

**COURT OF APPEALS OF GEORGIA
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September 14, 2015

To: D. Lynn Bearden, Esq., 202 South Park Avenue, Calhoun, Georgia 30701

Docket Number: Style:

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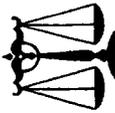
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7074

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September 2, 2015

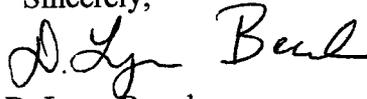
Clerk
Court of Appeals of Georgia
Suite 501
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Atlanta, Georgia 30334

Dear Clerk,

Enclosed for filing, please find an original plus one copy of an application for Leave to Appeal Interlocutory Order. Enclosed is an additional copy with a self-addressed pre-paid postage envelope for return when stamped filed. Also enclosed is check number 7074 in the sum of \$80.00 for the filing fee.

Thank you for your assistance.

Sincerely,



D. Lynn Bearden
Attorney at Law

DLB/lbh

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IN THE COURT OF APPEALS
STATE OF GEORGIA

DERWIN MILES TAYLOR,	:	Gordon County Superior Court
Petitioner,	:	Indictment/Case No. 24424
	:	
v.	:	
	:	
STATE OF GEORGIA,	:	
Respondent.	:	

APPLICATION FOR LEAVE TO APPEAL INTERLOCUTORY ORDER

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INDEX TO ATTACHMENTS

- "A"-Motion To Suppress
- "B"-Order Denying Motion to Suppress
- "C" Motion to Reconsider Denial of Motion to Suppress
- "D" Order Granting Motion to Reconsider but Denying Motion to Suppress
- "E"-Certificate of Immediate Review
- "F"-Transcript of Hearing on Motion to Suppress identified herein as "T"
- "G"- Video from Patrol Car

COMES NOW, DERWIN TAYLOR, PETITIONER in the above-styled case, pursuant to O.C.G.A. Section 5-6-34 and Georgia Court of Appeals Rule 30, and submits this his Petition For Leave to Appeal Interlocutory Order as follows:

I. STATEMENT OF JURISDICTION

The Defendant in the above and foregoing case filed a Motion to Suppress on January 27, 2014. [Attachment "A"] A hearing was held on February 27, 2014 and Defendant's motion was denied by written order on March 27, 2014. [Attachment "B"]. Prior to trial, on August 4, 2015. Defendant filed a Motion to Reconsider Denial of Defendant's Motion to Suppress. [Attachment "C"] Oral argument on Defendant's Motion was held on August 6, 2015. Defendant's Motion for Reconsideration was granted but Defendant's Motion to Suppress was denied by written order filed on August 14, 2015 and served upon Defendant August 17, 2015. [Attachment "D"] Within ten (10) days of the Order Denying Defendant's Motion to Suppress, the Petitioner submitted his Certificate of Immediate Review which was signed by the trial judge and filed in the Gordon County Clerk's Office on August 24, 2015. [Attachment "E"]

The Court of Appeals of Georgia, rather than the Supreme Court of Georgia, has jurisdiction over this case on appeal because, if accepted, this would be an interlocutory appeal from an order denying Defendant's Motion to Suppress in a non-capital case,

jurisdiction is not reserved to the Supreme Court of Georgia or conferred on other courts of law, and it does not draw into question the constitutionality of a law, ordinance, or constitutional provision. ARTICLE VI, Section VI, Paragraph II of the Constitution of the State of Georgia.

II. SUMMARY OF THE ISSUE INVOLVED AND THE NEED FOR APPEAL

Petitioner/Defendant is charged herein with one count of Trafficking Marijuana O.C.G.A 16-13-31(c), on or about September 19, 2013. This charge is based on evidence found in Defendant's vehicle, wherein Defendant was the driver and sole occupant, after a traffic stop and then drug investigation resulted in a warrantless, non-consensual search by a law enforcement officer. The issue as certified by the trial court is "Whether the alleged contraband seized from the Defendant's vehicle during a warrantless search by police should be excluded from evidence on grounds that the Defendant was unlawfully detained following a routine traffic stop, that police lacked reasonable articulable suspicion to detain Defendant for a drug investigation and to search the Defendant's vehicle? [Attachment "E"]

The application of recent cases to these facts present important questions affecting Petitioner's Constitutional rights and interlocutory resolution would likely be dispositive of the criminal charges now pending against Petitioner.

