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COLORADO COURT OF APPEALS
Court Address: 2 East 14th Avenue
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Appeal from Arapahoe County District Court
Case no. 04CR2316
Hon. Michael J. Spear, Judge

Plaintiff - Appellee:

THE PEOPLE OF THE STATE OF COLORADO

Defendant - Appellant:

ROBERT RAY

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STATEMENT OF ISSUES PRESENTED

1. Where the prosecution failed to disclose material exculpatory evidence prior to trial, did the court err in failing to grant defendant a new trial?

2. Did the trial court err in denying defendant's motion to suppress the weapon seized from the vehicle he was driving?

STATEMENT OF THE CASE

Defendant Robert Ray ("defendant" or "Ray") was charged by complaint with possession of a weapon by a previous juvenile offender, § 18-12-108(3), C.R.S., and carrying a concealed weapon, § 18-12-105(1)(a)(b), C.R.S. I:27-28. Prior to trial, defendant moved to suppress the evidence seized from the vehicle he was driving, alleging that the search of the vehicle was conducted without a warrant and in the absence of any exception to the warrant requirement, in violation of the fourth amendment to the United States constitution. Id. at 57-59. Following a suppression hearing, the court denied the motion. II, tr. 6/6/05, pp. 70-77. (Appendix A).

Jury trial was held on January 3 through 5, 2006. At the conclusion of the trial, the jury found defendant guilty on both counts. I:94-95. Following trial, the defendant moved for a new trial or for an order dismissing the case, alleging that, approximately six weeks prior to trial, the prosecution had interviewed LaToya Ray, defendant's wife, and that during this interview Ms. Ray stated that, shortly

before the stop and arrest of defendant, a number of other persons besides the defendant had driven or occupied the vehicle in which the weapon was eventually found. Id. at 121-22. The defendant further alleged that the prosecutor who had conducted the trial in this matter, John Hower, was personally present at that interview, but had failed to disclose these statements to defendant until January 13, 2006, nine days following trial. Id. The defendant argued that this evidence was material and exculpatory because the sole contested issue at trial was defendant's knowledge of the weapon's presence, which had been seized from inside the door panel and was not visible. Id. In addition, defendant noted that Hower, despite his knowledge of Ms. Ray's statements, had vigorously urged at trial that no one else had driven or had access to the vehicle. Id.

In its response to this motion, the prosecution acknowledged the statements that had been made by Ms. Ray, and admitted that Hower was present for the interview, but argued that the statements "did not make an impression" on Hower because Ms. Ray was being interviewed concerning a separate matter at the time. Id. at 126-27. On May 2, 2006, the court, following hearing, denied defendant's motion to vacate the conviction or for a new trial, finding that the withheld evidence was not material. VI, tr. 5/2/06, pp. 2-5. (Appendix B). On October 5, 2006, the court sentenced defendant to fifteen months on the felon in possession

charge, and to a concurrent sentence of one year on the concealed weapon charge. I:147.

Defendant in this appeal challenges the court's denial of his suppression motion and of his motion for new trial based on failure to disclose exculpatory evidence.

STATEMENT OF FACTS

A. Evidence at suppression hearing.[1]

On July 13, 2004, a number of officers were engaged in a traffic stop on 13th Avenue near Potomac Street in Aurora. II, tr. 5/19/05, p. 7. At that time, Officers Kurian, Gaskill, and Gallegos, and Sergeant Stewart were outside of their umarked vehicle, and Officers Martinez and Sandoval were present near their marked vehicle. Id. at 10; II, tr. 6/6/05, p. 8. The officers observed a maroon Lincoln traveling northbound on Potomac, and could hear loud music coming from the vehicle. II, tr. 5/19/05, pp. 8-11; II, tr. 6/6/05, pp. 6-7. The vehicle was in the left

[1]In reviewing the denial of a suppression motion, a reviewing court may only look at the evidence produced at suppression hearing. Moody v. People, 159 P.3d 611, 614 (Colo. 2007). Therefore, defendant will review such evidence separately, but will also note where this evidence differs from or was supplemented by trial testimony.

turn lane in order to turn onto 13th Avenue, but the driver looked at the police and instead continued northbound on Potomac. Id.[2]

Because of what the police considered to be a noise violation, the officers in the marked car attempted to follow the Lincoln on Potomac, while the unmarked car proceeded on 13th Avenue. II, tr. 6/6/05, pp. 9, 37. At that time, neither police vehicle had activated its lights or siren. II, tr. 5/19/05, pp. 12, 35; II, tr. 6/6/05, pp. 11, 42. While the patrol car was still two to three blocks behind the Lincoln, the Lincoln drove into the parking lot of an apartment complex. II, tr. 6/6/05, p. 39. The occupants of the unmarked vehicle, who were by that time at 14th and Xanadu, then observed the Lincoln exit the parking lot and turn onto 14th Avenue. II, tr. 5/19/05, p. 11; II, tr. 6/6/05, pp. 9-10. According to Sgt. Stewart and Off. Gaskill, the vehicle was traveling at a high rate of speed, which Stewart estimated at 15-20 miles per hour, and bottomed out in a dip at that intersection. Id.[3] The unmarked car activated its lights and siren, and brought the Lincoln to a stop on 14th Avenue,

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[2]In contrast to the testimony at suppression hearing indicating that the vehicle was in the left turn lane before continuing on Potomac, Off. Martinez testified at trial that the vehicle may have only begun to merge into that lane before continuing northbound. V:50.

