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STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff-Appellee,

v.

Matthew Scott Duff,

Defendant-Appellant.

Supreme Court
No. 163961

Court of Appeals
No. 354406

Circuit Court
No. 2018-267140-FH

Appendices to Plaintiff-Appellee's Supplemental Brief

KAREN D. McDONALD
PROSECUTING ATTORNEY,
OAKLAND COUNTY

MARILYN J. DAY
CHIEF, APPELLATE DIVISION

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APPENDIX A

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MATTHEW SCOTT DUFF,

Defendant-Appellee.

UNPUBLISHED
November 23, 2021

No. 354406
Oakland Circuit Court
LC No. 2018-267140-FH

Before: SHAPIRO, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

The prosecution appeals as of right an order granting defendant's motion to dismiss the charges against defendant for operating a motor vehicle while intoxicated, third offense, MCL 257.625, following the court's order granting defendant's motion to suppress. On appeal, the prosecution argues that the trial court erred when ruling on defendant's motion to suppress by concluding that the deputy seized defendant for purposes of the Fourth Amendment when the deputy parked his patrol car 10 feet away from defendant's car at a 45-degree angle. Under the facts of this case, we agree with the prosecution, and therefore reverse.

On the evening of March 4, 2018, Oakland County Sheriff's Deputy Jason Pence was out on patrol in Pontiac, Michigan, when he saw a white Kia Forte vehicle parked in the parking lot of a closed elementary school. It was the only vehicle in the parking lot. The engine of the vehicle was running, and the interior overhead lights were on. Deputy Pence observed a single person sitting in the driver's seat of the vehicle. Deputy Pence proceeded to park his patrol car 10 feet away, at a 45-degree angle, behind the vehicle. For his safety, the deputy pointed his spotlight at the driver's side of the vehicle and turned it on. Deputy Pence did not activate his overhead lights or emergency siren. He proceeded to walk up to the driver's side of the vehicle to speak with the occupant of the vehicle—defendant. Upon initiating contact with defendant, Deputy Pence noticed that defendant's eyes were bloodshot and glossy, and that he was slurring his speech. Deputy Pence also detected the odor of alcohol. Later during the investigation, defendant said that he had been drinking that night.

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On July 18, 2018, defendant filed a motion to suppress the result of his blood alcohol test, arguing that it must be suppressed because Deputy Pence lacked a reasonable, articulable suspicion, based on objective facts, that criminal activity was afoot when he seized defendant. On August 16, 2018, the prosecution responded, arguing that Deputy Pence was lawfully performing his duty when he approached defendant's vehicle and asked defendant to produce identification. The prosecution argued that initiating an encounter for the purpose of an inquiry does not constitute a seizure. An evidentiary hearing on defendant's motion to suppress was held on October 2, 2018. On November 9, 2018, the trial court entered an order denying defendant's motion to suppress, reasoning that Deputy Pence had a reasonable, articulable suspicion to seize defendant.

On February 13, 2019, defendant filed a delayed application for leave to appeal with this Court, arguing that all evidence obtained directly or indirectly as a result of Deputy Pence's encounter with defendant must be suppressed because Deputy Pence's act of parking his patrol vehicle behind defendant's vehicle and approaching defendant constituted a stop without reasonable suspicion of criminal activity in violation of defendant's Fourth Amendment rights. This Court denied defendant's delayed application for leave to appeal.[1] Defendant then filed an application for leave to appeal with our Supreme Court, and that Court entered an order remanding the case to the trial court to reconsider defendant's motion to suppress with instructions to "determine when the defendant was first seized for Fourth Amendment purposes." *People v Duff*, 504 Mich 995, 995 (2019). On March 4, 2020, the trial court held a status conference hearing. At the hearing, neither party presented additional evidence or testimony.

On July 15, 2020, the trial court entered an order granting defendant's motion to suppress. The trial court concluded that Deputy Pence seized defendant when the deputy parked behind him, reasoning:

> Deputy Pence proceeded to park his patrol car 10 feet away, at a 45-degree angle behind the defendant's vehicle and activated his spotlight pointing at the driver. The Deputy testified that if Mr. Duff were to back his vehicle straight out, he would have hit the officer's car. The defendant's only means to exit [was] driving over the grass in front of him. Under those circumstances, a reasonable person would have believed that he or she was not free to leave, thus constituting a seizure. [Citations omitted.]

The trial court explained that Deputy Pence did not have reasonable suspicion at the time of this seizure, so the seizure violated defendant's constitutional rights. On July 23, 2020, the trial court entered an order dismissing the case.

On appeal, the prosecution argues that the trial court erred by granting defendant's motion to suppress. We agree.

Constitutional questions are questions of law that are reviewed de novo. *People v Steele*, 283 Mich App 472, 487; 769 NW2d 256 (2009). This Court reviews "for clear error a trial court's

[1] *People v Duff*, unpublished order of the Court of Appeals, entered March 27, 2019 (Docket No. 347603).

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findings of fact in a suppression hearing," but reviews "de novo whether the Fourth Amendment was violated and whether an exclusionary rule applies." *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002).

For Fourth Amendment purposes, warrantless seizures are presumed unreasonable unless they fall under one of the exceptions to the warrant requirement. *Coolidge v New Hampshire*, 403 US 443, 454-455; 91 S Ct 2022; 29 L Ed 2d 564 (1971). However, not every interaction with law enforcement constitutes a seizure triggering the Fourth Amendment. An officer may approach a citizen "on the street or in other public places" and ask the citizen to voluntarily answer questions without violating the Fourth Amendment. *United States v Drayton*, 536 US 194, 200-201; 122 S Ct 2105; 153 L Ed 2d 242 (2002). "[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v Bostick*, 501 US 429, 439; 111 S Ct 2382, 2389; 115 L Ed 2d 389 (1991).

The trial court found that Deputy Pence parked his patrol vehicle behind defendant's vehicle, 10 feet away, at a 45-degree angle. This was supported by both Deputy Pence's testimony and the patrol-vehicle recording of the stop played for the trial court and included in the record. The trial court also found that, if defendant had reversed his vehicle straight back, he would have hit Deputy Pence's patrol vehicle. This was likewise supported by Deputy Pence's testimony, and arguably the video of the stop. Then the trial court found that "defendant's only means to exit [was] driving over the grass in front of him." The trial court cited this statement to "status conference 3/4/2020," which was the conference that the court held after the case was remanded from our Supreme Court. No evidence was presented at this hearing—only argument by the parties. It therefore appears that this finding by the trial court was based on defense counsel's argument at the hearing in which he asserted that defendant could only exit the parking lot by driving over the grass in front of him. This assertion was unsupported by any evidence, however. In fact, the evidence in the record only supports a contrary conclusion. Specifically, Deputy Pence testified, "If [defendant] would have turned his wheel as he was backing out, he would have cleared my vehicle." Moreover, being that the only vehicles in the parking lot were defendant's vehicle and Deputy Pence's patrol vehicle, and based on the court's finding that the deputy parked behind defendant's vehicle, 10 feet away and at a 45-degree angle, it seems common sense that defendant would have been able to have clear the deputy's vehicle if defendant "turned his wheel as he was backing out."[2] We are therefore left with a definite and firm conviction that the trial court made a mistake when it found that "defendant's only means to exit [was] driving over the grass in front of him."

The question then becomes whether Deputy Pence's conduct of partially obstructing defendant's ability to move his vehicle "would have communicated to a reasonable person that the

[2] Also, upon viewing the patrol-vehicle recording of the stop, it appears that defendant would have been able to safely reverse, albeit at an angle, out of the parking spot.

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person was not free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 US at 439. In answering this question, we find instructive a portion of *United States v Carr*, 674 F3d 570 (CA 6, 2012), that this Court cited approving in *People v Anthony*, 327 Mich App 24, 39-40; 932 NW2d 202 (2019). In *Carr*, the Sixth Circuit Court of Appeals explained:

> As a threshold matter, the stop was consensual at the point where the officers parked their unmarked police car near Carr's Tahoe. A "consensual encounter" occurs when "a reasonable person would feel free to terminate the encounter." *United States v. Drayton*, 536 US 194, 201; 122 S Ct 2105; 153 L Ed 2d 242 (2002). This court has analyzed similar civilian-police encounters by determining whether the police vehicle blocked the defendant's egress. See, e.g., *United States v. See*, 574 F3d 309, 313 (6th Cir 2009); *United States v. Gross*, 662 F3d 393, 399-400 (6th Cir 2011). As the concurrence in *See* suggested, unless there is other coercive behavior, a police officer can initiate a consensual encounter by parking his police vehicle in a manner that allows the defendant to leave. *See*, 574 F3d at 315 (Gilman, J., concurring). Here, the police officers parked their unmarked, black Ford Explorer at an angle in front of Carr's Tahoe. The angle of the police vehicle gave Carr sufficient room to drive either forward or backward out of the carwash bay. Although pulling forward would have required "some maneuvering" for Carr to get around the Explorer, "there was enough room that [Carr] could have just merely steered around [the Explorer]." As one of the officers testified, Carr had "ample room to steer and maneuver around our vehicle." Because the police vehicle allowed Carr to exit the carwash, albeit with "some maneuvering," Carr's car was not blocked for Fourth Amendment purposes. To conclude otherwise would be an endorsement of a "simplistic, bright-line rule" that a detention occurs "any time the police approach a vehicle and park in a way that allows the driver to merely drive straight ahead in order to leave." [*Carr*, 674 F3d at 572-573.]

Like the defendant in *Carr*, defendant here could exit his parking space, "albeit with 'some maneuvering.' " Thus, the position of Deputy Pence's patrol vehicle alone did not turn this encounter into a seizure, and we must determine whether there was "other coercive behavior" by Deputy Pence that turned the encounter into a seizure for Fourth Amendment purposes. *Id*. at 573. On the record before us, there was no such coercive behavior. Accordingly, Deputy Pence did not seize defendant for Fourth Amendment purposes when he parked his patrol vehicle behind defendant's vehicle, 10 feet away and at a 45-degree angle. As such, defendant's Fourth Amendment rights were not implicated when the deputy parked behind him. See *Anthony*, 327 Mich App at 33 ("If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.") (Quotation marks and citation omitted.)

According to Deputy Pence, when he reached the vehicle, which was running, the window was already down, and he saw that defendant's eyes were bloodshot and glossy, which the deputy explained was consistent with someone who had been consuming alcohol. When the deputy spoke to defendant, he noticed that defendant's speech was slurred, which was also consistent with someone who had been consuming alcohol. The deputy could also smell alcohol coming out of the vehicle. On these facts, Deputy Pence had reasonable suspicion that defendant had operated a vehicle while intoxicated, and could briefly detain defendant for further investigation. See *People*

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v Oliver, 464 Mich 184, 193; 627 NW2d 297 (2001) (explaining that an officer may "detain a person consistently with the Fourth Amendment on the basis of reasonable suspicion that criminal activity may be afoot").[3]

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien

[3] In light of our conclusion that the trial court erred by granting defendant's motion to suppress, we decline to address the prosecution's argument that the exclusionary rule should not apply under the facts of this case.

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MATTHEW SCOTT DUFF,

Defendant-Appellee.

UNPUBLISHED
November 23, 2021

No. 354406
Oakland Circuit Court
LC No. 2018-267140-FH

Before: SHAPIRO, P.J., and BORRELLO and O'BRIEN, JJ.

SHAPIRO, P.J. (*dissenting*).

I respectfully dissent. The trial court did not err by determining that defendant was seized for purposes of the Fourth Amendment because under the circumstances of this case a reasonable person would not have believed he was free to leave.

It is well-settled that "[a] lone automobile idling in a darkened parking lot late at night does not, without more, support a reasonable suspicion of criminal activity." *People v Freeman*, 413 Mich 492, 496; 320 NW2d 878 (1982). Where reasonable suspicion cannot be demonstrated, the officers may not act in a fashion to significantly hinder the ability of the person stopped to leave the scene. If a reasonable person would believe that they were not free to leave, then the police action is a *Terry* stop, i.e., a seizure. See *People v Shankle*, 227 Mich App 690, 659-696; 577 NW2d 471 (1998).

In this case, defendant was parked at the edge of a parking lot such that he could not drive forward without leaving the paved parking area and driving over grass. The approaching officer parked his patrol car 10 feet behind defendant's vehicle with the headlights pointed at defendant's car. The officer also activated the patrol car's spotlight, and pointed it at the driver's side of defendant's car. The officer testified that he purposely positioned his patrol car behind defendant's vehicle so that if defendant attempted to back straight out of the parking spot he would strike the police car. And the officer testified that if defendant had attempted to drive away he would have activated his sirens and lights and forced defendant to stop his vehicle.

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At the outset of this case, the prosecution argued that the officer had reasonable suspicion of criminal activity or that he was making a health and safety check of the driver. However, at the evidentiary hearing the deputy testified that his only basis for suspecting criminal activity was that the parking lot was in a high crime area and he conceded that he made no inquiry as to whether defendant needed assistance or medical treatment. Because there was no basis for a *Terry* stop and the stop was not for health and safety purposes, the prosecution was left only with the argument that what occurred was merely a "consensual encounter." The trial court conducted an evidentiary hearing and thereafter granted defendant's motion to suppress, finding that under the circumstances, "a reasonable person would have believed that he or she was not free to leave; thus constituting a seizure."

The majority concludes that this trial court finding was clearly erroneous because there was enough room behind defendant's vehicle for him to leave the scene by carefully maneuvering his vehicle in reverse around the police car. This reasoning, however, misconstrues the test for whether a seizure occurs within the meaning of the Fourth Amendment. The Fourth Amendment does not turn on a measuring tape or the existence of some demanding but conceivable means of departure; the question is not whether leaving was physically possible but whether a reasonable person would believe he was free to leave. The standard was clearly enunciated by the Supreme Court in *People v Jenkins*, 472 Mich 26, 32, 691 NW2d 759 (2005): "A 'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave." Whether defendant's car could actually have been maneuvered past the police vehicle is a factor relevant to that inquiry, but it is not the inquiry itself.

Viewing the totality of the circumstances, the evidence was overwhelming that a reasonable person in defendant's shoes would conclude that they were not free to leave and I see no basis to find clear error by the trial court. The police car was parked behind defendant's car at night, obstructing his only straight path of egress. Further, it was dark and the police car's headlights and spotlight were shining on defendant's vehicle, undoubtedly affecting defendant's vision were he to drive in reverse and strongly suggesting that the police were not merely initiating a casual, consensual encounter.[1] Under these circumstances, the defendant could not leave the scene without risking striking a police car or a police officer, or at least finding himself arrested for fleeing and eluding or resisting and obstructing.[2] The conclusion that defendant should have believed he was free to leave is one that only lawyers and judges could reach given that it can exist only in argument and not in reality. No reasonable person, and likely few unreasonable persons, would conclude that they are free to leave when a police car parks behind them so as to block or significantly hinder their ability to drive away and directs the police vehicle's headlights and spotlight at the person's vehicle.

---

[1] Although the spotlight shining on defendant was relied on by the trial court as a pertinent factor in this case, the majority declines to consider it in reversing the court.

[2] An officer's subjective intent not to let someone leave is not dispositive as to whether a seizure occurred, but it is relevant, particularly when the manner in which the officer behaves is consistent with that intent, e.g., physically hindering a person's ability to leave.

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In reversing the trial court, the majority relies heavily on *United States v Carr*, 674 F3d 570 (CA 6, 2012), a nonbinding federal decision[3] that was quoted with approval in *People v Anthony*, 327 Mich App 24; 932 NW2d 202 (2019). Both cases are readily distinguishable on the facts. In *Carr*, the defendant's vehicle could have left either through the front of the carwash bay, where a police vehicle was parked at angle in front of the defendant's vehicle, or the rear of the bay where there was no police vehicle. See *Carr*, 674 F3d at 572-573. In contrast, defendant in this case could not drive forward and his only option would have been to maneuver past the police vehicle in reverse while looking back into headlights and a spotlight pointed toward him. And in *Anthony*, there was no question about the availability of egress as the officers parked parallel to the defendant's vehicle on the street. See *Anthony*, 327 Mich App at 39.

Moreover, to the extent that *Anthony*'s reliance on *Carr* can be read for the proposition that the position of the police vehicle is irrelevant as to whether a seizure occurred so long as it does not block every possible path of egress, I would conclude that it was wrongly decided and its holding should be overruled by the Michigan Supreme Court. *Anthony* is plainly at odds with the well-established standard that a seizure occurs if, "*in view of all the circumstances*, a reasonable person would have believed that he was not free to leave." *Jenkins*, 472 Mich at 32 (emphasis added). See also *United States v Drayton*, 536 US 194, 201; 122 S Ct 2105; 153 LEd2d 242 (2002) ("[F]or the most part *per se* rules are inappropriate in the Fourth Amendment context."). Each case must be decided on its own facts, and defendant's theoretical ability to maneuver past the police vehicle is not dispositive.

