

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: [REDACTED]

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1. On Monday, July 11, 2011 Officer [REDACTED] of the Interstate Criminal Enforcement Team (ICE), a drug interdiction team, of the [REDACTED] County Sheriff's Office stopped a car entrusted to and under the care and control of Defendant [REDACTED] who was a back seat passenger of the vehicle being driven by [REDACTED].
2. Defendant's automobile was traveling north along Interstate Highway I-85 near the North Carolina South Carolina border and was allegedly pulled over because of violating the speed limit, 75 mph in a 65 mph zone.
3. Prior to stopping Defendant [REDACTED]'s vehicle Officer [REDACTED] pulled up alongside the vehicle and looked inside where it was obvious to him that the occupants were Hispanic persons.
4. After Defendant's vehicle slowed to within five miles of the speed limit Officer [REDACTED] dropped back and began following Defendant's vehicle.
5. While following Defendant's vehicle Officer [REDACTED] alleges that Defendant's vehicle sped up to 75 mph causing him ([REDACTED]) to activate his blue light and subsequently Defendant's vehicle pulled off to the right side of the Interstate at allegedly 8:38 am.

6. Immediately upon pulling over Defendant [REDACTED]'s automobile Officer [REDACTED] called Officer [REDACTED], also a member of ICE for back up.
7. Co-Defendant [REDACTED] was driving Defendant's vehicle, Co-Defendant [REDACTED] was the front seat passenger and the Defendant [REDACTED] was seated in the rear of the vehicle.
8. Officer [REDACTED] asked the driver of the vehicle to produce his driver's license at which time Co-Defendant [REDACTED] produced a valid driver's license.
9. Officer [REDACTED] then launched into a series of questions without attention to the purpose for which he claimed to have stopped Defendant's vehicle, including but not limited to: where are you coming from? How long have you been there? What part of Georgia were you in? Does the car belong to you? What part of New York do you live in?
10. Officer [REDACTED] then addressed Defendant [REDACTED] who was seated in the back seat asking: Is this your mother's car and where is the registration papers? Where are you coming from? Where are you from originally? Where are you really from?
11. Officer [REDACTED] then addressed the front seat passenger Co-Defendant [REDACTED] by asking her: Where are you coming from? What did you do while there? How long had you been there?
12. Officer [REDACTED] arrived on the scene and Deputy [REDACTED] let him "know what I had." As a result of the conversation between Officer [REDACTED] and Officer [REDACTED], Officer [REDACTED] called in a K-9 team of Officer [REDACTED] and Canine [REDACTED].
13. **It is at this point, after the interrogation above, that Officer [REDACTED] called the [REDACTED] County Communication Center to check the validity of Co-Defendant [REDACTED]'s driver's license. (Emphasis Added)**
14. Co-Defendant [REDACTED] had a valid driver's license and Officer [REDACTED] allegedly wrote him a warning ticket for speeding 75 in a 65 mph zone.
15. Officer [REDACTED] allegedly wrote out a warning citation to Co-Defendant [REDACTED] at 8:57 am by which time he had formed an opinion that drugs or guns were in the car based on "law enforcement training and experience" and the following personal observations:
 - (a) The front seat passenger and driver did not look at him when he pulled up along them.

- (b) Officer [REDACTED] "didn't see any luggage in the car".
- (c) Officer [REDACTED] smelled air fresheners.
- (d) Officer [REDACTED] noticed a single key in the ignition, an air freshener hanging from the rear view mirror, empty containers of energy drinks, and the rear seat passenger moving around a lot.
- (e) Co-Defendant [REDACTED]'s hands were shaking when he handed Officer [REDACTED] his driver's license.
- (f) While talking to Co-Defendant [REDACTED] "he placed his hands behind his back" as if he was ready to be handcuffed.

16. At or about 8:57 am Officer [REDACTED] allegedly presented Co-Defendant [REDACTED] with a warning citation and as [REDACTED] started to walk back to the vehicle Officer [REDACTED] asked. "can I ask you a few questions," including but limited to:

- (a) Do you have any drugs in the car?
- (b) Any marijuana in the car?
- (c) Any cocaine in the car?
- (d) Any heroin in the car?
- (e) Any guns in the car?
- (f) Large sums of money?
- (g) Can I search the car? To which Co-Defendant [REDACTED] responded: (It is not my car you will have to ask Defendant [REDACTED].)

17. Officer [REDACTED] followed Defendant [REDACTED] to the vehicle and began interrogating Defendant [REDACTED] who was still seated in the back seat; asking particularly:

- (a) Any drugs in the car?
- (b) Any pistols in the car?
- (c) Any large sums of money in the car?

(d) Can I search the car? To which Officer [REDACTED] alleges the Defendant [REDACTED] consented, but Defendant [REDACTED] denies.