[3]Off. Gaskill also claimed that the vehicle failed to stop for a stop sign before turning on to 14th Avenue, but admitted that this observation was not in his police report. II, tr. 5/19/05, p. 36.

while the marked car pulled up behind. II, tr. 5/19/05, pp. 12, 14; II, tr., 6/6/05, pp. 40-41.[4]

The four officers in the unmarked vehicle approached the Lincoln, followed by the two officers from the marked patrol car. II, tr. 5/19/05, pp. 13-14, 28; II, tr. 6/6/05, pp. 12, 42. The officers began shouting various commands at the driver, who turned out to be the defendant, telling him to turn the stereo off, to turn off his engine, and to get out of the vehicle. II, tr. 5/19/05, pp. 29-32, 47; II, tr. 6/6/05, p. 12. Off. Gaskill saw the defendant's arm drop down, while Off. Kurian stated that the defendant was not getting out of the vehicle. II, tr. 5/19/05, pp. 15-16. Gaskill testified that he drew his Taser, while Off. Gallegos drew his firearm. Id.[5] Sgt. Stewart grabbed defendant with a "twist lock," and, assisted by Off. Martinez, pulled him from the vehicle. II, tr. 6/6/05, pp. 13, 43. The defendant was then

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[4]Estimates of how long it took the vehicle to stop after the lights were activated varied widely. At suppression hearing, Off. Gaskill testified that the vehicle stopped after 1 to 1 ½ blocks, and Off. Martinez estimated the distance at 2 blocks. II, tr. 5/19/05, p. 12; II, tr. 6/6/05, p. 41. However, at trial, Off. Gaskill first testified that the vehicle took three blocks to come to a stop, but then subsequently testified that he didn't turn on his lights and siren until 14th and Vaughn, which is the intersection where the vehicle stopped. V:120, 152-53. In any event, Off. Gaskill later testified at trial that he observed no indication that the vehicle was attempting to elude the officers. V:123

[5]At trial, Gaskill indicated that he was unable to see the other officers at that time, and so did not know if they had their weapons out. V:128. Off Martinez testified at trial that he believed that all of the officers may have drawn their weapons. Id. at 69.

taken to the ground, handcuffed, placed under arrest, and put into the patrol car. II, tr. 5/19/05, pp. 16-19; II, tr. 6/6/05, p. 45.[6] The defendant offered no resistance to being removed from the vehicle or to his subsequent arrest. II, tr. 6/6/05, pp. 14, 47. Before placing him in the patrol car, Off. Martinez searched the defendant, finding money but no weapons. II, tr. 5/19/05, pp. 18-19.

After the defendant was handcuffed and placed in the patrol car, Off. Gaskill began searching the vehicle while Sgt. Stewart and Off. Martinez watched the defendant. II, tr. 6/6/05, p. 16. Off. Gaskill discovered a BB gun underneath the driver's seat. II, 5/19/05, p. 21. Sgt. Stewart then approached the vehicle and saw that the door panel on the driver's side "was a little bit loose...." II, tr. 6/6/05, pp. 15-16. Sgt. Stewart pulled out the panel and a firearm fell out. Id. at 17. Until he did so, the weapon was not visible. Id. at 18.

Based on the foregoing evidence, the trial court denied defendant's motion to suppress ruling that the search of the vehicle was justified as a protective search for weapons pursuant to Michigan v. Long, 463 U.S. 1032 (1983). Id. at 74-77.

B. Evidence at trial.

The evidence at trial concerning the stop, arrest and search was substantially similar to the suppression hearing testimony, with the exceptions noted above.

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[6]At trial, Sgt. Stewart testified, in contrast to Off. Gaskill's hearing and trial testimony, that the defendant was standing when he was handcuffed. V:130, 174.

Aside from proof that the defendant had previously been adjudicated as a juvenile for an offense that would be an adult felony, V:19, the remainder of the trial evidence focused on the access of other persons to the Lincoln.

The prosecution called Rose Asante, the defendant's mother as a witness. In response to questioning from Mr. Hower, she indicated that she and the defendant were both listed as registered owners of the Lincoln, and that she also drove the car from time to time. Id. at 25. However, Mr. Hower impeached her with a statement to a police officer indicating that she did not drive the car. Id. at 26. During cross-examination, Ms. Asante testified that several people besides the defendant drove the car, and that "[i]t was like the family car." Id. at 28. On re-direct examination, the prosecutor elicited testimony that "numerous people," including her other sons, Maurice Ray, and the defendant's wife, LaToya Ray, all drove the vehicle. Id. at 29. Having elicited this information, Mr. Hower, who at that time (as will be shown below) was personally aware that LaToya Ray had given a statement indicating that she and others had access to the car, launched into an extensive and withering impeachment of Ms. Asante, designed to demonstrate that Ms. Asante had originally told officers that no one else drove the vehicle, and implying that her testimony to the contrary was fabricated. Id. at 31-39.

Mr. Hower began this questioning by pressing Ms. Asante as to when she had learned that the gun was in the door panel:

Q. So safe to say in July of 2004 you were aware that he'd been arrested and had that [possession of a weapon] charged against him?

A. Yeah.

Q. Do you also know the circumstances of that arrest? In other words, that it was alleged that a loaded .40 caliber semiautomatic handgun had been found in the door panel of the car we're talking about?

....

A. I didn't know all of that basic stuff. I was just told that he was found with a gun in the car.

Q. When did you become aware that the gun was allegedly in the door panel of the car?

A. That I have no idea as in time frame.

Q. Did you become aware of it before today?

A. Yeah.

Q. This is now January 2006. The arrest was July of 2004. Can you give us some time frame in there of when you became that the reason he is charged with this crime was that supposedly a gun was found in the panel of the - the door panel of that car?

A. Um, sometime later that year. I don't know. I'm not --

Q. Sometime later – sometime later 2004?

A. Yeah.... Later, that – two, three months, I guess. I don't know.

....

Q. And you were aware, were you not, that the weapon that he was

accused of being in possession of was in the door panel of the car?

....

A. I guess later that year.

Q. Okay. And you were aware of that, right?

A. Yeah, I guess.

Id. at 31-33.

