

NO. 80215-1  
80216-0

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Appellant,

v.

**HAZEN GRAHAM SHOPBELL,**  
Respondent.

*consolidated with*

**ANTHONY EDWIN PAUL**  
Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

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**AMENDED OPENING BRIEF OF APPELLANT**

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## A. INTRODUCTION

Hazen Graham Shopbell and Anthony Edwin Paul were co-owners of Puget Sound Seafood Distributors, LLC. In August, 2016, after an investigation by the Washington Department of Fish and Wildlife (WDFW) uncovered evidence of violations of RCW 77.15, Detective Wendy Willett went to a cold storage facility being used by the company. Within, Willett observed over 1,000 pounds of frozen clams being stored without appropriate certification tags or documentation and without being dyed as required for bait clams. Willett put a hold on the clams and returned a few days later with additional WDFW officers. They photographed and documented the clams before taking a representative sample for evidence and seizing and disposing of the remaining clams.

Shopbell and Paul moved for dismissal of the ensuing charges or, alternately, suppression of evidence. In suppressing the evidence, the trial court found that the destroyed clams were “useful and potentially exculpatory evidence for the defense.” The trial court made no finding of bad faith.

Because Shopbell and Paul failed to establish that the proffered defense for which the 1,000 plus pounds of clams would have been exculpatory was an actually available defense, and because they failed to establish that any exculpatory value of the clams would have been

immediately apparent prior to their destruction, and because they failed to establish the actual, as opposed to speculative, evidentiary value of the destroyed clams, the trial court erred to the extent it found the evidence to be materially exculpatory.

For the same reasons that Shopbell and Paul failed to establish any materially exculpatory value of the clams, they also failed to establish that the clams were potentially useful to the defense, and the trial court erred in so finding. Even if the trial court properly found the evidence to be potentially useful, then the trial court erred in suppressing the evidence because it did not find any bad faith in the disposal of the 1,000 plus pounds of clams.

**B. ASSIGNMENTS OF ERROR**

1. The court erred in entering Conclusion of Law C. The bait clams were not “useful and potentially exculpatory evidence for the defense.”
2. The court erred in entering Conclusion of Law D. The retention of 15 bait clams was a sufficient sample.
3. The court erred in entering Conclusion of Law E. There was comparable evidence to satisfy the constitutional requirement that the defendants have an opportunity to present a complete defense.

4. The court erred in entering Conclusion of Law F. The destruction of the bait clams did not violate the defendant's due process rights.
5. The court erred in entering Conclusion of Law G, suppressing all evidence of the seizure, examination and destruction of all items seized from the cold storage facility, except the 15 retained clams.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Shopbell and Paul claimed that when the State failed to preserve over 1,000 pounds of clams, they lost their ability to establish a defense of lawful harvest of clams because if the clams had been harvested in a tribal location, they would not have been subject to the requirement of having a fish receipt ticket. Where they did not establish that they would not have been subject to this requirement, did the trial court err in finding the clams to be materially exculpatory or potentially useful?
2. Shopbell and Paul claimed that when the State failed to preserve over 1,000 pounds of clams, they lost their ability to establish a defense of lawful harvest of clams because if the clams had been harvested in a tribal location, they would not have been subject to the requirement of having dyed bait clams. Where they did not establish that they would not have been subject to this requirement,

did the trial court err in finding the clams to be materially exculpatory or potentially useful?

3. Shopbell and Paul claimed that when the State failed to preserve over 1,000 pounds of clams, they lost their ability to establish a defense related to weight and value of the clams. Where law enforcement documented the clams seized and destroyed, did the trial court err in finding the clams to be materially exculpatory or potentially useful?
4. Where Shopbell and Paul asked the trial court to speculate on the evidentiary value of the destroyed evidence, did the trial court err in finding the 1,000 plus pounds of clams to be materially exculpatory or potentially useful?
5. Where the trial court did not make any finding that the exculpatory value of the destroyed clams would have been immediately apparent to law enforcement, did it err in finding the evidence was materially exculpatory?
6. If the trial court found the destroyed clams to be “potentially useful,” did it err in suppressing evidence where it did not find bad faith on the part of law enforcement?

