

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**SUPERIOR COURT  
SUCR2014-10417  
SUCR2015-10384**

**COMMONWEALTH**

**vs.**

**AARON HERNANDEZ**

**MEMORANDUM OF DECISION AND ORDER ON  
DEFENDANT'S MOTION IN LIMINE FOR RELIEF  
BASED ON THE DESTRUCTION OF TANGIBLE EVIDENCE**

The defendant, Aaron Hernandez, has filed a “Motion in Limine for Relief Based on the Destruction of Tangible Evidence,” relating to evidence gathered from a BMW 325 xi sedan in which the victims, Daniel de Abreu, Safiro Furtado, and Aquilino Freire, were shot.<sup>1</sup> The motion is based on the fact that the police released the vehicle to its lawful owner in November, 2012, rendering it unavailable for further inspection. According to the defendant, the vehicle likely contained exculpatory evidence, the loss of which prejudices the defendant and warrants a sanction of dismissal of the charges or, alternatively, exclusion of evidence obtained from the vehicle, and exclusion of any expert testimony regarding the BMW.

The defendant’s motion is supported by an affidavit of the defendant’s attorney George J. Leontire. As set forth in the affidavit, the BMW was released to the owner’s insurer in November, 2012, and thereafter, sold at auction to a New Jersey car dealer who then shipped the vehicle to the Republic of Georgia for sale. In or around 2015, the Commonwealth retained a

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<sup>1</sup> The motion misidentifies the vehicle as a model 385 rather than a 325 xi. Attorney Leontire’s affidavit correctly describes the vehicle.

crime scene reconstructionist, Michael G. Haag, to offer expert opinions about the number and directionality of gunshots. Haag authored a report on November 29, 2015, supplemented by a further report on January 16, 2016. Haag rendered several opinions regarding the trajectory of shots based on an analysis of wounds to the victims and visible damage to the BMW, but noted that without personally examining the vehicle, he cannot state definitively the number of shots fired or the exact trajectory of each projectile.

The Commonwealth filed a written Opposition to the motion, supplemented by police reports documenting the police examination of the vehicle on and shortly after July 16, 2012. The Commonwealth's submissions indicate the following facts.

Boston police responded to a shooting incident at the intersection of Shawmut Avenue and Herald Street in the South End of Boston shortly after 2:20 a.m. on July 16, 2012. Two men, later identified as Daniel de Abreu and Safiro Furtado, were seated in the front seats of a 2003 BMW 325 xi sedan, de Abreu was in the driver's seat and Furtado was in the front passenger seat. Both men suffered apparent gunshot wounds and were pronounced dead at the scene. The police determined that there had been three other occupants in the car, two of whom left the area, and a third, Aquilino Freire, had been transported to Tufts Medical Center with non-life threatening gunshot wounds.

Because the incident involved a homicide, various units of the Boston police responded. Sergeant Detective Daniel Duff, a supervisor in the police Crime Scene Services Unit, responded together with Officers Michael Griffin and James Carnes. They observed the BMW and the two victims within, noted apparent blood stains on the interior and exterior of the car, and followed an apparent blood trail from the vehicle onto the sidewalk near the intersection of Herald and

Shawmut Ave. The officers documented the location of physical evidence with cones, by photographs, and in their written reports. A total of 58 photographs were taken at the scene, each of which was indexed in a "Photo Log." At approximately 5:13 a.m., the BMW (with the two victims inside) was loaded onto a flatbed and taken under police escort to the Boston Police Headquarters. Detectives sought and obtained a search warrant to further examine the vehicle and its contents.

The search warrant was executed on July 16, 2012, commencing at 1:14 p.m. and ending at 3:29 p.m. Members of the Crime Scene Response Unit, Crime Laboratory analysts and technicians, and a member of the Latent Print Unit participated in an inspection of the vehicle.<sup>2</sup> The police documented their search and the collection of evidence in various checklist forms, logs, notes, and reports. A total of 183 photographs were taken at various stages of the search, depicting the positions of the two victims, the location of items within the car, the location of ballistics, projectile, bloodstain, and impact evidence within the vehicle. Items of evidentiary significance were documented and collected for subsequent examination at the various sections of the Boston Police Crime Laboratory. Officers also used a slender metal rod to show the trajectory of bullets fired into the car. Entrance and exit holes were observed in both front seat headrests, and by placing trajectory rods through the holes, police were able to determine and visually record the apparent path of travel and angle of gunshots.