Following this line of questioning, designed to imply that Ms. Asante was lying to protect her son after finding out that the weapon was in the door panel, Mr. Hower questioned Ms. Asante extensively about the fact that she had not volunteered to the authorities the information concerning other drivers of the vehicle, nor had she mentioned the information when interviewed:

> Q. Okay. Knowing that – knowing that within a few months of his arrest that he was arrested because allegedly that gun was in the panel of the door and knowing that other people frequently drove that car, who did you call at the Aurora Police Department to tell them that, Hey, somebody else drove that car and may be the person who put the gun in the panel?
>
> A. No one.
>
> Q. Who did you call at the District Attorney's Office to say, Hey, you're charging my son with this offense, you need to know that other people, his wife and his brother, drove that car and may have put the gun in the panel?
>
> A. No one.
>
> ....

Q. Is there a reason why, knowing that your son was charged with this crime... that you did not inform anybody, the police department, the District Attorney's office, that, Hey, this is a mistake, somebody else, other people drove that car and may be the ones who put the gun in there. Is there a reason you didn't tell anybody?

A. Um, personally, um, just the way they take information and what they do with it.

Q. And on August the 9th, two months after your son was arrested for that, when interviewed by Detective Hoing, am I correct, you did not tell him that, Hey, you know, his wife Latoya drives that car or his brother Maurice drives that car. You didn't tell him that, did you?

A. He asked if I had driven the car and I hadn't that particular day.

....

Q. Detective Hoing asked you about your ownership of the car, correct?

A. Yes.

Q. Asked you about whether you had anything to do with the car, correct?

A. Yes.

Q. And asked you if you ever drove the car, correct?

A. Yes.

....

Q. Okay, and what you're telling us is you only answered that specific question and did not volunteer any additional information. Is that what you're saying?

A. Yeah.

....

Q. Is there a reason why you did not tell Detective Hoing, Hey, Latoya drives that car, Maurice drives that car, better talk to them...

A. Yes, um, I just learned not to volunteer information.

....

Q. Were you aware that if the gun had been placed in the door panel by someone else other than your son so that he didn't know it was there, that is information that would be helpful to him?

A. Yes.

Q. And on August 9th when you were interviewed by Detective Hoing, you knew that other people drove that car. [Objection overruled].

Q. Right?

A. He didn't ask me that specific question.

Q. And then my question is, knowing that it would help him or could help your son to tell Detective Hoing that information, you didn't do it.

A. No.

Q.... [D]id you tell him at that time that you did not know of anyone else that uses the car or drives the car? Did you tell him that?

A. I don't remember the question phrased like that.

Q. Okay. So you – you do not recall if you told him that you

did not know of anyone else who used or drove the car. Your answer is you don't recall telling him that?

A. I don't think he asked it like that. I think he asked me if I drove.

Q. Understood, but I want to kind of narrow down to just this one statement. Do you recall telling him that you did not know of anyone else that uses the car or drives the car?

A. I don't.

Q. You don't recall that. Okay. Are you saying you did not tell him that or you just don't recall whether you did or not?

A. I just don't recall it.

Id. at 33-38.

The prosecution also called Det. Hoing to testify that Ms. Asante stated that she did not drive the car, and that she was unaware of anyone else driving the car. Id. at 200-01. During closing argument, Mr. Hower dismissed the notion that someone else may have had access to the car, and explicitly argued that Ms. Asante's testimony was fabricated to protect her son: "You heard absolutely no evidence during this trial that anyone else ever drove that car other than what Ms. Asante told you on the witness stand... And I submit there's several problems with that testimony...." VI, tr. 1/5/06, p. 52. Hower then reviewed at length Ms. Asante's failure to provide this information to Detective Hoing or to call the police or district attorney to provide this information, adding:

> What's your reason and common sense tell you about that? If a loved one of yours was in a similar situation, serious crime, you had information that could indicate they had the wrong person, do you sit on it for a year and a half, wait for trial to say it?
>
> Think about it if she had told anyone else beforehand [sic], then either side could have tried to question the other person or other persons or brought them in to testify. But waiting until trial, you're stuck with taking her word for it.
>
> Now does she have a motive to testify in a certain way here?
>
> Ladies and gentlemen, I would hope that all of us have mothers who love us enough to help us out in a difficult situation. It doesn't make it right, but is it understandable?
>
> Of course it is. She's his mother.
>
> So I submit to you that the only evidence whatsoever that you have heard in this case that indicates anybody other than Robert Ray ever drove or touched or had anything to do with that car is not very credible evidence.
>
> Now you may be invited to speculate on the possibility that somebody else put that gun in there, his wife, his brother, a cousin, anybody, even, perhaps, the previous owner....

Id. at 54-55.

C. The statement of LaToya Ray.

Even as Mr. Hower was telling the jury that the notion that someone else, including the defendant's wife, had driven the car was "speculation," even as Mr. Hower was maintaining that the only evidence of other drivers came from Ms. Asante (who was not credible), and even as Mr. Hower was indicating that such

evidence, if only disclosed prior to trial, would allow the parties to call appropriate witnesses, Mr. Hower was in possession of a statement from defendant's wife indicating that she and others had in fact driven and occupied the car. On November 22, 2005, LaToya Ray was interviewed by the police concerning a separate homicide case involving the defendant; Mr. Hower was present for that interview. I:122, 127; VI, tr. 4/21/06, p. 39; Env. 2, exh. 1. During that interview, Ms. Ray indicated that on July 4, 2004, nine days prior to the stop and arrest of the defendant, Sir Mario Owens ("Rio") had driven the Lincoln, and that two women named Cashmere Jones and Ambrosia were present in the car at that time. VI, tr. 4/21/06, pp. 39-42; Env. 2, exh. 1, pp. 22, 24. Ms. Ray further stated that she had driven the car that same day, along with Markeeta Ray, Ambrosia, Cashmere Jones and Kendra Williams. Id.[7] The defendant was not in the vehicle at these times. Id. Thus, at the time that Mr. Hower was scoffing at the idea that anyone else had access to the vehicle, he had information indicating that such was indeed the case.