The trial court properly considered the totality of the circumstances and found that a reasonable person would not have believed he was free to leave. Because there was ample evidentiary support for this conclusion, I would affirm the trial court's ruling.

/s/ Douglas B. Shapiro

[3] *Carr* was a 2-1 decision.

APPENDIX B

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUTY OF OAKLAND

OAKLAND COUNTY 18-267140-FH
JUDGE D. LANGFORD MORRIS
PEOPLE v DUFF,MATTHEW,

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v

Case No: 18-267140-FH
Hon, Denise Langford Morris

MATHEW SCOTT DUFF,
Defendant.
_____/

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ORDER DENYING MOTION TO SUPPRESS

The Defendant Mathew Duff, through counsel, brought the instant Motion to Suppress Evidence and an evidentiary hearing held in this Court on October 2, 2018. The Deputy had a reasonable, articulable suspicion and conducted a proper investigation based on the facts and circumstances. Therefore, the Court finds that Deputy Pence had reasonable suspicion that "unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry v Ohio*, 392 US 1 (1968). After careful review of the testimony, exhibits, supporting briefs, and applicable law, the Court finds that the Defendant's motion must be denied.

FACTS

On Sunday, March 4, 2018, at approximately 10:09 pm Oakland County Sheriff Deputy Jason Pence was on routine patrol in the city of Pontiac, Michigan, near the intersection of W. Montcalm Street and Summit Avenue. He was in a fully-

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marked patrol vehicle and was in full uniform at that time. He observed a white Kia Forte vehicle parked and running in the parking lot of Whitman Elementary School. Deputy Pence parked his patrol car at the same school lot as the defendant and approached Mr. Duff's side of his vehicle on foot.

Deputy Pence observed Defendant seated in the driver's seat and sought identification from him. Upon initiating contact with the defendant, he detected the odor of alcohol on the defendant's breath, observed slurred speech, bloodshot and watery eyes. Deputy Pence also observed defendant having difficulty removing his driver's license from his wallet. Lastly, Defendant admitted to drinking and blew two PBTs and was over the legal limit.

CONCLUSION

The Court finds that, based on the totality of the circumstances, that the Defendant's assertions are unsubstantiated for the reasons set forth by the People.

Accordingly,

IT IS HEREBY ORDERED that the Defendant's Motion to Suppress Evidence is DENIED.

IT IS SO ORDERED.

DATED: NOV 0 9 2018

DENISE LANGFORD MORRIS
Circuit Court Judge

APPENDIX C

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Court of Appeals, State of Michigan

ORDER

People of MI v Matthew Scott Duff

Docket No. 347603

LC No. 2018-267140-FH

Colleen A. O'Brien
Presiding Judge

Deborah A. Servitto

Elizabeth L. Gleicher
Judges

The Court orders that the delayed application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAR 27 2019
Date

Chief Clerk

APPENDIX D

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUTY OF OAKLAND

PEOPLE OF THE STATE
OF MICHIGAN,
Plaintiff,

v

Case No: 18-267140-FH
Hon, Denise Langford Morris

MATHEW SCOTT DUFF,
Defendant.
_____/

ORDER GRANTING MOTION TO SUPPRESS

The Defendant Mathew Duff, through counsel, appealed a March 27, 2019 Court of Appeal's ruling to the Supreme Court for which it ordered this case REMANDED to the Oakland Circuit Court to determine when the defendant was first seized for Fourth Amendment Purposes.

[A] "seizure" occurs for Fourth Amendment purposes when a reasonable person would have believed that he or she was not free to leave. People v. Anthony, 327 Mich. App. 24, 932 N.W.2d 202 (2019). (See United States v. Mendenhall, 446 U.S. at 554, 100 S.Ct. 1870. (1980)). (alteration in quotation). In other words, "whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street ... ." Florida. v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991).

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FACTS

On Sunday, March 4, 2018, at approximately 10:09 pm Oakland County Sheriff Deputy Jason Pence was on routine patrol in the city of Pontiac, Michigan, near the intersection of W. Montcalm Street and Summit Avenue. He was in a fully-marked patrol vehicle and was in full uniform at that time. He observed a white Kia Forte vehicle parked, facing "northbound on Montcalm," and running in the parking lot of Whitman Elementary School (pg. 15) in a "high crime" area (pg. 18). The only vehicle on the lot that was "two or three parking spots in from the entrance off summit." *Id*. Yet, he is unable to articulate an "unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry v Ohio*, 392 US 1 (1968). (pg. 17, 26 - 27). Nor did he intended to conduct a welfare check on the defendant. Florida. v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991).

Nevertheless, Deputy Pence proceeded to park his patrol car 10 feet away, at a 45-degree angle behind the defendant's vehicle and activated his spotlight pointing at the driver (pg. 16). The Deputy testified that if Mr. Duff were to back his vehicle straight out, he would have hit the officer's car (pg. 28). The defendant's only means to exit is driving over the grass in front of him (status conference 3/4/2020). Under those circumstances, a reasonable person would have believed that he or she was not free to leave; thus constituting a seizure.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUTY OF OAKLAND

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Deputy Pence, then, proceeded to approached Mr. Duff's side of his vehicle on foot and conducted his investigation. Deputy Pence observed Defendant seated in the driver's seat and sought identification from him. Upon initiating contact with the defendant, he detected the odor of alcohol on the defendant's breath, observed slurred speech, bloodshot and watery eyes. Deputy Pence also observed defendant having difficulty removing his driver's license from his wallet. Lastly, Defendant admitted to drinking and blew two PBTs and was over the legal limit.

CONCLUSION

After careful review of the testimony, exhibits, supporting briefs, and applicable law, the Court finds that Deputy Pence's encounter with Mr. Matthew Duff constitutes a seizure. Furthermore, based on the totality of the circumstances, the Defendant's assertions are substantiated for the reasons set forth.

Accordingly,

IT IS HEREBY ORDERED that the Defendant's Motion to Suppress Evidence is GRANTED.

IT IS SO ORDERED.

DATED: 7/14/2020

DENISE LANGFORD MORRIS JN
Circuit Court Judge

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APPENDIX E

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Haddad Law Firm. PLC.

STATE OF MICHIGAN
IN THE OAKLAND COUNTY CIRCUIT COURT

STATE OF MICHIGAN,
Plaintiff,

-vs-

Case No. 2018-267140-FH
HON. DENISE LANGFORD MORRIS

MATTHEW SCOTT DUFF,
Defendant.
/

Oakland County Prosecutors Office
By: Jessica R. Cooper (P23242)
By: Jeffrey Zeman (P76610)
Prosecuting Attorney
1200 N. Telegraph Rd.
West Wing Bldg. 14E
Pontiac, MI 48341
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By: Issa G. Haddad (P71699)
Attorney for Defendant
30600 Telegraph Rd, Suite 3150
Bingham Farms, MI 48025
(248) 633-8500/Fax: (248) 633-8484
Issa@haddlaw.com
/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND RELEASE OF BOND PREVIOUSLY POSTED

At a session of said Court held in the City of Pontiac,
County of Oakland, State of Michigan
On the ___ day of July, 2020 7/23/2020

Present: Hon. DENISE LANGFORD MORRIS
Circuit Court Judge

This matter having come before the Court on the Defendant's oral motion to dismiss, based on the previous order granting Defendant's motion to suppress, good cause appearing for entry of the following Order, and the Court being otherwise advised in the premises:

NOW THEREFORE, IT IS ORDERED that this matter be dismissed, and the bond previously posted be released.

This is a final order and closes this case.

/s/ Denise Langford Morris 7/23/2020

Hon. DENISE LANGFORD MORRIS
Circuit Court Judge

JN

Agreed as to form only:

__/s/ Jeffrey Zeman__ with permission	*__/s/ Issa G. Haddad__*
Oakland County Prosecutors Office	Haddad Law Firm, PLC
Jeffrey Zeman (P76610)	By: Issa G. Haddad (P71699)
Attorney for Plaintiff	Attorney for Defendant

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Haddad Law Firm, PLC.

APPENDIX F

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OAKLAND COUNTY 18-267140-FH
JUDGE D. LANGFORD MORRIS
PEOPLE v DUFF,MATTHEW.

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STATE OF MICHIGAN

50th JUDICIAL DISTRICT COURT, OAKLAND COUNTY

THE PEOPLE OF THE STATE OF MICHIGAN,

v Case No. 1873027FD

CR No. 2018-267140-FH

MATTHEW SCOTT DUFF,

Defendant.
_____/

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KRYSTAL A. CRITTENDON
OAKLAND COUNTY CLERK
BY: _____ DEPUTY COUNTY CLERK

PRELIMINARY EXAMINATION

BEFORE THE HONORABLE MICHAEL C. MARTINEZ, DISTRICT JUDGE

Pontiac, Michigan - Thursday, May 31, 2018

APPEARANCES:

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WITNESSES: DEFENDANT:

None

EXHIBITS:	MARKED:	ADMITTED:
PX #1 - Video/Disc one	10	12
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Pontiac, Michigan

Thursday, May 31, 2018 - 9:42 a.m.

MR. FOGLESONG: Your Honor, now calling People v Matthew Duff, case number 1873027FD; Cory Foglesong, for the People.

MR. HADDAD: Good morning, Your Honor; Issa Haddad, on behalf of Mr. -- Mr. Duff, presently standing to my right. Today is the date and time for a preliminary examination; we are ready to proceed.

MR. FOGLESONG: The People are ready to proceed; we have one witness.

THE COURT: All right; what's your last name, Counsel?

MR. HADDAD: Haddad; H-a-d-d-a-d.

THE COURT: P number?

MR. HADDAD: 71699.

THE COURT: All right; you can have a seat, sir.

MR. HADDAD: Thank you.

THE COURT: All right; --

MR. FOGLESONG: The People call Deputy --

THE COURT: -- hold on. Before we begin, do we have any issue with sequestration?

MR. FOGLESONG: No, Your Honor.

MR. HADDAD: No, Your Honor.

THE COURT: All right; this is a one witness

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exam; is that correct?

MR. FOGLESONG: That is correct, Your Honor.

THE COURT: All right; you can call your first witness.

MR. FOGLESONG: The People call Deputy Jason Pence to the stand.

THE COURT: Step up, Deputy; turn towards me and raise your right hand. Do you solemnly swear or affirm to tell the truth, the whole truth, and nothing but the truth so help you God?

DEPUTY PENCE: I do, Your Honor.

DEPUTY JASON PENCE

(At 9:43 a.m., sworn as a witness, testified as follows)

THE COURT: Have a seat please. Now before you begin, state your full name and spell your last name for the record.

THE WITNESS: Deputy Jason Pence; P, as in Paul, P-e-n-c-e.

THE COURT: Mr. Foglesong?

DIRECT EXAMINATION

BY MR. FOGLESONG:

Q Deputy, where are you currently employed?

A With the Oakland County Sheriff's Office.

Q And what's your assignment at the Oakland County Sheriff's

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Office?
A At this time I'm on midnight shift in -- in the Pontiac Substation.
Q And what are your duties in that assignment?
A Do basic patrol, issue violations, look for crime and assist -- assist the citizens of the city of Pontiac.
Q Were you -- working at that assignment on March 4th of 2018?
A Yes, I was -- I was in training at that time; but I was working in Pontiac on that -- on the afternoon shift.
Q And while working on that date, did you encounter an individual named Matthew Scott Duff?
A Yes, I did.
Q Where did you encounter this individual?
A In a -- Whitman Elementary parking lot; which is at the intersection of Montcalm and Summit Road.
Q And what city is that parking lot located in?
A In the city of Pontiac.
Q Would you recognize Matthew Scott Duff if you saw him again?
A Yes, I would.
Q Is that person in the courtroom today?
A Yes, he is.
Q Would you please point to him and describe an item of clothing that he's wearing?

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A He's got a gray blazer; wearing a white button-up --

MR. FOGLESONG: Would the record --

THE WITNESS: -- or I'm sorry, a blue button-up.

MR. FOGLESONG: Would the record reflect the witness has identified the Defendant?

THE COURT: Any objection?

MR. HADDAD: No objection.

THE COURT: So noted by the Court. Just a quick question, approximately what time of the day or night was this?

THE WITNESS: Approximately just after 10:00 p.m.

THE COURT: Go ahead.

DIRECT EXAMINATION CONTINUING:

BY MR. FOGLESONG:

Q Where was the Defendant seated when you first encountered him?

A He was in the driver's seat, with the vehicle running.

Q Where were the keys?

A In the ignition.

Q Did you ask the Defendant for his driver's license, vehicle registration, and proof of insurance?

A I did.

Q Did the Defendant provide you with those items?

A From what I recall, he -- he attempted to giving me his -- his driver's license.

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Q And what did you observe about the Defendant's movements as he attempted to hand you his driver's license?
A His -- his speech was slurred and his eyes were bloodshot; his hands were shaking. He had a very difficult time removing his driver's license from his wallet.
Q And what did you smell, if anything at all?
A I could smell alcohol intoxicants emanating from him -- himself and the vehicle.
Q Did the Defendant say why he was there?
A He said he was pulled over the side of the road to -- that he was drinking that night and that he was resting.
Q What did you decide to do after observing his demeanor and hearing his reason for being at that parking lot?
A I -- at that point, I -- I -- asked him to step from the vehicle and gave him field sobriety tests.
Q And what field sobriety tests did you have the Defendant perform?
A The alphabet, count -- or state the alphabet without singing it, count backwards from I believe it was 70 -- 75 to 59, do a one-leg stand and then walk heel to toe.
Q How did the Defendant perform on the alphabet test?
A He -- slurred his speech and he missed one letter.
Q How did he perform on the counting backwards test?
A Continued his slurring of speech, but he stopped at 60 and didn't continue to -- 59.

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Q Are the alphabet test and the counting backwards test standard field sobriety tests per the National Highway Safety and Traffic Enforcement Agency?

A I believe so; I'm not -- I'm not certified in -- in Field Sobriety, so.

Q Would you explain the heel to toe test for the Court?

MR. HADDAD: Objection; he said he's not certified, and so even if -- there's no foundation for him describe it if he's not certified for the field sobriety test.

MR. FOGLESONG: Well how would he have the Defendant perform the tests if he didn't know how to instruct the Defendant to do it?

MR. HADDAD: Exactly; if he's not certified, he should have no authority to perform the field sobriety tests. So I object to this line of questioning, and this guy is not qualified to form a foundation.

THE COURT: The objection's overruled.

MR. HADDAD: Thank you, Judge.

THE COURT: Your welcome.

DIRECT EXAMINATION CONTINUING:

BY MR. FOGLESONG:

Q Why did you have him do the heel -- heel to toe test?

A As far as the field sobriety, which I obtained training as a police officer for over 22 years, I had him step -- I

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had demonstrated first to walk heel to toe approximately, I think it was, eight steps forward and turn around and then eight steps back.

Q And how did he perform on that test?

A He was able to take one step and then fell -- fell off taking a second step.

Q How many times did he attempt to perform the test?

A Just once.

THE COURT: Now when you say fell off, did he fall down or he just like --

THE WITNESS: No, he just fell to the side; he didn't fall down, he caught himself.

THE COURT: Okay.

DIRECT EXAMINATION CONTINUING:

BY MR. FOGLESONG:

Q How did the Defendant perform on the one-leg stand?

A He attempted to -- to lift his leg, but could not stand on one foot.

Q How long was he able to hold the one-leg stand position?

A As soon as he -- as soon he lifted his leg he wasn't able to gain his balance.

Q And how many times did he attempt to perform this test?

A Just once.

Q Was the Defendant placed under arrest for failing the field sobriety tests?

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A Yes, he was.

MR. FOGLESONG: I'm sorry; Connie, do you have exhibit stickers?

COURT REPORTER: I do.

THE COURT: Hand her the exhibits that you want marked.

MR. FOGLESONG: Three.

THE COURT: And tell her which order you want her to mark them. Now, I assume Defense has had a chance to review these?

MR. FOGLESONG: They were part of the discovery.

(At 9:51 a.m. PX #1, PX #2, PX #3 marked)

THE COURT: Now, are these being stipulated to them being in evidence or are they just being marked for identification purposes?

MR. FOGLESONG: They're being marked for identification purposes, unless the complete video up until the point where the field sobriety tests were done --

MR. HADDAD: Okay.

MR. FOGLESONG: -- or concluded.

MR. HADDAD: The --

THE COURT: All right; are we -- we're on the record now; so you have to speak up, 'cause I can't hear you.

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MR. HADDAD: Okay; the -- the videos, I obtained two videos and it doesn't show the vehicles pulling up and there's some audio qualities with mine. So I'm assuming that these are the same exact videos?

