STATE OF MAINE
YORK, SS

UNIFIED CRIMINAL DOCKET
LOCATION: BIDDEFORD
DOCKET NO. YRKCD-CR-23-1049

STATE OF MAINE, Plaintiff	)))	
v.	)	MR. NEVES' MOTION TO SUPPRESS
JUSTIN NEVES, Defendant	)))))	

NOW COMES Justin Neves, by and through his attorney, David J. Bobrow, with this Motion to Suppress particularly stated as follows:

BACKGROUND

This matter is currently before the Court on the State's charge of Aggravated Trafficking of Scheduled Drugs based on an arrest that occurred on or about December 9, 2022.

ISSUES PRESENTED:

1) Was there a foundational basis to conduct an initial *Terry* stop in this matter and continue the seizure of Mr. Neves?
2) Was there a basis to continue to seize Mr. Neves following the resolution of

the basis for the initial *Terry* stop?

3) Was there a basis to engage in a pat down of Mr. Neves?

4) Was there a basis to arrest Mr. Neves resulting in a search that produced evidence?

STATEMENT OF UNCONTESTED FACTS[1]

1) On December 9, 2022, midday (12:20 P.M.), Officer Alec Thompson was on patrol in Biddeford, Maine. See Thompson Report.

2) At a certain point, Officer Thompson made contact with a Black Honda CRV. See Thompson Report and Thompson Dashcam video.

3) Officer Thompson followed the vehicle, initiating a traffic stop. *Id*.

4) Upon the stop of the vehicle, Officer Thompson made a statement on audio that the basis was a brake light issue. *Id*.

5) According to the report of Officer Thompson, he was suspicious of Mr. Neves for a number of reasons including:

    a. The driver was sitting completely erect;

    b. The driver was monitoring his approach to the vehicle;

    c. The driver stated he was coming from 'Biddeford;'

    d. The driver further said he was coming from Raymond Street in

[1] The facts provided are taken from discovery provided by the Government, hearing testimony, and a statement from the witness and citations are therefore made to the various reports by title. There is an issue with the bodycam police video of Officer Thompson, discussed *infra.*

Biddeford[2];

e. The driver did not have anything with his name in the vehicle, even though he identified the vehicle as belonging to his girlfriend.

See *Id*.

6) Mr. Neves was able to locate the insurance and registration information for the vehicle. *Id*. He also provided Officer Thompson his driver's license information. *Id*.

7) Officer Thompson ran a license check on Mr. Neves confirming that he had an active license in the State of Massachusetts. *Id.*

8) Officer Thompson also determined that Mr. Neves was on probation which included a photograph of Mr. Neves. *Id*.

9) Two other officers arrived on the scene. *Id.*

10) Officer Thompson questioned whether the person in the photograph was the same person as the operator of the vehicle. Video of assisting officer.

11) During the continued detention, Officer Thompson made the statement "its screaming drugs all over it." *Id.*

12) At no time did Officer Thompson seek to confirm identity information. *Id.*

13) At no time was there any suggestion that Mr. Neves provided false

[2] The Officer said this was suspicious because it was miles from the current location. It is actually 1.8 miles, a seven minute drive from Raymond Street to the location of the stop.
https://www.google.com/search?q=map+biddeford+raymond+street+to+11+elm+street&sca_esv=557502889&rlz=1C1GCEA_enUS985US985&sxsrf=AB5stBhRCmH77MzheGJ4tFuXSKlQ79oPIw%3A1692212433878&ei=0RzdZMngNO2gptQPrbOwmA0&ved=0ahUKEwiJjYXI7uGAAxVtkIkEHa0ZDNMQ4dUDCBA&uact=5&oq=map+biddeford+raymond+street+to+11+elm+street&gs_lp=Egxnd3Mtd2l6LXNlcnAiLW1hcCBiaWRkZWZvcmQgcmF5bW9uZCBzdHJlZXQgdG8gMTEgZWxtIHN0cmVldDIFECEYoAEyBRAhGKABMgUQIRirAkjWG1DJAljNGHABeACQAQCYAakBoAHIE6oBBDAuMTi4AQPIAQD4AQHCAgoQABhHGNYEGLADwgICECbCAggQIRgWGB4YHcICBRAAGKIE4gMEGAAgQYgGAZAGBg&sclient=gws-wiz-serp

information. *Id.*

14) At no time was there any evidence that Mr. Neves was impaired. *Id.*

15) At no time was there any evidence that Mr. Neves was aggressive or presented a danger. *Id.*

16) Officer Thompson directed Mr. Neves to exit the vehicle. *Id*.