The interview transcript containing these statements was not provided to the defendant until January 13, 2006, following the trial and guilty verdict. I:125. On January 23, 2006, Mr. Hower wrote to defense counsel by email to point out that

[7]At the point in the interview when she is discussing driving the car, Ms. Ray uses only first names; however, the last names for all persons except Ambrosia appear at other points in the interview.

the interview contained statements concerning the access of other persons to the Lincoln. Id. Mr. Hower indicated that, although he had been present for the interview, he "did not consciously recall them [the statements concerning access to the car] during trial." Id.

As noted above, the defendant moved for a new trial or for dismissal of the charges based upon the failure to disclose these statements prior to trial, and the court denied that motion.

SUMMARY OF THE ARGUMENT

Where the prosecution fails to disclose material exculpatory evidence, a new trial is required. Evidence is material where it undermines confidence in the verdict; it need not be shown that a different verdict would have resulted or that the evidence of guilt is insufficient in light of the withheld material. Here, the key contested issue at trial was defendant's knowledge that the weapon was hidden inside the door panel, which in turn would be called into question were it shown that other persons had access to the vehicle around the time of defendant's arrest; indeed, the prosecution itself considered this issue so vital that it engaged in extended questioning and argument on this issue, as demonstrated above. The prosecution withheld evidence that went directly to this issue when it failed to disclose the interview of LaToya Ray, in which she disclosed that she and a number of other persons rode in the car without the defendant nine days before

defendant's arrest. Such evidence, had it been disclosed and presented to the jury, could certainly have raised a reasonable doubt as to whether the defendant, rather than someone else, had hidden the weapon inside the door panel. For this reason, the withheld evidence was material and a new trial is required.

The court upheld the search of defendant's vehicle as a protective weapons search under Long. This ruling was incorrect for two reasons. First, the defendant was not merely detained, but rather was under arrest, and therefore could not return to the car and gain access to any weapons once he had been handcuffed and placed in the patrol car. Second, neither a protective weapons search under Long, nor a search incident to arrest, may extend to removing door panels or dismantling vehicle parts.

ARGUMENT

I. A NEW TRIAL IS REQUIRED DUE TO THE PROSECUTION'S FAILURE TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE.

Pursuant to the due process clause of the United States constitution, the prosecution has an obligation to disclose to the defense any exculpatory evidence that tends to negate the guilt of the defendant. Brady v. Maryland, 373 U.S. 83, 86-87 (1963); People v. Lincoln, ___ P.3d ___, 2007 WL 1805599, *5 (Colo. 2007); People v. District Court, 808 P.2d 831, 833-34 (Colo. 1991).[8] This

[8]This obligation is also codified at Crim. P. 16(I)(a)(2).

obligation exists even in the absence of a specific request by the defendant for discovery. United States v. Agurs, 427 U.S. 97, 107-08 (1976); Lincoln, 2007 WL 1805599 at *5; People v. District Court, 808 P.2d at 834. The obligation encompasses impeachment as well as substantive evidence. Lincoln, 2007 WL 1805599 at *5; People v. District Court, 808 P.2d at 834. In addition, Crim. P. 16(I)(a)(1) requires that the prosecution provide all witness statements (such as Ms. Ray's statement) without a specific request from the defense. People v. Alberico, 817 P.2d 573, 574 (Colo. App. 1991).

Where the undisclosed evidence is "material," reversal is required. Kyles v. Whitley, 514 U.S. 419, 435 (1995); Lincoln, 2007 WL 1805599 at *5; People v. District Court, 808 P.2d at 834. Evidence is considered material if there is a reasonable probability that the result of proceeding would have been different if the evidence had been disclosed; "reasonable probability" is defined in turn as "a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985); People v. District Court, 808 P.2d at 834.

In Kyles, the Supreme Court explained at length what is entailed in a showing of materiality. First, the Court held, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.... The question is not whether the defendant would more likely than not have received a

different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. at 434. Second, the Court explained, the materiality test

> is not a sufficiency of the evidence test. A defendant need not demonstrate that after discounting the exculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Id. at 434-35 [footnote omitted].

Under this test, the withheld evidence here was material. In order to convict the defendant of either charge, it had to be shown beyond a reasonable doubt that he knowingly possessed the weapon that was found inside the door panel. §§ 18-12-105(1), 18-12-108(3), C.R.S. At the time the defendant was stopped by the police, the weapon was hidden inside the door panel and not visible. No fingerprints were recovered from the weapon, the BB gun, or the door panel. V:214-217. Nothing else connected the defendant to weapon except his presence in the car while it was hidden inside the door panel. Under these circumstances, the production of witnesses who had access to the car in the days preceding the stop, and thus who could have placed the weapon inside the door panel, could

easily have created a reasonable doubt as to defendant's knowledge. Had the LaToya Ray statement been disclosed, the defense would have had the opportunity to interview and produce not only Ms. Ray, but also any of the other persons she identified as having access to the vehicle. Indeed, the possibility that other persons could have had access to the car was so crucial to the element of knowledge that the prosecution spent eight pages impeaching Ms. Asante's assertions concerning such access, and devoted a large portion of its closing argument to ridiculing as "speculation" the possibility that other persons may have had such access.

Contrary to the arguments made by the prosecution below, it does not matter that the jury could have inferred from defendant's conduct that he had some connection to the weapon. I:128. As held in Kyles, the defendant need not demonstrate that insufficient evidence for conviction exists, or that the withheld evidence would likely have resulted in acquittal. Rather, the withheld evidence need only undermine confidence in the verdict. Here, because the withheld evidence was sufficient to raise a reasonable doubt as to defendant's guilt, that test is satisfied, even though there exists other evidence from which guilt may be inferred.