MR. FOGLESONG: I copied the same exact videos. I sent over four discs; I have -- discs two and three.

MR. HADDAD: Okay; one second, I thought we had two discs. I just want to confer. Okay -- okay; which -- we did get four discs, and what -- which ones are you looking to --

MR. FOGLESONG: We are going to play the entirety of disc two.

MR. HADDAD: How long is that one?

MR. FOGLESONG: Approximately ten minutes.

MR. HADDAD: Okay.

MR. FOGLESONG: And the second one up until the point the one-legged stand is concluded.

MR. HADDAD: Okay; I can just --

MR. FOGLESONG: And that's another seven and a half minutes.

MR. HADDAD: For the exam purpose I can stipulate to those two portions.

THE COURT: All right; so are we gonna play them?

MR. FOGLESONG: The People move to publish?

THE COURT: All right; they're in evidence,

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People's -- are they #1 and #2?

MR. FOGLESONG: Yes, Your Honor.

THE COURT: People's #1 and #2 in evidence.

(At 9:52 a.m., PX #1 and PX #2 admitted)

THE COURT: Chad, show him how the tv on and all of that. Just so -- the video is the entire encounter I hope; we're not gonna be looking at a blank screen for five minutes, are we? If that's the case then skip through it and get to the action, so to speak.

MR. HADDAD: You can just play it -- it starts about 55 seconds into the audio, Your Honor; if I'm correct. So before 55 seconds into the audio --

THE COURT: Okay -- all right; just leave --

MR. FOGLESONG: It is difficult to jump.

THE COURT: Yeah, I can see that.

MR. FOGLESONG: This is the Watch Guard program.

THE COURT: All right; you can make it full screen again though.

MR. FOGLESONG: Sure.

(At 9:55 a.m., first video begins playing)

DIRECT EXAMINATION CONTINUING:

BY MR. FOGLESONG:

Q Deputy Pence, is that you coming from the driver's -- or the passenger side or are you on the driver's side?

A It's Deputy Flaviani.

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Q Deputy Flaviani's on the passenger's side?
A Yes.
Q You were on the driver's side?
A Yes.
Q All right.

THE COURT: Deputy, at this point it starts from 9:58 of the video, was the car still running at this point?

THE WITNESS: I believe -- I believe it was; I'm not sure, sir.

THE COURT: Okay.

MR. FOGLESONG: Your Honor, 9:58 --

MR. HADDAD: To clarify --

MR. FOGLESONG: -- is the time it is right now; it's not --

THE COURT: I know.

MR. FOGLESONG: Okay.

THE COURT: I'm just talking about because that -- there's no other way to --

MR. FOGLESONG: Okay.

THE COURT: -- specify the time; that's the only time I can use, because there isn't a time. Does this video conclude with a field sobriety?

MR. FOGLESONG: The field sobriety tests continue on to the next one.

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THE COURT: Was there a blood draw or data master or --

MR. FOGLESONG: There was a blood draw, Your Honor. I plan on getting to that after the videos.

THE COURT: My point is what utility is the videos when you have a blood draw?

MR. FOGLESONG: I was trying to put as much evidence out there as possible to establish probable cause standard. I can skip ahead to the third video if you want.

THE COURT: I -- it's not -- I don't know -- I mean, we're watching a guy standing in a parking lot, until some action I guess.

(At 10:03 a.m., video concludes)

(AT 10:05 a.m., second video begins)

THE COURT: Is that the second video?

MR. FOGLESONG: Exhibit #2, Your Honor; yes.

(At 10:11 a.m., second video concludes)

DIRECT EXAMINATION CONTINUING:

BY MR. FOGLESONG:

Q Deputy, where did you transport the Defendant after placing him under arrest?

A McLaren Oakland Hospital.

Q Was the Defendant read his Chemical Test Rights at McLaren Oakland?

A Yes, he was.

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Q Did he consent to a blood draw?
A Yes, he did.
Q Who drew the Defendant's blood?
A A registered nurse from McLaren Oakland Hospital.
Q Did you observe the blood draw?
A Yes, I did.
Q What happened to the Defendant's blood after it was drawn?
A It was collected and placed into the blood kit.
Q Did you do the collection?
A Yes, I did.
Q What happened after you received it and placed it into the collection?
A It was then sealed and then sent off to the Michigan State Police --
Q Did you receive --
A -- Crime Lab.
Q -- a report back from the Michigan State Police Lab?
A Yes, I did.

MR. HADDAD: I'm going to object to it; it's hearsay.

MR. FOGLESONG: Under MCL 766.11(b), it's not hearsay at preliminary exam to admit the results of a lab report.

MR. HADDAD: My objection's hearsay; I believe that we required all technicians to testify at the exam.

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There's no stipulations at the p-c-c, and we mean for all technicians to testify.

MR. FOGLESONG: I believe we requested the testimony at trial, not preliminary examination; if you can show me where.

THE COURT: That's exactly right; it's -- it's not required at preliminary examination. It is however required at trial. So he's not required to produce the technician; if that was the case, you'd have technicians running around all day, every day in court, instead of doing the testing that they're - they're getting paid to do. Is this in evidence?

MR. FOGLESONG: It's not in evidence; --

THE COURT: He's --

MR. FOGLESONG: -- it's not been stipulated to.

THE COURT: Well, he can -- he can testify as to the results then.

MR. FOGLESONG: Okay; may I approach?

THE COURT: Yes; do you recall what the results were?

THE WITNESS: I don't recall the exact numbers that were on there.

DIRECT EXAMINATION CONTINUING:

BY MR. FOGLESONG:

Q If you -- if you reviewed them and see the lab report,

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would it help refresh your recollection as to what the results of the lab report --

A Yes, sir; yes, it would.

Q Please read that silently to yourself; don't read directly off of it and look back up at me when you refresh your recollection.

THE COURT: That phone should be off, Mr. Haddad.

MR. HADDAD: I'm gonna turn it off now.

DIRECT EXAMINATION CONTINUING:

BY MR. HADDAD:

Q Did reviewing your report help refresh your -- recollection?

A Yes.

Q What were the results of the blood test?

A .339.

Q All right; thank you.

MR. FOGLESONG: I have no further questions.

THE COURT: Cross? Cross?

MR. HADDAD: Yes, sir.

THE COURT: You'll have to step to the podium.

MR. HADDAD: Yes; I'm just gathering my notes, Your Honor.

CROSS-EXAMINATION

BY MR. HADDAD:

Q Good afternoon, my name is Issa Haddad; I'm the attorney

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for Mr. Duff.

A How are you doing, sir?

Q Now, you've testified that you're a police officer for 22 years?

A Yes, Judge -- yes, sir.

Q What year did you graduate the Policy Academy?

A 1994.

Q And as a law enforcement officer you took an oath to uphold the Constitution; correct?

A I did.

Q And the -- the Constitution protections are important; correct?

A Yes, they are.

Q And when you are working as a uniformed police officer, you have a gun on your side; correct?

A Correct.

Q And that's for your safety and your protection?

A And for everybody else's protection also.

Q Okay; number one is to protect you though; correct?

A And everybody else.

THE COURT: What -- what's this line of questioning going?

MR. HADDAD: It's just some -- it's just some background information, Your Honor; I'll move on.

CROSS-EXAMINATION CONTINUING:

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BY MR. HADDAD:

Q Now, when you -- when you interact with citizens and potential suspects, they have Constitutional protections that you have to be aware of; correct?

A Correct.

THE COURT: All right; let's -- let's not get into hypotheticals. Just get into what happened with your client; --

MR. HADDAD: Okay.

THE COURT: -- that's what we're here for.

MR. HADDAD: Okay.

CROSS-EXAMINATION CONTINUING:

BY MR. HADDAD:

Q And in -- and in this interaction, you created a police report; correct?

A Yes, I did.

Q And your training requires you to make a police report with every interaction with the witness, suspect, or citizen contact; correct?

A Can you say that once again?

Q Your training and -- as a police officer, you're required to make a report any time you have contact with a citizen, a suspect, a defendant in any investigation; correct?

A No.

Q No; when you do -- when are you required to make a police

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report?

THE COURT: All right; we're not gonna get into -- I don't want to hear the whole policy. Just -- he said he created the report for your client; so go from there.

MR. HADDAD: Okay.

CROSS-EXAMINATION CONTINUING:

BY MR. HADDAD:

Q In this report, you're trained that it needs to be truthful; correct?

A Yes.

Q And it has to be accurate?

A Yes.

Q Contain all the relevant details of your investigation?

A Yes.

Q There's no limit on how long your report can be; correct?

A That's correct.

Q And the more you put in there, the better off you are; fair to say?

A Not necessarily.

Q Okay; the less you put in there, the better off you are?

A Not necessarily.

Q But in order to be truthful, you have to put everything in there that's important to the situation; correct.

A Yes.

Q Okay; now, you said that you graduated from the Police

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Academy in '94 and -- I'm sorry; on direct you said that you're not certified in field sobriety tests or you are certified?

A And as far as I know there is no certification on field sobriety tests; there's extra training for standard field -- field sobriety tests within the state of Michigan.

Q Okay; and what manual were you trained from for your field sobriety tests training? Your manual you were trained from?

A I don't believe there was a manual.

Q Okay; with your -- have you had updated training on field sobriety training?

A No.

Q FST training?

A No.

Q So your -- your only training is from 1994?

A 1994 and throughout, when I was a police officer with the city of Hazel Park.

Q Regarding field sobriety testing, you had continuing training after that; after graduating the Police Academy in 1994?

A No -- no -- no specified training; it was just on -- on the job knowledge and on the job training, as -- as a police officer in my past.

Q Okay; were you ever provided a -- a -- a manual to study

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from for your training or on the job training?
A Not that I recall.
Q Not that you recall; okay. Now, part of your training for your on the job training, you gave the field sobriety tests to determine if someone's intoxicated to operate a motor vehicle; correct?
A Yes.
Q And in that training, there is three standard field sobriety tests; the HGN, the one-legged stand, and the heel to toe walk and turn; correct?
A I'm not -- I'm not aware of -- of that specifics, because I'm not trained in that.
Q Okay -- okay; and so when you give these tests to Mr. Duff in this case, you were just going off your on the job field training; correct?
A Yes.
Q Okay; and are you aware that those tests must be performed in substantial compliance, in order to make a determination if somebody's intoxicated, from those test; are you aware of that?
A I went off of -- as a police officer for 22 years, I used my training from 22 years as a police officer of what I've done in the past, and that's what I went off of.
Q Okay; are --
A To determine if someone was legally intoxicated.

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Q So I take it from your answer, you're not aware that the manual requires substantial compliance with the instructions to perform the tests?
A Like I said, I don't know of any manual out there that -- that says that.
Q So if it does say that you're not aware of that; correct?
A Correct.
Q And so any testing you gave, you don't know if it was in compliance with the field sobriety training do you?
A What you're talking about?
Q Yes.
A No, I have no idea.
Q No idea, okay; and -- and this -- you testified that you instructed the individual to walk eight steps forward, turn around, come eight steps back; correct?
A I believe I said eight on the stand, but I think I -- in the video I recall that I said ten.
Q Okay; do you always use eight or ten?
A I believe I've always used -- I've always used ten; I don't know why I said eight.
Q Okay; now, in this incident you made a police report; correct?
A Yes, I did.
Q All right; and this police report is dated and time stamped, when you entered it into the system; correct?

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A Yes, if the system time -- actually time stamps it, I'm - I'm not so much aware, but I'm assuming it is --
Q Okay.
A -- somewhere -- somewhere on it.
Q You made this report shortly after bringing Mr. Duff from the hospital back to the police station -- the Oakland County Jail; correct?
A Yes.
Q Okay; and your report's accurate?
A Yes.
Q Truthful?
A Yes.
Q It contains all the important details of a -- that you're investigation -- concludes; --
A Yes.
Q -- correct?
A Yes.
Q Okay; now, you were on routine patrol, working the midnight shift on this date; correct?
A Afternoon shift.
Q Afternoon shift; and what time does that shift start, what time does it end?
A 1500 hours and it ends at 2300 hours.
Q So it's 3:00 p.m. to 11:00 p.m.?
A Yes.

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Q Okay; and this happened approximately at 10:00 p.m.?
A Just a little after.
Q Okay; and you had a partner working with you?
A Yes, at that point I was -- I was in training with the Oakland County Sheriff's Office.
Q You were in training?
A Yes.
Q How long have you been with the Oakland County Sheriff's Office?
A I was part-time and hired in June, and then -- then I was full-time starting this February.
Q So in February, okay; and prior to that where were you employed?
A City of Hazel Park.
Q Okay; for approximately 20 -- 21 years?
A 22 years.
Q 22; so -- okay, thank you, and the officer you were with, I take it that was a superior officer to you?
A He was my training officer.
Q Training officer, okay; now, when you approached Mr. Duff it wasn't pursuant to a dispatch -- a radio dispatch; correct?
A Correct.
Q There was no calls in the area that -- no alarms went off at the school?

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A No.
Q There was no emergency going on in the -- in the vicinity?
A No.
Q There was no beyond the lookout for any suspects or anything?
A No.
Q It was just you seeing a parked car and you wanted to go investigate; correct?
A Correct.
Q Okay; and you were -- do you have a body cam; do you wear a body cam?
A No.
Q Does your partner wear a body cam?
A No.
Q Do you have a body mic on your person?
A Yes.
Q And who was driving the police car when you guys first arrived?
A I was.
Q Okay; and you didn't activate your overhead lights on this -- when you made this traffic stop?
A I believe I did not.
Q Okay; did you have to manually activate your audio and video recording?
A I believe I did.

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Q Okay; and I noticed the video starts and the audio doesn't pick up for about 55 seconds in the -- in the first video we watched; can you explain that?
A I can't explain that.
Q You cannot explain that?
A No.
Q When you turn them on they both come on at the same time?
A Mine comes on.
Q Yours comes on?
A When I activate it.
Q Okay; and do you activate that from your person or from the car?
A Both.
Q Both?
A I can; either or.
Q In this situation, do you recall -- how you activated the audio and video recording?
A I don't recall.
Q You don't recall; okay. There is no report for suspicious activity; this was just a -- a random car you see and you want to investigate; correct?

MR. FOGLESONG: Judge, that has been asked and answered.

THE WITNESS: Correct.

THE COURT: It has been asked and answered.

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MR. HADDAD: Okay.

CROSS-EXAMINATION CONTINUING:

BY MR. HADDAD:

Q Now, do you know how long this vehicle was sitting parked, before you approached it?

A No idea.

Q Okay; and you didn't ask the Defendant, Mr. Duff, how long he was parked there before you arrived did you?

A Not that I recall.

Q Okay; --

THE COURT: I have a question; when you saw the vehicle in the parking lot, were its lights on or off if you recall?

THE WITNESS: I don't recall; I believe -- I do know the rear -- rear tail lights were on; so I don't know if it was the park -- or the parking lights were on or the headlights were on; I don't recall that.

THE COURT: Okay; 'cause I noticed in the video the rear lights were on.

THE WITNESS: Yes.

THE COURT: Go ahead.

MR. HADDAD: Thank you.

CROSS-EXAMINATION CONTINUING:

BY MR. HADDAD:

Q When you pulled into -- where -- where were you when you

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first observed this parked vehicle in the parking lot of the -- elementary school?

A Driving down Montcalm; westbound.

Q And eastbound on --

A Westbound.

Q -- westbound; okay. The direction of Mr. Duff's vehicle, was that facing north or south?

A North.

Q Facing north, okay; so if you're driving westbound, you were coming from the east in the video to the left -- to the -- to the -- from the right to the left in the video?

A Yes.

Q And then you had to turn down some street and turn into the -- the parked -- in the parking lot?

A Yes.

Q Okay; is this a high crime area?

A Yes, it is.

Q Okay; and have you made arrests in this parking lot before?

A Not in this one; not myself.

Q Okay; and if he had his parking lights on, you don't recall -- his front headlights were facing -- Montcalm Road; correct?

A Correct.

Q And you don't recall if you saw either headlights or the

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parking lights on in front of you?
A I don't recall.
Q Okay; and when you pulled behind the vehicle, you were able -- did you run the plate before you exited the vehicle?
A I don't recall; I know I gave it out to Dispatch.
Q You gave it out to Dispatch?
A Yes.
Q And you don't know if you got a response before you exited your vehicle?
A I usually don't get a response back immediately.
Q Okay; do you recall if you got a response while you were questioning Mr. Duff?
A I don't recall.
Q Okay; it was March 4th, I saw that you had a coat on and your partner had a coat on and Mr. Duff had a coat on; do you recall how cold it was that night?
A It was chilly.
Q Chilly; there was still snow on the ground?
A I don't recall if there was snow, but it was chilly.
Q Okay; enough where you would need a coat?
A Yes.
Q All right; now, the car was lawfully parked in the parking lot; correct?
A Excuse me?