The order denying Petitioner's Motion to Suppress appears erroneous and will probably cause a substantial error at trial and will adversely affect the rights of Petitioner until entry of final judgment.

With application of recent cases of the issue of traffic stops becoming drug investigations without warrant or sufficient cause, the establishment of precedent is desirable.

III. BASIS FOR GRANTING APPLICATION FOR LEAVE TO APPEAL

On September 19, 2013, Defendant Derwin Taylor was the sole occupant and was driving a vehicle on Interstate 75 in Gordon County. Deputy Pullen of the Gordon County Sheriff's Office made a traffic stop upon Defendant for failure to maintain lane and for too dark window tint. T p.22 (7-11) Mr. Taylor gave the deputy his driver's license and proof of insurance. T p.22 (12-14) The deputy observed numerous air fresheners and packaging which were releasing an "overwhelming odor." T p.9 (7-12); T p.23 (1-3) . Also noticed was Defendant's hand shaking when producing his license which the deputy interpreted as an indicator of nervousness. T p.23 (6-11) The deputy checked the vehicle's window tint.

Mr. Taylor exited the vehicle upon request. Mr. Taylor stood with Deputy Pullen as directed and answered his numerous questions about where he had been, why he

had been there, and who he was seeing while the deputy completed writing two warning citations. T p.25 (12-17) Although Mr. Taylor no longer seemed nervous, the deputy thought the Defendant should have known or given more information about the relative that he claimed to having visited. The deputy called in the driver's license and tag information to dispatch. The trial court found that the deputy had completed writing the two traffic warning citations when he then asked Mr. Taylor for consent to search his vehicle. T p.26 (18-25) The deputy still possessed Mr. Taylor's drivers license and was waiting for the license and registration information to return from dispatch. Mr. Taylor denied the deputy's request for a consent to search. T p.10 (16-17)

When the deputy went back to his patrol car, the license and tag information check was returned from dispatch as all clear. T p.27 (16)- p. 28 (3) Instead of returning the driver's license and providing the already completed citations, the deputy continued to detain Mr. Taylor longer while he employed procedures for his drug dog to conduct a free air sniff of Mr. Taylor's vehicle.

The trial court found “ When the deputy went back to the car to retrieve the canine, the license and tag information returned as all clear. The deputy then proceeded to remove the canine in order to conduct a dog sniff of the Defendant's vehicle.”

[Attachment “D”] The traffic stop had concluded before the Defendant was detained for Deputy Pullen to get his drug dog out of his patrol car and go through procedures for

sniffing Defendant's vehicle.

After conducting procedure with the canine, and interpreting positive response, the deputy proceeded to search the Defendant's vehicle and obtained evidence that the State will seek to introduce at trial.

Deputy Pullen lacked reasonable articulable suspicion of criminal activity sufficient to detain the Defendant for a drug dog sniff of his vehicle after the purpose of the traffic stop had concluded.

This Court initially found in denying Defendant's Motion to Suppress that Defendant was not "unnecessarily prolonged" when he was further detained by the free air sniff of Mr. Taylor's vehicle. The Court found that the Defendant was "not unreasonably detained and the interaction leading up to the free air sniff lasted less than twenty minutes." [Attachment "B"].

Following the entry of this Court's initial Order Denying Defendant's Motion to Suppress, the Supreme Court of the United States decided Rodriguez v. United States, 135 S. Ct 1609 , 191 LE2d 492 on April 21, 2015. Mr. Rodriguez was stopped for a moving vehicle violation. "After attending to everything related to the stop, checking the driver's license and issuing a warning, the officer asked for permission to walk his dog around the vehicle." Mr. Rodriguez like Mr. Taylor refused such consent. The officer retrieved his dog who alerted to the presence of drugs in the vehicle. Seven or

eight minutes elapsed from the time the warnings were issued until the drug dog alerted. The District Court had denied the Motion to Suppress by concluding that “prolonging the stop by seven to eight minutes for the dog sniff was only a de minimus intrusion on Rodriguez's Fourth Amendment right's and was for that reason permissible”. The United States Supreme Court vacated and remanded the case holding “Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures”.

