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COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
District Court for Arapahoe County Honorable Michael J. Spear, Judge Case No. 04CR2316	▲ **COURT USE ONLY** ▲
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. ROBERT KEITH RAY, Defendant-Appellant.	Case No.: 06CA2269
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PEOPLE'S ANSWER BRIEF

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INTRODUCTION

In this case, the Defendant, Robert Keith Ray, was convicted of possessing a weapon as a previous offender and carrying a concealed weapon. He was sentenced to 15 months in prison but credited with 466 days of time served.

On direct appeal of his convictions, the Defendant argues that the trial court erred in denying his motion for new trial and in denying his motion to suppress.

STATEMENT OF THE FACTS

On July 13, 2004, the Defendant was on probation, having been adjudicated a delinquent on controlled substance and motor vehicle theft charges (v. 5, pp. 19-21). Officers on routine patrol decided to contact the Defendant based upon the loudness of the music coming from his car (v. 5, pp. 51-52). As the officers followed the Defendant, who was the driver and sole occupant of the car, he exceeded the speed limit, drove evasively and recklessly, and ran a stop sign (v. 5, pp. 68, 118-20). After the officers activated their overhead lights and the Defendant stopped his car, he refused to comply with the officers' demands to get out of the car and appeared to be reaching for a weapon (v. 5, pp. 126-27). The Defendant was removed from his car, handcuffed, and placed in the back of a patrol car (v. 5, pp. 130-32). In searching the Defendant's car, an officer pulled the

bottom of a loose door panel a few inches and a semi-automatic handgun fell out (v. 5, pp. 141, 177-78).

STATEMENT OF THE CASE

The Defendant was charged with murder in a separate case, 04CR1805, based upon a shooting which occurred on July 4, 2004 (see, e.g., v. 1, p. 126). His appeal in that case is presently before this Court in People v. Ray, 07CA0561.

In the present case, the Defendant's motion to suppress the evidence seized after the search of his car was denied by the trial court on June 6, 2005 (v. 2-6/6/05, pp. 70-78). The Defendant's challenge to that ruling is the subject of Argument II of this brief.

The Defendant was found guilty after a jury trial held January 3-5, 2006 (vv. 4, 5, 6). On January 13, 2006, the prosecutor disclosed to defense counsel that, in the course of a November 22, 2005 interview concerning 04CR1805 and the events of July 4, 2004, the Defendant's wife had indicated that on July 4, 2004, she and others had driven the car in which the gun was found on July 13, 2004 (v. 1, p. 125). The defense's motion for new trial based upon this untimely disclosure was denied by the trial court on May 2, 2006 (v. 6-5/2/06, pp. 2-5). The Defendant's challenge to that ruling is the subject of Argument I of this brief.

SUMMARY OF THE ARGUMENT

1. The trial court properly exercised its discretion in denying the Defendant's motion for new trial because the newly discovered evidence of statements made by the Defendant's wife was information already known by the Defendant and cumulative of other evidence presented at trial.

2. The search of the Defendant's car was proper either as a protective search or a search incident to his arrest. The search was lawful as a protective search of the car for weapons because the officers had a reasonable belief that the Defendant was armed and dangerous. Moreover, the search also was lawful incident to the Defendant's arrest because the gun dropped out when the officer pulled on the loose door panel.

ARGUMENT

I. The trial court properly exercised its discretion in denying the Defendant's motion for new trial because the newly discovered evidence of statements made by the Defendant's wife was information already known by the Defendant and cumulative of other evidence presented at trial.

The Defendant contends that the trial court should have granted his motion for new trial based upon the untimely disclosure of statements by his wife that she and two others had driven his car nine days before the police found the gun in it.

Standard of review. The denial of a motion for new trial based upon newly discovered evidence will not be overturned unless it is shown that the trial court clearly abused its discretion. People v. Williams, 827 P.2d 612 (Colo. App. 1992). The Defendant's claim was preserved by his motion and the trial court's ruling denying it (v. 1, pp. 121-25; v. 6, pp. 2-5).