17) Officer Thompson performed a pat down of Mr. Neves. He did not locate any weapons. *Id.*

18) Officer Thompson continued a pat down and located currency in his front pocket. *Id.*

19) Officer Thompson continued the pat down and felt a bulge. He lifted Mr. Neves sweatshirt and asked what was in his waistband. Mr. Neves did not answer. *Id.*

20) Officer Thompson then arrested Mr. Neves by placing him in handcuffs and removed the bag from his underwear. *Id*.[3]

21) The varies videos do not show any aggressive movements by Mr. Neves. See videos generally.

22) The bag purportedly contained drugs. *Id.*

23) Mr. Neves was subsequently charged with Aggravated Trafficking in Scheduled Drugs. *Id.*

[3] Evidence will be presented at trial that this is a *modus operandi* of this Officer.

ARGUMENT

I. THE STOP OF THE MOTOR VEHICLE WAS CONSTITUTIONALLY IMPERMISSIBLE UNDER BOTH THE MAINE AND THE UNITED STATES CONSTITUTION

A. The Government can produce no evidence to support the basis for the stop, therefore the stop and all evidence should be suppressed.

Temporary traffic stops are analogous to so-called *Terry stops* and therefore, all protections under *Terry* apply to traffic stops. *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Stopping a vehicle and temporarily detaining its occupants constitutes a seizure for Fourth Amendment purposes. *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) (collecting cases); *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). The Court stated that "Except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile is unreasonable under the Fourth Amendment." *Prouse* at 663. In *Terry v. Ohio*, 392 U.S. (1968), the Supreme Court of the United States held that to justify an initial investigative stop, there must be unusual conduct which leads a police officer, based on his experience, to have a reasonable belief that criminal activity is afoot. *Id.* at 29.

Under *Terry*, the police must be able to articulate particular facts to support their suspicions that criminal activity is imminent. A stop will not be upheld where it is based

solely on arbitrary police practices or mere hunches. *Landstrom v. Texas*, 443 U.S. 47 (1979).

In the case at bar there was absolutely no evidence of any criminal conduct which would justify the motor vehicle stop. The officer's only justification would be if the officer personally observed a motor vehicle infraction. When Officer Thompson stopped that the vehicle containing Mr. Neves, he did not allege the vehicle engaged in a specific traffic offense. See *Thompson Report*. Despite the existence of cruiser cameras, the Government cannot produce one video, audio, or written evidence that there was a vehicle infraction.[4] All such evidence has been requested and is solely within the control of the Government. The missing evidence rule provides that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Int'l Union, United Auto., Aerospace & Agricultural Implement Workers of America (UAW) v. NLRB ("Int'l Union")*, 459 F.2d 1329, 1336 (D.C.Cir.1972). The idea is that "all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case." *Id.* at 1338. Thus, "[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character." *Interstate Circuit v. United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610 (1939)(internal citations omitted).

[4] The Officer alleges that the driver was not wearing a seatbelt however never states this during his initial stop, only in the report drafted subsequent to the stop.

A negative inference in this case would be that there was no specified violation or basis to initiate the stop. With that inference, the stop was clearly impermissible and all evidence obtained subsequent should be suppressed.

B. There was no basis to stop the motor vehicle

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. Const. Amend. IV*. An exception to this is often referred to as a '*Terry Stop*,' which is derivative from Supreme Court caselaw. Under *Terry v. Ohio*, an officer may briefly invade that right and detain a suspect for questioning if the officer has reasonable suspicion to believe criminal activity occurred or may occur. 392 U.S. 1 (1968). It is well established that "an officer cannot conduct a *Terry* stop simply because criminal activity is afoot." *United States v. Brown*, 159 F.3d 147, 149 (3rd Cir. 1998). "Instead, the officer must have a particularized and objective basis (reasonable suspicion) for believing that *the particular person* is suspected of criminal activity." *Id.* citing *Cortez*, 449 U.S. at 417-18, 101 S.Ct. 690 (*emphasis added*). "Reasonable suspicion requires more than mere hunch, but less than probable cause." *United States v. Ruidiaz*, 529 F.3d 25, 29 (1st Cir. 2008). Reasonable suspicion requires a "particularized and objective basis for suspecting the person stopped of criminal activity. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). The particularized requirement means, in effect, that such a finding must be grounded in specific and articulable facts." *United States v. Espinoza*, 490 F.3d 41, 47 (1st Cir. 2007).

