

**ARKANSAS COURT OF APPEALS**

DIVISION IV  
No. CACR09-806

MACK DECONILE SMITH  
APPELLANT  
V.  
STATE OF ARKANSAS  
APPELLEE

**Opinion Delivered** February 11, 2010

APPEAL FROM THE FAULKNER  
COUNTY CIRCUIT COURT  
[CR-2008-1219]

HONORABLE CHARLES E.  
CLAWSON, JR., JUDGE

AFFIRMED

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**DAVID M. GLOVER, Judge**

In a bench trial, appellant, Mack Smith, was found guilty of possession of a controlled substance (marijuana) and possession of drug paraphernalia and was sentenced to three years in the Arkansas Department of Correction on each conviction, with the sentences to run concurrently. On appeal, he argues that destruction of potentially useful evidence violated the Due Process Clause of the Fourteenth Amendment under the spoliation doctrine. We affirm his convictions.

At trial, Conway Police Department patrolman Daniel Teague testified that he stopped Smith on July 25, 2008, at about 8 p.m. for running a stop sign. He explained that his vehicle was equipped with a camera that automatically began to record the stop as soon as the blue lights were activated. Teague said that as he approached the vehicle, he smelled a strong odor

of marijuana; that Smith was alone in the vehicle; that Smith did not have a driver's license; and that Smith was arrested when it was learned that he had outstanding warrants from Pulaski County. Teague testified that in the vehicle search and inventory, he found a black toiletry bag underneath the passenger seat that was within Smith's reach; he opened it on the hood of the vehicle so that the camera could record it; and in it he found electronic scales, baggies, two bags of a green leafy substance, and a green leafy substance in a jar. Teague stated that Smith told him that he had smoked some marijuana, and he found the remains of a joint in the ashtray in the front of the vehicle. Neither the black bag nor the joint were produced as evidence at trial.

With respect to the camera recording, Teague testified that there were priority codes to be entered by officers depending upon what the stop entailed. Priority one is classified as "all other events" that will be recorded by the system but do not appear to have immediate need for retention; priority two are traffic stops where a traffic citation warning is issued; priority three are "notable incidents" such as field interviews, unruly crowds, or demonstration events that might generate complaints; priority four are DWI/drug events and stops; and priority five are arrests. Under the department's written policy, Teague admitted that when an officer stops recording at the end of an incident, the officer will be prompted to enter a priority code from one to five; that all events will automatically be coded priority one until changed by the officer; that priority codes one and two would be retained for a minimum of sixty days and would be automatically deleted on the sixty-first day; that all recordings will not be maintained unless they are given a priority code of three or higher; and

that any recording may be tagged for evidentiary purposes as an officer or supervisor deems necessary. Teague admitted that the policy was in effect at the time of the traffic stop; he said that he did not learn until November 2008 how to set priority codes, and that he still did not set priority codes on his traffic stops.

Conway Police Department patrolman Greg McKay also testified, stating that he was riding with Teague when they came into contact with Smith. McKay said that once it was confirmed Smith had outstanding warrants, he searched Smith and placed him in handcuffs. McKay testified that he smelled an odor of burnt marijuana coming from Smith, and that Smith's eyes were bloodshot. McKay said that he stayed with Smith while Teague searched the vehicle; that he could see everywhere Teague searched; that he saw Teague reach down on the passenger side of the vehicle and say "look what I found"; and that it was a black "bathroom bag" that contained marijuana, which Teague showed to the camera.

Gene Hodges, a Conway police officer and an investigator with the Conway and Faulkner County narcotics teams, testified that he took control of the evidence, processed it, and submitted it to the crime lab for analysis. Hodges could not remember if Smith smelled like marijuana when he spoke with him.

Smith testified in his own defense. He stated that he was driving his girlfriend's vehicle, and that he had only been in the vehicle for five minutes before being pulled over. He denied that he had been smoking marijuana, and he stated that he did not know where Officer Teague had obtained the burnt joint. Smith said that he was placed in the back of the police unit before Officer Teague found the black bag; that he did not know the black bag,

the marijuana, or the joint was in the vehicle; and that the officers did not find any of those items on his person.

Smith's counsel made a similar spoliation argument at trial, arguing that because Teague did not code the recording to be saved, the video no longer existed so that it could be seen where the black bag was found—under the passenger seat, or somewhere to which Smith did not have access. The trial court made no ruling on Smith's spoliation argument at the end of the bench trial and took the case under consideration. In a letter dated January 7, 2009, and filed of record the following day, the trial court found Smith guilty under the theory of constructive possession. Also, in the next to last paragraph of the letter, the trial court stated:

One final matter has come to the Court's attention in this case. Officer Teague testified that at the time of the stop he had available to him recording equipment which was operating and did in fact record the events which occurred on the side of the street. However he testified that in contradiction to the established policy of the Conway Police Department he failed to "save" that recording, and as a result there is some controversy regarding the events which occurred. The Court is very much of the opinion that if the City of Conway and the Conway Police Department have gone to the trouble of buying and installing such equipment just for such purposes as is noted in their policy it would be an excellent idea for the officers who are charged with its use to do so. This was a felony arrest involving a controlled substance as a result of a traffic stop and while any evidentiary value might have been minimal, the Court has no way of knowing, it could have resolved issues which were raised during the course of these proceedings. Therefore, I would request that the Prosecuting Attorney's Office contact the appropriate authorities and relay to them the Court's concern regarding the use of the recording equipment.

The trial court did not make a ruling on Smith's spoliation argument anywhere in this paragraph. An appellant must obtain a ruling on his argument in order to preserve the issue for appellate review. *Hinojosa v. State*, 2009 Ark. 301, 319 S.W.3d 258. The failure to obtain

Cite as 2010 Ark. App. 136

a ruling on an issue at the trial-court level, including constitutional issues, precludes appellate review on appeal. *Huddleston v. State*, 347 Ark. 226, 61 S.W.3d 163 (2001). Because Smith did not obtain a ruling on his spoliation argument from the trial court, we are precluded from addressing it on appeal.

Affirmed.

GRUBER and BROWN, JJ., agree.