#### D. STATEMENT OF THE CASE

Detective Wendy Willette works with the Washington Department of Fish and Wildlife (WDFW) Police. CP-AP 387<sup>1</sup> (Finding of Fact 1, 2); CP-AP 531. In 2015 WDFW commenced an investigation into licensed wholesale fish dealer Puget Sound Seafood Distributors (PSSD) regarding various alleged violations of RCW 77.15. CP-AP 387-388. Hazen Graham Shopbell and Anthony Edwin Paul, respondents herein, were co-owners of that company. CP-AP 387.

The investigation revealed that Shopbell and Paul, while being unlicensed as shellstock shippers, had purchased clams thirty-four times between June 4, 2015, and October 29, 2015, sold clams seventy-two times between June 9, 2015, and May 9, 2016, and sold 877.75 pounds of illegally harvested clams for bait in thirteen separate transactions between February 11, 2016, and May 9, 2016. CP-AP 2.

On August 12, 2016, Willette received information that PSSD had written five checks from December 28, 2015, through January 8, 2016, to various individuals for various pounds of bait clams. It was believed that these bait clams may have been illegally harvested. CP-AP 391. These clams were

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<sup>1</sup> State v. Anthony Paul and State v. Hazen Shopbell have been consolidated for appeal. The State will refer to clerk's papers from Mr. Paul's file as CP-AP and clerk's papers from Mr. Shopbell's file as CP-HS.

believed to be at Marine View Cold Storage in Burlington, Washington (“Marine View”). CP-AP 392.

On August 15, 2016, Willette went to Marine View. She discovered a commercial quantity of clams (1,180 pounds), being stored there and that the facility did not have a Department of Health approved certification tag. She did not see any dyed clams<sup>2</sup>. CP-AP 2, 392. Willette placed a hold on four totes holding frozen seafood, three of which appeared to be clams. The fourth tote did not appear to be clams. CP-AP 392, 531 (Finding of Fact 2). Willette photographed the totes, their weights, cold storage labels on the outside of the totes, and the clams. A hold was placed on the clams. CP-AP 392.

On August 22, 2016, Willette and other WDFW officers returned to the storage facility. They used a sledge hammer, hammer, and shovel to dislodge the frozen contents of the totes. The method potentially damaged the items within. They then removed the contents of the totes and sorted them into two totes. Those two totes of bait clams were then disposed of at the Skagit County dump. Willette preserved samples from the totes in four baggies that contained approximately fifteen clams, one of which appeared to have been dyed. CP-AP 531 (Finding of Fact 3, 4, 5).

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<sup>2</sup> Bait clams are required to be dyed. WAC 246-282-036.

On June 15, 2018, the State filed an information charging Shopbell and Paul with counts 1 and 2: Unlawful Use of Fish Buying and Dealing Licenses in the First Degree over the time period December 28, 2015, through January 11, 2016, and counts 3 -5: Unlawful Trafficking in Fish, Shellfish, or Wildlife in the Second Degree over the time period February 11, 2016, through May 9, 2016. CP-AP 3-5; CP-HS 1-3. On June 18, 2019, the State filed an amended information, amending counts 1 and 2 to Unlawful Fish and Shellfish Catch Accounting in the First Degree over the same initially charged time frame. Counts 3 – 5 remained the same. CP-AP 527-529; CP-HS 29-31.

On March 13, 2019, Paul filed a (corrected) motion to suppress or dismiss. CP-AP 6-379. Shopbell joined in the motion. CP-HS 6-7. Paul alleged a number of bases in support of his motion, however the trial court ultimately suppressed “all evidence of the seizure, examination and destruction of the bait clams and other items seized on August 22, 2016 from [the storage facility] . . .except for the 15 retained clams” based on the claim that useful and potentially exculpatory evidence was destroyed by the State. CP-HS 532 (Conclusion of Law G). The trial court did not enter any findings or conclusions with respect to any of the other bases put forth by Paul and Shopbell. CP-AP 530-533; CP-HS 32-36; 6/18/19 RP<sup>3</sup> 80-81. The suppression

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<sup>3</sup> The State will refer to the verbatim report of proceedings by using the date followed by “RP” and the page number. The VRP in this record consists of one volume which covers two dates; May 21, 2019, and June 18, 2019.

of the evidence had the practical effect of terminating the State's ability to prove the elements of each offense charged in the amended information. CP-AP 532 (Conclusion of Law H); CP-HS 34.