Factual background. On November 22, 2005, the Defendant's wife was interviewed by detectives for about 90 minutes concerning the events of July 4, 2004, particularly the shooting which had occurred that day (Exhibit 1 – Envelope 2). During the interview, the Defendant's wife said that she and the Defendant had attended a barbeque on July 4, 2004; she had arrived with her sister in her car, the Defendant had come in his truck, and their friend, Sir Mario Owens, had driven the maroon Lincoln (Exhibit 1, pp. 2, 21-23). Later, they left the barbeque to go to a park, and the Defendant's wife had driven the Lincoln with the Defendant's permission, and she and the Defendant's sister drove it home after the shooting in the park (Exhibit 1, pp. 3-4, 24). According to the Defendant's wife, the Defendant had bought the Lincoln intending to give it to his mother and titled it in her name, but had been driving it himself (Exhibit 1, p. 56). The Defendant's wife also indicated that the Defendant routinely had a gun in his possession and had

fired his gun in the park on July 4 (Exhibit 1, pp. 44-45). Prosecutor John Hower was present for portions of that interview (v. 1, p. 127).

At the trial in this case, on January 4, 2006, the Defendant's mother testified on direct examination that she owned the Lincoln with the Defendant and that she drove it from time to time (v. 5, p. 25). She agreed that she had told the police that the Lincoln was registered to her solely for insurance purposes and that she did not drive it (v. 5, pp. 25-26). On cross examination, the Defendant's mother was asked, "Did anyone else to your knowledge drive that vehicle?" (v. 5, p. 28). She responded, "Several people. It was like the family car" (v. 5, p. 28). On redirect examination, the Defendant's mother was asked to explain who else drove the car, and she responded, "It's just numerous people" (v. 5, p. 29). When asked who those numerous people were, the Defendant's mother said her other sons, the Defendant's wife, and others whose faces she knew but not their names (v. 5, pp. 29-31). Later, the prosecution called a police officer who testified that he had interviewed the Defendant's mother and she had told him she did not drive the car and she was unaware of anybody else who drove the car (v. 5, pp. 200-201).

On January 12, 2006, a transcript of the November 22 interview was received by the prosecutor, and on January 13, 2006, it was given to the defense (v. 1, p. 125). On January 20, 2006, the prosecutor reviewed the transcript and

realized that the Defendant's wife had made statements relevant to this case, and on January 23, 2006, the prosecutor sent an e-mail to defense counsel bringing the matter to defense counsel's attention (v. 1, p. 125).

On February 2, 2006, the defense filed a motion for new trial based upon the untimely disclosure of the Defendant's wife's statements (v. 1, pp. 121-25). The prosecution filed a written response to that motion (v. 1, pp. 126-34). On April 21, 2006, the trial court heard arguments on the motion and took the matter under advisement to review the trial transcripts (v. 6-4/21/06, pp. 33-50). On May 2, 2006, the trial court denied the motion for new trial in an oral ruling (v. 6-5/2/06, pp. 2-5). In its ruling, the court found that "information was available prior to trial to indicate that others drove the vehicle" and concluded that the information was not material to the case and would not have changed the outcome of the case if it had been presented at trial (v. 6-5/2/06, p. 4).

Legal standards and analysis. To prevail on a motion for a new trial based upon newly discovered evidence, a defendant must show that:

> (1) the evidence was discovered after the trial;
>
> (2) the defendant and his counsel used diligence to discover all possible evidence favorable to the defendant before and during trial;

> (3) the newly discovered evidence is material to the issues involved, and not merely cumulative or impeaching; and, finally,
>
> (4) the newly discovered evidence would probably bring about an acquittal verdict if presented in another trial.

People v. Lowe, 969 P.2d 746, 750 (Colo. App. 1998).

Here, with regard to the first point, it is undisputed that the Defendant's wife's statements to the police were disclosed after the trial.

With regard to the second point, the wife's statements included that the Defendant had been present at the party on July 4 when Owens arrived in the Lincoln, she had asked, and received, permission from the Defendant to drive the Lincoln from the barbeque to the park, and that the Defendant was aware that she and his sister had driven the Lincoln home from the park (Exhibit 1, pp. 3-4, 24). Accordingly, because the information that others had driven the car on July 4 was known by the Defendant, the diligence requirement has not been satisfied.