18. At 9:00 am Officer [REDACTED] and Officer [REDACTED] started to search Defendant's vehicle later assisted by Canine Officer [REDACTED] and Canine [REDACTED].

19. After the Canine allegedly "alerted" on an area of the vehicle Officer [REDACTED] retrieved tools and removed bolts beneath the carpet in the vehicles floor board where contraband was allegedly found.

20. A review of warning citations issued by Officer [REDACTED] reveals that a disproportionate number of such citations have been issued to Hispanic persons.

WHEREFORE, Defendant [REDACTED] respectfully prays the Court as follows:

That a Hearing be conducted to determine the legality of the said stop, search and seizure and thereafter find the following:

1. That the stop of the Defendant's vehicle be suppressed based upon denial of the Defendant's right to enjoy equal protection of the laws under the United States Constitution and the North Carolina Constitution.
2. That the search of the Defendant's vehicle be suppressed as the purported consent to search the vehicle (which Defendant [REDACTED] denies) is in violation of the Defendant's Fourth Amendment Right to be free from unreasonable stop as well as his Fifth Amendment Right Against Self Incrimination as well as his Sixth Amendment Right to have counsel present during questioning. Further, that any evidence seized as a result of the search be suppressed as the search exceeded the scope of the Defendant's consent.
3. That all evidence seized in connection with the Defendant's stop and seizure on the side of Interstate 85 on July 11, 2011 be excluded as fruit of the poisonous tree.

This the _____ day of _____, 2012.

By: _____
[REDACTED], Attorney for Defendant
PO Box [REDACTED]
[REDACTED], North Carolina [REDACTED]
Office [REDACTED]
FAX [REDACTED]

CERTIFICATE OF SERVICE

The undersigned certifies that he has served a copy of the foregoing motion upon the STATE OF NORTH CAROLINA by and through the District Attorney and or Assistant District Attorney for the State in this action:

() by regular U.S. mail; or

() by personal delivery of a copy to an employee of the District Attorney; or

() by placing a copy in the basket of the District Attorney maintained by the Clerk of Superior Court; or

() Other: _____

This the _____ day of _____, 2012.

By: _____

_____, Attorney for Defendant

PO Box _____

_____, North Carolina _____

Office _____

FAX _____

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF [REDACTED]

2013 AUG -1 PM 4:12

SUPERIOR COURT DIVISION

FILE NO. [REDACTED]

COUNTY, C.S.C.

STATE OF NORTH CAROLINA, BY

ORDER

VS.

ALLOWING MOTION TO SUPPRESS

DEFENDANT.

This matter came on to be heard at the May 13th, 2013 regular session of Criminal Superior Court in [REDACTED] County, North Carolina. This order is entered upon a hearing conducted on the defendant's motion to suppress filed April 24, 2012 in the above captioned case. The hearing was held in open court in the absence of any jury. The defendant was present at all times with his counsel, Mr. [REDACTED]. The State was represented by Assistant District Attorneys Ms. [REDACTED] and Mr. [REDACTED]. From the evidence presented, the Court finds as fact the following by at least a preponderance of the evidence:

1. In ruling upon this motion to dismiss, the Court has had the opportunity to observe the manner and demeanor of each witness and has determined the credibility of each witness. The Court has seen the body language of each witness as they testified. The Court has observed the pauses and hesitations, if any, when the witnesses have answered questions. The Court has heard the inflections and the tones of the voices of the witnesses as they testified. The Court has observed the facial expressions of the witnesses as they answered questions. The Court has observed many other factors used in determining the credibility of witnesses which a bare black and white record cannot afford.

2. The testimony considered in ruling upon this motion includes that of Investigator [REDACTED], Officer [REDACTED], Sergeant [REDACTED] and Officer [REDACTED], all with the [REDACTED] County Sheriff's Office, Ms. [REDACTED] with the [REDACTED] County Clerk's Office and the defendant. Where in this Order, this Court makes a finding of fact that a witness "testified" to certain facts, this Court is simply stating what occurred during the hearing of this motion and is not adopting such testimony set forth as a factual finding of the Court.

3. The Court has also considered the documentary and other tangible exhibits that have been offered and received by the State and the defendant. During the entry of this order in open court on May 15th, 2013, this Court reserved the right to make additional findings of fact and conclusions of law, or remove certain findings or conclusions made in open court. Counsel for the State and Defendant consented to such changes on the record. All counsel also consented to this order being signed out of county, session and term. This written Order supplants and replaces any and all findings and / or conclusions entered in open court.

4. On or about July 11, 2011, Deputy [REDACTED] with the [REDACTED] County Sheriff's Office was working as part of the Interstate Criminal Enforcement (hereinafter "ICE") team with the [REDACTED] Sheriff's Office.

5. The purpose of the ICE team was to monitor and control Interstate 85 as it runs through [REDACTED] County from the number one mile marker to the number eight mile marker.

