, and Nisbett stood in the back. Therefore, Nisbett stated, he had an obstructed view of the monitor and could not identify anyone from the footage. After playing the recording, Oxbrough made about eight still shots from the recording to aid in the identification of the suspects. According to Oxbrough, he could not identify either of the suspects, but that Ortiz and an employee from the security firm identified both suspects as Earl Yhan and Carl Yhan Jr.

Ortiz testified that the video he reviewed at the store was clear, and that he was able to identify Earl Yhan as one of the suspects because he had interacted with him professionally before the incident. He also identified Carl Yhan Jr. whom he knew as a corrections officer and as the son of a Superior Court Marshal. However, he did not make any written statements or reports reflecting his identifications. Rather, he testified from memory regarding those

[1] According to Nisbett, detectives would not normally be called to the scene of a grand larceny, which is typically handled "at the patrol level." However, he stated that detectives were always assigned to a case when it may involve a police officer. Earl Yhan is an officer with the Virgin Islands Police Department. According to his attorney, he is currently on leave pending the resolution of this matter.

identifications.[2]

Oxbrough made a copy on compact disc of the data contained in the recording, including the still shots, for the detectives, and also provided them with a compact disc containing a software driver necessary to view the footage on another computer. He also gave a disc to Crosier, who copied the data to her desktop computer. According to Oxbrough, the video camera system itself re-records over the footage every ten (10) days. The detectives did not direct him to save the digital recording or to do anything else to preserve the evidence, other than make a copy on the compact discs.

Nisbett, the case agent,[3] stated that he reviewed the footage upon returning to the police station on August 18, 2008, and that it was clear. He stated that he could identify from the footage Earl Yhan, who was currently a police officer at the time. Nisbett testified that he memorialized this identification in a supplemental report, but not in his affidavit in support of the Information.[4] From that footage, Nisbett could describe the color and kind of the Yhan's attire, and the color and general type of their vehicles. He could also see the two men, one of whom removed boxes from the premises and loaded them in a sports utility vehicle. He saw them make a number of trips in that vehicle.

Nesbitt testified that he gave the discs that Oxbrough provided to him to the forensics department of VIPD. Forensics, he said, made copies of those discs for him to keep with the file and to provide to the Attorney General's office. Counsel for Carl Yhan Jr. provided two chain-of-custody documents which were admitted into evidence. The first reflects the transfer of the

[2] Nisbett's affidavit states that Ortiz identified the Yhans from the footage.
[3] Ortiz testified that the case agent would be responsible for handling and preserving the evidence.
[4] He stated that he does not know where the supplemental report is. Counsel for the People stated that he has never seen a copy of that report.

disc to Nisbett at the scene on August 18, 2008. The second reflects the transfer of Nisbett's disc to Forensics on August 19, 2009. There were no other chain of custody documents produced, and the People's October 21, 2009 "Response to Discovery Request" similarly indicates the existence of only two chain-of-custody forms.

According to Oxbrough, some time after the incident—he was not sure whether it was a couple of weeks or a month or more, but was confident less than a year had passed—VIPD officers returned to the store, stating that they had lost the discs and requested copies. Oxbrough stated that Crosier provided a copy to the officers, which Oxbrough did not review.[5]

Nisbett testified that he did not recall anyone returning to the store to ask for copies. However, he stated that more than a year later, but less than two years later, he needed another copy of the video to give to the Attorney General's office. He testified that Assistant Attorney General Charlotte Poole contacted him in June 2010, stating that the Attorney General's office had lost their copy. Nesbitt attempted to get a copy from Luiz Encarnacion ("Encarnacion"), an officer in the forensics department, but Encarnacion was in Afghanistan at the time. Upon his return, Encarnacion located the disc (or discs) in his "drawer," and gave a copy to Nisbett who, in turn, provided it to the People. He admitted that he did not create a chain of custody document when he obtained the copied disc from Encarnacion and when he, in turn, provided it to counsel for the People because it was an "emergency" situation.[6]

ANALYSIS

In criminal proceedings, the People have an obligation to preserve evidence that may be

[5] It is unclear whether Crosier provided the officers with a data disc and a separate driver disc, or whether she only provided them with one disc.

[6] Apparently the "emergency" was the necessity of counsel for the People to respond to Defendants' Motion to Dismiss.

"expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488 (1984). The government's failure to preserve evidence may, at times, constitute a violation of an accused's rights to Due Process. To succeed on a Due Process claim, a defendant must prove that the government acted in bad faith when it failed to preserve the evidence. *U.S. v. Deaner*, 1 F.3d 192, 200 (3d Cir. 1993). If the government did not act in bad faith, the defendant will not succeed in his challenge. *Deaner*, 1 F.3d at 200; *U.S. v. Christian*, 302 Fed. Appx. 85 (3d Cir. 2008). To determine whether the government acted in bad faith, the Court must consider whether the exculpatory value of the evidence was apparent at the time it was lost or destroyed. *Arizona v. Youngblood*, 488 U.S. 51, 56 n.1 (1988) ("The presence of 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."). It is not enough for a defendant to show that the police did not follow its normal procedures, or that the government was negligent in its duty to preserve evidence. *Deaner*, 1 F.3d at 200-01 (holding that the failure to follow common police procedures did not, by itself, constitute a Due Process violation).

