

CONCURRING OPINION BY REIFURTH, J.

I agree with the majority's analyses and conclusions regarding Gordon's latter two points of error. I write separately, however, to concur with the majority's conclusion regarding the video tape, as I would reach that conclusion differently.

Gordon argues that "Walmart and the State failed to properly preserve the best evidence of Gordon's true actions." As Gordon offers no argument that either Walmart or its asset protection coordinator is subject to state and federal constitutional due process strictures, I focus on what the State failed to do. Cf. *Nakamoto v. Fasi*, 64 Haw. 17, 23, 635 P.2d 946, 952 (1981) ("[C]onstitutional safeguards were designed to protect the individual from arbitrary, oppressive, and harassing conduct on the part of *government officials*." (emphasis added) (citing *United States v. Ortiz*, 422 U.S. 891, 895 (1975))).

Gordon contends that authorities failed to preserve evidence that it never had in its possession. Implicit in his argument is the premise that the State has a duty to collect or obtain particular evidence, whether it be the "best" evidence or just potentially exculpatory evidence. Gordon cites to no authority to support this position. Some jurisdictions have recognized that the failure to collect potentially exculpatory evidence may violate a defendant's due process rights. See, e.g., *Miller v. Vasquez*, 868 F.2d 1116, 1120 (9th Cir. 1989); *People v. Velasco*, 124 Cal. Rptr. 3d 238, 244 (Cal. Ct. App. 2011). But see, e.g., *United States v. Hughes*, 211 F.3d 676, 688 (1st Cir. 2000) ("[T]he government has no duty to produce evidence outside of its control, and it is not responsible for the preservation of evidence that was never in its control in the first place." (citations omitted)); *White v. Tamlyn*, 961 F. Supp. 1047, 1062 n.12 (E.D. Mich. 1997) (criticizing *Miller*); *State v. Schmidt*, 817 N.W.2d 332, 338 (N.D. 2012) ("Police generally have no duty to collect evidence for the defense." (quoting *State v. Steffes*, 500 N.W.2d 608, 612 (N.D. 1993))); accord *Snyder v. State*, 930 P.2d 1274, 1282 (Alaska 1996). This can only be so, however, where there is a showing of bad faith on the part of the

investigating authorities.^{1/} *Miller*, 868 F.2d at 1120 ("We hold that a bad faith failure to collect potentially exculpatory evidence would violate the due process clause."); *Velasco*, 124 Cal. Rptr. 3d at 244 ("Defendant is correct that if the defendant can show bad faith by the police, failure to preserve potentially useful evidence may, depending on the circumstances, violate his due process rights[.]" (internal quotation marks and citations omitted)).

Because Gordon fails to argue that state authorities were constitutionally required to seek and obtain the videotape in this case, *cf. Schmidt*, 817 N.W.2d at 335-38 (differentiating the constitutional implications of the failure to preserve evidence from those of the failure to collect it), and, moreover, because he does not demonstrate that the authorities acted in bad faith,^{2/} see *Miller*, 868 F.2d at 1120; *Velasco*, 124 Cal. Rptr. 3d at 244, I would conclude that his argument is without merit. *Cf. Schmidt*, 817 N.W.2d at 335-38 (rejecting a due process challenge where officers failed to timely obtain a video surveillance tape prior to its destruction by a private party).

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^{1/} Gordon correctly observes that under Hawai'i's due process clause, a defendant need not show bad faith in the failure to preserve evidence. See *State v. Matafeo*, 71 Haw. 183, 187, 787 P.2d 671, 673 (1990).

^{2/} Gordon at best makes the case that the investigating officers acted negligently in failing to inquire about a possible videotape. But bad faith requires more. See *Velasco*, 124 Cal. Rptr. 3d at 243 ("If 'the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant' and fail to preserve it, that shows 'bad faith on the part of the police.'" (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988))).