The State timely appealed from this decision. CP-AP 534-539; CP-HS 37-43.

#### E. ARGUMENT

THE TRIAL COURT ERRED WHEN IT FOUND THAT THE STATE'S FAILURE TO PRESERVE OVER 1,000 POUNDS OF CLAMS AS EVIDENCE CONSTITUTED A VIOLATION OF SHOPBELL'S AND PAUL'S DUE PROCESS RIGHTS.

The trial court erred when it suppressed evidence that had not been preserved based on that evidence being "useful and potentially exculpatory." CP-AP 532 (Conclusion of Law C, F).

Where the State has failed to preserve "material exculpatory evidence" the remedy is a dismissal of the charges. *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). Such a failure is a violation of a defendant's due process rights.<sup>4</sup> *Wittenbarger*, 124 Wn.2d at 475. However, there is no "undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution."

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<sup>4</sup> U.S. Const. amend. XIV.

*Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

A trial court's decision that such evidence is "materially exculpatory" is reviewed de novo. *State v. Burden*, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001).

The test to determine whether lost or destroyed evidence is materially exculpatory is (1) whether the evidence possessed an exculpatory value that was apparent before it was destroyed and (2) the defendant cannot reasonably obtain comparable evidence. As to the requirement that the evidence be exculpatory, "[a] showing that the evidence might have exonerated the defendant is not enough." *Wittenbarger*, 124 Wn.2d at 475. As to the comparable evidence prong, where the defendants have other reasonably available means to demonstrate their innocence, then he has comparable evidence and charges will not be dismissed. *See Wittenbarger*, 124 Wn.2d at 475-476 (quoting *California v. Trombetta*, 467 U.S. 479, 490, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984): "Furthermore, the Court found that the defendants had means, other than retesting the original breath samples, to demonstrate their innocence.").

In *State v. Burden* the court did not need to speculate on the exculpatory value of the missing evidence. Because, under the unique facts of that case, the defendant had already been tried once and the evidence was

actually used in that trial, the trial court was well aware of the significance of the evidence. *Burden*, 104 Wn. App. at 512-513.

Where lost or destroyed evidence does not meet the standard of materially exculpatory, but is “potentially useful,” then there is no due process violation unless the defendant can show bad faith on the part of the State. *Burden*, 104 Wn. App. at 512; *State v. Johnston*, 143 Wn. App. 1, 11, 177 P.3d 1127 (2007); *State v. Groth*, 163 Wn. App. 548, 261 P.3d 183 (2013). “Potentially useful evidence” is “evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” *Youngblood*, 488 U.S. at 57.

The basic elements of the crime of unlawful trafficking as pertains to Shopbell and Paul in counts three through five are that a person traffic in shellfish worth less than two hundred and fifty dollars and the trafficking violates any rule of the WDFW. RCW 77.15.260.

The basic elements of the crime of unlawful shellfish catch accounting as pertains to Shopbell and Paul in counts one and two are that a person acting as a licensed wholesale fish buyer receive for commercial purposes shellfish, the person fails to document that receipt with a fish-receiving ticket or that person fails to submit that fish-receiving ticket to WDFW, and the shellfish is worth two hundred fifty dollars or more. The statute also provides for alternatives to the two hundred fifty dollars element.

That is, instead of proving the monetary value of the shellfish, the State could instead prove that the person acted with knowledge that the shellfish was taken from a closed area, at a closed time, or by a person not licensed to take the shellfish. A second alternative to proving the monetary value of the shellfish is proving that the person acted with knowledge that the shellfish was taken in violation of any tribal law. RCW 77.15.630.