In or around 2015, the Commonwealth retained Michael Haag, a forensic consultant, to review the crime scene evidence in an apparent effort to determine the manner in which the

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<sup>2</sup> After photographing and documenting the positioning of the deceased, technicians from the Office of Chief Medical Examiner removed the bodies and transported them to the mortuary for autopsy.



shooting occurred, the number of shots fired, and the path of each projectile. Haag reviewed a raft of investigative material, including reports and photographs from: two autopsies, the crime scene, the BMW, and laboratory and firearm analysis results. He examined clothing and all of the ballistics evidence that was recovered at the autopsies and from the BMW.

Seven items of ballistics evidence were recovered by the police. At autopsy, de Abreu was found to have suffered two through-and-through gunshots, the bullets entering his upper front torso on the right side and exiting on the left rear shoulder and arm. Several lead fragments were collected during the autopsy. The autopsy performed on Furtado revealed that he suffered three gunshot wounds, two to the head and one through-and-through wound, entering his right shoulder and exiting his right upper back. A largely intact but damaged bullet was recovered from the victim's head, the bullet entering the right temple. A second gunshot entered the scalp behind the right ear, exiting the left side of the back of the head, and leaving a number of lead fragments in the wound path. At Tufts Medical Center, police recovered a largely intact bullet that had lodged in Aquilino Freire's right forearm. The lead nose of the bullet was damaged in a smooth but angled fashion, indicative of striking a hard surface before hitting Freire. Another nearly intact bullet was recovered in the BMW on the driver's side rear floor mat. Additional ballistics evidence included a steel jacket recovered from the passenger side rear seat and a small bullet fragment with a shard of glass attached that was recovered from the left rear door handle, above which was a shattered door window.

The police also documented, and Haag analyzed, apparent ballistics damage to the vehicle itself. Both front seat headrests had entrance and exit holes; there was damage to the faux-wood trim on the driver's door, damage to the steel pillar between the driver's door and rear passenger

door, and a shattered window on the rear driver's side door.

Haag was able to form certain opinions based on information from the autopsies (and medical treatment rendered to Freire), an examination of the victims' clothing, their respective positions within the BMW, the location of recovered bullets or jackets, a trajectory analysis of the two headrests, and the ballistics damage to the vehicle as depicted in reports and photographs. Based on the information available, Haag concluded that the bullet that lodged in Freire's right forearm likely struck Furtado in the right shoulder, exiting his back and traveling through the seat headrest before striking Freire.<sup>3</sup> The bullet that entered Furtado's head behind the right ear, exiting the rear left scalp, was not recovered. Haag theorized that the bullet likely traveled in one of three ways: (1) striking the left rear door frame (accounting for the small fragment with glass found in the door handle); (2) perforating the driver's side headrest before striking the driver's door pillar; (3) or exiting out one of the left windows. Haag further concluded that the largely intact bullet recovered on the left rear floor mat likely first struck de Abreu in the torso, exiting his left side and ricocheting off the faux-wood door trim at an angle, coming to rest on the rear floor.

Haag noted that some ballistics evidence was not recovered. He explained the discrepancy as possibly arising because ballistics evidence inadvertently could have been removed when the three occupants of the back seat exited the BMW after the shooting, or because bullets could have traveled through the car and out of the left side door windows (the

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<sup>3</sup> Haag's opinion as to the path of travel of this bullet was buttressed by his obtaining a headrest conforming to the style and design used in a 2003 BMW 325, which he analyzed and found to contain a hard plastic surface that would account for the blunt angled damage to the nose of the bullet recovered from Freire's arm. Haag's description of the headrest inspection is reported in his January 16, 2016 report.

driver's door window was down at the time of the shooting and the passenger door window was shattered by at least one projectile). For the same reasons, Haag could not conclusively determine how many shots in total were fired. He noted that "the lack of a vehicle to examine reduces this investigator's certainty, and in some cases, ability to make conclusions about the relationships between trajectories in bodies versus impacts and paths through the vehicle . . . ."<sup>4</sup> For instance, photographs of entry holes in the headrests appear to show irregular tears which would indicate that the bullet had penetrated another object before striking the headrest, but Haag would be more comfortable in examining the holes personally before making a conclusive determination. Similarly, the loss of the passenger seat headrest prevented Haag from observing the directionality and point of impact between a bullet and the hard plastic inner shell. Although Haag drew some determinations based on an examination of photographs of glass shards from the shattered rear window, Haag was unable to examine the remaining glass fragments which could have yielded more information about the number of bullets that struck the window.