6. This highway interdiction team worked exclusively on Interstate 85. The primary function of the ICE team was to look for drugs and illegal activity traveling through the I-85 corridor in [REDACTED] County.

7. On July 11, 2011, in the early morning hours, Deputy [REDACTED] was in a marked Chevrolet Tahoe with [REDACTED] County Sheriff's Office stickers on the side in the median of I-85 around mile marker one monitoring northbound traffic on I-85. He was wearing a BDU type uniform which was gray in color and had badges sewn on it. He had another badge clipped on his belt.

8. Deputy [REDACTED] was watching for any criminal activity and particularly was watching for what he called a "fear induced reaction" by motorists to his presence. This fear induced reaction included changes in speed or vehicle travel, reckless driving and the like.

9. As Deputy [REDACTED] was monitoring traffic, he saw the vehicle in which the defendant was a passenger, a blue Chrysler Pacifica, approaching from approximately a half mile away.

10. Deputy [REDACTED] testified that he saw this vehicle slow down as it approached, but that this was not abnormal as the majority of vehicles, as they approached his marked patrol vehicle,

slowed down.

11. Deputy [REDACTED] testified that as the vehicle passed his location, he saw the male driver look away and the female front seat passenger look in his direction. He further noticed that the vehicle had a front New York license plate.

12. Deputy [REDACTED] left the median and began following the Chrysler.

13. Deputy [REDACTED] testified that most vehicles on I-85 are speeding. Nevertheless, Deputy [REDACTED] testified that what drew his attention to this vehicle was its speed and the occupants' reaction as the Chrysler passed his location.

14. Deputy [REDACTED] was not certified to operate a speed detection radar device, and did not employ the use of any radar device, though his patrol vehicle did contain a radar. Further, Deputy [REDACTED] did not have his own vehicle calibrated to determine if the speedometer on the Tahoe was accurate.

15. After catching up to the Chrysler at approximately the two mile marker, Deputy [REDACTED] pulled his marked patrol Chevrolet Tahoe up along beside the Chrysler Pacifica and drove side by side of the Chrysler for approximately three miles on I-85.

16. While driving his patrol vehicle directly adjacent to and side by side of the Chrysler, Deputy [REDACTED] was able to observe the driver and front seat passenger and was able to determine, if he had not already done so, that they were Hispanic individuals. The Hispanic driver continually looked straight ahead in the direction he was driving and held his hands on the Chrysler steering wheel at the ten and two position. Deputy [REDACTED] testified that the driver looking straight ahead and keeping his hand at the ten and two position constituted, along with other factors, grounds upon which he eventually stopped the vehicle.

17. Deputy [REDACTED] testified that as he rode beside the Chrysler, he saw that the driver had a tight grip on the steering wheel and that he could tell that the driver's knuckles changed to a lighter color as he gripped the steering wheel. The Court finds this evidence to be incredible and unbelievable and an attempt by Deputy [REDACTED] to bolster his grounds for stopping the Defendant's vehicle.

18. At approximately mile marker five, Deputy [REDACTED]'s vehicle

and the Chrysler approached slower traffic and Deputy [REDACTED] at that point slowed down and allowed the Chrysler to come over into the fast lane of travel. Both vehicles then passed slower traffic on the right-hand side. Deputy [REDACTED] was pacing the defendant's vehicle with his own which had not been calibrated.

19. At about the time the vehicle was to exit [REDACTED] County, between the seven and eight mile marker, Deputy [REDACTED] activated his blue lights. The Chrysler immediately responded without incident and came to rest on the right shoulder of I-85.

20. Deputy [REDACTED] testified that he stopped this vehicle because of its speed and that his plan was to write the driver a warning ticket. Notwithstanding his testimony, the State in the case has conceded that Deputy [REDACTED] pulled this vehicle over on a pre-textual basis.

21. The Court finds that Deputy [REDACTED]'s stated purpose for pulling over the Chrysler was a pretext for the real reason that he pulled the vehicle over which will be outlined later in this order.

22. Approximately thirty seconds prior to activating his blue lights, the I-COP camera within Deputy [REDACTED]'s vehicle turned on and the Court has viewed State's Exhibit 1, being a DVD of the in-car video camera in Deputy Fitch's car.

23. The Chrysler Pacifica immediately pulled to the shoulder of the road and once the car was stopped, Deputy [REDACTED] notified another officer, Deputy [REDACTED], who was also on the ICE team, of the stop and Deputy [REDACTED] advised that he would be en route to provide backup.

24. Deputy [REDACTED] testified that he had not noticed the backseat passenger, the defendant in this case, prior to stopping the vehicle. The court finds this testimony incredible, especially in light of the other testimony by Deputy [REDACTED] that he saw the backseat passenger clearly once the vehicle was stopped.

25. Deputy [REDACTED] exited his vehicle and walked up to the passenger side of the vehicle and began speaking to the driver.

