**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

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| TIMOTHY PURCELL TEAFATILLER, | ) | |
| | ) | |
| Appellant, | ) | NOT FOR PUBLICATION |
| v. | ) | Case No. F-2005-366 |
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| THE STATE OF OKLAHOMA, | ) | |
| | ) | |
| Appellee. | ) | |

**SUMMARY OPINION**

**CHAPEL, PRESIDING JUDGE:**

Timothy Purcell Teafatiller was tried by jury and convicted of Possession of Concealed Drug in violation of 63 O.S.2001, § 2-402(B)(1), in the District Court of Pushmataha County, Case No. CF-2004-85. In accordance with the jury's recommendation the Honorable Lowell R. Burgess, Jr., sentenced Teafatiller to six (6) years imprisonment. Teafatiller appeals from this conviction and sentence.

Teafatiller raises seven propositions of error in support of his appeal:

I. Teafatiller's conviction should be reversed because the same judge presided over the preliminary hearing and trial;
II. Teafatiller's conviction should be reversed and remanded for a new trial because he was denied a fair trial before an impartial judge who was disinterested in the cause, proceedings, and result of the trial;
III. Teafatiller was denied due process of law because evidence was destroyed pending the trial;
IV. Teafatiller's conviction should be reversed because the State failed to prove venue during the trial;
V. Teafatiller did not receive a fair trial because evidence of other crimes was admitted in the trial when the prosecutor and the police made remarks about outstanding warrants;
VI. Teafatiller's conviction should be reversed because he was denied the Sixth Amendment right to confront a witness when the prosecution failed to show the witness's unavailability; and

VII. Teafatiller was denied the effective assistance of counsel when defense counsel failed to request that the trial judge recuse himself.

After thoroughly considering the entire appellate record, including the original record, transcripts, and briefs and exhibits of the parties, we find that that Proposition III requires reversal. Given our resolution of Proposition III, the other propositions are moot and we do not address them.

In Proposition III Teafatiller claims he was denied due process of law when the evidence against him was destroyed. Teafatiller was charged with possession of .68 grams of methamphetamine, found in a baggie in his wallet. Teafatiller was arrested on August 24, 2004, and the drugs were received by the OSBI for testing on September 1, 2004. On December 19, 2004, the OSBI released the drugs to the Pushmataha County Sheriff's Office. On December 29, 2004, without notice to Teafatiller or his counsel, the Sheriff's Office returned the drugs to the OSBI for destruction. The OSBI does not have the envelope which contained the drugs. The trial record does not contain any specific record of their destruction but, if not destroyed, they were unavailable for trial, and both parties presumed they had been destroyed by either the OSBI or the Pushmataha County Sheriff's Office.

Preliminary hearing in this case was held on October 13, 2004, while the drugs were still at the OSBI. The record and court minutes reflect that no motions docket, nor any other court date in this case, was subsequently held until the pretrial conference was held on January 6, 2005, after the drugs had been destroyed. Teafatiller filed a motion in limine regarding other crimes and

his statements, and a discovery motion, on February 17, 2005. Teafatiller's failure to also file a motion to test the drugs was unsurprising, as all parties were aware at this point that the drugs were missing and presumed destroyed. Trial was held on March 14 and 15, 2005. At the end of trial, after the story of the destruction of the evidence was put forth on the stand, Teafatiller moved to dismiss based on destruction of the evidence. The trial court found the sheriff's office acted with ignorance and negligence, but not bad faith, and denied the motion.