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Q The car was parked in between two yellow lines; correct?
A Yes; it was the only vehicle in the parking lot.
Q All right; and it wasn't obstructing any traffic behind it; correct?
A No.
Q And in front of it is grass -- grass and snow; if -- if you look at the video, I see the snow in front of the car and there's grass on the other side?
A Okay; yes.
Q Okay; so if the car were to go forward it'd have to drive on the grass?
A Yes.
Q Okay; and when you parked behind the vehicle, you approached -- you exited and you went to the driver's side of the vehicle?
A Yes.
Q And your partner went to the passenger side of the vehicle?
A Yes.
Q And you were in a full uniform?
A Yes, I was.
Q And your scout car, I believe it was fully-marked?
A Yes, it is.
Q Okay; so with regards to Mr. Duff, there was a uniformed officer on his left, uniformed officer on the right and a

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marked police car behind him; correct?
A Yes.
Q Okay; now, Mr. Duff had no warrants for him after you obtained his name; correct?
A Correct.
Q He had a valid driver's license at the time?
A Yes.
Q And then when -- when you went to go question him, did he open the door or did he put the window down?
A He just put the window down.
Q How far did he put the window down?
A It was all the way.
Q All the way down, okay; and you started to ask him questions?
A Yes.
Q You started to ask him where he's coming from, where is he going?
A I had first asked for his information.
Q Driver's license, registration, and proof of insurance?
A Correct.
Q Okay; and that's what you normally do in any investigative stop; correct?
A Correct.
Q And did he provide you the driver's license, proof of insurance and registration?

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A I don't recall about the registration or proof of insurance; but I know he did, at a -- at a point, provide me with his license.
Q Okay; and do you have any reason to believe that the vehicle wasn't registered at the time?
A No, it was --- I believe it was properly registered to him.
Q Do you have any reason to believe that the car was properly insured at the time?
A I don't recall.
Q Okay; you have no reason not to believe it was properly insured at the time though; correct?
A Not -- not -- like I said, not that I recall if it was or wasn't insured.
Q Okay; and you were standing up and you were asking Mr. Duff questions; correct?
A Yes.
Q Okay; and you -- you noticed his eyes were bloodshot --
A Yes.
Q -- and his speech was slurred?
A Yes.
Q And you noticed that right away?
A Yes.
Q Okay; and that -- that's the point it turned into a criminal investigation for a potential OWI; correct?

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A Correct.
Q Okay; and that's -- I mean, that's within the first few questions of talking to him; correct?
A Correct.
Q Okay; and prior to that, you were investigating to see, you know, what crime was afoot in this area; correct?
A Or possibly if someone was having an emergency.
Q Okay; you never called for an ambulance?
A No.
Q Okay; you never notified Dispatch; hey, I'm checking out, we may need an ambulance, is there anything close by; correct?
A No, I did not do that.
Q Okay; when you started your investigation your job is to ask who, what, why, and what's going on; correct?
A Sure.
Q Okay; you never asked Mr. Duff if he had any medical emergencies did you?
A No.
Q Okay; you said that he had difficulties pulling out his driver's license from his wallet; correct?
A Correct.
Q Did he need to use two hands to pull it out?
A Yes -- well, he needed one to hold the wallet and one to hold -- try to get his license out.

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Q Okay; did -- did he -- did it seem like it was a tight fit coming out of his wallet?

A Not necessarily; he was just kind of fumbling through the -- through the wallet, trying to find it.

Q Okay; and he produced it to you in a reasonable amount of time though; correct?

A On an average; it was longer -- longer than average.

Q Okay; how long was it?

A 20 seconds approximately.

Q Okay; you don't note anything in your report that it -- any difficult time removing the license -- but you didn't -- state in your report he had any difficult time locating his license did you?

A No.

Q Okay; so you knew his license was in the wallet?

A Excuse me?

Q He -- is it fair to say that you could assume he knew where the license was in his wallet?

A I don't know whether he knew that or not.

Q Okay.

THE COURT: How could he know what's in his own mind -- what's in another person's mind.

MR. HADDAD: Thank you, Your Honor; I'll move on.

CROSS-EXAMINATION CONTINUING:

BY MR. HADDAD:

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Q You asked him to step from his vehicle shortly after approaching his window and him handing you his driver's license; correct?
A Yes.
Q And you asked for his consent to search the vehicle before any field sobriety tests were given; correct?
A Yes.
Q You asked him if there's anything in the car he shouldn't have?
A Correct.
Q You patted him down and asked if he had any sharp objects in his pockets?
A Correct.
Q There was nothing in the vehicle that was illegal or contraband; correct?
A Correct.
Q You searched the car thoroughly?
A Yes, I did.
Q You patted him down; there was no sharp object in his pockets or his pants?
A Correct.
Q He was very cooperative?
A Very.
Q Now, if he didn't give consent to search his vehicle, you'd need a warrant; correct?

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A Yes.

THE COURT: We're not gonna go into -- hypotheticals; --

MR. HADDAD: Okay.

THE COURT: -- just go into what happened.

CROSS-EXAMINATION CONTINUING:

BY MR. HADDAD:

Q You did not have a warrant to search his vehicle; correct?

A No, I did not.

Q Okay; after about five minutes of searching the vehicle, you then decided to do -- to perform some field sobriety tests; correct?

A At some point I did.

Q Okay; and the first test was the ABC's?

A Yes.

Q Okay; and you say that he only messed up one letter?

A Yes, I believe it was an S instead of an X.

Q Okay; and then you asked him to count backwards?

A Correct.

Q And he took his time counting backwards, nice and slow; correct, and he stopped 60 and you wanted him to continue on to 59; correct?

A Correct.

Q And then you asked him to do the heel to toe test; correct?

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A Yes.
Q And you demonstrated it?
A Yes.
Q And you instructed how your training how your training has provided you to instruct it; correct?
A Yes.
Q And then you asked him to perform the test?
A Yes.
Q Okay; and then he gave it a shot?
A Yes, he did.
Q And you gave him an opportunity to do the one-legged stand?
A Yes.
Q And you gave it a shot?
A Yes, I did.
Q All right; and he attempted to -- to start it; correct?
A Yes.
Q And you instructed it as you believe your training has taught you; correct?
A Yes.
Q Okay; and you believe you that you instructed it in substantial compliance with your training?
A Well, the training that I've -- that I've been provided? Yes.
Q Yeah.

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A Yes.

Q Okay; thank you. Now, after the one-legged stand, you asked him to give you a PBT; correct? You asked him to take a PBT; correct?

A At some point.

Q Okay; and did you inform him of his rights to take a PBT or not take a PBT?

A I informed him of his rights.

Q Okay; and what did you tell him, regarding his rights, whether he could take a PBT or not take a PBT?

A I read it off of a card.

Q Read it off a card.

THE COURT: All right; now, -- hold on, Mr. Haddad you're aware that the PBT results is not admissible in court; and -- in fact, the Prosecutor, I assume deliberately avoided going into that line of questioning; but now you're opening the door to that line of questioning; do you really want to do that?

MR. HADDAD: I'm asking him the conversation that he had; I'm not asking for the results of --

THE COURT: Well, yeah but the point is once you start -- it's once the door is opened it's opened. So my point is you might be better off skipping that line of questioning about the PBT's.

MR. HADDAD: I understand, Your Honor; I will

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leave that door where it's at.

CROSS-EXAMINATION CONTINUING:

BY MR. HADDAD:

Q And you arrested him after giving the second field sobriety tests -- I'm sorry; it would have been your fourth -- the one-legged stand, and that's when you decided to make your arrest; correct?

A Yes.

Q Now, at that point and time you had not observed him operating a motor vehicle; correct?

A He was behind a running motor vehicle.

Q Okay; and are you aware -- the motor vehicle was running; correct?

A Yes, it was.

Q All right; now, it wasn't in a position that would cause the vehicle to be put in motion, to risk a collision of property or damage to somebody else or something else; correct?

THE COURT: All right; hold on. You're asking this -- this deputy to draw a legal conclusion and that's not proper; that's up to the Court to draw a legal conclusion about what the definition of operating actually is.

MR. HADDAD: I'll save that for my argument, Your Honor.

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CROSS-EXAMINATION CONTINUING:

BY MR. HADDAD:

Q There was no third party, independent witness that told you that this vehicle was operated by Mr. Duff at any point in this night; correct?

A Right.

Q And you've never met Mr. Duff before this encounter on March 4th; correct?

A Correct.

Q And when you started to ask him questions, you did not have a response back from Dispatch regarding running a plate at that time; correct?

MR. FOGLESONG: He's already answered this question.

THE COURT: He -- yes, I believe he has already asked and answered it; he said no he did not.

MR. HADDAD: Okay.

CROSS-EXAMINATION CONTINUING:

BY MR. HADDAD:

Q At what point and time did Dispatch respond to you with Mr. Duff's information and the information on the vehicle?

A I don't recall at -- at the point where -- when they did or didn't.

Q Okay; you then drove him to the hospital?

A Yes.

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Q And his blood was taken?
A Yes.
Q And his vehicle was left in the parking spot, for the tow truck to come; correct?
A A deputy stood by it.
Q A deputy stood by; someone else was there, okay. The vehicle was not blocking traffic or illegally parked at the time it was towed; correct?
MR. FOGLESONG: Yeah, and he's already answered this question.
THE COURT: It's been asked and answered; --
MR. HADDAD: Okay.
THE COURT: -- and the video speaks for itself.
MR. HADDAD: Okay.
CROSS-EXAMINATION CONTINUING:
BY MR. HADDAD:
Q Did you determine if this vehicle was abandoned?
A No; it was impounded.
Q It was impounded?
A Yes.
Q And what was the purpose of it being impounded?
A Being it was part of the crime.
Q Part of the crime?
A Yes.
Q Okay; and -- and it was seized to protect and preserve

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evidence?
A It was impounded.
Q Was it seized?
A We did not seize it.
Q You did not seize it; it was impounded and was there a hold place on the vehicle?
A I don't believe so.
Q So it was towed to get it out of the parking lot basically?
A It was towed -- it was towed because it was part of a crime and impounded.
Q Okay; now, you have -- you have impound procedures from the Oakland County Sheriff's Department, it says when you can tow a vehicle and impound a vehicle; correct?
A Yes.
Q And in this scenario you're saying it was seized 'cause it was used as evidence -- it was used at the crime; correct?
A As part of a crime.
Q Okay; it wasn't needed to preserve evidence though; correct?
A Correct.
Q Are you familiar with the Oakland County Sheriff's Office impound and towing policy?
MR. FOGLESONG: Again, Your Honor, it's getting into policy. The policy --

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THE COURT: I -- I -- where are you going with this Mr. Haddad?

MR. HADDAD: The vehicle was -- he testified the vehicle --

THE COURT: I know the vehicle was impounded.

MR. HADDAD: The vehicle was impounded pursuant to a crime, --

THE COURT: Okay.

MR. HADDAD: -- and the crime was potentially OWI and --

THE COURT: Okay; but what's your point?

MR. HADDAD: -- and the purpose is that I believe that it was impounded against the policy, because you can't tie this vehicle to a crime, pursuant to the evidence that this officer put forth.

THE COURT: Well even -- all right; let's assume that's true; who cares if it was impounded or not? The crime is -- is the Defendant drinking; it has nothing to do with the impound, and that's assuming you're 100 percent correct. So who cares if the car was impounded? That's not the crime. The crime is that -- is -- well, --

MR. HADDAD: I understand, Your Honor; I'll move on.

CROSS-EXAMINATION CONTINUING:

BY MR. HADDAD:

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Q You took the blood kit to the hospital with you; correct?
A Yes.
Q And the blood kits are numbered on the outside of the box?
A With lot numbers.
Q They have lot numbers on the outside of the box; do they have serial numbers for the box that matches the -- the tubes inside the kit?
A That -- that match the -- that match the lot numbers? I'm not exactly sure if they do or they don't.
Q Let me rephrase the question. If I had three kits and I took out all the vials and mixed them all up and put them back in, is there a way to un-mix them up and say this vial came out of this box?
A I'm not sure if that -- I'm not sure about that; there's only one box with two vials inside.
Q Okay; and that's what you brought into the hospital; correct?
A Yes.
Q And you have more than one of these kits in your vehicle?
A I just have one.
Q You just have one at a time?
A Yes.
Q Okay; and you watched the nurse draw the blood?
A Yes, I did.
Q And she did what she had to do and signed her name on some

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documents?
A Yes.
Q And then you sealed the box up; correct?
A Yes.
Q Now, what's the protection that someone has if they had a second box to --

MR. FOGLESONG: Objection to speculating about --

THE COURT: You're --

MR. FOGLESONG: -- some other person with some other box --

THE COURT: -- asking a question that calls for speculation; he didn't have two boxes, he had one.

MR. HADDAD: Okay.

THE COURT: So let's just stick to the one box.

CROSS-EXAMINATION CONTINUING:

BY MR. HADDAD:

Q Okay; and where did you put this -- you sealed this box up; correct?
A Yes.
Q And where did you take it next?
A I took it to -- back to the Substation.
Q And then where did you put it in the Substation?
A I put it in the mail.
Q In the mail?
A Yes.

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Q Okay; and you put the label on it or the label's already on the box?
A To be sent to the Crime Lab?
Q Yes.
A It's already on the box.
Q Okay; is postage on the box too?
A No; they -- they put postage on it.
Q Okay; so you didn't put it in the mail, you put it in the outgoing box for postage, to be mailed?
A Yes.
Q Okay; that's different than putting it in the mail, do you agree with me?
A It's our mail for the Oakland County Sheriff's Office.
Q Okay -- all right; and so before it got mailed off, somebody had to touch the box to put the stamp on to mail it off; correct?
A I'm sure.
Q Okay; and you got some results back some -- some -- sometime later?
A Yes; through -- through email.
Q Okay; now, you did not observe any violations for motor vehicle codes before you pulled up behind Mr. Duff's vehicle; correct?

THE COURT: All right; we're not gonna get back into that. He -- he said he did not; we're not gonna go

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backwards in time. We already know he didn't.

MR. HADDAD: Okay; one second, Your Honor.

CROSS-EXAMINATION CONTINUING:

BY MR. HADDAD:

Q Once you placed Mr. Duff under arrest did you read him Miranda?

A No.

Q You did not read him Miranda? Did you ever read him Miranda before he was put in the back of your police car?

A No.

Q Did you ever read him Miranda at any time you had conversations with Mr. Duff?

A No.

MR. HADDAD: No further questions.

THE COURT: Redirect?

MR. FOGLESONG: Briefly.

REDIRECT EXAMINATION

BY MR. FOGLESONG:

Q It is unusual for a lone car to be parked --

MR. HADDAD: Objection; calls for speculation.

THE COURT: He hasn't -- answered -- he hasn't finished the question yet --

REDIRECT EXAMINATION CONTINUING:

BY MR. FOGLESONG:

Q In your -- in your experience, both as a Hazel Park Police

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Officer and as a Sheriff for the Oakland County -- as a Deputy Sheriff for the Oakland County Sheriff's Office, is it unusual for a lone car to be parked in an elementary school parking lot at 10:00 in the evening on a Sunday?

MR. HADDAD: Objection; calls for speculation.

MR. FOGLESONG: I asked him in his experience.

THE COURT: Well, just --

MR. FOGLESONG: He may or may not.

THE COURT: Look, just ask him -- I understand what you're getting at, but don't -- you don't have to do the roundabout way; just ask him. That -- is there a reason why you chose to go check out the car that's in the parking lot; just answer that -- ask him that question. Go ahead, Deputy; you can answer.

REDIRECT EXAMINATION CONTINUING:

BY MR. FOGLESONG:

Q It's -- yeah, what was the reason why you went to go approach that vehicle?

A Because the vehicle was suspicious. I didn't know if someone was in there having an emergency or what the reason why someone would be parked there in an elementary parking lot at 10:00 at night.

Q All right.

MR. FOGLESONG: Thank you, Your Honor; no further questions.

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THE COURT: Recross?

RECROSS-EXAMINATION

BY MR. HADDAD:

Q In your report you stated you observed a white male a white male sitting in a car, and that's -- your police report's written in chronological order; correct?

A Yes, sir.

Q And did you observe the white male when you were on Montcalm Street, on Summit Street, or after you got out of your vehicle?

A I believe as I was driving at some point, I saw the vehicle first and then I thought it was occupied. I don't know exactly what -- at what point I saw that it was occupied versus seeing the car.

Q Okay; and from -- when you first observed him, was he hunched over or was he sitting up, did it appear he was sleeping; appear that he was just parked?