### **DISCUSSION**

Due process of law requires the Commonwealth to disclose material, exculpatory evidence in its possession or control. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Commonwealth v. Tucceri*, 412 Mass. 401, 404-405 (1992). Where the defendant asserts that the Commonwealth has lost or destroyed potentially exculpatory evidence, "a balancing test is employed to determine the appropriateness and extent of remedial action." *Commonwealth v. Willie*, 400 Mass. 427, 432 (1987) (citations omitted). "The courts must weigh the culpability of the Commonwealth, the materiality of the evidence and the potential prejudice to the defendant."

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<sup>4</sup> Haag Report dated January 16, 2016, p. 16.



*Id.* Remedies for a violation of the duty to produce exculpatory evidence vary based on the balancing of interests, or based on bad faith or reckless conduct by the Commonwealth. Where the loss or destruction of evidence is egregious, dismissal of charges may be appropriate, see *Commonwealth v. Sasville*, 35 Mass. App. Ct. 15, 22-29 (1993). In cases involving less than egregious conduct, remedies may include a new trial, see *Commonwealth v. Olszewski*, 401 Mass. 749, 754 n.2 (1988); suppression of the evidence, see *Commonwealth v. Gliniewicz*, 398 Mass. 744, 747-749 (1986); or an instruction regarding the incompleteness or inadequacy of the police investigation that may give rise to a reasonable doubt as to the defendant's guilt, see *Commonwealth v. Bowden*, 379 Mass. 472, 485-486 (1980).

Because a defendant often cannot demonstrate that lost or destroyed evidence was in fact exculpatory, a lesser showing of prejudice is required. A defendant must demonstrate "a reasonable possibility, based on concrete evidence rather than a fertile imagination, that access to the . . . [material] would have produced evidence favorable to his cause." *Commonwealth v. Neal*, 392 Mass. 1, 12 (1984) (citation and internal quotations omitted). In *Commonwealth v. Williams*, 455 Mass. 706, 718 (2010), the court made clear that a defendant seeking relief for the loss or destruction of potentially exculpatory evidence bears a threshold burden of demonstrating the exculpatory nature of the evidence, using the *Neal* standard. If the defendant meets his burden, then the court must engage in a balancing of the Commonwealth's culpability, the materiality of the evidence, and the prejudice to the defendant. *Id.* If, however, the defendant fails to meet his initial burden, no balancing test is required.

Evidence is exculpatory if it "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material,

although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." *Commonwealth v. Daniels*, 445 Mass. 392, 401-402 (2005), quoting *Commonwealth v. Ellison*, 376 Mass. 1, 22 (1978). Based on Haag's reconstruction analysis, the defendant asserts that there is a "reasonable possibility" that the vehicle would constitute or reveal exculpatory evidence. Haag writes that without the vehicle to examine, he is unable to confirm or refute certain hypotheses that he formed regarding the path of certain bullets or accounting for the damage to certain bullets. Likewise, some of his opinions could be affected by personally examining the car and the ballistics damage that is, in some instances, imprecisely depicted in photographs. Notwithstanding his inability to examine the BMW, Haag does render some opinions based on wounds to the victims, their positions within the car at the time of the shooting and during the execution of the search warrant, and visible ballistics damage to the car. Whether those opinions will be permitted at trial depends on an application of the evidentiary principles to the proffered testimony. See Mass. G. Evid. § 702 et seq (2016). Facts inconsistent with an expert's opinions are typically the subject of cross examination, but ordinarily do not affect the admissibility of expert testimony.