1. Where the respondents failed to establish that the destroyed clams would have been necessary to assert any viable defense, where the evidentiary value of the clams was based on pure speculation, and where there was no showing that any exculpatory value of the clams would have been apparent to law enforcement prior to their destruction, then the trial court erred to the extent that it found the clams to be “materially exculpatory.”

Shopbell and Paul offered several arguments to the trial court as to why the 1,000 plus pounds of disposed clams were materially exculpatory or potentially useful and therefore ought to have been preserved.<sup>5</sup>

Their primary argument was that if the clams had been preserved, their type and appearance would have somehow led to the identification of the location where they were harvested. CP-AP 19, 397-398; 5/21/19 RP 30. This identification would have theoretically occurred by an unidentified tribal harvester being asked if he could identify the clam, whether he had harvested

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<sup>5</sup> As previously indicated, there were other arguments made in support of the motion to dismiss however the court did not decide those motions.

the clam, and/or being asked, where he would normally harvest clams in 2016.  
5/21/19 RP 34; 6/18/19 RP 64.

Shopbell and Paul argued that the location of the harvest of the seized clams was relevant to their defense that those clams were legally harvested. They argued that because “the information alleges, in part, that Mr. Shopbell and Mr. Paul acted with knowledge that the fish or shellfish were taken in violation of any tribal law,” and because Tulalip Tribes do not require a fish receiving ticket, then any harvest within the “usual and accustomed” gathering grounds of the tribe even in the absence of a fish receiving ticket would not be “shellfish taken in violation of any tribal law.” 5/21/19 RP 37-38, 40.

First of all, this is not a valid defense. Shopbell and Paul did not establish to the trial court that Tulalip did not require a fish ticket but merely baldly asserted this. Furthermore, it actually is not true that Tulalip does not require a fish receiving ticket. Under Tulalip Tribal Code 8.05.210, a fish ticket must be filled out at the time of sale. Thus, even if all the clams were harvested in the usual and accustomed gathering grounds of the Tulalip Tribes, the criminal acts alleged here would still be established by the lack of fish tickets. Finally, whether the clams were taken in violation of any tribal law is only one alternative available to the State in proving the charge. The State may prove alternatively that the value of the clams exceed two hundred and fifty dollars. The State then need not prove violation of tribal law.

The defense additionally argued that establishing the location of the harvest would also establish whether the clams needed to be dyed. CP-AP 19; 5/21/19 RP 31-32. “[O]ur contention is that dying provision would only apply to clams that were harvested outside of a tribal authority; that each tribe is an independent sovereign. They can set their own rules. If the Tulalip Tribe or Snohomish<sup>6</sup> Tribe wants to let people harvest bait clams and not dye them that’s certainly their right. . . . So if we had the clams, if I knew where they came from, I could then say see these clams don’t have to be dyed because they were harvested by the Indians within their U and A.<sup>7</sup>” 5/21/19 RP 32.

The Tulalip and the Swinomish Tribes are signatories to the Consent Decree Regarding Shellfish Sanitation Issues filed in *United States v. Washington*, No. 9213 (W.D. Wn. 1994), referred to herein as “Consent Decree.” Therein, the signing tribes agreed to work cooperatively with federal authorities and the state and to comply with the National Shellfish Sanitation Program (NSSP) manual. In the Appendix, the parties agreed to a protocol for bait clams which includes dying the clams. Consent Decree at A-1 and Attachment B. WAC 246-282-036 requires that a person operating under a bait permit dye any bait clams immediately upon harvest. The Northwest

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<sup>6</sup> The comment was probably referring to the Swinomish tribe, not the Snohomish tribe. The Snohomish tribe is not a federally or state recognized tribe and is not mentioned anywhere else in the proceedings.

<sup>7</sup> “U and A” is presumably short for “usual and accustomed fishing grounds” protected by treaty.