A I don't recall; I just remember he was occupying it -- the driver's seat.

MR. HADDAD: No further questions, Your Honor.

THE COURT: All right; thank you, Deputy, you may step down. You're not to discuss your testimony outside the courtroom; thank you.

(At 10:44 a.m., witness excused)

THE COURT: Any other witnesses?

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MR. FOGLESONG: No further witnesses; the People rest.

THE COURT: Defense have any witnesses?

MR. HADDAD: No witnesses, Your Honor.

THE COURT: Argument?

MR. FOGLESONG: Your Honor, the People move to --

COURT REPORTER: Mr. Foglesong, I'm sorry; can you please go to the podium, thank you.

MR. FOGLESONG: The People move to bind the Defendant over as charged. We believe the evidence and the testimony put on today establishes by a probable cause standard that the crime of operating while under the influence of alcohol third offense was committed and that the Defendant committed it, and reserve all further argument for rebuttal.

THE COURT: Mr. Haddad?

MR. HADDAD: First, Your Honor, there's been no testimony and no stipulations that he has any prior drunk drivings. So for this to be a third, there's no evidence of that, and knowing the Court can't bind this over as a third, no evidence put forth that he has any priors; no stipulations made to that effect. Number two, there was a seizure and you can see from the video and the officer's testimony that he first pulled in to investigate. It's a high crime area, he pulled in and he parked behind the

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vehicle; therefore blocking the vehicle. He exited; one officer went to the driver's side door, one officer went to the passenger side door; that's a seizure, for the Fourth Amendment purposes. Mr. Duff, and a reasonable person, including Mr. Duff would not feel free to leave at this point and time. Next, the first questions are; who, what, where? Driver's license, registration and then who, what where? This was a criminal investigation before they even get out of this police car, which requires probable cause or reasonable suspicion that a crime was committed. The fact that it's a high crime area, he didn't know who this person was, never met him before; it's a car in the parking lot -- and there's no gates and there's no parking signs saying you can't park here, do not enter, there's no after-hours parking; nothing of that was brought on the record. It was a car parked in a parking lot. Whether the lights were on, the lights were off, the parking lights were on, there was a single occupant in the car -- there was no reason to approach, to block this car in from moving forward. The video clearly shows that to go forward, you got to drive on grass. You can't go to the left, there's an officer; you can't go to the right, there's an officer. You can't back up, there's an officer -- there's a police car there. There's a seizure for the Fourth Amendment purposes and from that point on

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everything thereafter, without probable cause, to make that seizure is fruit of the poisonous tree, and therefore everything should be um -- um -- um -- not admissible for purpose of preliminary exam. There's no question of fact that it was an absolute seizure, from the officers testimony and why he approached that vehicle, and he was there to investigate a crime; straight out of the officer's mouth.

Now, there was no operation of a motor vehicle. The officer -- the -- the Defendant's own statement -- Corpus delicti, without any further overt act or further investigation, and how long the vehicle was sitting there, there's no way to determine that his blood alcohol level was that at the time the vehicle was -- was brought there. The officer doesn't know how long it was there; he didn't ask those questions. It could have been there the day before. It was cold, it was chilly; to use his vehicle as a shelter is not operating a motor vehicle, for the purposes of the OWI statute. For the purposes -- and it's a -- it's a legal analysis that the Court can make; you have to put the vehicle in some type of position that would pose a risk of collision or property damage to somebody else, to have a definition of operating a motor vehicle for the OWI statute. They don't have that here, period, Your Honor. They don't know how long it's been

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there; they never asked those questions.

Without any further third party witness, or somebody else to testify --

THE COURT: Go ahead.

MR. HADDAD: -- to testify that there was -- the vehicle was put in motion by Mr. Duff, shortly before the cops encountered him, they just don't have that, Your Honor. Therefore, we're asking not to bind this over for the reasons stated.

THE COURT: Mr. Foglesong?

MR. FOGLESONG: Briefly on rebuttal, a few points; the fact that --

COURT REPORTER: Mr. Foglesong, can you please go to the podium.

MR. FOGLESONG: Sure; I'll get used to that. The fact that it's a third offense notice is not an element of the crime; it's just that thereupon conviction of this new OWI charge, it would be his third one. I don't have to prove that he has been convicted two prior times at preliminary exam. The fact that he wasn't -- this investigatory stop only requires reasonable suspicion. The officer testified that his lone car parked in the elementary school at night, not sure if a crime was being committed or if he was there for a welfare check; so he had a right to approach him and ask him what was going on.

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It was only through further investigation that he realized that the Defendant was drunk. And lastly, the fact that he operated the vehicle; he admitted to the officer, after the officer observed bloodshot eyes, slurred speech, fumbling with the wallet, and the typical signs of intoxication, that he had drank too much and had stopped to rest. Therefore, he was driving the vehicle; he parked it in the parking lot to sleep it off. The car was in -- it's in park, but the keys were in the ignition and it was running. At any point he could have passed out and put the car in motion. He could have driven off before officers responded to him. So he was in operation of that motor vehicle; therefore, probable cause has been established, and the People would move to bind the Defendant over as charged.

THE COURT: All right; I've heard the testimony, I'm ready to make my decision. The only real issue -- well, first let's go to the -- to the priors. The People are not required to prove the priors at preliminary examination; those are for sentence -- sentencing purposes only. So they don't have to show that he had been convicted previously; that's fine. As far as -- the only real issue is -- well, I guess there's a couple issues, but one of the issues is was there reasonable suspicion to approach the vehicle, and at that point it's 10:00 at

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night, the officer sees a car and -- out of place, so to speak, not in an area that it should be. It's 10:00 at night; he goes up, parks behind the vehicle and he walks up to the vehicle, he asks the Defendant if -- he asked him for his information immediately upon him putting the window down, the officer said he could tell that -- he could smell the odor of intoxicants from not only the inside of the vehicle, but from the Defendant himself; that was the first sensory impression he received. He then asked the Defendant to produce his driver's license, and paperwork in other words, and the Defendant had a hard time getting his license out of his wallet. He had slurred speech, bloodshot eyes. At that point -- even at that point, he was not under arrest; it was only that -- at that point he asked him to step outside the vehicle and do the field sobriety tests. Obviously, the -- the video speaks for itself; the Defendant did not pass the tests and then eventually went to the hospital where he -- there was a blood draw and his blood draw was .33, which is four times the legal limit.

So the real issue is operating. Was the Defendant sitting in a parked vehicle with the car running and him behind the driver's seat, no other people in the car, constitute operating? Now that is a legal question, and there are some cases that are directly on point --

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MR. HADDAD: Your Honor, may I cite a couple of those cases? Do you have them?

THE COURT: No, no; I have them.

MR. HADDAD: Okay.

THE COURT: I'm trying to figure out which one is the most analogous one. We already know that the Defendant took the car there, unless he carried it into the parking lot, he drove it; and in fact, when the officer asked him did you -- how did you get here, he said I drove the car and I had been drinking, so I -- I pulled over; basically. So -- and of course, the -- the public place has been defined many times; a parking lot is a public place, so that -- that's not one of the issues. So the only issue is whether him sitting in the vehicle, as I indicated, was operating; there is a case that's directly on point to that. It says if the vehicle is in -- is running and the Defendant is the -- is behind the wheel, the person is there -- he's there, no other people there, that could satisfy the operating portion of the statute.

So after hearing the -- preliminary examination, I'm finding by a probable cause standard, number one; a crime was committed and number two; that this Defendant committed the crime. The matter is hereby bound over to the Oakland County Circuit Court for further disposition; that's it.

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MR. HADDAD: Thank you, Your Honor; may the bond be continued?

THE COURT: Bond is continued.

MR. HADDAD: Thank you, Judge.

(At 10:55 a.m., proceedings concluded)

STATE OF MICHIGAN)

COUNTY OF OAKLAND)

I certify that this transcript, consisting of 58 pages, is a complete, true, and correct record of the preliminary examination and testimony taken, as recorded on Thursday, May 31, 2018.

6-28-18 Connie J. Viazanko

Connie J. Viazanko, CER 8505

50th District Court

70 North Saginaw Street

Pontiac, Michigan 48342

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APPENDIX G

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OAKLAND COUNTY 18-267140-FH
JUDGE D. LANGFORD MORRIS
PEOPLE v DUFF,MATTHEW,

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE PEOPLE OF THE
STATE OF MICHIGAN,

v Case No. 2018-267140-FH

MATTHEW SCOTT DUFF,

Defendant./

EVIDENTIARY HEARING

BEFORE THE HONORABLE DENISE LANGFORD MORRIS, CIRCUIT JUDGE

Pontiac, Michigan - Tuesday, October 2, 2018

APPEARANCES:

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Pontiac, Michigan

Tuesday, October 2, 2018 - 10:02 a.m.

* * * * * *

THE CLERK: Your Honor, now calling the matter of People versus Duff, case number 18-267140-FH.

MR. ZEMAN: Jeff Zeman appearing on behalf of the People.

MR. HADDAD: Good morning, your Honor, Issa Haddad on behalf of Mr. Duff, present and standing to my left, date and time for the evidentiary hearing. We are ready to proceed.

THE COURT: All right. As I indicated, I have an emergency that arose -- a death of a dear friend, Judge Ben Logan, in the Grand Rapids District Court. He died, and so anyway, I've got to get up there. I need to be in Grand Rapids at one o'clock and I don't want to be arrested for speeding on the way. So, I'm going to be leaving shortly.

MR. ZEMAN: Your Honor, the People have --

THE COURT: So, let's get started.

MR. ZEMAN: Your Honor, the People have only one witness, Deputy Pence, who's in the courtroom right now. There's nobody else in the courtroom besides counsel, defendant, court staff and the Judge --

THE COURT: Okay, I'd like to get --

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MR. ZEMAN: -- the People would ask for a mutual sequestration order, nevertheless.

THE COURT: So ordered.

MR. ZEMAN: Thank you.

MR. HADDAD: No objection.

MR. ZEMAN: Just --

THE COURT: Any opening statement?

MR. ZEMAN: Just briefly opening, your Honor. Def -- it's defendant's motion with regard to the stop, the initial seizure of the defendant at the time of the offense. Obviously, it's the -- the People's burden to admit any and all evidence at trial. It's the People's position that all evidence (indiscernible) from that stop should be admissible at trial.

The People's position is that the -- that Deputy Pence was either performing a -- a wel -- a welfare check or had reasonable suspicion at the time that he first approached the defendant's vehicle to investigate for possible criminal activity and we intend to put on evidence to support that.

THE COURT: So noted.

MR. ZEMAN: Thank you, your Honor.

MR. HADDAD: Your Honor, in response to that, all the evidence elicited at the preliminary exam was that this was an investigatory stop. He approached, he parked

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behind the vehicle. The vehicle was seized at that moment. Even though the overhead lights were not on, it was considered a seizure for the purpose of the 4th Amendment because the defendant, Mr. Duff, was not free to leave.

If he were to put the car in drive, he'd have to drive on the grass and the snow in front of him, which isn't part of the -- part of the paved parking lot. To put it in reverse, he would have to either hit the patrol car or try to maneuver in a position where it would be -- it would be unreasonable to back up the way the officer positioned his car.

It's our position that once he parked his patrol vehicle behind the defendant without any reasonable suspicion of criminal activity being afoot, that was a seizure for all 4th Amendment purposes. Once he got out, the first thing he asked the defendant was for his papers, his identification, which isn't for a welfare check, it's not "how are you doing, you know, is something wrong? Why are you here;" it was identification, license, insurance and registration.

(Indiscernible) from the -- from the preliminary exam and this was a 4th Amendment stop. He was seized without any reasonable suspicion or probable cause for that matter and at the end, we're going to ask to suppress

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any evidence after the vehicle was stopped -- I'm sorry, after the police car was stopped, parked, positioned behind my defen -- my client's car. Thank you.

THE COURT: Okay. For the purposes of the record, you stipulate that it was March 4, 2018, 10:09 at the time of the stop, correct?

MR. ZEMAN: Yes, your Honor.

MR. HADDAD: Yes, your Honor.

THE COURT: Call your first witness.

MR. ZEMAN: Your Honor, actually I would, prior to calling the first witness, I believe there's also a stipulation from both of the parties to the admission of People's Exhibits One and Two. They are copies of -- they are CDs containing in-car video that were also admitted at the preliminary examination; is that correct, counsel?

MR. HADDAD: That's correct.

THE COURT: What's the difference between the two of them?

MR. ZEMAN: It's continued. I think the files were just too big to fit on a single disk.

THE COURT: One is part one and one is part two?

MR. ZEMAN: That's right, your Honor.

THE COURT: Okay.

MR. ZEMAN: Actually, I think they're labeled parts two and three, but they're relevant portions.

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THE COURT: Parts two and three? Is there another part missing?

MR. ZEMAN: There are -- there's also part -- well -- well, there are four disks, but just for the Court's -- just so the Court is aware --

THE COURT: All involving this --

MR. ZEMAN: -- when you see the disks --

THE COURT: All involving this case?

MR. ZEMAN: All involving this case, your Honor. That's right.

THE COURT: So, why ar -- are we putting them all in or --

MR. ZEMAN: No, just -- just two and three. These are the ones that were admitted, unless you -- I mean, would you -- I know, I guess I (indiscernible) with them all. It doesn't matter to me.

MR. HADDAD: Right. The -- those are the two that's pertinent, that shows -- there's not one of them actually pulling in where they -- where they stop, so --

THE COURT: Okay. So, you stipulate that you only want the Court to review parts two and three, that parts one and four are irrelevant?

MR. HADDAD: For the purposes of this motion, your Honor.

THE COURT: For purposes of this evidentiary

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hearing?

MR. HADDAD: At this time, I'm stipulating to two and three.

THE COURT: So noted.

MR. HADDAD: Thank you.

THE COURT: All right?

MR. ZEMAN: Thank you, your Honor, and they are labeled somewhat confusingly, one and two.

THE COURT: Well, they're Exhibits One and Two, but --

MR. ZEMAN: That's right, your Honor.

THE COURT: -- they're parts two and three.

MR. ZEMAN: Yes, your Honor. If I may approach?

THE COURT: Got it, mm-hmm.

(At 10:07 a.m., People's Exhibits One and Two were admitted.)

THE COURT: All right, you may call your first witness.

MR. ZEMAN: Thank you, your Honor. The People call Deputy Pence.

THE COURT: Raise your right hand. Do you swear to tell the truth, the whole truth, so help you God?

MR. PENCE: I do, your Honor.

THE COURT: All right, please be seated. State your full name for the record.

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THE WITNESS: Deputy Jason Pence, P as in Paul, e-n-c-e, is my last name.

THE COURT: P?

THE WITNESS: -- e-n-c-e.

THE COURT: Oh, like Vice President Pence?

THE WITNESS: Yes, ma'am.

THE COURT: Okay, any relation?

THE WITNESS: No.

THE COURT: You never know. You never know.

THE WITNESS: You're right.

THE COURT: Okay, go ahead.

MR. ZEMAN: Thank you, your Honor.

DEPUTY JASON PENCE

(At 10:07 a.m., sworn as witness, testified as follows)

DIRECT EXAMINATION

BY MR. ZEMAN:

Q Deputy Pence, how are you currently employed?

A With the Cou -- with the Oakland County Sheriff's Office.

Q Okay. Are you a patrol deputy for the Oakland County Sheriff's Office?

A Yes, sir.

Q Where are you currently assigned?

A I am currently assigned in Independence Township, but I -- at the time of the incident, I was assigned as a -- as a field training office -- or as a training -- a training

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deputy, I had just -- just started with the Oakland County Sheriff's Office.

Q Okay. So, on March 4th --

A And I was in -- I was in Pontiac.

Q On March 4th of this year, you were assigned to Pontiac patrol; is that correct?

A Yes.

Q Okay. Now, what experience do you have as a law enforcement officer prior to your training with the Oakland County Sheriff's Office back in March on the Pontiac patrol?

A One year with Milford Police Department, twenty-two years with Hazel Park Police Department in which, out of those nine -- or out of those twenty-two years, nine years was a -- as detective and school liaison.

Q Okay. And prior to your being hired by the Oakland County Sheriff's Office; how long was it between your working for Hazel Park and coming to work for the Sheriff's Office?

A I retired and then, I gained employment -- full-time employment in February of 2018.

Q Okay. I guess, at -- at what point did you retire? I'm just kind of wondering how --

A Oh, February of 2017 -- end of February 2017.

Q Okay. So, directing your attention now to March the 4th, approximately 10:09 p.m.; where were you on that date and

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time?

A I was driving a patrol vehicle on Montcalm in the city of Pontiac.

Q Okay. Were you -- were -- you say patrol vehicle; was it a fully-marked patrol vehicle?

A Yes, it was.

Q Was it equipped with overhead lights?