26. Deputy [REDACTED] testified that he did not see any luggage in the car and that when he approached the car, he smelled air fresheners. He spoke to the driver and told him why he stopped him. He asked to see the driver's license of the driver.

27. Deputy [REDACTED] testified that he saw a single key in the vehicle's ignition, saw several energy drinks in the console and that he noticed the driver's hands were shaking when he produced his driver's license.

28. Deputy [REDACTED] asked the driver, later identified as the co-defendant in this case, Mr. [REDACTED], to exit the vehicle and walk back to the front of the deputy's vehicle.

29. Once at the front of Deputy [REDACTED]'s vehicle, Deputy [REDACTED] began speaking to the driver, Mr. [REDACTED]. Deputy [REDACTED] asked Mr. [REDACTED] a series of questions, including: 1) "Where ya'll headed today?", 2) "Back to New York?; where you coming from?", 3) "Your cousin's house?; Where's [th]at?", 4) "Georgia? You been down there for a week, or . . . ?" 5) "Four days? So now you're heading back?"; 6) "What part of Georgia you in?", 7) "This your car?"; 8) "Your friend's car?"; 9) "Where ya'll live at in New York?"; 10) "What part of New York [does your friend's mother live]?"; 11) "Manhattan?"; 12) "So this is your friend's mother's car?".

30. Deputy [REDACTED] then directed Mr. [REDACTED] wait where he is and approached the vehicle again to ask for the registration papers. He then asked the passengers of the vehicle a series of questions including where they had been, what their purpose was for the travel, how long they had been in Atlanta, where they lived and how they knew Mr. [REDACTED]. The registration papers were provided to Deputy [REDACTED].

31. Once he obtained the registration, Deputy [REDACTED] walked back to Deputy [REDACTED]'s vehicle, which had by then arrived, and told Deputy [REDACTED] "what [he] had." The two officers spoke for a brief period of time and discussed the investigation up to that point.

32. According to the I-COP camera video, the defendant's vehicle was pulled over at approximately 8:39 a.m. At 8:40 a.m. the driver was out of the vehicle speaking with Deputy [REDACTED]. At 8:43 a.m., Deputy [REDACTED] begins talking to Officer [REDACTED], and at 8:44 a.m. Deputy [REDACTED] is heard to say to Deputy [REDACTED] that he's going to "start the paperwork."

33. Fourteen minutes after stopping the Chrysler, at 8:53 a.m., Deputy [REDACTED] ran the driver's license of the driver of the vehicle and at 8:54 a.m. Deputy [REDACTED] ran the tag of the vehicle.

34. After speaking with Deputy [REDACTED], Deputy [REDACTED] contacted Deputy [REDACTED], who was the canine handler, to respond to the scene. At approximately 9:00 a.m., Deputy [REDACTED] arrived on the scene to assist with his canine, "Heky."

35. Deputy [REDACTED] determined that the driver's license of the driver was valid and that the vehicle's registration was in proper order and legal.

36. At approximately 8:57 a.m. Deputy [REDACTED] is seen on the DVD video handing the driver his license and the warning ticket. They are seen to shake hands and Mr. [REDACTED] tells Deputy [REDACTED] to have a nice day.

37. Deputy [REDACTED] responded "you too," but in the same breath he began asking Mr. [REDACTED] a series of questions, including, 1) "Can I ask you another question?"; 2) "You don't have any drugs in the car do you?"; 3) "Any marijuana?"; 4) "None?"; 5) "Any cocaine?"; 6) "Heroin?"; 7) "Any guns in the car?"; and 8) "Any large sums of money over \$10,000.00 in the car?" Mr. [REDACTED] responded "no" to all these questions.

38. At 8:58 a.m., Deputy [REDACTED] asked Mr. [REDACTED] "Can I search the car?" and Mr. [REDACTED] responded that it's not his vehicle and that he would need to ask the backseat occupant.

39. Deputy [REDACTED] then directed Mr. [REDACTED] to stay where he was and then re-approached the Chrysler Pacifica. Mr. [REDACTED] was not free to leave.

40. Deputy [REDACTED] walked up to the passenger side of the vehicle and asked "Can I ask you a question?", followed by "You comprende?" A short exchange between the female passenger and Deputy [REDACTED] occurred subsequent to which Deputy [REDACTED] is heard to say "Yeah, if you'll translate for me."

41. Deputy [REDACTED] then asked the occupants of the vehicle a series of questions, including 1) "Do you have any [incomprehensible Spanish word]?"; 2) "Any drugs in the car?"; 3) "Any pistoles?"; 4) "Any large sums of money over 10,000?"; 5) "Mucho Dinero?"; 6) "[incomprehensible Spanish question]?"; 7) "Can I search the car?"; and again 8) "Can I search the car?"