The Fourth Amendment of the United States Constitution and Article 1, Section 5 of our Maine Constitution do require that the officer's objective observations, coupled with any relevant information he may have, together with the rational inferences and deductions he may draw and make from the totality of the circumstances, be sufficient to "reasonably warrant suspicion of criminal conduct" on the part of the party or parties subjected to the investigatory stop or detention, criminal conduct which has taken place, is occurring, or imminently will occur. *State v. Griffin,* 459 A.2d 1086, 1089 (Me. 1983).

For an officer to make a constitutionally sound investigatory traffic stop, there must be an "articulable suspicion that criminal conduct has taken place, is occurring, or imminently will occur, and the officer's assessment of the existence of specific and articulable facts sufficient to warrant the stop is objectively reasonable in the totality of the circumstances. *State v, Tarvers,* 709 A.2d 726, 727 (Me.1998). When Justin Neves was stopped by Officer Thompson on December 9, 2022, the basis for the stop remains unclear. Officer Thompson states in his report that he observed that the seatbelt was not fastened. See Thompson Report. Yet, he did not disclose this as a basis when he called dispatch nor spoke with Mr. Neves. See Thompson Audio. Rather, the Officer states that the stop was because of a brake light that wasn't functioning. *Id.* This, however, does not appear on the video and the time of the stop calls this into question.

Because the stop of Justin's vehicle was not supported by reasonable articulable suspicion of criminal activity, all evidence obtained as a result of the stop are "fruits of poisonous tree" and accordingly, must be suppressed.

II. THERE WAS NOT REASONABLE SUSPICION TO REQUIRE MR. NEVES TO EXIT THE MOTOR VEHICLE, THUS A VIOLATION OF HIS 4th AMENDMENT RIGHTS UNDER THE MAINE AND UNITED STATES CONSTITUTION

'A seizure of the person occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen such that he (or she) is not fee to walk away.'" *State v. White*, 2013 ME 66, ¶ll, 70 A.3d 1226, 1230 quoting *State v. Cilley*, 1998 ME 34, ¶7, 707 A.2d 79. When Officer Thompson directed Justin to step out of the vehicle, he was seized for the purposes of Fourth Amendment analysis. *State v. Carey*, CR-2018-5291.

https://files.mainelaw.maine.edu/library/SuperiorCourt/decisions/CUMcr-18-5291.pdf

At the time Mr. Neves was directed to exit the vehicle, there was no evidence that he had engaged in any criminal activity.[5] There was no smell of alcohol, no evidence of intoxication, no direct evidence of criminality, and he had identified himself. This is a stark contrast to evidence that would be necessary to continue the detention of the individual. See *Id.* ("Sgt. Noyes' actions, in requesting that Ms. Carey exit her vehicle so that he could conduct field sobriety tests were reasonable based on his observations of the various traffic infractions, followed by her slightly slurred speech, bloodshot and glassy eyes, dilated pupils, evasive answers about where she had been that night, and the odor of alcohol coming from the vehicle contrasted with Ms. Carey's denial that she had

[5] It is noteworthy that the Officer had referenced his belief that drugs were present before any evidence was presented.

consumed any alcohol that night." Additionally, any alleged motor vehicle infraction had been resolved at this point.[6]

III. THERE WAS NO PROBABLE CAUSE TO PAT DOWN MR. NEVES AND THUS A 4th AMENDMENT VIOLATION UNDER THE MAINE AND UNITED STATES CONSTITUTION

When the officers encountered Mr. Neves, he did not display any actions that would justify an officer believing there was an apparent safety issue. He exited the motor vehicle without issue. In *Sibron v. United States*, the Court explicitly stated that a pat down was not appropriate where "the officer was not acquainted with Sibron and had no information concerning him. He merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. It must be emphasized that Patrolman Martin was completely ignorant regarding the content of these conversations, and that he saw nothing pass between Sibron and the addicts." 392 U.S. 40, 62 (1968). In this case, similarly, the officers were not acquainted with Mr. Neves, they had no safety information concerning him. The sole basis for permitting a frisk is a justifiable suspicion that the person to be frisked is armed and poses an immediate danger to police safety or community safety. *Id.* There must be particularized facts to support a reasonable conclusion that "the person with whom the police officer is dealing may be armed and presently dangerous." *Terry* at 27. There are no particularized facts to support the

[6] Assuming the basis was the brake light, the Officer had the opportunity to make Mr. Neves aware of the vehicle issue. If the basis was the seatbelt violation, the Officer had the opportunity to present Mr. Neves a warning or ticket.

reasonable conclusion that Mr. Neves was armed or was presently dangerous. As such, the subsequent frisk was unlawful and the evidence obtained should be suppressed. *Wong Sun v. United States,* 371 U.S. 471 (1973).