Indian Fisheries Commission, of which the Tulalip and Swinomish Tribes are members, has acknowledged that tribally harvested bait clams are subject to the state health department's requirement to dye bait clams. Northwest Indian Fisheries Commission, *Swinomish Tribe harvests clams in new Bait Fishery*, (June 7, 2011), <https://nwifc.org/swinomish-tribe-harvests-clams-in-new-bait-fishery/> (last visited 1/12/20).

Even if this defense, that a harvest within the usual and accustomed fishing area of the tribe means that Shopbell and Paul did not need to comply with fish ticket and dyeing requirements, were a viable defense there is nothing to suggest that the destroyed clams would provide any information that would shed light on where and when they were harvested. Shopbell and Paul were asking the trial court to speculate that maybe an as yet unidentified tribal member would be able to look at a clam and identify where it was harvested. In order to establish that evidence is materially exculpatory the party needs to show that it actually is, not speculate that it might be.

Shopbell and Paul also argued that the destroyed clams would have shown whether they were actually dyed or not and if they had been dyed then Shopbell and Paul would have been in compliance with the requirement to dye bait clams. However, the assertion that the disposed of clams might have been dyed is purely speculative and there is no reason to believe that they were. Law enforcement would testify that they preserved the only clam that was

dyed. The defense did not assert that they believed any of the clams were dyed. The defense would certainly be free at trial to cross-exam all of the law enforcement officers who were present as to whether they saw any dyed clams. Finally, whether or not the bait clams were dyed is not a necessary element that the State must prove in order to establish the offenses.

Shopbell and Paul also argued that the clams were materially exculpatory because the weight of the clams was relevant to whether PSSD possessed a commercial quantity of clams and they briefly argued that the clams were needed to establish value. CP-AP 19; 5/21/19 RP 32. The weight and value of clams were noted by and would be testified to by the law enforcement officers. Cross examination is available to the defense on that issue.

Finally, Shopbell and Paul did not establish and the trial court did not make any finding that the exculpatory nature of the clams was apparent prior to their destruction. There would be no reason for law enforcement to consider that the actual 1,000 plus pounds of clams themselves would have any evidentiary value for any viable defense.

The trial court erred to the extent it found that the clams were materially exculpatory to any valid defense.

2. Where the trial court did not find bad faith, it was error to suppress evidence based on any potential usefulness of the clams.

Shopbell and Paul argued that even if the evidence was not “materially exculpatory” then it was “potentially useful”. CP-AP 20. The State for the same reasons argued *supra* regarding materially exculpatory asserts that the existence of the clams would not even be potentially useful to the defense.

However, this is not a determination that this Court needs to make. Given that the trial court made no finding of bad faith at all, potential usefulness alone is not sufficient to find a due process violation.

Shopbell and Paul argued to the trial court that the decision to dispose of the one thousand plus clams was made in bad faith because Willette had provided no notice or court order. CP-AP 20. However, she was not required to do so. RCW Chapters 69.30 and 77.15 provide the authorization for seizure and disposition. The trial court did not find that the clams were unlawfully seized or disposed of by virtue of the absence of notice or court order. Shopbell and Paul also invited the trial court to speculate on the existence of bad faith because of a time line of events that showed that Detective Willett continued to do her job with respect to these defendants despite ancillary legal proceedings. CP-AP 20. The trial court declined to so speculate. CP-AP 20.

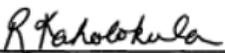
There are logical and valid reasons for disposing of the 1000 plus pounds of clams, e.g. a proper storage facility. The clams were photographed and documented by law enforcement officers prior to disposition.

Because there was no showing of bad faith and the trial court did not find bad faith, the trial court erred in finding that the failure to preserve “potentially useful” evidence violated Shopbell’s and Paul’s due process rights.

F. CONCLUSION

For the foregoing reasons, the trial court’s suppression of evidence should be reversed and this matter remanded to the trial court for further proceedings.

DATED this 13th day of January, 2020.



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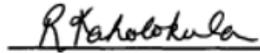
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Attorney for Respondents:

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DATED this 13<sup>th</sup> day of January, 2020.



WSBA #25026

Rosemary Kaholokula  
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Declarant

# SKAGIT COUNTY PROSECUTING ATTORNEY

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