42. There is a short exchange which is inaudible on the DVD during the point at which Deputy [REDACTED] attempts to gain consent to search the Chrysler Pacifica. The Court finds that any consent obtained was involuntary and was not supported by

reasonable suspicion as set forth in this order. Further, any consent to search the vehicle is invalid for other reasons which will hereinafter be set forth.

43. Deputy [REDACTED] directed the occupants of the vehicle to step out of the vehicle and motioned for them and directed them where they would be stationed while the search occurred.

44. At 8:59 a.m., Deputy [REDACTED] turned around, walked back to his patrol vehicle and replaced the microphone which recorded the audio portion of the I-COP DVD into the charger. This action silenced the audio and thereafter on the DVD video, no audio is heard or recorded.

45. Deputy [REDACTED] intentionally turned his microphone off and intentionally silenced the remaining audio of the recording.

46. The search of the vehicle began at approximately 9:00 a.m. with Deputy [REDACTED] searching the rear seat area of the vehicle and Officer [REDACTED] searching the front seat area. Deputy [REDACTED] testified that he saw no luggage in the car, but when one views the in car DVD video, it does not appear that Deputy [REDACTED] looked in the car for any luggage. During the search, Deputy [REDACTED] found luggage in the car - three small bags, one with baseball clothes and equipment, one with a makeup kit and one bag with some male clothes.

47. The search of the Chrysler vehicle was extensive and included searching under the hood, the back of the hatch, inside the luggage bags which were found in the vehicle, inside of the console and dash, under the seats, under the carpet, under and behind other upholstery of the vehicle, and underneath the vehicle. At 9:09 a.m., Deputy [REDACTED] cranked the vehicle and drove it such that it was further off of the road so that a canine drug sniffing dog could be deployed upon the vehicle.

48. At approximately 9:10 a.m., roughly 10 minutes into the search, Deputy Cook deployed Canine "Heky" onto the vehicle and according to testimony, Canine Heky alerted behind the back seat in the cargo area near the floorboard.

49. At one point during the search the officers went underneath the vehicle and began looking around the spare tire area. They noticed an area that looked like it was an aftermarket overspray with a slight color change than the rest of the undercarriage of the vehicle. This appeared to be the area located underneath the back seat.

50. Deputy [REDACTED] removed a floor panel underneath the back seat and noticed what he described as suspicious shiny bolts. Deputy [REDACTED] retrieved a tool kit from his patrol vehicle and unscrewed bolts underneath the rear seat and lifted up the seat and the hatch and saw an area cut out of the floorboard that looked to be a non-factory alteration of the vehicle.

51. Inside this concealed compartment they found three packages which appeared to them, based on their training and experience, to be a controlled substance and they thereafter placed the occupants under arrest.

52. The search of this vehicle began at approximately 9:00 a.m. The occupants were placed under arrest at approximately 9:28 a.m. The search continued after the arrest.

53. A portion of the [REDACTED] County Sheriff's Office policy and procedure manual (policy # 3.20) was introduced as Defendant's Exhibit 1. It provides, in pertinent part, as follows:

Policy Title: USE OF MOBILE VIDEO / AUDIO RECORDING EQUIPMENT

PURPOSE:

* * *

MVR equipment has been demonstrated to be of value in the prosecution of traffic violations, criminal offenses, evaluation of employee performance, and use as a training aid. Deputies **shall** adhere to the following procedures for the use of MVR equipment.

PROCEDURES:

- A. [REDACTED] County Sheriff's Office has adopted the use of in-car video recording systems in order to accomplish several objectives, including but not limited to:
1. Accurate documentation of events, actions, conditions and statements made during arrests and critical incidents so as to enhance officer reports, assist in the collection of evidence, and testimony in court.
 2. The enhancement of this agency's ability to review probable cause for arrests, arrest procedures, and for evaluation and training.
- B. Deputies **shall** adhere to the following operating procedures when using vehicles with MVR equipment:
1. MVR equipment installed in any vehicle is the responsibility of the deputy assigned to that vehicle and **shall** be maintained and operated per the manufacturer's recommendations.
 2. MVR equipment will be automatically activated when the emergency

lighting system on the patrol vehicle is activated.

3. MVR activation *shall* include audio recording as well as video recording. Deputies *shall* include audio recording as part of their documentation. He/she *shall not intentionally fail to turn on or intentionally turn off audio recordings* of matters being documented. Microphone condition, maintenance, and plug in at transmitter are the deputy's responsibility to ensure proper recording of the audio portion.

4. Deputies shall not erase or alter video recordings in any manner.

* * *

7. Deputies *shall* use their MVR equipment to record:
 - a. The actions of suspects during on-scene interviews while conducting, but not limited to, field sobriety checks or when placing suspects in custody, to be used as evidence in later judicial proceedings;
 - b. The circumstances at crime scenes and other events, such as confiscation and documentation of contraband or other types of evidence.

