

## SkillsUSA Tennessee State Leadership and Skills Conference

### Fact Pattern for Mock Trial Appellate Argument

VolState County Grand Jury indicted Touchdown Tony, Defendant, with driving under the influence (DUI), DUI per se, and possession of a firearm while under the influence. Defendant moved to suppress the evidence, arguing that the State did not have probable cause or reasonable suspicion for the traffic stop and that video evidence of Defendant's driving was erased and deleted as a result of a malfunctioning recording system in VolState's Trooper Terrific Tim's patrol car. The trial court concluded that the loss of video evidence constituted a violation of the State's duty to preserve potentially exculpatory evidence recognized in *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999), and deprived Defendant of the right to a fair trial. The trial court granted the motion to suppress and dismissed the indictment, and the State appealed.

On January 3, 2019, Trooper Tim was returning to his home in VolState County after working security at the Governor's residence. While he was traveling behind a white pickup truck on Highway 96 in VolState County, he observed the truck cross over the right shoulder line of the road ("the fog line"). Trooper Tim's patrol car was equipped with a Mobile Video System ("the MVS") that continuously records and deletes until the system is activated, at which time the system preserves what is being recorded and what had been recorded during the thirty seconds prior to activation. Trooper Tim could manually activate the MVS to begin audio and video recording by pushing a button on his belt or by pushing a button on the camera, or the system would automatically begin recording when the vehicle's emergency lights were activated. Trooper Tim testified that he pressed the button on his belt to wirelessly activate the MVS within thirty seconds of the truck's crossing the fog line. Trooper Tim continued to follow the truck. He said that the truck crossed the fog line at least three more times before the driver turned right into a driveway and shut off the truck's lights. Trooper Tim testified: I watched him turn into the driveway. And it may have been a delayed reaction of why that I didn't turn right in, but I was watching him and then got almost pass (sic) the driveway before I initiated my lights.<sup>1</sup> And then when I did I come back and made the U-turn and come back. I watched him turn into the driveway. I watched him pull to the edge of the driveway, shut his lights off on the vehicle.

After pulling in behind Defendant, Trooper Tim contacted dispatch and asked that another trooper be sent to the scene to handle the investigation, explaining that he did not want to handle a case in VolState County. Trooper Green came to the scene and completed the DUI investigation. On the audio recording at the scene, Trooper Tim can be heard telling Trooper Green that Defendant "crossed the fog line and I mean he liked to have hit that low shoulder." After completing the investigation at the scene, Trooper Green transported Defendant from the scene and prepared the affidavit of complaint, which stated in pertinent part: "On January 3, 2019, at approximately 10:17 p[.]m[.], THP Trooper Tim observed a vehicle fail to maintain its lane of travel near the 4400 block of Hwy 96."

Although Trooper Tim thought that the MVS began recording when he pressed the button on his belt, the camera did not activate and continued deleting the thirty seconds of rolling video. Trooper Tim explained that, "once he attempted to start it, which is a simple push of the button, it should have started. It was a malfunction in the unit, hence one reason why VolState changed camera systems."

The trial court also questioned Trooper Tim about when he became aware of the fact that the video did not activate when he pressed the button on his belt. Trooper Tim agreed that it was “quite some time” before he actually watched the video. He added that because he did not make the arrest, he “never looked back . . . on it” and “just tagged it” so that Trooper Green could access it.

Near the end of the first hearing, Defendant moved to amend his motion to suppress to raise “the evidence preservation issue.” Defendant argued that he did not know “until Trooper Tim’s testimony today” that Trooper Story had attempted to activate the video recording system by pressing the button on his belt. In granting Defendant’s request to amend his motion to suppress to raise a Ferguson violation, the trial court reasoned:

So[,] I think that there is a negligent failure to preserve the evidence, but it is not Trooper Story’s negligence. It’s the failure of the Department of Safety to provide reliable equipment that turns on when it is supposed to when the trooper who as he said is paying attention to the driving habits of the vehicle in front of him, paying attention to other things that are going on around him, trying to operate his own vehicle safely. He does what he’s trained to do, he hits the button on his belt to turn it on and it doesn’t turn on.

Trooper Tim made the same claim of outdated equipment during testimony in the second hearing. He also stated that he checked to make sure all his equipment in the vehicle was working per policy, but that checking to make sure the transmitter on his belt functioned properly to start the recording is not part of policy. He did not check the transmitter.

When questioned about the location of his vehicle behind Defendant’s truck, Trooper Tim said that he “was not very far back” when Defendant turned into the driveway. He said that he was watching Defendant and went past the driveway. He said, “By this time I was almost right at the driveway . . . [and] I activated my lights [and] had to actually turn around in the road and then come back.”<sup>2</sup> Defense counsel asked, “So if you hit your blue lights at about the driveway, we should be backing up [thirty] seconds back from that, which [would] have you following him on the roadway three or four car lengths, correct?” Trooper Tim answered, “Possible.” He explained, “Wherever I activated my lights it should have [gone] back [thirty] seconds.” Trooper Tim said that it did not appear that the video backed up thirty seconds before he activated his emergency lights.

The trial court took the matter under advisement and, issued its Memorandum and Order finding that potentially exculpatory evidence was erased and deleted as a result of an obsolete recording system installed in Trooper Tim’s patrol car by TDS. The court found that Trooper Story “was without fault” and that “nothing he did or did not do caused or contributed to the destruction of the video evidence.” Based on Trooper Tim’s testimony, the court found “that the unreliability of the obsolete video recording equipment was well-known among his fellow troopers performing patrol duties” and that troopers “like Trooper Tim had no choice but to continue using this unreliable equipment, not knowing from one day to the next whether it would function properly.” The court determined that “[t]his state of affairs is a consequence of policy choices” made by TDS. “There is no evidence in the record of this case of an objective standard against which TDS’s policy choice not to replace the obsolete video recording equipment can be measured. Therefore, TDS’s inaction cannot be found to be negligent. Nevertheless, TDS is charged with the knowledge of its employees in the field, such as Tr[oo]per Story, that the

obsolete video recording system was no longer fit for purpose. By leaving the obsolete equipment in the field, TDS was running the risk that relevant evidence could be lost, just as it was in this case.”

The court found that the State “had a duty to preserve the recorded evidence,” and that the State breached its duty. The court found that evidence was “irretrievably lost,” thus depriving Defendant of the “only objective evidence with which to challenge” Trooper Tim’s testimony, that there was “no substitute for the video recording of [Defendant’s] driving which was erased and deleted,” and that Defendant has been “unfairly prejudiced as a result.” The trial court reasoned that “[t]he missing video relate[d] only to one issue: whether [Defendant’s] driving provided a legitimate reason for Trooper Tim to detain him for investigation.” The court concluded that “the State ha[d] failed to carry its burden of proof to show by a preponderance of the evidence that its detention of [Defendant] was lawful.” The court also concluded that “relevant evidence was destroyed” and that “exclusion of all evidence downstream of the destruction of this relevant, irreplaceable evidence [was] the only viable remedy.” The court stated that “[Defendant] ha[d] been denied a fundamentally fair trial.” The trial court granted the motion to suppress the evidence and dismissed the indictment. The State appealed.

In your argument, please be prepared to argue for either the state, or the defense concerning.

1. Was there reasonable suspicion or probable cause for the stop?
2. Is the loss of video evidence a violation under *State v. Ferguson* 2 S.W.3d 912 (Tenn. 1999)?