The U.S. Supreme Court found in Rodriguez v. U.S. that “The Government's argument that an officer who completes all traffic-related tasks expeditiously should earn extra time to pursue an unrelated criminal investigation is unpersuasive, for a traffic stop 'prolonged beyond' the time in fact needed for the officer to complete his traffic-based inquiries is 'unlawful' “citing Caballes, 543 U.S. At 407. The Court adds “The critical question is not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the dog sniff adds time to the stop”.

Prior to the U.S. Supreme Court's ruling in Rodriguez v. U.S., the Eight Circuit court had permitted “de minimus” detentions after all traffic issues had been completed in order to run a drug dog around a vehicle. This was the same analysis initially applied by this Court in denying Defendant's Motion to Suppress. [Attachment “B”] This Court found “the amount of time taken was reasonable” and that the stop was not

"unnecessarily prolonged" by the free air sniff by the dog. Under Rodriguez v. U.S., holding Mr. Taylor after the traffic warning citations were completed and the motor vehicle registration and driver's license had been verified to conduct a sniff of his vehicle by a dog, was a violation of Mr. Taylor's Fourth Amendment rights and Defendant's Motion should be granted.

Upon reconsideration by the trial court post Rodriguez v. U.S., the trial court found "Since the deputy had reasonable articulable suspicion at the time he retrieved the canine, the stop was not impermissably prolonged." The trial court now grants that "if the deputy sheriff had not had articulated reasonable suspicion the search would have been improper." [Attachment "D"]

The detention of Mr. Taylor beyond the completion of the warning citation for window tint violation and the license and registration check was prolonged beyond the conclusion of the investigation that warranted the detention in the first place.

The trial court found that the drug investigation was conducted beyond the completion of the traffic stop. [Attachment "D"]. In denying Defendant's Motion to Suppress the trial court found that the deputy had reasonable articulable suspicion at the time he retrieved the canine and therefore the stop was not unreasonably prolonged. [Attachment "D"].

The trial court erred by finding that the indicators cited by the deputy rose to a

level of reasonable articulable suspicion of other criminal activity sufficient to detain the Defendant for good cause to pursue different investigation. There were three factors to constitute reasonable articulable suspicion testified to by Deputy Pullen:

First, was that Mr. Taylor was nervous. The deputy concluded this because Mr. Taylor's hand seemed to shake when he handed the deputy his license. T p.23 (6-9) Deputy Pullen admitted "That's not a sign of criminal activity or illegal activity". T p.23 (9-10) After Mr. Taylor stepped out of his vehicle at the deputy's request, they had a lengthy conversation and the deputy did not notice any further signs of nervousness. T p.23 (11-17) The trial court specifically disregarded nervousness as a factor in finding that the deputy articulated reasonable suspicion. [Attachment "D"]

The second factor was that Mr. Taylor had a large number air fresheners of unknown age hung on his rear view mirror with opened packaging therefrom and an overwhelming odor of air freshener. T p. 9 (4-12) p. 23 (1-3) The trial court found an estimated 20 to 25 car air fresheners together with knowledge that air fresheners are used to mask the odor of marijuana was a factor (combined with the third factor below) sufficient to constitute reasonable articulable suspicion sufficient to further detain Mr. Taylor though the traffic stop was completed. [Attachment "D"]

The trial courts finding that air fresheners, if in large quantity, constitutes reasonable articulable suspicion of criminal activity is in contradiction of the finding in

Nash v. State, 323 Ga. App. 438 (2013) wherein this Court reversed a denial of a motion to suppress from a detention following completion of an investigation of a motor vehicle infraction, for a drug dog free-air sniff based on nervousness, cell phones, and an overwhelming odor of air freshener with multiple air fresheners in the vehicle.. An overwhelming odor or multiple number of air fresheners, perfume, cologne or any other legal substance is not sufficient to create a reasonable articulable suspicion of criminal activity. This Court also previously found that the presence of air fresheners, even when coupled with other factors, are not sufficient grounds to detain a defendant for a drug investigation in State v. Thompson, 256 Ga. App. 188 (569 SE2d 254) (2002). "Although laundry detergent and dryer sheets can be used to mask the odor of an illegal substance, they are themselves legal substances that can be used for a legal purpose and thus do not justify the officer's further detention of [appellant] where such an odor was coupled with extraordinarily nervous and defensive behavior." id at 190.