With regard to the third point, although the information was relevant to the issue of knowing possession of the gun, the Defendant's wife statements that she and others drove the car was cumulative of the Defendant's mother's testimony at trial that others, including the Defendant's wife, drove the car.

Similarly, with regard to the fourth and final point, the Defendant's wife's statements would be unlikely to result in an acquittal verdict if presented in another

trial because there was already testimony that others sometimes drove the car and the Defendant was the driver, co-owner, and sole occupant of the car when the gun was discovered on July 13, 2004. Moreover, were the defense to call the Defendant's wife as a witness, she could be cross-examined about the Defendant's possession and use of a gun, strengthening the prosecution's case against him.

In summary, the defense failed to establish three of the four points from Lowe, and the trial court did not abuse its discretion in denying the motion for a new trial based upon newly discovered evidence.

The Defendant argues that his due process rights were violated by the failure to disclose exculpatory evidence. As a requirement of due process, the government has the obligation to disclose evidence in its possession that is both favorable to the accused and material to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87 (1963). Under Brady, evidence is considered material only if there is a reasonable probability that disclosure to the defense would have resulted in acquittal. Banks v. Dretke, 540 U.S. 668 (2004); Kyles v. Whitley, 514 U.S. 419, 434 (1995). As discussed above, the undisclosed information was already known to the Defendant, cumulative of other evidence admitted at trial, and there is no reasonable probability that timely disclosure would have resulted in an acquittal. Accordingly, the evidence was not material, and no due process violation occurred.

II. The search of the Defendant's car was proper either as a protective search or a search incident to his arrest.

The Defendant also contends that the trial court erred in denying his motion to suppress. Specifically, he contends that police officers' discovery of a gun hidden behind a loose door panel of his car was unlawful.

Standard of review. An appellate court defers to the trial court's findings of fact, but it reviews conclusions of law de novo, within the totality of the circumstances. People v. Garcia, 11 P.3d 449, 453 (Colo. 2000). The Defendant's claim was preserved by his motion to suppress and the trial court's ruling denying it (v. 1, pp. 57-58; v. 2, pp. 70-78).

Factual background. On January 21, 2005, the defense filed a motion to suppress evidence (v. 1, pp. 57-58). Hearings were held on the suppression motion on May 19, 2005 and June 6, 2005 (v. 2). The transcripts of both hearings appear in a single nonconsecutively paginated volume; in this brief, the transcript from May 19 will be referenced as Volume 2A, and the transcript from June 6 as Volume 2B. As relevant to the stop and search of the Defendant's car, three police officers testified for the prosecution: Officer Michael Gaskill (v. 2A, pp. 5- 49); Sergeant Eric Stewart (v. 2B, pp. 5- 31); and Officer Anthony Martinez (v. 2B, pp. 32-60).

Officer Michael Gaskill testified that he and other gang unit officers were conducting a traffic stop while on routine patrol on the night of July 13, 2004 (v. 2A, pp. 7-8). The officers observed a maroon Lincoln Town Car with a very loud car stereo approaching them (v. 2A, p. 8). The Defendant, the driver and lone occupant of the car, was signaling to make a left turn, but, upon looking at the officers, he moved out of the turn lane (v. 21, pp. 8, 9).

The Defendant drove away "at a high rate of speed" and subsequently failed to stop at a stop sign (v. 2, pp. 11-12). Officer Gaskill felt the Defendant was driving carelessly, recklessly, and attempting to elude the police (v. 2A, p. 45). When the officers caught up with the Defendant's car, they activated their lights and sirens to signal the Defendant to stop (v. 2A, p. 12). The Defendant continued driving for a block or a block and a half, turned into a trailer park, and stopped (v. 21, p. 12). Six police officers were at the scene with two police vehicles, one marked and one unmarked (v. 2A, p. 13-14).

The Defendant was asked to get out of his car and he responded that he was not going to get out (v. 2A, p. 15). Officer Gaskill testified that "we lost sight of the defendant's right arm. In effect I didn't know if he was going to go for a weapon" (v. 2A, p. 15 see also p. 41). Officer Gaskill got out his Taser, and Officer Gallegos drew his handgun; they repeated orders for the Defendant to show

his hands (v. 2A, pp. 16, 41). Using a control hold, Sergeant Stewart grabbed the Defendant and pulled him out the car (v. 2A, pp. 17, 42). The Defendant was taken down to the ground, handcuffed, arrested for the noise violation and failure to follow police orders, and detained in the back of a patrol car (v. 2A, pp. 18-19).