(where there is emphasis, it is added by the Court)

54. The [REDACTED] County Sheriff's Office written policy regarding the use of mobile video and audio recording equipment provides many other limits, directives, requirements and procedures for the use of MVR videos.

55. Sergeant [REDACTED] and his captain in the Sheriff's Office, despite the written policy of the Sheriff's Office, had an unwritten policy whereby once the search of a vehicle at a traffic stop began, the audio portion of the MVR was intentionally silenced. This verbal policy was in strict non-compliance and the opposite of the written policy of the sheriff's office and undermined the written policy's purpose and objectives. Sergeant [REDACTED] was Deputy [REDACTED] Fitch's immediate supervisor on the ICE team. Deputy [REDACTED] Fitch was aware of his supervisor's unwritten policy of turning off the audio portion of the MVR.

56. Sergeant [REDACTED] testified, and the Court finds as credible evidence, that the reason for the unwritten policy of the audio portion of the MVR being turned off was to hide evidence and prevent lawyers and those charged with criminal offenses from learning the particular techniques and manner in which law enforcement officers obtain information to make arrests.

57. Sergeant [REDACTED] admitted that such information regarding the techniques law enforcement used came out in open court notwithstanding the silencing of these audio recordings.

58. Deputy [REDACTED], [REDACTED], and Deputy [REDACTED] all worked together on the ICE team and it is apparent to this Court that they were aware of the unwritten policy of Sergeant [REDACTED] and his captain in shutting off these audio recordings once the search of the vehicle began.

59. Deputy [REDACTED] testified that he was having battery problems with his audio microphone and that he placed it back in the charger in his vehicle thereby silencing it because he had been having battery problems. He further testified there were budget concerns with the Sheriff's office in getting new batteries. The Court finds that Deputy [REDACTED]'s stated purpose in open court for replacing the audio microphone into his vehicle is a complete and total falsehood. The Court finds this testimony to be unbelievable and specifically finds that it is an attempt by Deputy [REDACTED] to deceive this Court. It is apparent that the reason Deputy [REDACTED] placed the audio recording in its charger was pursuant to the unwritten policy of his sergeant - he intentionally did so and thereby secreted and hid that evidence in this case.

60. Deputy [REDACTED]'s testimony about battery malfunction and Sergeant [REDACTED]'s testimony regarding the purchase of new batteries is an attempt to deceive this Court as to the real reason for Deputy [REDACTED] turning off the audio recording in this case.

61. This particular evidence, particularly the admitted withholding of evidence, the admitted secreting and spoliation and hiding of evidence by the officers involved in this case and the additional attempt by these officers to cover up this action in this court in this hearing has cast a cloud of suspicion and distrust over their testimony. Such a circumvention of the Sheriff's written policy and the admitted and purposeful withholding of and hiding evidence renders the investigation and testimony of the officers in this case wholly suspect and untrustworthy.

62. By Deputy [REDACTED]'s action in silencing the audio portion of the DVD, he prevented anyone from hearing what transpired for approximately one hour during the search and investigation in this case. This evidence would have been beneficial to the defendant and could have been exculpatory.

64. The Court finds that this particular behavior by Deputy [REDACTED] in this case is, by itself, reason enough to grant the defendant's motion to suppress. The Court need not and does not decide this motion based solely upon that ground.

65. The defendant's attorney on September 5, 2011, sent a request for public records to the [REDACTED] County Sheriff's Office requesting specifically "all citations and/or warning citations issued by Deputy [REDACTED], Deputy [REDACTED], and Deputy [REDACTED] where the initial observation of the persons cited were made on Interstate Highway 85 regardless of the physical location where the citations or warning citations were actually issued from January 1, 2009, through July 30, 2011."

66. Approximately three months later, on December 1, 2011, Sergeant [REDACTED] with the [REDACTED] County Sheriff's Office responded to Mr. [REDACTED]'s request and advised that the warning citations were commonly discarded via recycling or other means of disposal and that the sheriff's office did not have storage capacity to keep these records. Sergeant [REDACTED] sent to Mr. [REDACTED] those records that he had for those three officers.

67. Defendant has introduced Defendant's Exhibit 7 which includes nine warning tickets written by Deputy [REDACTED]. These were purported and proffered by the sheriff's office as those tickets written by Deputy [REDACTED] from January 1, 2009, through July 30, 2011 on I-85. Deputies [REDACTED] and [REDACTED] had only been part of the ICE team since December, 2010.

68. Of those nine warning citations written by Deputy [REDACTED], six of the individuals are noted to be Hispanic, two as white, and one as black. All of these warning citations occurred on Interstate 85.

69. Deputy [REDACTED]'s warning citations as delivered to or obtained by the defendant pursuant to his request were introduced as Defendant's Exhibit 6, and include twenty citations.