In this matter, there is no evidence that the police knew of the video's alleged exculpatory value at the time it was lost or destroyed. *Youngblood*, 448 U.S. at 56 n1. In fact, there was no evidence presented at the hearing that the video had any exculpatory value.[7] Three witnesses for the People testified under oath that they viewed on the video men moving boxes from the store. Two of these witnesses were able to identify the defendants from the footage. There was no evidence to contradict their testimony. Earl Yhan may have preferred to use the video to show

[7] The Court is aware that it is difficult to determine the value of evidence which it cannot examine. *Trombetta*, 467 U.S. at 486 ("Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.").

that, as several witnesses testified, he remained in one of the vehicles while most of the boxes were loaded. However, this is not necessarily exculpatory and, even if it was, Earl Yhan has other evidence he can use to prove this fact: the testimony of the witnesses who said as much at the hearing. *See Trombetta*, 467 U.S. at 489 (holding that, for evidence to meet the standard of constitutional materiality required for a Due Process challenge, its exculpatory value must be evidence *and* it must the evidence must "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means"); *see also U.S. v. Haywood*, 363 F.3d 200, 212 (3d Cir. 2004) (rejecting a Due Process challenge because, although the government could not produce the clothing the defendant wore when he was identified at the scene of the incident, there was other evidence reasonably available, as the government produced at trial a photograph taken of the defendant at the time he was booked wearing the clothing).

Because the lost video appears to lack exculpatory value, and because there is no evidence the police believed the video was exculpatory at the time the discs were lost, the Court cannot find that the video was "constitutionally material to the defense." *Trombetta*, 467 U.S. at 488 ("To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defense would be unable to obtain comparable evidence by other reasonably available means."). In addition, regardless of the video's exculpatory value, the evidence presented painted only a picture of negligent conduct and not malicious intent. *See Youngblood*, 488 U.S. at 58 (describing the police's failure to preserve evidence as conduct that "at worst" could be "described as negligent," and therefore declining to find a Due Process violation). Importantly, the Defendants presented no evidence that the police or the Attorney General's office acted in

bad faith. Therefore, the Defendants' Due Process challenge must fail and the Court will deny their Motion to Dismiss. *Id.* ("We therefore hold that unless a criminal defendant can show bad faith on the part of the police, the failure to preserve potentially useful evidence does not constitute a denial of Due Process law.").

Although the Court finds that the Government did not violate the Defendants' Due Process rights in this case, the Court takes the opportunity to express its deep concern regarding the negligent handling of the video surveillance tape. At the outset, the Court observes that this is not the first case presented to the undersigned in which the People have failed to preserve a clear copy of a surveillance video material to its case. In this case in particular, no one knows for sure what happened to the compact discs containing the clear copy of the recording. The Court received testimony from a detective stating that he failed to create chain-of-custody forms when transferring evidence. The Court has testimony from a store security employee that no one from the government directed him to preserve the original recording and no one attempted to seize the surveillance equipment. Finally, although Defendants made a demand more than a year ago for a copy of the video, the People only complied when, a year later, the Defendants moved to dismiss. The concerns expressed by the Third Circuit in *U.S. v. Ramos* are familiar:

> We confront, once again, a problem which no court, trial or appellate, should have to face in this circuit. Although we have unequivocally required since 1977 that government agents preserve rough notes of interviews with prospective trial witnesses, this case presents yet another instance in which notes were destroyed. We do not reverse here because it is apparent to us that the destroyed notes did not constitute Jencks Act or Brady material and that the officers who destroyed them acted in good faith. Nonetheless, we take this opportunity to emphasize that the fortuitous mix of legal and factual circumstances which might excuse the destruction of notes, and this constrain us to leave a conviction undisturbed, are few and far between. We should not encounter such cases in the future.

27 F.3d 65, 66 (3d Cir. 1994) (citations omitted).

Although this Court has not "unequivocally required" the preservation of surveillance tapes, it is nonetheless disturbing that the Government so often fails to preserve surveillance evidence clearly material to its case. As the Third Circuit opined in *Ramos*, this Court repeats here: "[This Court] should not encounter such cases in the future."

CONCLUSION

Because there is no evidence the Government acted in bad faith, and because the Defendants failed to prove that the surveillance video, if it had been preserved, would have been exculpatory, the Defendants' Motion to Dismiss will be denied. A separate Order of even date will follow.

DATED: August 6, 2010

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST:
VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY:
ROSALIE GRIFFITH
Court Clerk Supervisor 8/6/10

CERTIFIED A TRUE COPY
Date: 8/6/10
Venetia H. Velazquez, Esq.
Clerk of the Court
By:
Court Clerk

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
****

PEOPLE OF THE VIRGIN ISLANDS, Plaintiff, v. **EARL YHAN,** Defendant.	CRIMINAL NO. SX-08-CR-402 V.I. CODE ANN. tit. 14, §§ 1083(1), 11(a) (5 Counts); 2101(a), 11(a) (5 counts)
PEOPLE OF THE VIRGIN ISLANDS, Plaintiff, v. **CARL YHAN JR.,** Defendant.	CRIMINAL NO. SX-08-CR-403 V.I. CODE ANN. tit. 14, §§ 1083(1), 11(a) (5 Counts); 2101(a), 11(a) (5 counts)

ORDER

AND NOW, pursuant to the Memorandum Opinion issued in this matter on even date, it is hereby

ORDERED that Defendants' Motion to Dismiss is **DENIED**; and it is further

ORDERED that a copy of this Order and the accompanying Memorandum Opinion shall be served on Defendants Earl Yhan and Carl Yhan Jr., and copies thereof directed to counsel of record, to the Chief of Police, Virgin Islands Police Department, and to the Chief of the Criminal Division, Office of the Attorney General, Virgin Islands Department of Justice.

DATED: August 6, 2010

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY
Date: 8/16/10
Venetia H. Velazquez, Esq.
Clerk of the Court
By: Court Clerk

ATTEST: VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court
BY: ROSALIE GRIFFITH 8/16/10
Court Clerk Supervisor