After the Defendant was placed in the patrol car, the officer searched the immediate area around the driver's seat of his car (v. 2A, p. 20). Officer Gaskill found a BB gun under the seat, and Sergeant Stewart found a handgun in the door panel (v. 2A, pp. 21, 44-45).

According to Officer Gaskill, under some situations, traffic violations may be arrestable offenses (v. 2A, pp. 25-26). He also testified that a noise violation can be an arrestable offense, although he agreed that he had never arrested anyone for a noise violation prior to this case (v. 2A, pp. 25, 26-27).

Sergeant Eric Stewart testified that while he and other officers were completing a traffic stop, they heard loud music coming from an approaching car (v. 2B, pp. 5-6). Although the driver of the approaching car initially appeared to be about to turn left, he did not turn and sped away; it seemed he was trying to avoid contact with the police (v. 2B, pp. 6-7). The officers decided to contact the driver based on the noise violation and caught up with the car about a quarter of a mile away (v. 2B, pp. 24-26). After they activated their overhead lights and pulled

the car over, the driver did not comply with demands that he get out of the car (v. 2B, pp. 12-13). At least one officer drew a weapon and another drew a Taser (v. 2B, p. 15). Sergeant Stewart saw movement by the driver consistent with the driver reaching for a weapon; he applied "a twist lock to the driver and helped him out of the vehicle" (v. 2B, p. 13).

After the Defendant was arrested, Officer Gaskill found a BB gun underneath the seat of his car (v. 2B, p. 16). Sergeant Stewart helped with the search and noticed that the door panel on the driver's door was loose; he had recovered weapons previously concealed behind door panels (v. 2B, pp. 16-17). Sergeant Stewart did not remove the panel, but he used his hands to pull the bottom of the loose panel out a few inches, and a gun fell out of it and on to the ground (v. 2B, pp. 16-17, 18, 20).

Officer Anthony Martinez testified that he was working with Officer Sandoval in a marked patrol car, and they had assisted the gang unit with a traffic stop when they heard a loud stereo coming from an approaching car (v. 2B, pp. 33-34). It appeared that the driver of the car, the Defendant, had intended to make a left turn, but after observing the officers, he did not (v. 2B, pp. 34-35). The officers decided to contact the Defendant based upon the loud stereo (v. 2B, p. 37).

As the officers followed the Defendant, he drove in excess of the speed limit (v. 2B, p. 38).

The Defendant did not pull over for two blocks after being signaled to do so by the officers' emergency lights (v. 2B, pp. 40-41). After the Defendant stopped, the officers approached his car on foot and yelled commands to him, but he did not comply (v. 2B, p. 43). After the Defendant was removed from his car and arrested, Officer Martinez searched him for weapons (v. 2B, p. 45). According to Officer Martinez, the Defendant was under arrest at that point (v. 2B, p. 45)

Trial court's ruling. The trial court concluded that there was reasonable suspicion to support the stop of the car based upon the noise violation and probable cause for the Defendant's arrest based upon the traffic offenses (v. 2B, p. 74). The court also concluded that the search of the car was permissible as a protective search for weapons pursuant to Michigan v. Long, 463 U.S. 1032 (1983) (v. 2B, pp. 74-75). In its ruling, the court noted:

> I would concur with defense counsel that there's absolutely no right that the police have to rip a vehicle apart to conduct an invasive search of the vehicle and actually either take panels off or stick a knife ... in the fabric of the seat and search for a weapon in that fashion, but in this particular situation based upon the type of behavior that was being conducted by the defendant during his contact with the police, the police were well

> within their rights to be in a reasonable belief that there was some danger being posed by the defendant.