Moreover, the evidence of defendant's conduct does not as clearly demonstrate guilty knowledge as the prosecution would suggest. The fact that the defendant chose to not make a left turn that would have placed him in direct

contact with the officers could equally easily be explained as a desire to avoid officers while playing a loud stereo or the understandable reluctance of a young black male, even one who has done nothing wrong, to risk an encounter with police officers.[9] At the time the defendant continued northbound on Potomac from 13th Avenue, he was traveling at 40 to 45 miles per hour in a 35 mile per hour zone, hardly a speed that suggest an intent to run from the police. II, tr. 6/6/05, pp. 56-57. No lights or sirens were activated prior to the time defendant exited the apartment complex, so that the defendant had no reason to believe he was being pursued. Although the officers concluded that the defendant was traveling at a high rate of speed when he left the apartment complex, Sgt. Stewart, as shown above, estimated this speed at only 10 to 15 miles per hour. The defendant stopped within one to three blocks after the lights and sirens were activated, and Off. Gaskill concluded that there was no evidence defendant was trying to elude the officers. In sum, the evidence of defendant's "flight" is hardly an overwhelming demonstration of guilty knowledge,

The prosecution's explanation for Mr. Hower's failure to disclose this information prior to trial is equally irrelevant to the disposition of this issue. Even

[9]The basis for that reluctance is illustrated by the facts of this case. One might question whether the police would have pursued as zealously a vehicle playing a loud stereo had it been driven by a middle-aged white person.

if one accepts that Mr. Hower simply failed to recognize the significance of the information or to recall it at trial, the willfulness of the prosecution is irrelevant to a determination of materiality. People v. Mucklow, 35 P.3d 527, 536 n.14 (Colo. 2000).

In sum, the issue of defendant's knowledge that the weapon was in the car, and whether it might have been placed there by another person, was crucial, and was, in fact, the only real contested issue at trial. After withholding evidence demonstrating that others had access to the car and might be responsible for the weapon, the prosecution proceeded to forcefully argue at trial that no such evidence existed. Had this evidence been disclosed, the defense could have presented witnesses that would have created a reasonable doubt as to defendant's knowledge of the weapon, and the prosecution could not as easily have dismissed the idea that others had access to the vehicle. Under these circumstances, the withheld evidence was material, as it is impossible to have confidence in a verdict that was reached in the absence of evidence that could so easily create a reasonable doubt. For this reason, a new trial is required.

II. THE TRIAL COURT ERRED IN FINDING THAT THE SEARCH OF DEFENDANT'S VEHICLE WAS A VALID PROTECTIVE SEARCH.

A. Because defendant could not return to his vehicle, the search was invalid.

As noted above, the trial court here ruled that the search of defendant's vehicle, which produced the weapon that gave rise to the charges herein, was a valid protective search for weapons pursuant to Long. In Long, the Court held that, where the police have detained a suspect during a roadside encounter, a

> search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

463 U.S. at 1049 (internal quotation marks and citation omitted). The Court further explained that, because of the nature of an investigative detention, such a search may be conducted even where the detainee is briefly within the control of the police:

> During any investigative detention, the suspect is 'in the control' of the officers in the sense that he may 'be briefly detained against his will....' [Cit. omit.] Just as a Terry [v. Ohio, 392 U.S. 1 (1968)] suspect on the street may, despite being under the brief control of a police officer, reach into his clothing and retrieve a weapon, so might a Terry suspect in Long's position break away from police control and retrieve a weapon from his automobile. [Cit. omit.] In addition, if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside. [Cit. omit.] Or, as here, the suspect may be permitted to reenter his vehicle before the Terry investigation is over, and again, may have access to weapons.

Id. at 1051-52.

In People v. Litchfield, 918 P.2d 1099, 1104 (Colo. 1996), the court articulated a four-part analysis regarding the propriety of a protective search during a roadside detention:

> (1) there must 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.

In both Long and Litchfield, therefore, the courts held that there must be specific facts that would give rise to a reasonable belief that the suspect may "gain immediate control" of a weapon. In neither case did the court address a situation, such as the present one, where the suspect is not only handcuffed and in a patrol car, but is also under arrest, so that there is no possibility that the suspect could return to the vehicle and gain immediate control of weapon. However, in Litchfield, the court did indicate that a protective search under Long cannot be found to be valid under other circumstances where a suspect could not have access to a weapon. There, during a roadside encounter the police determined that they would seize the vehicle they had stopped, and informed the occupants that they could drive the vehicle to the police station themselves. Prior to permitting the occupants to do so, the police searched not only the passenger compartment, but

the trunk as well, and discovered a bale of marijuana. The court held that the search of the trunk was invalid for the precise reason that the occupants could not have had access to this area: "The search of the trunk was unnecessary for the protection of the officers as neither defendant would have access to the trunk during the short drive to the state patrol office." 918 P.2d at 1105.

Cases from other jurisdictions, analyzing the requirements of Long, have similarly emphasized that the continued access of the suspect to the area searched – either during or at the conclusion of the stop – is crucial to a valid protective search for weapons. In United States v. Holmes, 376 F.3d 270 (4th Cir. 2004), the suspects were handcuffed and placed in the back of a patrol car, but were not placed under arrest; the officers then searched the vehicle. In analyzing the propriety of the search, the court first noted that Long advanced three reasons why a protective search could be justified during the "brief control" of a detention: "the suspect (1) could 'break away' from the officer and reenter the car, (2) could be allowed to reenter the car before the Terry stop ended, or (3) if not arrested, could lawfully reenter his car at the conclusion of the stop...." Id. at 276. The court then noted that Long did not itself involve a situation in which the suspect was handcuffed and in a patrol car, and did not hold that a search could be conducted regardless of the degree of police control over the suspect:

> Long did not clearly hold that the degree of officers' control over the suspect during a protective search of a vehicle is irrelevant to the reasonableness of the officers' decision to conduct a Terry search. See, e.g., 4 Wayne R. LaFave, Search & Seizure § 9.5(e), at 290-91 (3d ed. 1996).