A Yes, it was.

Q Was it equipped with a siren?

A Yes.

Q Were there any other deputies in your patrol vehicle with you at that time?

A Yes, there was. It was a field training officer; his name was Paul Flatiani (ph).

Q Deputy Flatiani?

A Yes.

Q Okay. Anyone else besides the two of you in the patrol vehicle?

A No.

Q Okay. What, if anything, did you observe at that time?

A As I was traveling westbound on Montcalm, I observed up at the elementary school, which is Whitman Elementary off of Summit, a vehicle parked in the parking lot, which seemed at the time suspicious due to the time and day and being that the area is a high drug crime area.

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Q Okay. Deputy Pence, so with regard to the day of the week, what day of the week was March 4th of 2000 -- hold on, let me just make sure this is right, 2018?

A It was a Sunday.

Q Was it a Sunday? So, this is a Sunday night at approximately 10:00 p.m. that we're talking about now; is that correct?

A Yes.

Q Was it dark? Sorry, that's kind of a dumb question.

A Yes.

Q Was the school itself illuminated in any way at that time?

A The parking lot was illuminated.

Q Okay. Illuminated in what way?

A With parking lot lights.

Q Okay. Now, you described seeing a vehicle in the parking lot at that time; is that correct?

A Yes.

Q Were there any other vehicles besides the one that you described in the parking lot at the same time?

A Only -- only vehicle in the parking lot.

Q To your knowledge, was the school open at that time?

A It was closed.

Q Okay. What do -- what -- upon observing that vehicle, what did you do?

A I pulled up. I observed it. At that time, I observed

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that it was occupied. The driver had his in-car lights illuminated. I could see that it was occupied just by one light in there.

Q By one light? Okay, when you say the in-car lights; you mean interior lights?

A Interior lights, yes.

Q Okay. Was the car running?

A I don't recall.

Q You don't recall, okay. Would it be in your report if it was?

A It may -- it may be, I'm not sure if it was.

Q Okay. Would it help you to review your report if that would refresh your recollection?

A Yes.

MR. ZEMAN: Your Honor, may the record reflect I'm showing defense counsel, it's page six of People's discovery, page four of six of the police report.

MR. HADDAD: Yes.

THE COURT: So noted.

MR. ZEMAN: May I approach the witness, your Honor?

THE COURT: Yes.

BY MR. ZEMAN:

Q Deputy Pence, I'm handing you a copy of your police report. If you'll take a look at it, try to refresh your

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recollection. If your recollection is refreshed, look up at me, I'll take it back from you.

A Yes, sir.

Q Is your recollection refreshed?

A Yes.

Q Do you recall whether the vehicle was running when you first saw it?

A Yes, it was.

Q The vehicle was running?

A Yes, it was running.

Q Did you, yourself, pull into the parking lot upon observing that vehicle?

A Yes.

Q Okay. And you were -- were you driving or Deputy Flaviani?

A I was.

Q Where did you pull in the parking lot?

THE COURT: I'm sorry, Deputy who?

MR. ZEMAN: Flaviani, the field training officer.

THE COURT: How do you spell that?

MR. ZEMAN: How do you spell Flaviani?

THE WITNESS: F-l-a-v-i-a-n-i.

THE COURT: Thank you, go ahead.

BY MR. ZEMAN:

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Q Where in the parking lot did you pull the patrol vehicle?
A The vehicle was facing northbound towards Montcalm.
Q Safe to say the suspect's vehicle?
A Yes, the suspect vehicle was facing northbound. I then pulled around and, I believe, at about a -- at about a 45-degree angle to the vehicle.
Q Okay. So, I'm going to ask you for a little more detail on that. Was the suspect vehicle parked in the parking spot?
A Yes, it was.
Q Was the parking spot in the middle of the parking lot, at the edge of the parking lot; do you recall?
A Probably two or three parking spots in from the entrance off of -- off of Summit.
Q Okay. Was it pulled into a parking spot facing forward or facing backward?
A Facing forward.
Q Okay. And in front of the vehicle, was there -- was there more asphalt or was it -- or was it lawn or grass or was it --
A It was lawn or grass.
Q It's grass. Okay. Now, then, when you pulled -- you described pulling your vehicle in at a 45-degree angle. I guess, what part of -- I guess, where was the -- the nose of your vehicle pointing toward?

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A My nose was pointing towards his left rear bumper of his vehicle.
Q Okay. How close to the suspect vehicle were you?
A Approximately ten feet.
Q Okay. So, ten feet behind the suspect vehicle facing towards his rear left bumper; is that correct?
A And the middle of my vehicle was facing directly at his left rear bumper.
Q Okay. Is it driver's side rear bumper?
A Yes, driver's side.
Q Did you activate your lights at that time? Your -- I'm sorry, your emergency overhead lights at that time?
A No, I don't believe I did.
Q Okay. Did you activate your emergency siren at that time?
A No.
Q Okay. Did -- were your headlights operational?
A Yes.
Q Were they aiming at the vehicle?
A Yes.
Q Did you activate any spotlight or anything like that?
A Yes, I did.
Q Okay. And where did you point that?
A At the driver.
Q Okay. Why did you do that?
A For my safety and Deputy Flaviani's safety.

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Q Okay. So, let me ask you this. Prior to pulling into the parking lot as you des -- sorry. Let me ask you this first, and did you park your vehicle in that position?

A Yes.

Q Okay. Prior to your even entering the parking lot, are you -- why did you do that?

A Being that it was a lone vehicle in a parking lot and that I know there was no activity going on at the school, I see it was occupied, the school was closed, it was -- it was late. We didn't -- I didn't know if he was having some sort of medical emergency or possibly, since it is a high crime area where -- where that school is located or that the person was possibly having any sort of criminal activity going on at that time.

Q Okay. Is Whitman Elementary -- is that located in the city of Pontiac?

A Yes, it is.

Q Okay. So, what kind of criminal activity do you think might have been happening in --

MR. HADDAD: Objection, irrelevant.

THE COURT: Sustained.

MR. HADDAD: Thank you.

MR. ZEMAN: Your Honor, the -- the question here reasonable suspicion. This was with -- I can -- I can rephrase, if the Court would prefer.

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THE COURT: You've -- you've got to have facts. He said there's no -- he said it's a high crime area. We're not going to speculate on what could have happened as a crime in the area.

MR. ZEMAN: Your Honor, re -- respectfully, the operative question here is whether or not there's reasonable suspicion to suspect -- to suspect that a crime was occurring.

THE COURT: Yeah, based on what he's seen.

MR. ZEMAN: Based on what he's seen now, so based on his training and experience. Okay.

THE COURT: It's -- it's an over broad question. We know that anywhere in the world, murders, robberies, rapes, child molestation, anything is possible. We're not trying to get on what's possible. We're dealing with reasonable suspicion based on what you observe and what you see and we know he's an experienced officer. He's already told us that.

MR. ZEMAN: Yes, your Honor.

THE COURT: Let's go -- let's move on.

MR. ZEMAN: Okay. Thank you, your Honor.

BY MR. ZEMAN:

Q Okay. Upon positioning your vehicle behind the suspect vehicle, what did you do next?

A I approached the driver on -- on his side of the vehicle.

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Q Okay. Is that to say you walked up to the driver's -- driver's window?
A Driver's -- driver's door. Driver's door.
Q Driver's door? Okay. And what happened next?
A He had his window down already.
Q Okay. Did you speak to the oc -- the -- to the driver of the vehicle?
A Yes, I did.
Q Is that person in the courtroom right now?
A Yes, he is.
Q Could you please point to that person and describe something they're wearing?
A He's wearing a gray -- gray suit, gray -- green undershirt.

MR. ZEMAN: Your Honor, may the record reflect an in-court identification of the defendant.

THE COURT: So ordered.

BY MR. ZEMAN:
Q What, if anything, did you observe upon first speaking to the driver of the vehicle -- or to the defendant that night?
A I could see that his eyes were bloodshot and glossy which, with my experience, tends to lean towards someone that had been drinking that night.
Q Okay. Did you speak to the defendant?

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A Yes, I did.
Q What was his manner of speaking; if you recall?
A It was -- he had slurred speech.
Q Okay. Could you -- could you smell anything? Did you observe anything else that would indicate alcohol?
A Yes, then I could smell an odor of alcohol intoxicants coming out of -- of the vehicle and out of him.
Q Did you -- did he tell you anything to indicate whether or not he had been drinking?
A Yes, later during the investigation, he did say that he had -- he had been drinking.
Q But not until -- not until after -- sometime after your initial encounter with him?
A Yes.

MR. ZEMAN: Okay. I have no further questions at this time, your Honor.

THE COURT: You may cross-examine.

MR. HADDAD: Thank you.

CROSS-EXAMINATION

BY MR. HADDAD:
Q Now, it's true that there was no report of any crimes at the parking lot of the elementary school, correct?
A Correct.
Q And you don't know how long this vehicle was parked before you approached this vehicle, correct?

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A Correct.

THE COURT: You mean no reports of a crime that night?

MR. HADDAD: Yes, your Honor. That's -- that -- that was my --

THE COURT: So noted.

BY MR. HADDAD:

Q Thank you. Now, you have never met Mr. Duff prior to this day, correct?

A Correct.

Q You have never seen his vehicle before?

A No, not his vehicle.

Q Okay. And you have -- and your partner, are you aware if he had any encounters with Mr. Duff prior to this date?

A Not that I'm aware of.

Q Okay. So, this is the first time you've encountered Mr. Duff, correct?

A Yes.

Q All right. Now, when you first approached -- when you first -- you were driving from east to west in front of the school?

A Yes.

Q And you saw a vehicle parked in the parking lot, correct?

A Yes.

Q You decided to investigate, correct?

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A Yes.
Q And so, at that point in time when you made the decision to investigate, all you had was, there was a parked car in the parking lot, correct?
A I could see it was occupied.
Q It was occupied. An occupied car in the parking lot at night time?
A Yes.
Q Okay. So, you made a left onto the road where the school driveway entrance was, then you made a left in the parking lot, correct?
A I believe so.
Q Okay. Now, when you first pulled in -- I'm sorry. At that point in time, that's all you had, just a lone vehicle in a parking lot with -- and do you recall if it was running or not?
A It was running.
Q Do you recall if the front headlights were on?
A I don't recall if it was on or not.
Q Okay. Whether the headlights were on or not, would that make a difference?
A No.
Q Okay. So, there's a car running, occupied in the lone parking lot, correct?
A Of an elementary school.

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Q Of -- of an elementary school. Now, is there any posted signs that says do not enter this parking lot?
A Like, as in trespassing signs?
Q Yes.
A I don't recall.
Q You don't recall, okay. You didn't note that in your police report in any way or if there was though, did you?
A No.
Q And you're familiar with this area, correct?
A Yes.
Q As you sit here today, you don't know if there's any known trespassing signs or not?
A No, I don't think so.
Q Okay. Now, this is a public-owned elementary school, correct?
A Yes.
Q Okay. And there's gates on this entrance?
A No.
Q Okay. So, this is just an open driveway like, open to a 24-hour gas station, correct?
A Yes.
Q Okay. Someone could pull in, turn around and pull out and they wouldn't have any problems, correct?
A Correct.
Q Okay. Now, when you first approached the vehicle, the

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vehicle was parked in between two lines, correct?
A I don't know if he was between -- in -- in a parking spot or in between the lines, he was parked.
Q Okay. All right. It's not notated in your police report whether he was straddling a line or not, correct?
A I don't believe I put that in there.
Q Okay. If -- that would have been important how the person would have parked before you got out of your vehicle to determine if a crime was afoot though, correct?
A Not necessarily.
Q Not necessarily. Okay, fair enough. Now, you said you pulled in and you had a 45-degree angle in position to where the car was parked, correct?
A Yes.
Q Okay. So -- so, was the center of your vehicle the -- your dash-mount camera is located in the center of your windshield, correct?
A It's off to the right of the -- of the rearview mirror.
Q More or less, it's in the one-third in the middle of your windshield though, correct?
A Yes.
Q Okay. And that points forward, correct.
A Yes.
Q And so, where yours is positioned, you would have -- your camera was your center of your bumper directly toward the

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left corner bumper of the white Kia?
A I believe so.
Q Okay. And so, your -- your camera would able to encompass the driver exiting his vehicle, correct?
A Yes.
Q Okay. Have you seen the vehicle?
A What'd you say?
Q I'm sorry, have you seen the video?
A Yes, it's been some -- some time since we had the exam.
Q Okay. So, the -- is that the first time you saw it was at the exam?
A Yes.
Q Sometime in May of this year?
A Yes.
Q Okay. And have you seen it since then?
A No.
Q Okay. Now, when you first parked your vehicle, you said you were ten feet away from the defendant's bumper, correct?
A Approximately. That's usually how I -- how I park my vehicles during a stop.
Q Okay. And so, for this traffic stop, you didn't activate your overhead lights, did you?
A No.
Q No, okay. And you manually turned on your recorder,

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correct?
A Yes.
Q All right. And that was to capture the discussion you were going to have with this investigation, correct?
A Yes. Anytime we have any sort of conversation with -- with the public, I turn on my -- I turn on my microphone which activates our recorder.
Q Now, did you call anything in prior to pulling into this parking lot?
A I believe I did.
Q What did you call in?
A I believe I called out a suspicious vehicle.
Q Suspicious vehicle, okay. When you parked your vehicle before you exited, did you try to run the plate?
A I believe I did.
Q Okay. And that's all consistent with a criminal investigation, correct?
A Yes.
Q Okay. Now, you didn't call to see if any ambulances were in the area, correct?
A No.
Q You didn't verify with dispatch if anybody reported any emergencies with any white cars in the area, did you?
A No.
Q You weren't aware of any ongoing emergencies in the area,

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were you?
A Not that I know of.
Q Okay. All right. So, this was a criminal investigation when you first pulled in the parking lot, correct?
A Not necessarily.
Q Okay. What was it, then?
A It was just to investigate why someone was parked there --
Q Okay.
A -- at that time of night.
Q Okay. Now, you said there was ten feet between your car and the defendant's car, and I need to clarify this because car's have different lengths and different widths. Would you say your front bumper, the closest part of your car was ten feet away from the closest part of Mr. Duff's vehicle?
A Yes.
Q Okay. And so, that would roughly be the center of your bumper in the corner of his vehicle, correct?
A Yes.
Q Okay. And if you were closer to him, it would mean your left bumper would have been closer to his vehicle, correct?
A My left bumper, by closer to --
Q Your left front bumper would have been closer to him if he were more than -- if you weren't at a 45-degree angle?

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A I don't get your -- what you're going at.
Q Okay. It's your testimony that you pulled up at a 45-degree angle to the corner of his bumper, correct?
A Correct.
Q All right. So, if you would have been closer to his vehicle -- or, I'm sorry. If you would have been not at a 45-degree angle, your left front bumper would have been closer to his right corner bumper?
A I still don't understand what you're saying about that. I mean --
Q All right. I will move on. The video -- hopefully, the video will speak for itself.
A Okay.
Q Now, was there -- the way you positioned your car in the parking lot, were there parking spaces on the left and right side?
A Yes.
Q Okay. And the way you positioned your vehicle, was it -- for Mr. Duff to back straight out, would he have hit your car?
A Yes. Straight back, he would have.
Q Okay. Now, if -- for him to exit, he would have to make a right-hand -- how many lanes is this driveway pulling in versus the -- the -- the -- for the -- the parking -- the parking spaces on both sides of you?

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A To -- how many lanes as in how big is the parking lot?
Q Yeah. How -- the area that you would -- if the car was full of park -- if the parking lot was full of cars and you were to drive your car where you -- where you drove in and saw Mr. Duff, how wide is that area? Is it one lane or two lanes?
A Well, it's -- it's a huge parking lot. It's a good-sized parking lot. It's --
Q The question is if the parking lot was full and the area -- you would go through the parking lot to search for a space; could two cars pass?
A Yes.
Q Okay. When you parked on a 45-degree angle, could two cars still pass?
A No.
Q Okay. Now -- now, when you got out of your vehicle, did you have your hand on your duty weapon when you approached the vehicle?
A I don't recall.
Q Okay. Is that normal in a high crime area?
A Possibly.
Q Okay. When you first approached the vehicle, you said that the window was already down?
A Yes, it was.
Q And the first thing you asked Mr. Duff was for his

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identification, correct?
A Yes.
Q Registration and insurance?
A Yes, and his -- and his driver's license.
Q His identification, his driver's license. And that's all consistent with in -- investigatory criminal investigation, correct?
A Yes.
Q Okay. Did you ever ask Mr. Duff if he was okay or if he needed an ambulance?
A I was assessing the situation as I was speaking with him.
Q Okay. So, do you recall if those questions ever came up?
A I don't recall if -- if I did or didn't.
Q Okay. They're not notated in your report though, are they?
A I don't believe so.
Q Okay. And when we watch the video, do you recall if there's anything in the video that even hinted towards those type of questions to see if this was a -- you know, to see -- at any point in time, did this ever turn from a criminal investigation to a -- to see if Mr. Duff was okay?
A After I made initial contact?
Q Yes.
A No.