The third and only remaining factor identified by Deputy Pullen was that he was suspicious about the story as to why Mr. Taylor had traveled to Atlanta. "A couple of things that caught my mind was that uncle, a family member, that he cared enough to drive from Kentucky to some where in Atlanta, he didn't know where he was at. He said that he didn't know that area. He was just all messed up. When asked which hospital the uncle had been in, he did not know. When asked the diagnosis of the uncle,

he said, I don't know, I think stomach problems, stomach cancer, I think. If I drove six hours to see a family member that I care about that much, in the two day conversation with this family member, at some point knowing that he did not have insurance and that it was serious enough to kick him out of a hospital, a name of a hospital would have been brought up. A diagnosis would have been brought up. So indicators like that, that led me to believe he was not being truthful with me." T p.23 (22)- p.24 (12) This is picked out by the deputy as a small part of responses to his lengthy questioning while writing the warning citations which included topics of truck driving, Louisville, and the weather while the deputy completed the warning citations. T p.23 (12-17)

Additionally, based on the question/answer session, Deputy Pullen testified that Mr. Taylor contradicted himself as to whether he stayed in an apartment or hotel while in Atlanta. When asked for details about this contradiction Deputy Pullen stated that Mr. Taylor was talking about the Chevy apartments but then stated he stayed in a hotel and brought out a room key card to show the officer which hotel. T p.25 (1-11). When asked if Mr. Taylor had said that the uncle he was visiting lived at the Chevy apartments and that Mr. Taylor stayed at the identified hotel, the officer couldn't remember. T p.25 (9-14) This is the extent of the alleged contradiction.

In Matthews v. State, 330 Ga. App. 53 (2014) this Court reversed the trial court's failure to grant a Motion to Suppress and in finding reasonable cause to move from a

tag violation investigation into a drug investigation based on “nervousness” and meaningless inconsistencies in answers given to police questions. In Taylor's case, the nervousness was brief and he was not as inconsistent with his statements as defendant Mathews. In Mathews, the officer observed that “Mathews appeared extremely nervous, exhibiting a tick of rubbing his head and that the underling of his eye...[was] just trembling...he was unusually nervous”. Additionally the officer suspected that Mathews was lying about his itinerary. Also in Mathews, “within moments, the K-9 car arrived”. This Court found in Mathews that “ The State bears the burden of proving the search of the car was lawful, and to carry thus burden, the State must show that it was lawful to detain [Mathews] until the the drug dog indicated the presence of drugs. In this case, the State did not meet its burden. The officer stated that he believed that he had developed reasonable suspicion to detain Mathews beyond the conclusion of the investigation that warranted the stop because, amongst other things, the officer observed that Mathews was extremely nervous, was driving a borrowed vehicle, and was traveling out of state but had no luggage. But this Court has held that similar facts did not provide 'a particularized and objective basis for suspecting that [a driver] was, or was about to be engaged in criminal activity.” As this Court has held, “meaningless inconsistencies in answers to police questions ... do not give rise to reasonable, articulable suspicion.” Ward v. State, 277 Ga. App. 790 (2006) In Ward, although the

driver lied to police about the reason for her presence at a certain location, this Court held that the mere fact the driver had told a lie did not give rise to reasonable, articulable suspicion of criminal activity. Even if Matthews did wear the same clothes for three days, or make a decision (that the officer believed was unwise) to leave his clothes in Atlanta with a relative; and even if Matthew's statements about his clothing were inconsistent; that behavior and those statements did not constitute either illegal or sufficiently unusual conduct that provided any objectively reasonable basis for suspecting that Matthews was, or was about to be, engaged in criminal activity. Accordingly, the officer was not authorized to detain Matthews beyond the conclusion of the investigation of the traffic infraction." Matthews id. at 56.