There is no dispute that the drugs which formed the basis for the charges against Teafatiller were destroyed, at the direction of the Pushmataha County Sheriff, well before trial in this case.[1] Neither defense counsel nor the prosecution was told the evidence was being destroyed; nobody had the opportunity to object or to request further testing. The Legislature has provided for the destruction of controlled dangerous substances, and the paraphernalia and hazardous materials which may be seized along with them.[2] The statute requires that all controlled dangerous substances seized pursuant to the Uniform Controlled Substances Act "shall be destroyed" at the direction of the OSBI, which has discretion to preserve samples for testing.[3] However, an officer seizing drugs must make a written inventory and maintain custody of that material until all legal actions are exhausted.[4] All parties agree that this

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[1] Former Pushmataha County Sheriff Flood testified that, when he left office, he ordered all the evidence still in the Sheriff's Office to be destroyed.
[2] 63 O.S.Supp.2004, § 508.
[3] 63 O.S.Supp.2004, § 508(A).
[4] 63 O.S.Supp.2004, § 2-507.

provision, which is designed to protect the rights of the accused, was violated. As hazardous materials were not involved here, there was no statutory imperative for immediate destruction, and the record contains no explanation for law enforcement's failure to follow the clear directions of the statute.

In *Vilandre v. State* we recently held that, in the context of this statutory scheme, "A defendant has a constitutional right to examine the evidence which will be used against him at trial. To enforce this right, the State, and its law enforcement representatives, must provide a defendant the opportunity to examine that evidence, preserving sample evidence for testing where appropriate."[5] We noted, the "OSBI may preserve – *and should do so, to preserve a defendant's right to examine the evidence against him* – a sample of the controlled dangerous substance itself for testing before destruction."[6] We stated, "a procedure as set forth by the Legislature in Section 2-508(B), when the amount of controlled dangerous substance exceeds ten pounds, should be adopted in a properly modified format to ensure a defendant's constitutional right to examine evidence is uniformly preserved throughout the state."[7] The record here shows that no attempt was made to preserve a sample of the drugs for testing before destruction.

The destruction of evidence requires reversal and remand. Teafatiller had no statutory right to test the controlled dangerous substance in this case

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[5] *Vilandre v. State*, 2005 OK CR 9, 113 P.3d 893, 896, citing U.S. Const. amend. V, VI, XIV; Ok. Const. art. II, §§ 7, 20.
[6] *Vilandre*, 113 P.3d at 896 (emphasis added).
[7] *Id.*

under the Oklahoma statute. However, he did have a constitutional right to examine and test the evidence against him, and we have directed that the statute be interpreted in light of that right. Teafatiller's right to examine the evidence against him was not only violated, it was completely negated by the State's actions. Following the trial court's conclusion below, the State argues that this error requires no relief because the record fails to show the Sheriff acted in bad faith – that is, that he intentionally ordered the evidence destroyed because he believed it would help Teafatiller's case. The State has mistaken the issue here. It is true that failure to preserve *potentially useful evidence* is not a due process violation, absent bad faith on the part of police.[8] We are not discussing *potentially useful evidence* here. The State destroyed the evidence which formed the basis of the charges, without any notice to the defense or prosecution, before the first pretrial conference had occurred. This is a violation of both a statutory provision designed to preserve evidence and a constitutional right.[9] In *Vilandre*, we found the denial of the defendant's constitutional right to examine the evidence against him was harmless, as the destroyed evidence consisted of hazardous and contaminated materials, while the controlled dangerous substances which formed the basis of the charges against him were available for testing.[10] The facts here compel a different conclusion. The controlled dangerous substance forming the basis of the

[8] *Hogan v. State*, 1994 OK CR 41, 877 P.2d 1157, 1161; *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 334, 102 L.Ed.2d 281 (1988).
[9] 20 O.S.2001, § 3001.1.
[10] *Vilandre*, 113 P.3d at 896, n. 15.

charge against Teafatiller was destroyed and he had no opportunity to examine it. This proposition is granted, and the case reversed and remanded.[11]

**Decision**

The Judgment and Sentence of the District Court is **REVERSED** and the case **REMANDED** for further proceedings not inconsistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

[11] As this Opinion makes clear, Teafatiller has the right to examine and test any evidence which may form the basis of charges against him in any subsequent proceeding.

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**OPINION BY: CHAPEL, P. J.**

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| LUMPKIN, V.P.J.: | CONCUR IN RESULTS |
| C. JOHNSON, J.: | CONCUR |
| A. JOHNSON, J.: | CONCUR |
| LEWIS, J.: | CONCUR |