Id. at 280 n.6. Thus, the court found that it may very well be the case, as the defendant argued, that the Long rationale permitting a search where the suspect could "break away" would not justify a search where the degree of police control rendered such a possibility remote; however, so long as the suspect is merely detained and thus may reenter the vehicle at some point, a search would nonetheless be justified:

> The *premise* of this argument may have merit: if there is no reasonable possibility that a suspect will gain access to the interior of his car during the period of the seizure or shortly thereafter, i.e., the time when he would pose a threat to the safety of law enforcement officers or others, it may be that Long would not permit the officers to conduct a protective search of the car. [Footnote omitted] However, we need not decide whether the Court's decision in Long included this caveat because under the facts of this case, we conclude that it was well within the range of reason to believe that, after the conclusion of the stop, the suspects would have access to the interior of their car.

Id. at 279 (emphasis in original).

Similarly, in United States v. Graham, 483 F.3d 431, 440 (8th Cir. 2007), the court followed Holmes in explaining that, where a suspect is handcuffed and in a patrol car, it is only the possibility of later access to the vehicle that permits a Long search:

> Although the Holmes court stated there was "no reasonable possibility" that the cuffed suspects in the back of the police cruiser could access the interior of Holmes' car while detained, the Court explained that 'it was well within the range of reason to believe that *after their release at the conclusion of the stop*, the suspects would have access to the interior of their car. [Cit. omit.]

(Emphasis in original).[10]

Thus, in a situation in which a suspect is handcuffed and in a patrol car, as occurred in the present case, a Long search is justified only because the situation involves a detention rather than arrest, and thus, by definition, the suspect may be able to return to the vehicle. Here, in contrast, the defendant was under arrest, and would not be returning to the vehicle. Moreover, during the time that the search proceeded, he was handcuffed in the back of a patrol car, and could not have accessed the Lincoln absent superhuman powers. Because the defendant thus could not "gain immediate control" of any weapons inside the vehicle either during

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[10]Although the trial court here did not find that the search was justified as a search incident to arrest, courts have also found that this rationale cannot support a search where the suspect can no longer return to the vehicle or gain access to weapons. See, e.g., Thornton v. United States, 541 U.S. 615, 625-26 (2004)(Scalia, J., concurring)(rejecting government's argument that "despite being handcuffed and in the back of a squad car, petitioner might have escaped and retrieved a weapon or evidence – a theory that calls to mind Judge Goldberg's reference to the mythical arrestee 'possessed of the skill of Houdini and the strength of Hercules.'" [Cit. omit.]); United States v. Edwards, 242 F.3d 928, 938 (10th Cir. 2001)(where defendant was "handcuffed in the back of a police vehicle at the time of the search," there was "no reason to fear that [he] could retrieve a weapon or destroy evidence in the car....").

or following his detention and arrest, the trial court erred in ruling that the search was a valid protective search under Long.

B. The search exceeded the permissible scope of a protective search.

As noted above, the Court in Long specified that a protective weapons search must be confined to the "passenger compartment" of a vehicle. See also Litchfield, 918 P.2d at 1105 (holding that protective search extending to trunk exceeded permissible scope of Long search). In a number of cases, courts have held that a search which results in dismantling vehicle parts, including the removal of door panels, as occurred here, is not within the scope of a "passenger compartment" search. For example, under facts similar to the present case, the court in United States v. Ornelas-Ledesma, 16 F.3d 714, 719 (7th Cir. 1994), judgment vacated on other grounds sub nom. Ornelas v. United States, 517 U.S. 116 (1996), held that a Long search of the passenger compartment may not include pulling off a loose door panel: "The only lawful purpose of a search incident to a Terry stop is to protect the officers from the danger that the persons they have stopped will reach for a weapon [cit. omit.], and ordinarily and here the officers do not have to dismantle the car to satisfy themselves on that score.... The seizure was lawful, therefore, only if the search yielded information that gave [the officer] probable cause to believe that contraband was secreted behind the loose panel." Accord, United States v. Infante-Ruiz, 13 F.3d 498, 502 n.1 (1st Cir. 1994)(in the

context of a search incident to arrest, "[t]he 'passenger compartment' has been interpreted to mean those areas reachable without exiting the vehicle *and without dismantling door panels* or other parts of the car." [emphasis added]); United States v. Rivera, 465 F. Supp.2d 89, 107 (D. Puerto Rico 2006)(same); see also United States v. Patterson, 65 F.3d 68, 71 (7th Cir. 1995)(under search incident to arrest doctrine, "although Trooper Brown was permitted to search the passenger compartment of the vehicle without a warrant, the exemption does not extend to dismantling parts of the vehicle, including the tailgate's interior cover.").

Under these authorities, the officers here were not permitted to dismantle the door panel as part of either a protective weapons search or a search incident arrest.[11] For this reason, the court erred in denying the motion to suppress the weapon seized from inside the door panel.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that this court reverse the judgments of conviction and remand for a new trial.

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[11]The trial court here appeared to recognize as much, noting that a search incident to arrest may not include dismantling the vehicle: "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 the panels off or stick a knife in the seat in the fabric and search for a weapon in that fashion...." II, tr. 6/6/05, p. 75. Given that finding, it is unclear why the court proceeded to rule that the dismantling of the door panel was justified here.

DATED: July 16, 2007.

SPRINGER AND STEINBERG, P.C.

By: _____

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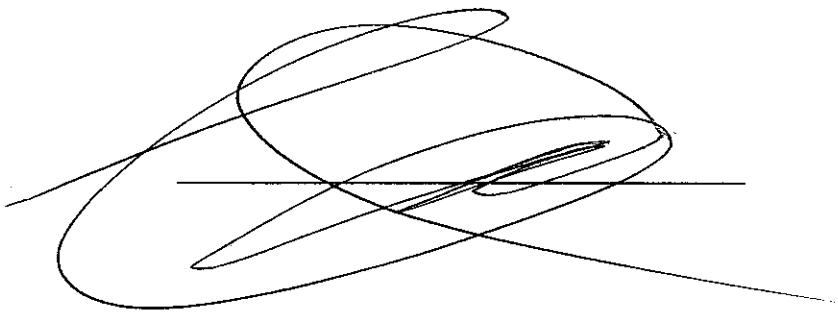
CERTIFICATE OF SERVICE

This is to certify that I have duly served the above and foregoing **OPENING BRIEF** by placing a true and correct copy of same in the United States mail, postage prepaid, this 16th day of July, 2007, addressed to the following:

Office of the Attorney General
1525 Sherman Street 5th Floor
Denver, Colorado 80202



APPENDIX A

approximately 8:30 at night pulling a vehicle over for, under their own testimony, noise violation.