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Q Okay. Prior to that, you testified that this was a criminal investigation, correct?
A Prior to me speaking with him?
Q Yes.
A I said it was a suspicious --
Q Suspicious?
A Yes.
Q Okay, not as a reason to stop him, okay. So, if you were to back straight up, he would hit your vehicle, correct?
A Straight back, yes.
Q Okay. When you first approached -- when you ask somebody for their identification, license, registration and insurance, are they free to leave at that point in time?
A No.
Q Now, you said that he -- the window was already down when you approached him?
A Yes.
Q Okay. And before -- and who made the -- who made the first communication? Did you ask him questions or did he ask you questions?
A I don't -- I believe I asked him questions.
Q Okay. There was two deputies there, one on each side of his car, correct?
A There was me and Deputy Flaviani.
Q Correct. And when -- when you first approached the

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vehicle, you were on the driver's side and the other deputy was on the passenger side, correct?

A Yes.

MR. HADDAD: I have no further questions, Judge.

THE COURT: Any redirect?

MR. ZEMAN: Just briefly, your Honor.

REDIRECT EXAMINATION

BY MR. ZEMAN:

Q Deputy Pence, you described that the way that you had your vehicle positioned behind the defendant's vehicle with a 45-degree angle, approximately ten feet back. On cross, you said that if the defendant had pulled straight back, he would have hit your patrol vehicle; is that correct?

A Yes.

Q Is it -- the way you said that, you made it seem as if there might be some other way he could have pulled out. Is there some other way besides straight back the defendant could have pulled out of the parking lot, given the positions of your two vehicles?

A If he would have turned his wheel as he was backing out, he would have cleared my vehicle.

Q Okay. So, is that to say that if the defendant had backed out while also turning his vehicle, he could have pulled around your vehicle?

MR. HADDAD: Objection, calls for speculation.

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THE COURT: Overruled.

MR. HADDAD: Thank you.

BY MR. ZEMAN:

Q If you could answer the question?

A Yes.

Q Okay. So, there was -- and could the defendant have done that while staying on the -- on the, I guess, blacktop of the parking lot?

A Yes.

Q And he could have exited the parking lot?

A Yes.

MR. ZEMAN: No further questions, your Honor.

MR. HADDAD: I have a couple.

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MR. HADDAD:

Q when you parked behind the defendant, was it your intentions to not allow this vehicle to back up before you were done questioning him?

MR. ZEMAN: Objection, your Honor. His intention is irrelevant for the purposes of this hearing. It's again, what the of -- what the Court can see based on the evidence of the testimony -- the objective evidence of the testimony.

THE COURT: Well, I think the wit -- the

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witness' state of mind is always relevant. Overruled.

MR. ZEMAN: Would -- okay.

MR. HADDAD: Thank you.

BY MR. HADDAD:

Q Was it your intention to park behind him where the suspect vehicle could not back out until you were done talking to him?

A No.

Q No. So, if -- so, if the defendant didn't want to put his window down and talk to you, he was free not to do that, correct?

A Yes.

Q And he could have backed out by not interfering with you and you would have just let him drive away, correct?

A No, that would not have been the case, but --

Q Okay.

A -- he could have.

Q Okay. You said that would not have been the case. Explain that to me.

MR. ZEMAN: Objection, relevance, your Honor. I mean, that goes outside the scope of what actually occurred here.

THE COURT: I'll allow it. There's no jury, just me.

BY MR. HADDAD:

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Q Explain that to me.
A About --
Q If he were to back out to try to leave, would you have let him leave?

THE COURT: If you know.

THE WITNESS: He would have been -- he would have been able to leave, but I would have then activated my emergency lights and sirens.

MR. HADDAD: Okay, no further questions.

MR. ZEMAN: Well, your Honor, I do have some follow up. I -- I would say that the Court did not allow me to ask for the defendant's state of mind with regard to what he believed the suspicious -- suspicious activity may have been. I mean, given this line of questioning, I'd like to know what he suspected, why he would be pulling the vehicle over. I'm --

THE COURT: Well, the vehicle is already pulled over. What do you mean?

MR. ZEMAN: Well, okay. May -- may I pose the question and then, we can address whether or not you'll let me ask it?

THE COURT: Yeah, what's the question?

MR. ZEMAN: The question for the deputy would be when you pulled into the parking lot, what criminal activity were suspi -- were you specifically expecting may

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have been -- may have been going on in that parking lot.

THE COURT: Okay, and like I said, I'll take judicial notice that any crime in the world could always possibly be occurring.

MR. ZEMAN: Well, that's right, your Honor, but he did describe a particular set of circumstances in a particular place that would again lead to that state of mind that would -- that it goes to the officer's state of mind at that time. I -- I can rephrase the question.

THE COURT: I -- I think it's speculation, but I'll let you -- I'll let -- let's let him answer the question.

MR. ZEMAN: Okay. That's -- that's all I'm asking the deputy --

THE COURT: I'm interested.

BY MR. ZEMAN:

Q -- is based on the circumstances that you've already described with regard to where -- with regard to where the vehicle was and what you saw prior to your pulling into that parking lot, what crim -- kind of criminal activity were you suspecting might be afoot?

A Possibly drug use, being that the -- the area that it's in, alcohol --

Q Okay.

A -- and like I said, a med -- possibly a medical issue

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where he pulled over and needed some help.

MR. ZEMAN: Okay, nothing else, your Honor.

MR. HADDAD: Nothing further, your Honor.

THE COURT: Okay, may the witness be excused?

MR. ZEMAN: Yes, your Honor.

THE COURT: All right, you may step down, deputy, you're done.

THE WITNESS: Thank you.

THE COURT: Okay, call your next witness.

MR. ZEMAN: The People have no further witnesses, your Honor.

THE COURT: Any witnesses for the defense?

MR. HADDAD: No witnesses for the defense, your Honor.

THE COURT: Defense rests?

MR. HADDAD: Defense rests.

THE COURT: All right. So, you've got your videos and you want the Court to review the parts two and three entered as Exhibits One and Two?

MR. ZEMAN: That's right, your Honor.

THE COURT: I'll take a look at them. I may require additional information from you, but I don't know, okay?

MR. ZEMAN: Yes, your Honor.

THE COURT: So, let's have -- usually, I do

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findings of fact, conclusions of law, but I don't think it's really necessary. Do you want to do findings of fact, conclusions of law? I'll allow it if you want it.

MR. ZEMAN: Your Honor, I would note that the People's original response to defendant's motion did not include law or argument with regard to the reasonable suspicion.

THE COURT: Do you want to add that?

MR. ZEMAN: I -- I would, your Honor, just --

THE COURT: Okay.

MR. ZEMAN: -- because of the additional evidence that's come out.

THE COURT: Why don't the two of you do that?

MR. ZEMAN: Thank you, your Honor.

THE COURT: If you want to.

MR. HADDAD: (Indiscernible).

THE COURT: We'll give you -- how many days do you need to get that done? Ten days? Two weeks? Three weeks?

MR. HADDAD: Your pleasure, counsel.

MR. ZEMAN: Fourteen days, your Honor. Within fourteen days from today.

THE COURT: Fourteen days. Okay, you've got fourteen days to file supplemental briefs and I'll have you back for ruling from the Court on -- let's say, 14

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days is October 18th and then, I'm not here on the 25th. Wait, I'm leaving early on the 25th, so let's say November 8th.

MR. ZEMAN: Okay, so that's a Thurs --

THE COURT: That'll be a status -- that's a Thursday.

MR. ZEMAN: Thursday? Okay.

THE COURT: Yeah, that'll be a status and I probably will issue a written decision, so you'll have your decision by then, but if you don't, I'll rule verbally on that date in open court, November 8th, okay?

MR. HADDAD: I have a conflict that morning, your Honor.

THE COURT: We'll make it afternoon, then.

MR. HADDAD: It's a -- it's a jury trial in the 36th District Court. It's supposed to begin on the 7th and is the Court available on Tuesday, the 6th?

MR. ZEMAN: It's -- I mean, I'm -- I'm usually available when you're available.

THE COURT: You want to come Tuesday, the 6th, in the morning?

MR. ZEMAN: That's fine, your Honor, yeah.

THE COURT: You want to do it on a Tuesday?

MR. HADDAD: That's fine, (indiscernible).

THE COURT: Tuesday, the 6th in the morning is

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good.

MR. HADDAD: I can be available.

MR. ZEMAN: Okay.

THE COURT: Okay, we'll make a note. So, what date -- let's make sure you meet with my clerk and know the 14 days when your supplemental briefs are due.

MR. HADDAD: Okay.

MR. ZEMAN: Thank you, your Honor.

THE COURT: Okay? Anything further?

MR. HADDAD: On that -- on the November 6th, is that 8:30, 9:00, 9:30?

THE COURT: It's always 8:30.

MR. HADDAD: Eight-thirty, yes, Judge.

THE COURT: All right, Court is in recess.

MR. ZEMAN: Thank you, your Honor.

MR. HADDAD: Thank you, your Honor.

THE CLERK: All rise.

(At 10:37 a.m., proceedings concluded.)

* * * * * *

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STATE OF MICHIGAN)
COUNTY OF OAKLAND)ss.

I certify that this transcript is a true and accurate transcription to the best of my ability of the proceeding in this case before the Honorable Denise Langford Morris, as recorded by the clerk.

Proceedings were recorded and provided to this transcriptionist by the Circuit Court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceeding or for the content of the recording provided.

Dated: February 4, 2019

/S/ Krista S. Michels
Krista S. Michels, CER #8490

APPENDIX H

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FILED Received for Filing Oakland County Clerk 8/31/2020 10:34 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE PEOPLE OF THE
STATE OF MICHIGAN,

v Case No. 2018-267140-FH

MATTHEW SCOTT DUFF,

Defendant./

STATUS CONFERENCE HEARING

BEFORE THE HONORABLE DENISE LANGFORD MORRIS, CIRCUIT JUDGE

Pontiac, Michigan - Wednesday, March 4, 2020

APPEARANCES:

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WITNESSES

None

EXHIBITS RECEIVED

None offered.

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Pontiac, Michigan

Wednesday, March 4, 2020 - 10:55 a.m.

* * * * * *

THE CLERK: Calling -- calling -- calling number 36, People versus Duff, case number 18-267140-FH.

MR. ZEMAN: Jeff Zeman appearing on behalf of the People. Good morning, again, your Honor.

THE COURT: Good morning.

MR. ZEMAN: Issa.

MR. HADDAD: Good morning, your Honor, Issa Haddad on behalf of Mr. Duff. This --

THE COURT: Okay. Where's Mr. Duff?

MR. HADDAD: This -- I got a call saying that they just wanted to meet with counsel and I didn't know we were going on the record.

THE COURT: I'm sorry. You're waiving his appearance? He has a right to be here.

MR. HADDAD: I'm -- I'm -- yes.

THE COURT: I don't know who told you that.

MR. HADDAD: I'm going to be waiving his appearance for -- for this -- for this matter, your Honor --

THE COURT: Okay. All right.

MR. HADDAD: -- with his permission.

THE COURT: Okay. So, what are we talking

about?

MR. ZEMAN: Your Honor, I was advised by your staff that you were looking to inquire from counsel as to what our position is on what --

THE COURT: Oh, this -- where's the case at?

THE CLERK: Oh, I'm so sorry, Judge.

THE COURT: The Court of Appeals case that --

MR. ZEMAN: That's right.

THE COURT: -- they wanted clarification on something.

MR. ZEMAN: That's right.

THE COURT: And so, I wanted to know if either of you have any opinion. We didn't necessarily need briefs or anything, but I didn't know what your position was. They're asking when did the seizure occur?

MR. ZEMAN: That's right.

THE COURT: So, I was wondering if you could look at the hearing transcript and if you have any position, either of you, with respect to your clients as to the Court of Appeals de -- request and could you approach, first?

MR. ZEMAN: First? Sure.

THE COURT: Yes.

(At 10:56 a.m., bench conference was held.)

(At 11:00 a.m., bench conference concluded.)

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THE COURT: Okay. So, it's my understanding that you do have respective positions as to the Court of Appeals request and so, you may state those on the record today.

MR. HADDAD: Yes. And your Honor, what I'd like to do is use the board to give you a visual of -- of what my position is, okay?

THE COURT: Okay.

MR. HADDAD: So, what we have is --

THE COURT: And I've gone over my notes with you at the bench.

MR. HADDAD: Yes. Okay, so there is a parking lot with a few parking spaces in it, okay? And my client is parked inside a parking space and the car is running with the lights on and it's cold out, okay? And the officer pulls into the parking lot and he's parked like this and he -- he blocks the -- he blocks the defendant's vehicle and there's grass over here and I think that there's bumpers -- bumpers or I -- I can't recall.

But for my client to drive forward would be he'd have to drive on the grass and that obviously would give rise to police to put their lights on and stop him. My client was asleep in the car. He was using the car as shelter and the cops had no probable cause. There's no crimes in the area. There's no reports of anything going

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on there. They come in and where they parked their car blocking my client is -- is the defense's position that's the point of the seizure. Now --

MR. ZEMAN: So, to respond briefly --

THE COURT: At the point that they blocked him in?

MR. HADDAD: At the point --

THE COURT: You're claiming that was the point, then?

MR. HADDAD: That's the point of the seizure.

THE COURT: Plaintiff seizure.

MR. HADDAD: If -- if I can -- if I can finish and then, you can --

MR. ZEMAN: Oh, I thought you were done.

MR. HADDAD: I wasn't done.

MR. ZEMAN: I'm sorry.

MR. HADDAD: I wasn't done.

MR. ZEMAN: I thought -- I thought -- sorry.

MR. HADDAD: She -- she was --

MR. ZEMAN: It was the point of the seizure.

MR. HADDAD: -- she -- she was -- she was writing something down and I was just waiting, okay?

MR. ZEMAN: I (indiscernible). Sure. Sure, sure, sure.

MR. HADDAD: And so, the video shows -- the --

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the video starts afterwards, okay? And the way that the officers walked in, my client could not reasonably back out -- straight back out without hitting them and the officer testified at the end of the transcript that he could have maneuvered around him and then, I asked the questions, you know, if he didn't want to talk to you, would you let him drive around you and leave. He goes, "No, I would have put my lights on, I would have stopped him."

Which goes to show that this was a criminal investigation from the beginning and not a community caretaker to check on somebody. The -- and the first questions when he approached was, "License, registration and insurance," okay? At the preliminary exam transcript, the -- the -- the -- the District Court Judge said that yeah, he parked behind him and that's where the testimony was in that transcript was he parked behind him to block him from leaving and the officer could do that to go start his investigation.

I mean, so, the defense's position is that the point of the seizure happened before the officer stepped out their car before they could smell alcohol before they could do anything and that's the point of the seizure and that's what violates the Constitution because they have no probable cause to stop him. Now, if the officer would

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have pulled next to him, it would have been a different story. My position is where the officer positioned his car was the seizure for the purposes of the Fourth Amendment and that's what the argument was.

And that the Court went on and -- and -- and made statements to the officer that there could be murders in Birmingham. This may be a high crime area, but there was nothing reported at the time and the cop just seen a -- a lone vehicle parked in a parking lot with the lights on and then, drove up to investigate.

MR. ZEMAN: Counsel, you're getting away from the issue. It's when the point of the seizure was --

MR. HADDAD: Right.

MR. ZEMAN: -- not --

MR. HADDAD: But the -- the -- the information they knew beforehand goes to the point of the seizure. There was no crimes committed. There was nothing. No calls, no be -- be on --

THE COURT: Okay. I think -- I think we have that --

MR. HADDAD: -- the look outs --

THE COURT: -- in the record.

MR. HADDAD: Yes.

THE COURT: Okay?

MR. HADDAD: That's our -- that's defense's

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position.

THE COURT: All right. Anything -- what's the People's position as to when the exact point of seizure occurred?

MR. ZEMAN: Sure. So, to answer that question directly, your Honor, I'm just going to go ahead and amend counsel's drawing right here. The testimony in the -- in the -- in the record from the evidentiary hearing in this case which was held, both parties had the opportunity to examine Off -- De -- Deputy Pence (ph) at that time.

Counsel had the opportunity to cross-examine Deputy Pence. Rely on that hearing and that evidence, Deputy Pence testified that at the time he pulled into the parking lot when he saw defendant's car sitting there, you know, with the lights on and running in the dark parking lot, he pulled in and positioned his car ten feet back from the defendant's vehicle, angled at a 45-degree angle so that he was facing the rear bumper of defendant's vehicle.