70. Of the twenty citation of Deputy [REDACTED], fourteen of those were for Hispanic individuals, four were for black individuals, one was listed as other, and one was unlisted as to the race of the individual.

71. No citations were provided to Mr. [REDACTED] as to Deputy [REDACTED]'s citations or warning tickets, but the State

introduced those as State's Exhibit 2.

72. There were apparently three citations or warning tickets written on I-85 by Deputy [REDACTED] during the dates requested and including the warning citation written in this case, all three were for Hispanic persons.

73. Most of the reasons articulated by Deputy [REDACTED] for pulling over the Chrysler border on the absurd. Deputy [REDACTED] assigns suspicion to the passenger looking in his direction as the vehicle passed his location while at the same time, he assigns suspicion when the driver fails to look in his direction and has both hands on the steering wheel at the ten and two position while driving on I-85 with a marked police Tahoe directly beside him. There is nothing suspicious about changing lanes on an interstate or passing other vehicles. There is nothing suspicious about a vehicle displaying a New York license plate driving north on I-85. While innocent factors can, when taken together, give rise to reasonable suspicion, the factors Deputy [REDACTED] relied upon in this case do not collectively eliminate a substantial portion of innocent travelers. See U.S. v. Digiovanni, 650 F.3d 498 (4th Cir. 2011).

74. Deputy [REDACTED] further testified that the reason he stopped this vehicle was based upon its speed. Based upon the totality of the circumstances in this case, the Court finds this testimony incredible. The Court further finds that the State has presented insufficient evidence and has failed to prove by a preponderance of the evidence that the Chrysler was speeding.

75. The ICE team wrote a disproportionate number of citations and / or warning tickets to Hispanic persons as compared to other races. This evidences circumstantially that the ICE team stopped more Hispanic drivers than any other race, that the ICE team targeted Hispanics, and that the ICE team selectively enforced the law based upon race.

76. This Court is aware of our Supreme Court's intolerance of "discriminatory application of the law based upon a citizen's race." State v. Ivey, 360 N.C. 562, 564, (2006). The Court finds that Deputy [REDACTED] targeted the occupants of the Chrysler in this case because of their race as Hispanic individuals. Deputy [REDACTED] pulled this vehicle over solely because of the race of its occupants. During the hearing of this case, he further attempted to cover up this reason by articulating and perhaps fabricating various and sundry "suspicious" behaviors.

77. Even if Deputy [REDACTED] had probable cause or reasonable suspicion to stop the Chrysler vehicle in this case, the search and seizure in this case would nevertheless be unconstitutional based upon the other reasons delineated in this order.

78. Deputy [REDACTED] was dilatory when he did not pursue immediately his purported reason for the stop and did not within a reasonable period of time check for the validity of Mr. [REDACTED]'s driver's license or the vehicle registration. Instead, he engaged in a series of questions to the driver, who, from the in car video, did not appear to be overly nervous. He then engaged the occupants of the vehicle in a series of questions and then proceeded to approach Officer [REDACTED] and engage in a conversation with him. He then required the driver to remain standing in front of his patrol vehicle for an unreasonable period of time.

79. The scope of the detention of Mr. [REDACTED] and the occupants of the Chrysler was not carefully tailored to Deputy [REDACTED]'s purported underlying justification for the stop - his testimony was that he stopped the vehicle for speeding and planned to write the driver a warning ticket.

80. Once Deputy [REDACTED] finally made the relevant inquiry regarding Mr. [REDACTED]'s driver's license and registration and determined they were valid, and after requiring Mr. [REDACTED] to remain standing in front of his patrol vehicle for approximately seventeen minutes, Deputy [REDACTED] handed Mr. [REDACTED] his driver's license and the warning ticket. The Court has observed Mr. [REDACTED] on the MVR video standing in front of Deputy [REDACTED]'s vehicle for approximately seventeen minutes. During this entire period of time, Mr. [REDACTED] does not appear nervous and to the extent he was or appeared nervous, such nervousness would be normal.

81. Considering the totality of the circumstances surrounding the stop in this case, the duration of the stop as a whole was unreasonable both in its scope and duration. The duration of this stop was not *de minimus*. See Digiovanni, 650 F3d at p. 508-09.

82. Based upon Deputy [REDACTED] immediately engaging in an additional conversation with Mr. [REDACTED], and upon the totality of all the circumstances in this case, a reasonable person in Mr. [REDACTED]'s position and a reasonable person in defendant's position would not have felt free to leave. Supporting this finding is Deputy [REDACTED]'s own testimony that Defendant at that point was not free to leave.

83. Once the purported reason for the stop was addressed, there was no grounds upon which to extend the stop. In short, Deputy [REDACTED] did not have reasonable suspicion that criminal activity was afoot.

