

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-070130
Plaintiff-Appellee,	:	TRIAL NO. B-0605427
vs.	:	<i>JUDGMENT ENTRY.</i>
TYRELLE WEBSTER,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Tyrelle Webster was convicted, after a jury trial, of tampering with evidence,² having a weapon while under a disability,³ and carrying a concealed weapon.⁴ We affirm his convictions.

In the evening of June 20, 2006, Cincinnati police officers were in the Mt. Auburn area of Cincinnati investigating numerous complaints they had received concerning drug trafficking and shots fired. Several officers detained individuals on Dorchester Avenue.

Officer Joshua Fehrman, who was in his cruiser nearby, noticed that Webster was intently watching the detaining officers on Dorchester Avenue. After Webster noticed that Fehrman was watching him, Webster crouched down behind a vehicle.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² R.C. 2921.12(A)(1).

³ R.C. 2923.13(A)(3).

⁴ R.C. 2923.12(A).

Fehrman decided to detain Webster. As Fehrman pulled his cruiser around the corner, Webster began to walk away. Fehrman exited from his cruiser and radioed fellow officers that he was pursuing Webster and that he believed that Webster would run.

When Fehrman ordered Webster to stop, Webster ran. Webster reached into his waist area and then turned towards Fehrman. Fehrman saw a short, black revolver in Webster's hand. Fehrman watched Webster turn back and throw the gun like a discus in the direction of the roof of a nearby building.

Webster was arrested and placed in a police cruiser. Fehrman secured the area while Officer Daniel Taylor searched the roof of the building for the gun. On the roof, Taylor found a digital scale. Taylor then spotted a black gun on the concrete driveway on the other side of the roof. A small portion of the gun's handle had chipped off and was next to the gun. Fehrman identified the gun as the weapon he had seen Webster holding after he had reached into his waist area. Taylor showed the scale to Fehrman, who found it insignificant. Ultimately, the scale was not retained or tagged as property for this case. Both Taylor and Fehrman testified that the scale looked like it had been on the roof for some time: Taylor described it as "mildewed," and Fehrman described it as "mossy."

In his first assignment of error, Webster argues that the state's failure to preserve the scale denied him materially exculpatory evidence in violation of his due-process rights.

The Due Process Clause protects a criminal defendant from being convicted of a crime where the state has failed to preserve materially exculpatory evidence.⁵

⁵ See, generally, *Arizona v. Youngblood* (1988), 488 U.S. 51, 109 S.Ct. 333; *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1.

Evidence is deemed materially exculpatory if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.⁶ A “reasonable probability” is a probability sufficient to undermine confidence in the outcome of the case.⁷

Webster claims that the state destroyed materially exculpatory evidence because, if the scale had been preserved, he could have tested it to determine whether there was moss or mildew on it and whether his fingerprints were on it. He concludes that “[b]y discarding the digital drug scale, the officers destroyed the only piece of tangible evidence that [he] could use to undermine the charges.”

We reject Webster’s allegation that the state’s failure to preserve the scale denied him materially exculpatory evidence. It was undisputed at trial that Officer Taylor had found the scale on the roof of the building. As acknowledged by Webster, physical possession of the scale would have merely allowed him the opportunity to subject it to tests, the results of which **might** have exonerated him. At best, the state destroyed potentially useful evidence, not materially exculpatory evidence.⁸

The failure to preserve potentially useful evidence does not constitute a denial of due process of law unless a criminal defendant can show bad faith by the police.⁹ Webster has not alleged any bad faith by the officers, and the record belies a finding of bad faith. Both officers testified that they had disregarded the scale because its physical condition indicated that it had been on the roof for a long period of time. And Officer Fehrman presented an additional reason: he observed Webster throw only a gun.

⁶ *State v. Johnston* (1988), 39 Ohio St.3d 48, 61, 529 N.E.2d 898, citing *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375.

⁷ *Id.*

⁸ See *Youngblood*, 488 U.S. at 58.

⁹ See *id.*; *Geeslin*, 2007-Ohio-5239, at ¶9-10.

Because Webster has failed to demonstrate a violation of his due-process rights, we overrule his first assignment of error.

In his second assignment of error, Webster argues that his convictions were against the manifest weight of the evidence.

A weight-of-the-evidence review requires an appellate court to sit as a “thirteenth juror.”¹⁰ We must review the entire record, weigh the evidence, consider the credibility of witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.¹¹

Webster claims that Officer Fehrman’s entire testimony was not believable because Fehrman testified that, after Webster had pointed the gun at him, he chose not to pull out his service weapon to subdue Webster “because [Webster] was too close.” Webster argues that Fehrman’s “restraint” contradicted his police training and human nature.

We do not agree that the jury lost its way in believing Fehrman’s testimony. Fehrman sufficiently explained his restraint when he later testified that he did not think that he had enough time to draw his weapon and that he ran to strike Webster before he could take a shot. Additionally, Fehrman testified that he did not think that Webster would shoot him.

Webster argues also that the jury should not have overlooked the conflicting testimony from Officers Fehrman and Taylor concerning who had taken custody of the scale after Taylor had retrieved it from the roof. We acknowledge that there was a discrepancy in this testimony, as Taylor testified that he gave it to Fehrman, and Fehrman testified that he never had possession of it. But Webster has failed to

¹⁰ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

¹¹ *Id.*

OHIO FIRST DISTRICT COURT OF APPEALS

persuade us that the jury lost its way in finding him guilty where the officers' testimony concerning the elements of the offenses was harmonious and corroborated by the physical evidence in the case. Accordingly, we overrule the second assignment of error.

We affirm the trial court's judgment.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R.24.

HILDEBRANDT, P.J., SUNDERMANN and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on February 20, 2008

per order of the Court _____.
Presiding Judge