They approach, at least two officers, maybe three, at gunpoint. We don't believe there's anything reasonable about that and we believe that that exceeds the defendant's rights pursuant to Bergmeyer v. McCarty (phonetic), as well as People v. Archuletta. This is not a routine traffic stop. This is not something a normal citizen sees when they're pulled over for a traffic violation, so for those reasons we would urge the court to enter an order of suppression.

Thank you.

THE COURT: All right. The court has entertained testimony in this particular matter from three officers. Officer Gaskill's testimony was given on May 19th before this court and then today the court has heard from Sergeant Stewart and Officer Martinez in regards to the situation that they were confronted with on July 13th of 2004.

I will indicate that the officer's testimony in many respects was fairly consistent within itself. Obviously each of them had a different perspective and a different place, if you will, in the entire scheme of things in terms of how things occurred out on the side of the street on July 13th of 2004.

However, the evidence has clearly established that these three officers, as well as three other officers, were

together at the corner of East 13th and Potomac when their attention was called to a maroon Lincoln Town Car which had a large amount of sound coming out of it and because of that the officers made the decision to contact the driver of the vehicle if for no other purpose than to discuss the loud noise aspect of their stereo.

It has been argued to the court that a loud noise municipal ordinance violation is not sufficient grounds for an arrest of an individual. If that was all we were dealing with in this particular situation, that would be the end of the discussion, but after the officers made this decision to contact the driver of the Lincoln Town Car, the Lincoln Town Car did not make the left turn as it was indicating, it did not stop for the officers, but it continued on its way and all of the officers testified that it accelerated once the driver of the vehicle identified as the defendant in this action noticed that there were six officers standing on the corner of 13th and Potomac.

We have testimony now from the officers which taken in combination, not in isolation, does establish that the defendant was driving his maroon vehicle in such a manner as to indicate a careless and imprudent disregard for the width, grade, curves, corners, traffic, and use of the streets and highways in all other attendant circumstances.

Various officers have testified that it's reckless

driving, they observed some of the officers testified it was careless driving that they observed, they observed high rates of speed, they observed various types of driving behavior in coming out from a parking lot into a traveled street way. They observed various types of driving which would properly be characterized as or possibly be characterized as a violation of 42-4-1402, careless driving, so even if there was some conflict in regards to the contact with the defendant in regards to a noise ordinance violation, the fact is is that the driving that was observed and was clearly indicative of someone who was not paying attention to the traffic laws that we have that govern cars on the roadway.

Also I would indicate that the officers had consistent contact with the defendant in the sense that when he observed them, he took some steps to avoid having contact with the officers, which included the bad driving I've already referenced, but also when he was finally essentially stopped by the police, in spite of repeated verbal commands by the officers to show his hands, to not move his hands, there apparently was some sort of movement that caused the officers to believe that their safety was at issue, caused one officer to draw a weapon and one officer to draw a Taser and hold the defendant at gunpoint, and also caused Officer Stewart to apply a control hold on the defendant, the wrist lock that's been referenced, and then Officer Martinez also testified that

he applied similar-type hold to the other hand of the defendant and took the defendant out of the car.

There has been some mincing of words in regards to whether or not this was resisting arrest or whether there was compliance with commands, but the fact is is that the behavior exhibited by the defendant was consistent throughout in his attempts to essentially not comply with police in any way, shape, or form, and that includes not wanting to have contact with them initially and when contact was compelled, not to do anything at all in terms of complying with any of their orders that were given.

I know the argument could be made because the stereo was so loud that perhaps the defendant was unable to hear the commands being given by the officers in this case; however, I find the officers -- Officer Martinez's testimony to rebut that because although he was not able to say whether or not the stereo was still so loud that commands could not be heard, as a matter of fact I think the specific question he was asked is whether or not the stereo was so loud that he could not hear commands, the fact is he testified he did hear commands that were being given. He also indicated he heard the stereo was being played. So clearly since he was some distance away from the car, the Lincoln Town Car, when this occurred, the individual who was in the driver's seat, defendant in this action, clearly would have been in a better position to hear

commands that were being given essentially from just a few feet away even with the stereo playing loud.

So the arrest that occurred in this particular situation is supported. First the attempts to contact and the stopping of the vehicle was supported by reasonable suspicion. The actual arrest that occurred was supported by probable cause for the violation of the traffic offenses.

Now the question comes down to as to the search of the vehicle itself.

I'm relying primarily on the case of Michigan v. Long, 463 United States Supreme Court case found at U.S. 1032, 1983 case, and I would note that that is a case that was cited in the Smith case cited by the People which I believe the correct citation is actually 13 P.3d 300, a Colorado Supreme Court case from the year 2000.

The Smith case is not on point as it relates to this particular search of the vehicle. After all, in Smith it was more of a consent search that was at issue; however, language that was used in Smith which was drawn primarily out of Michigan v. Long case is indicative of the level of search that can occur when there's an encounter between the police and individuals.

Because roadside encounters are recognized as being especially hazardous when there is an investigatory stop in the context of a traffic stop, the police may essentially

order people out of the vehicle and they may conduct a protective search of the passenger compartment of the vehicle for weapons as long as the officer possesses a reasonable belief that the occupants pose a danger.

I would note that the language in Michigan v. Long is fairly broad in the sense that if the occupants pose a danger to the police, the police will have a sufficient grounds for a search of a vehicle and when they do do the search, they may, of course, look in any area that may reasonably be containing a weapon.