(V. 2B, p. 75). The court went on to conclude that the officer's action in pulling the door panel with his hands was permissible:

> While [the door] was open, Sergeant Stewart apparently noticed that the panel was loose. There ...was some type of fastening devices that were missing from the panel itself and because of that and because of his training and experience as law enforcement recognizing this is a common place to conceal weapons, he then merely opened the panel a little wider and in the process of doing that, I would indicate that nobody has indicated, no testimony has been presented that he actually removed the panel, he merely opened the panel a little bit wider and when he did that, a gun fell out on to the ground and that was the gun that was seized in this particular situation.

(V. 2B, p. 76) (emphasis added). Having concluded that the search was a proper protective sweep, the trial court did not make legal conclusions regarding the theory of search incident to arrest, which had also been argued by the prosecution.

On appeal, the Defendant challenges the trial court's denial of his motion to suppress, specifically, arguing: A) he posed no danger to the officers after he had been taken into custody; and B) the officer's action in pulling the door panel exceeded the permissible scope of a protective search or a search incident to arrest.

A. The search of the car was lawful as a protective search for weapons because the officers had a reasonable belief that at the Defendant was armed and dangerous.

The Defendant contends that the trial court erred in concluding that the search of his car was a permissible protective search for weapons.

In the context of a roadside encounter, an officer may conduct a protective search for weapons not only of the driver's person but also of the passenger compartment of the vehicle. Michigan v. Long, 463 U.S. 1032, 1049 (1983); People v. Litchfield, 918 P.2d 1099 (Colo. 1996). There is a four-part analysis when analyzing the propriety of a roadside protective search for weapons. In order to conduct such a search: (1) there must be an articulable and specific basis in fact for suspecting that criminal activity has occurred, is taking place, or is about to occur; (2) the purpose of the intrusion must be reasonable; (3) the scope and character of the intrusion must be reasonably related to its purpose; and (4) there must be specific and articulable facts which reasonably cause the officer to believe that the suspect is armed and dangerous and may gain immediate control of the weapon. People v. Corpany, 859 P.2d 865, 869 (Colo. 1993).

In the present case, the Defendant's argument that the search was invalid as a protective search for weapons rests primarily on his assertion that because at the

time of the search he had been arrested, handcuffed, and placed in the back of the patrol car, he would not have been able to "gain immediate control" of any weapons in the car (opening brief at 26-27). However, the fact that the officer is in physical control of the suspect does not necessarily remove the threat of harm to the officer from a weapon, for the suspect can still break away from police control and retrieve the weapon from his automobile or, if not ultimately arrested, might well have access to any weapons upon his reentry into the automobile. Long, 463 U.S. at 1051-52; People v. Weston, 869 P.2d 1293, 1296 (Colo. 1994).

In the present case, although one would certainly hope that the Defendant would be unable to escape from the back of the patrol car and access the gun, it might nonetheless be possible, if, for example, the doors of the patrol car or the handcuffs were not properly secured. Moreover, had the officers not found the gun, it is possible they might have changed their minds and merely issued the Defendant a summons for the noise violation. Here, based on the officers' observations that the Defendant was not complying with their orders and appeared to be reaching for a weapon, there was reasonable suspicion to justify the protective search of the car. As it turned out, the Defendant did not break away from police control, and he remained in custody, but those outcomes should not retrospectively affect the lawfulness of the protective search.

The Defendant's argument that the search was beyond the scope permissible as a protective search or a search incident to arrest is discussed below.

B. Moreover, the search also was lawful incident to the Defendant's arrest because the gun dropped out when the officer pulled on the loose door panel.

The officer's action of pulling the loose door panel fell well short of dismantling the Defendant's car, and, thus, the intrusion fell within the scope of a search incident to arrest as well as a protective search. Although the trial court did not reach the question of whether the search was lawful incident to arrest, the record also supports that rationale for the search. See People v. Aarness, 150 P.3d 1271, 1277 (Colo. 2006) (an appellate court has discretion to affirm the denial of a suppression motion on different grounds than those relied upon by the trial court).

When the police make a lawful custodial arrest of the occupant or recent occupant of a vehicle, the police may conduct a search of the passenger compartment of that vehicle "contemporaneous incident of that arrest." New York v. Belton, 453 U.S. 454, 460 (1981). This rule applies even where the arrestee is away from the vehicle and safely within police custody at the time of the search. People v. Graham, 53 P.3d 658, 661 (Colo. App. 2001) citing People v. Savedra, 907 P.2d 596, 598 & n. 1 (Colo. 1995). The Belton Court explicitly based its

bright-line rule on "the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach in order to grab a weapon or evidentiary [item]." People v. Graham, 53 P.3d at 662 quoting Belton, 453 U.S. at 460 quoting Chimel v. California, 395 U.S. 752, 763 (1969).