Here, although Hernandez asserts that there is a reasonable possibility that the BMW would reveal exculpatory evidence, he fails to articulate (much less demonstrate) how a further examination, by Haag or anyone else, would yield evidence favorable to the defense. In the end, the loss of the vehicle seems more harmful to the Commonwealth insofar as Haag, a nationally-recognized expert in shooting reconstruction, will be unable to render opinions with the same degree of certainty that might exist after a personal examination. The suggestion that a further examination of the vehicle would undermine the Commonwealth's case is entirely speculative



and not grounded in any concrete facts. Consequently, the defendant has failed in his initial burden under *Neal*.

A second avenue of relief exists where, notwithstanding a defendant's failure to show a reasonable probability that exculpatory evidence was lost or destroyed, the defendant establishes that the loss or destruction was committed by the Commonwealth in "bad faith or recklessly." *Commonwealth v. Williams*, 455 Mass. at 718. See *Commonwealth v. Sanford*, 460 Mass. 441, 450 (2011). Bad faith claims often arise where the Commonwealth has acted in violation of or in disregard of discovery orders or agreements. See, e.g., *Commonwealth v. Sanford*, 460 Mass. at 450 (firearm test-fire without presence of defense expert as required by discovery order); *Commonwealth v. Williams*, 455 Mass. at 718-719 (DNA testing without presence of defense expert despite agreement to permit expert to observe testing). Further, in certain instances, the negligent loss or destruction of evidence could serve a basis for relief. *Commonwealth v. Williams*, 455 Mass. at 719 & n.10.

Here, the circumstances surrounding the handling of the vehicle do not show bad faith or recklessness on the part of the police or prosecutors. The condition of the vehicle was carefully documented and photographed prior to the removal of the victims or movement of the car to the police garage. Crime scene personnel documented the location and collection of scene evidence and took 58 photographs of the area, the vehicle, and damage to it. The vehicle was transported under police escort and then comprehensively searched. The victims were photographed in place from various angles and distances, physical items within the car were documented and photographed prior to being collected, and all existing ballistics evidence was similarly noted and photographed prior to being collected. Areas of suspected ballistics damage were identified and

assigned alphabetic letters, they were described and recorded in crime scene services reports, and a series of photographs of each area of damage were taken. The police spent over two hours inspecting and documenting the condition of the BMW. A total of 183 photographs were taken, and reports were written describing the search itself and the results of any subsequent forensic analysis on items recovered from the victims and the car.

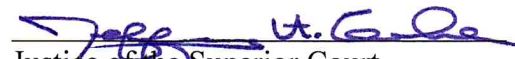
Any claim of bad faith or reckless conduct must necessarily lie only because of the release of the BMW in November, 2012. The car was released to its lawful owner (Daniel de Abreu's sister) and was taken by the vehicle insurer for reconditioning and sale. The defendant does not claim that the Commonwealth permitted the car to be released in a deliberate attempt to conceal evidence nor is there any basis to suggest a nefarious motive on the part of the Commonwealth. Rather, it appears that the Commonwealth believed, in good faith, that it had mined the vehicle for its full evidentiary value and that continued retention was not necessary. In this regard, the vehicle should not be treated substantially different from other crime scenes, such as private homes, street settings, or public areas where the police routinely release the site after conducting their crime scene investigation.

Likely, it was only after retaining Michael Haag to perform a reconstruction analysis that the Commonwealth realized that it would have been prudent to have the BMW available for the expert's inspection. Haag's inability to personally examine the car and the physical damage caused by the gunfire prevents him from opining more definitively on certain hypotheses he formed regarding the path and trajectory of some of the bullets. Moreover, he candidly notes the instances where a physical inspection would have been helpful, undoubtedly providing valuable fodder for cross-examination. Whether the Commonwealth's failure to retain the car indefinitely

amounts to negligent conduct will depend, in large part, on how the defendant explores the loss during trial. It may be that an instruction tailored to the loss of the vehicle is appropriate. See *Commonwealth v. Bowden*, 379 Mass. at 485-486; *Commonwealth v. Williams*, 455 Mass. at 719 n.10. At this stage, no further remedy is appropriate.

**ORDER**

Defendant's Motion in Limine for Relief Based on the Destruction of Tangible Evidence is **DENIED**.

  
Justice of the Superior Court

Dated: February 2, 2017