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 seat in the fabric on 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.

The timing on which the various items were found is particularly telling here as well.

The evidence is pretty well consistent that the BB gun was discovered first and Officer Gaskill described the BB gun as being remarkably gun-like in its appearance.

This obviously caused the officers to have some concern.

The weapon itself, the gun that is at issue in this particular case was found in the driver's side door and from the testimony, although none of the officers were directly asked, the court can draw the reasonable inference that the door was open during the arrest of the defendant, the actual physical seizure of the defendant and his removal from the car, and no one ever said that the vehicle, the door itself ever closed in any fashion. While it was open, Sergeant Stewart apparently noticed that the panel was loose. There had -- 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 bit 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.

Relying upon the language in Michigan v. Long and the situation there, as well as cases in Colorado that have essentially adopted the Michigan v. Long standard, such as People v. Holmes found at 981 P.2d 168, Supreme Court case

from 1999, we've also got People v. Litchfield, L-i-t-c-h-f-i-e-l-d, 918 P.2d 1099, Supreme Court case from 1996, the court does find that the seizure of the weapon in this case was pursuant to that automobile exception in Michigan v. Long and I will deny the motion to suppress the gun in this case.

As far as statements go, I don't believe any statements were given by the defendant. None of the officers questioned the defendant at the scene and although an attempt was made by the detective in this case to contact Mr. Ray and talk to him about the situation that has resulted in the charge being filed in 04 CR 1805, the defendant apparently declined to talk with the detective. The detective honored that particular invocation of rights and did not force the situation.

As far as evidence goes in that particular case as well, I've heard no argument made about whether or not the photocopying of the jewelry items that were referenced by the detective should in any way be suppressed.

The items were physically taken into the custody of the police department, but apparently, from what I've heard here, released. They were not put into evidence, they were put into property and property was apparently returned to Mr. Ray upon his bonding out on the case.

So I haven't heard any sort of evidence at all that

APPENDIX B

MORNING SESSION, MAY 2, 2006

(WHEREUPON, the following proceedings were had commencing at 8:07 a.m.)

THE COURT: All right. At this time the court will call 04 CR 2316, 05 CR 1943. These are the Robert Ray cases.

MS. LUNDIN: Jennifer Lundin on behalf of the People.

MR. STEINBERG: Harvey Steinberg with and on behalf of Mr. Ray.

THE COURT: All right. Good morning. The matter is set today for ruling on the defense motion to vacate conviction and dismiss charge or in the alternative for a new trial.

The court has had a transcript of Ms. Asante's testimony presented or prepared and I've reviewed that. I've also reviewed the closing argument primarily made of the prosecution, Mr. Hower, in this matter because the court felt that the materiality of the evidence that was known to the prosecution but not disclosed prior to the trial in this matter needed to be placed in the context of the evidence that was presented to the jury for their consideration in order to make the assessment of materiality.

What Ms. Asante's testimony established is she was called by the prosecution to establish the joint titling of the car, that she was on the title to the automobile in question in which the gun was found, the automobile that the

defendant was driving on the date in question.

And after her examination by the prosecution, the defense then did ask her questions about whether or not other people had had access to that vehicle and actually driven that vehicle and she did provide answers that other people had indeed driven the vehicle. She said it was numerous people. She was able to provide the jury with names of certain individuals who would drive the car specifically focusing on the defendant's wife and his brother.

She did reaffirm that she did not drive that vehicle, but she did mention that others drove it and she was not able to provide names.

On redirect examination Mr. Hower questioned her in regards to this information and pressed her on the point as to why this has not been disclosed prior to her testimony in court.

She provided the explanation that essentially she did not trust the police to take the information and handle it in the appropriate fashion.

And then during closing argument it was presented to the jury Ms. Asante's credibility was called into question in terms of her disclosure of the information, her late disclosure, and obviously her relationship to the defendant primarily focusing on that relationship as reason to call into question the testimony that she presented.

The court would note that the testimony in this case and the entire case was focused on the date in July in which the defendant was stopped behind the wheel of this automobile and the fact that during this contact or in the course of attempting to contact the defendant, the defendant took evasive action, not a great deal of evasive action, but nonetheless enough evasive action for the People to argue the inference of guilt in regards to or knowledge of that gun and also the fact that he was the sole occupant of the vehicle at the time. There was a BB gun found under the driver's seat and then the weapon itself, the handgun was found in the door panel, behind the door panel on the driver's side door.

Looking at the cases which talk about materiality of evidence, the court makes the determination at this time that while I'm obviously not pleased about the lack of disclosure of this information which was in existence and known to the prosecution prior to the trial in this particular matter, the fact is is that information was available prior to trial to indicate that others drove the vehicle and this was not rebutted in any fashion during the trial itself.

The jury did return a verdict in this case after rather quick deliberations, although I would indicate this was a very straightforward case in the sense that the defendant was the sole occupant of the vehicle, the driver of the vehicle, and one of the registered owners of the vehicle.

The court cannot arrive at the conclusion that the evidence that was withheld in this particular case was material to the case and would have changed the outcome of the case if it had been revealed to the jury during the course of the jury trial itself.

So the motion to vacate conviction and dismiss charge or in the alternative for new trial is denied.

Now, I was going to ask the parties how they would like to proceed at this particular point now that there is a conviction in place, not really a conviction, the guilty verdict has been rendered.

We need to set the matter for sentencing proceedings, although there was a previous record made in regards to how that may impact another case currently pending with other counsel on it.

What's the People's position as to how the case should proceed from here?

MS. LUNDIN: Judge, at this point I would like to confer with my co-counsel about how they'd like to proceed, but I'd ask the court to go ahead and set a sentencing date and I think that we can address that issue further if need be on the next date.

THE COURT: Mr. Steinberg, your input?

MR. STEINBERG: Obviously we would, considering there's two first degree murder cases pending, think that