84. The reasons proffered by Deputy [REDACTED] which ostensibly gave rise to reasonable suspicion including the nervousness of the driver, a single key in the ignition, the smell of air fresheners, energy drinks in the console, movement in the car, the absence of luggage and inconsistent statements by the occupants are all factors which are easily associated with innocent travelers, independently and collectively. Assuming this Court believed Deputy [REDACTED]'s testimony regarding what he smelled or saw, or failed to see, each of these factors fails to meet the threshold requirement of reasonable suspicion and do not eliminate a substantial portion of innocent travelers. Namely, a single key in the ignition is not unusual, and is consistent with this vehicle being borrowed from the Defendant's mother. Many drivers have air fresheners in their vehicles and many drivers drink energy drinks, including coffee, while they drive. There was not an absence of luggage in the car and based upon the in car video, there was not excessive or abnormal movement from the backseat passenger, the defendant, in this case, nor was there abnormal nervousness from the driver.

85. The self-styled inconsistent statements given by Mr. [REDACTED] and the occupants of the Chrysler do not constitute, either by themselves or together with any other factor, a reasonable suspicion for the officer to extend this stop. Deputy [REDACTED] never understood where Mr. [REDACTED] said he had come from and Deputy [REDACTED] testified that he did not know whether or not Suwanne, Georgia was within the confines of Atlanta, Georgia. The Court takes judicial notice that Smyrna, Georgia is on the outskirts of Atlanta, Georgia. Further, there was an obvious language barrier between Deputy [REDACTED] and the occupants of the vehicle. The two day versus four day visit is not necessarily inconsistent in the context within which these statements were given.

86. Assuming without deciding that the defendant gave consent to search the Chrysler, such consent was tainted by the illegality of the extended detention and rendered any consent given by the defendant ineffective to justify any search of the defendant's vehicle.

87. At the time the purported consent was obtained, there were

at least two sheriff's patrol vehicles with blue lights flashing located behind defendant's vehicle. The occupants of the Chrysler had been detained at the time the purported consent was obtained for approximately twenty minutes. Based upon the nature and the manner in which Deputy [REDACTED] addressed the driver and the occupants of the vehicle and upon the totality of the circumstances, any consent obtained in this case was invalid.

88. Deputy [REDACTED]'s request for consent exceeded the scope and duration of the stop even assuming the stop was legal and justified in the first instance. The prolonged detention of the vehicle without reasonable suspicion was not constitutional. See State v. Jackson, 199 N.C. App. 236, 2009, State v. Parker, 183 N.C. App. 1 (2007), State v. Myles, 188 N.C. App. 42 (2008).

89. Even if there were valid consent in this case, the search of the Chrysler was overly excessive and far surpassed a search which a reasonable person would have understood and believed he or she was consenting to. Thus, to the extent any consent obtained by the defendant in this case was valid, the search in this case exceeded the scope of the consent given and was therefore invalid, unauthorized, and violated defendant's constitutional rights.

90. To the extent a finding of fact found by this Court or any portion thereof constitutes a conclusion of law, or to the extent any conclusion of law is a finding of fact, the Court hereby designates all such findings as conclusions and all such conclusions as findings.

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. There was no credible evidence of a particularized, reasonable, articulable suspicion to justify the traffic stop in this case.

2. Even if the Court believed Deputy [REDACTED]'s testimony regarding the speed of the Chrysler vehicle in this case, which the Court does not, Deputy [REDACTED] selectively enforced the law based upon race and thereby violated the Defendant's Constitutional rights under the Equal Protection Clause.

3. Deputy [REDACTED]'s action in silencing the audio portion of the in car video in this case constitutes a violation of the Defendant's Constitutional rights of Due Process.

4. Assuming there was reasonable suspicion or probable cause to stop the Chrysler, there was no credible evidence of reasonable articulable suspicion to justify the prolonged detention of the occupants of the vehicle in this case. The detention of the defendant in this case was unreasonable in scope and duration.

5. Any consent obtained from the defendant to search the Chrysler was tainted and invalid.

6. To the extent any consent given was valid, the search of the Chrysler exceeded the scope of the consent given and such additional search and any seizure of evidence resulting from such search should be suppressed.

7. Defendant's Fourth Amendment right to be free from unreasonable searches or seizures was violated in this case and such violation renders the evidence obtained in this case inadmissible by the exclusionary rule.

8. Defendant's Fourteenth Amendment rights were violated and such violation requires the exclusion of the evidence seized in this case.

9. Defendant has standing to pursue this motion to suppress and this Court has jurisdiction to enter this order out of county, session and term.

Based upon the foregoing findings of fact and conclusions of law, IT IS THEREFORE ORDERED:

1. The defendant's motion to suppress is allowed. The search of the defendant's vehicle and any and all items seized as a result of that search should be and hereby are suppressed and ruled inadmissible in this case.

Entered this 25th day of July, 2013.


Superior Court Judge Presiding