A leading commentator has opined that although the Belton rule extends to "all spaces reachable without exiting the vehicle" it "does not permit the dismantling of the vehicle to get inside door panels" or other parts of the vehicle. 2 Wayne R. LaFave, et al., CRIMINAL PROCEDURE § 3.7(a), at 203 (2d ed. 1999) cited in United States v. Barnes, 374 F.3d 601, 604 (8th Cir. 2004); see also United States v. Infante-Ruiz, 13 F.3d 498, 503 n. 1 (1st Cir. 1994) (citing La Fave); United States v. Rivera, 465 F.Supp.2d 89, 107 (D. Puerto Rico 2006) (same).

In practice, courts have reached different conclusions, based upon the facts and circumstances of the case, concerning when an officer's actions rise to the impermissible level of "dismantling" a vehicle. For example, in United States v. Willis, 37 F.3d 313, 317-18 (7th Cir. 1994), the Seventh Circuit Court of Appeals upheld the search of a removable car stereo from a dashboard, concluding that it was "a container" under Belton. In another case, that court similarly upheld a search of a covered secret compartment built into the back seat of a car. United

States v. Veras, 51 F.3d 1365, 1371-72 (7th Cir. 1995). However, in United States v. Patterson, 65 F.3d 68, 71 (7th Cir. 1995), the court concluded that a search incident to arrest "does not extend to dismantling portions of the vehicle, including the tailgate's interior cover. In order to take apart the tailgate of Patterson's GMC Jimmy, the officers needed to have probable cause to believe that drugs were inside the vehicle" (citing United States v. Ornelas-Ledesma, 16 F.3d 714, 719 (7th Cir. 1994)).

Here, the officer did not use any tools, and he did not remove or take the door panel apart. Rather, he pulled on the loose panel with his hands, and the gun fell out. Thus, the Defendant, when he was in the driver's seat, also would have easily been able to access his gun. Under these circumstances, the officer's actions did not amount to a dismantling of the car, and the intrusion falls within the scope of a lawful search incident to arrest, as well as within the scope of a protective search for weapons. See Barnes, 374 F.3d at 604 ("While seated in the driver's seat, one could easily part the rubber strips with two fingers, just as Deputy Degan did, to hide or retrieve such objects"); cf. Litchfield, 918 P.2d at1105 ("The search of the trunk was not reasonably related to the purpose of protecting the officers from harm. Therefore, we hold that in this case the search of the trunk exceeded the scope of a proper protective search").

CONCLUSION

For the above reasons, the judgment of conviction should be affirmed.

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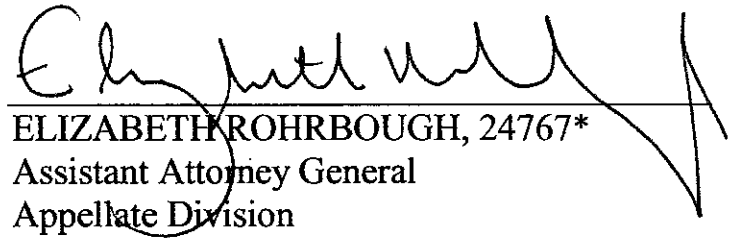

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 15th day of January 2008 addressed as follows:

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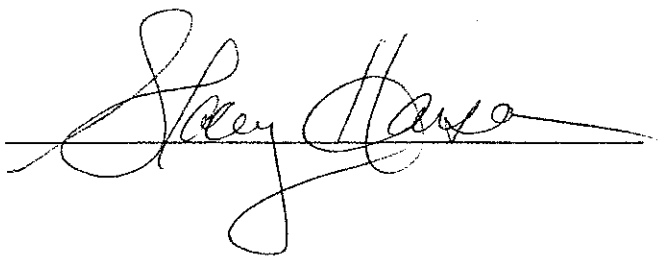

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