That Mr. Taylor did not know which hospital his uncle he had traveled to visit had been released from and was not definite as to his Uncle's medical diagnosis are reasonably explainable and are just as irrelevant. Where Mr. Taylor stayed on his trip was also not related to the mission of the traffic stop. There were no statements made that objectively reasonably justify detaining Mr. Taylor and launching into a drug investigation.

Unlike the cases of Betancourt v. State, 322 Ga. App. 201, 744 S.E.2d 419 (2013) and Calcaterra v. State, 321 Ga. App. 874, 743 S.E.2d 534 (2013) where contradictory answers related to the reason for the traffic stop, the health of Defendant's uncle and

where the Defendant had stayed had nothing to do with the mission of the traffic stop.

Like Nash, the purpose of the initial traffic stop was completed when the warning citation was completed and license checked. The indicators that Deputy Pullen used of nervousness, air fresheners, and conflicting stories about whom they were traveling to visit and their location were the same indicators rejected by this Court in Nash as grounds to detain an individual beyond a traffic stop to launch into a drug investigation.

The trial court initially distinguished Nash as being less than 20 minutes for the whole search rather than waiting 20 minutes for a drug dog to arrive. [Attachment "B"] The length of time of continued detention is under Rodriguez v. U. S. no longer a factor as a de minimus intrusion.

The trial court combined the second and third factors of air fresheners and inconsistent statements about whom the person had been visiting to equate to reasonable articulable suspicion of drug activity exactly as the trial court did in Nash, wherein the trial court was reversed. And here, just as in Nash, the officer continued with and completed the mission of the traffic stop before beginning a drug investigation.

The citations from the reason for a traffic stop were complete, the check on the driver's license and vehicle registration were returned as all clear, after the officer

requested and was denied consent to search, but before the deputy detained the Defendant further and removed the drug dog from his vehicle and conducted the procedure of a free-air sniff. A seizure that is justified solely by the interest in issuing a warning ticket becomes unlawful when it is prolonged beyond the time reasonably required to complete that mission. Nunnally v. State, 310 Ga. App. 183, 185 (2011). The continued detention and warrant less search by police without reasonable particularized suspicion of criminal activity was in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States, and of the Constitution of the State of Georgia and based on recent decisions cited herein, the Defendant's Motion to Suppress should be granted.

IV. ORDER APPEALED AND CERTIFICATE OF IMMEDIATE REVIEW

Petitioner attaches hereto as Attachment "A" his Motion to Suppress. The Defendant in the above and foregoing case filed a Motion to Suppress on January 27, 2014. [Attachment "A"] A hearing was held on February 27, 2014 and Defendant's motion was denied by written order on March 27, 2014. [Attachment "B"]. Prior to trial, on August 4, 2015. Defendant filed a Motion to Reconsider Denial of Defendant's Motion to Suppress. [Attachment "C"] Oral argument on Defendant's Motion was held on August 6, 2015. Defendant's Motion for Reconsideration was granted but

Defendant's Motion to Suppress was denied by written order filed on August 14, 2015 and served upon Defendant August 17, 2015. [Attachment "D"] Within ten (10) days of the Order Denying Defendant's Motion to Suppress, the trial court issued a Certificate of Immediate Review attached hereto as Attachment "E". The trial court's certification is that the issue presented for review herein is of such importance to the case that immediate review should be had. Petitioner attaches hereto as Attachment "F" the transcript of the hearing on the Motion to Suppress which has been referred to as "T" for transcript herein. Petitioner attaches as Exhibit "G" a copy of the video from the patrol car of the stop, detention, search, and seizure.

Respectfully submitted by:



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CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of the foregoing Appellant's Brief by personal hand delivery and U.S. Mail with sufficient postage to a representative of the District Attorney's Office, Cherokee Judicial District, P.O. Box 1478, Calhoun, GA 30703-1478. before filing.

This 2nd day of September, 2015.

By: 
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