IV. EVEN IF THE INITIAL FRISK WAS PERMISSIBLE, THE SUBSEQUENT WARRANTLESS ARREST WAS IMPERMISSIBLE AND THUS A VIOLATION OF MR. NEVES 4th AMENDMENT PROTECTIONS UNDER THE MAINE AND UNITED STATES CONSTITUTIONS

A. It is inarguable that Mr. Neves was arrested under both the Federal and Maine standards

When Mr. Neves was handcuffed, he was formally arrested and had his freedom of movement restrained to the degree associated with a formal arrest. *U.S. v. Ventura*, 85 F.3d 708, 710 (1st Cir. 1996). He was also detained under the more stringent Maine standard:

> Compare:
>
> "... the ultimate inquiry is not whether a reasonable person would feel free to leave, but rather whether there was a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318, 322, (1994)
>
> with
>
> Our "*ultimate inquiry is whether a reasonable person standing in the shoes of [Prescott] would have felt he or she was not at liberty to terminate the interrogation and leave* or if there was a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Poblete*, 2010 ME 37, ¶ 22, 993 A.2d 1104 (*emphases added*)

He had not committed any criminal activity. The officer then used the illegal arrest, absent a warrant, to further search for contraband.

B. The fruits of the subsequent search after the illegal arrest should be suppressed

When contraband is seized by officers who do not possess a warrant, the Government "bears the burden of proving the existence of an exception to the Fourth Amendment's warrant requirement." *United States v. Ramos-Morales*, 981 F.2d 625, 628 (1st Cir. 1992). The United States Supreme Court held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the person with whom he is dealing may be armed and presently dangerous,...he is entitled for the protection of himself and others in the area to conducted a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Terry v. Ohio*, 392 U.S.1, 30 (1968). The *Terry* Court emphasized that "the sole justification of the search in the present situation is the protection of the police officer and others nearby, and must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29. The search for weapons approved in *Terry* consists solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. *Sibron* at 65.

In this matter, Officer Thompson quickly determined that Mr. Neves possessed no weapon, and instead continued his search for other contraband. The continued search "was not reasonably limited in scope to the accomplishment of the only goal which might have conceivably justified its inception, the protection of the officer by disarming a potentially dangerous man." *Id*. Officer Thompson made "no attempt at an initial limited exploration for arms**.** *Id.*

While the State might argue that the findings by the Officer created the basis for the arrest, "it is axiomatic that an incident search may not precede an arrest and serve as part of its justification." ***Henry v. United States, 361 U. S. 98 (1959); Johnson v. United States, 333 U. S. 10, 16-17 (1948).*** Allowing otherwise would render all evidence found after a *Terry* pat down admissible. *Texas* v. *Brown*, 460 U. S., at 748 (Stevens, J., concurring in judgment)("this Court rightly has been sensitive to the danger … that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will.")

Officer Thompson's "continued exploration of {Mr. Neves'} pocket after having concluded that it contained no weapon was unrelated to "[t]he sole justification of the search [under *Terry*:] . . . the protection of the police officer and others nearby." *Terry*, 392 U. S., at 29. It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize. *Minnesota v. Dickerson*, 508 U.S. 366 (1993) citing *Michigan* v. *Long*, 463 U. S., at1049, n. 14; *Sibron*, 392 U. S., at 65-66. Therefore, all evidence obtained was unlawful and should be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1973).

WHEREFORE, Mr. Neves respectfully requests that the Court grant this Motion to Suppress or in the alternative set the matter for an evidentiary hearing.

RESPECTFULLY SUBMITTED:
JUSTIN NEVES
By His Attorney,
David J. Bobrow, Bar No. 9164
P.O. Box 366
9 Bradstreet Lane
Eliot, Maine 03903
(207) 439-4502

09/12/2023 /s/ David J. Bobrow, Esq.
David J. Bobrow, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this date I mailed, postage paid, a copy of this Motion to Assistant District Attorney Andrew Berggren, Esq. of the York County District Attorney's Office, York, Maine.

09/12/2023 /s/ David J. Bobrow, Esq.
David J. Bobrow, Esq.