He testified that if the defendant had pulled straight back, sure. He would have hit the officer's vehicle had he continued to pull back, but if he had just turned his wheel, he would have avoided the defen -- the officer's vehicle and could have pulled out without an issue over the parking spots, not necessarily the grass.

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And that is the testimony and I'll -- I'll let you know a point to that is page 16 of the transcript from the evidentiary hearing and then also, continue with regard to the defendant's ability to clear the vehicle and then, clear the -- the deputy's vehicle and exit the parking lot, that's at pages 32 to 33.

The officer didn't have his overhead lights or siren activated at that time. It's the People's position that there was not a seizure of the defendant until such time as the officer observed the signs of intoxication and asked the defendant to participate in his investigation of operating -- of operating while intoxicated.

And, you know, I remind the Court obviously that the subjective intent of the officer does not go to the Court's examination of the question of the seizure for Fourth Amendment purposes. It's literally when did the stop actually occur as a matter of law. Lastly, as appeals counsel in this case when addressing it for the Court of Appeals, pointed out there's case law to the effect of a person inside a stationary that has already stopped a vehicle is stopped for the purposes of the Fourth Amendment only if officers completely block a person's parked vehicle with a police vehicle. That's People versus Anthony, 327 Mich App 24 at 40, your Honor. That's a 2019 case.

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THE COURT: People versus Anthony, 327 Mich App what?

MR. ZEMAN: Twenty-four at page forty. That's a 2019 case that's citing --

THE COURT: Okay.

MR. ZEMAN: Yeah, that's -- you'll -- you'll see the citation case.

THE COURT: Okay. All right. Anything further from defense counsel?

MR. HADDAD: Yes, your Honor. We've submitted the exhibits of the video --

THE COURT: Mm-hmm.

MR. HADDAD: -- to the Court and --

THE COURT: Okay.

MR. HADDAD: -- acc -- according to prosecution's positioning of where the -- the vehicle was --

THE COURT: Uh-huh.

MR. HADDAD: -- if the -- the camera's in here in a wide angle would show a clearer view of everything going on. The camera position in the video, and I encourage the Court to watch the video for just -- just bring it up and watch for a few seconds. See where the positions -- the car is much closer because the angle doesn't get the driver's door and it's showing -- it's

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showing, your Honor, I don't know if -- if you can see from the -- the monitor, I'll move it just a little bit. The angle, if it's ten feet away, may have shown the driver's door, but the car was so close to the bumper that it didn't get the entire driver's side door where the officer was standing because he was so close and he actually blocked the defendant in and his testimony that he was at least ten feet apart --

THE COURT: Uh-huh.

MR. HADDAD: -- was still not enough for my client to back out reasonably and leave. Additionally, the officer's testimony at -- at -- during the cross-examination or recross, he testified that if the driver were to back out and maneuver around, he would have put his lights on and stopped him and that's the -- and I know that's a hypothetical, but the officer's intent was, he was going to investigate a crime before anything in this position. And so, when the Court watches the video, and all's you've got to do is bring up the home screen, the --

THE COURT: Well --

MR. HADDAD: -- the first screen --

THE COURT: -- and for purposes of this inquiry, I think you're in agreement that it was dark?

MR. HADDAD: Yes, and -- and that --

THE COURT: And it was the lone vehicle --

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MR. HADDAD: Yes.

THE COURT: -- dark, lone vehicle and --

MR. HADDAD: And -- and your inquiry brought up one more memory that I have that shows clearly in the video. The officer put on a spotlight before he exited the vehicle and it shows in the -- in the video that the spotlight comes on and it shows that -- that he -- he -- he put the spotlight right on the driver's side door. And you could see the shadow of it on and I believe that it -- to see that, you have to watch the end of the video when they go to pull away because the spotlight comes off.

And so, even though they didn't use their overhead lights, they put the spotlight on the defendant at the end of the video. And so, all those facts come together that how close he was to the vehicle, he had him trapped and blocked in. The officer's testimony that he was ten feet away is just not credible because the video clearly shows he was a lot closer than ten feet. If he was ten feet away, the -- the angle on the camera would show clearly the driver's side door and there's nothing in there showing the driver's side door.

It's -- I encourage the Court to, you know, watch the first few seconds of the video and -- and -- and then, you know, review the officer's testimony on the fact that he would have put his lights on and stopped him if

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this guy would have tried to pull away -- drive away because he had the intention to stop him and talk to him.

THE COURT: Okay. And was the video admitted?

MR. HADDAD: The videos were admitted in the exam.

MR. ZEMAN: Yes, your Honor.

MR. HADDAD: In -- in the -- they were played at the exam and --

THE COURT: Yeah. You -- you stipped to Exhibit One and Two and so, is that the videos you're referring to?

MR. HADDAD: Yes.

MR. ZEMAN: Yes.

THE COURT: Okay.

MR. HADDAD: I believe the Court -- the prosecution dropped off copies to the Court. If they need, I -- I have my copies with me, if the Court -- if they're not readily available for the Court.

THE COURT: All right. We'll take a look at it. And anything further from the People?

MR. ZEMAN: Just briefly, your Honor, since counsel keeps bringing it up, I would just -- it -- this is contained in People's brief and statement of law subsequent to the evidentiary hearing, the fact that an officer does not have the state of mind, which is

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hypothetic, (indiscernible) by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstance is viewed objectively justify that action.

That is Whren versus United States, 517 U.S. 806 at page 813, your Honor. So really, Deputy Pence's response to what he would have done, that hypothetical, is irrelevant to the Court's inquiry today for the purposes of the Fourth Amendment. Lastly yes, the People would agree that Deputy Pence did aim the spotlight at the -- at the suspect vehicle. He did testify to that at the evidentiary hearing. That's on page 16 of the transcript.

He indicated at that time that he pointed the spotlight for his and his colleague's safety. Again, the overhead lights and the siren were not turned on, but it was a dark parking lot late at night, your Honor, so the -- so hence, the light.

THE COURT: Anything further?

MR. ZEMAN: Oh, yes. Sorry, just -- and lastly, to respond to counsel's last point, Dep -- Detective Pence's testimony was credible with regard to, you know, it -- it does -- does not contradict the video evidence is the People's position. Secondly, Deputy Pence was candid. He, you know, told the Court what he was thinking. He told the Court that had the defendant backed up straight,

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had gone and backed up in a straight line, that -- with his own vehicle, but you know, it was clear to the Court that all the defendant had to do was turn his wheel. He would have cleared the officer's vehicle and he was not completely blocked in.

THE COURT: Okay. Anything further?

MR. HADDAD: Yes. And -- and -- and finally, your Honor, People v Freeman is the case where the officers need probable cause to stop someone for the Fourth Amendment. In this case here, the positioning of the vehicle with the spotlights, you know, going up to him, the one thing that I've noticed in the preliminary exam transcript, there was no testimony that this was done for a community caretaker to, you know, see if this guy was okay or not.

It was all directed towards license, registration, insurance and only at the preliminary exam after we filed our motion did they bring in that they were checking on him initially. So --

THE COURT: Okay. So, do you both agree that under the facts and the video, the defendant had done nothing wrong when the -- Officer Pence pulled up behind him? At whatever point he pulled up, whether it was within ten feet or without ten feet or actually ten feet?

MR. HADDAD: I agree with that statement, your

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Honor.

MR. ZEMAN: Well, I can't agree to that statement in the light of the subsequent investigation.

THE COURT: So, what is it that -- what is it -- is there anything in the evidence, in the record --

MR. ZEMAN: Sure.

THE COURT: -- that the defendant was doing anything wrong at that time?

MR. ZEMAN: Or at least that the officer had observed him doing anything wrong? Is that the Court's question? It's --

THE COURT: Yea -- yeah. Had he been observed doing anything wrong?

MR. ZEMAN: So, Peop -- so, I'll -- I'll advise the Court that -- that I don't believe my -- the answer I'm about to give you as relevant to the Court of Appeals' inquiry, your Honor --

THE COURT: Uh-huh. Uh-huh.

MR. ZEMAN: -- insofar as they're asking about the time that he was actually seized?

THE COURT: Yes.

MR. ZEMAN: Right. But People's secondary argument at the time we had this evidentiary hearing and I filed my subsequent findings of fact, conclusions of law was -- was that there would have been reasonable

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suspicion, which is, of course, the standard for a seizure under Terry. Given -- given the officer's testimony about where the defendant was parked and the fact that he's sitting in his car. Now again, that's a secondary argument, primarily the People's argument is that the defendant was not even seized until the time that the officer approached his vehicle and made the observations and asked him to get out.

THE COURT: So, what you're saying is that they could have seized it, but they didn't until later?

MR. ZEMAN: I -- I think so. I think -- and candidly, I do think it's a weaker argument because again, it is just a car idling in the parking lot.

THE COURT: Right.

MR. ZEMAN: People's primary position on this is again, that the officer did not seize the defendant at that time.

THE COURT: Okay. Anything further?

MR. HADDAD: The off -- he was innocent conduct in a parked motor vehicle --

THE COURT: I think we're starting to repeat ourselves.

MR. HADDAD: Yes.

THE COURT: Yet, you say that your client was doing nothing wrong. He's just sitting in his car. It's

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idling. There's no reports of anything going on wrong. It may be a high crime area, but they're not saying that they were investigating a specific crime.

MR. HADDAD: Correct.

THE COURT: And so, you're saying that that's irrelevant. The seizure took place when the defendant, a reasonable defendant, would not have believed that he could back and curve his wheel to avoid hitting the police vehicle that had pulled up behind him in the dark in the park lone area.

MR. HADDAD: Correct.

THE COURT: Okay. Anything further that you haven't already stated?

MR. HADDAD: The District Court Judge's findings at the bind over clearly stated that he had the right to block him in to investigate and that was his conclusions and he watched the video at the preliminary exam. And I encourage the Court to review the -- the arguments at the preliminary exam transcript for -- for the argument for the bind over.

THE COURT: Okay.

MR. ZEMAN: And then, I guess just briefly, my last response would be then that the Court obviously heard the testimony of Deputy Pence, his testimony with regard to this very issue was that, and he's obviously the

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witness who was present at the time, was that the defendant's vehicle was not completely blocked in, which is the relevant question in the People's position.

THE COURT: The witness being?

MR. ZEMAN: I'm sorry, the -- sorry, the defendant's vehicle was not completely blocked in --

THE COURT: Yes.

MR. ZEMAN: -- which is the operative question.

THE COURT: That's your position that --

MR. ZEMAN: Yes.

THE COURT: -- it was not completely blocked in. That although the defendant couldn't have backed straight out, he could have gone -- gone around the vehicle?

MR. ZEMAN: Yes, your Honor.

MR. HADDAD: Yes, your Honor.

THE COURT: Anything further?

MR. HADDAD: I think -- I think I said enough.

THE COURT: Okay, thank you.

MR. ZEMAN: Thank you, your Honor.

THE COURT: I appreciate you coming in, I really do.

MR. HADDAD: We have a return date, I believe, of March 12th?

THE COURT: Yeah, I'll have it done by then.

MR. HADDAD: Okay.

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THE COURT: Okay?

MR. ZEMAN: Thank you, your Honor.

MR. HADDAD: All right.

THE COURT: All right, thank you.

MR. HADDAD: Thank you very much, your Honor.

THE COURT: All righty, have a good day, gentlemen.

MR. HADDAD: Does the Court have a copy of the preliminary exam transcript?

THE COURT: Yes.

MR. HADDAD: Okay.

THE COURT: All right, but I think we have it. If we don't have it, we can print it out.

MR. HADDAD: Okay. I --

THE COURT: It's been filed.

MR. HADDAD: -- they -- they -- they mailed me one to my old address and then, I picked up another one. So, I have an extra copy.

THE COURT: So, the one -- I -- I have a copy. It's --

MR. HADDAD: Okay.

THE COURT: -- like, 58 pages, but I don't know if it's the whole thing. So, I want to make sure we have the whole thing.

MR. HADDAD: Fifty-eight pages is the whole

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thing for the preliminary exam transcript.

THE COURT: Okay, so noted.

MR. HADDAD: Yes.

THE COURT: There wasn't a part two.

MR. HADDAD: There wasn't a part two. It was a one-day thing.

THE COURT: Okay. So, we've got it. Okay?

MR. HADDAD: Thank you very much, Judge.

THE COURT: All right, thank you. Appreciate your presence.

MR. ZEMAN: Yes, your Honor.

THE COURT: Call the next case.

THE CLERK: That completes the docket for today, your Honor.

THE COURT: Okay. The Court is in recess.

(At 11:17 a.m., proceedings concluded.)

* * * * * *

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STATE OF MICHIGAN)
COUNTY OF OAKLAND)ss.

I certify that this transcript is a true and accurate transcription to the best of my ability of the proceeding in this case before the Honorable Denise Langford Morris, as recorded by the clerk.

Proceedings were recorded and provided to this transcriptionist by the Circuit Court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceeding or for the content of the recording provided.

Dated: August 31, 2020

/S/ Krista S. Michels
Krista S. Michels, CER #8490

APPENDIX I

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE PEOPLE OF THE
STATE OF MICHIGAN,

v Case No. 2018-267140-FH

MATTHEW SCOTT DUFF,

Defendant./

PRETRIAL HEARING

BEFORE THE HONORABLE DENISE LANGFORD MORRIS, CIRCUIT JUDGE

Pontiac, Michigan - Thursday, July 23, 2020

APPEARANCES:

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EXHIBITS RECEIVED

None offered.

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Pontiac, Michigan

Thursday, July 23, 2020 - 11:11 a.m.

* * * * * *

(Hearing held via Zoom Videoconferencing.)

THE COURT: Call the next case. Clerk, are you muted?

MR. DUFF: Not -- I'm unmuted.

THE COURT: I'm talking to my clerk.

THE CLERK: Calling -- calling docket number ten, People versus Matthew Scott Duff, case number 18-267140-FH, date and time set for pretrial.

MR. ZEMAN: Jeff Zeman appearing on behalf of the People. The People consent to the Zoom hearing this morning, your Honor.

MR. HADDAD: Good morning, your Honor, Issa Haddad on behalf of Matthew Duff, who's here via Zoom. We also consent to the Zoom hearing for this proceeding.

THE COURT: Okay. And this is the date set for pretrial. What do you need from me, counsel?

MR. HADDAD: Your Honor, at this time, you did grant our motion to suppress the evidence. At this time, I'm moving for a dismissal.

THE COURT: Okay. I believe -- is this your case, Mr. Zeman?

MR. ZEMAN: It is, your Honor. To advise the --

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to refresh the Court's recollection with regard to this particular case, this -- the People received this order last week. It suppresses the evidence, pretty -- pretty much all the evidence except for -- and I've discussed this with counsel, the officer's observation of --

THE COURT: Have you had a chance to meet with --

MR. ZEMAN: I'm sorry, your Honor. Could you repeat that?

THE COURT: Have you had -- have you had a chance to meet with your appellate division?

MR. ZEMAN: Yes, your Honor, and have spoke to the appellate attorney. The People are -- you know, he -- he advised me to advise the Court that we, at this time, do not, given the suppression, have the evidence to proceed with the charges at trial. We are not stipulating to any dismissal in this case.

And the Court -- you can either feel free to set it for trial, we won't be in any better position then, given the nature of the ruling, or entertain, you know, the -- the defense's order. Today, I'd -- you know, I'd waive the notice with regard to the motion. I have no problem with you hearing it today, but I'm not stipulating to the dismissal.

THE COURT: Okay. Counsel, did you want to say

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anything else?

MR. HADDAD: Yes, your Honor. Given the lights of the order -- the Court's order, the only evidence the prosecution has is a car parked in a parking lot with the lights on and that's pretty much it. You know, no crime was reported. Nothing was there. They don't have anything to go forward with trial. And so, I'm asking the Court to dismiss this matter. If they want to appeal it, they can, but I believe that if we do set it for trial, we'd be wasting everybody's time.

THE COURT: Okay. Given what the prosecutor has already stated, I'm simply going to dismiss it, but I'll note for the record that should the prosecutor appeal and should we hear anything from the appellate courts, we'll follow their directive. Our appellate courts are not shy and so, they'll let us know.

MR. HADDAD: Thank you very much. With regard to bond, we ask that that be (indiscernible) and returned.

THE COURT: And have you posted a bond; is that the issue?

MR. HADDAD: Yes, your Honor, a bond was posted. I believe it was only $500.

THE COURT: Okay. Any response as to the bond issue, prosecutor?

MR. ZEMAN: No, your Honor.

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THE COURT: All right, so ordered.

MR. HADDAD: Thank you, your Honor.

THE COURT: If you get the orders through to me through my clerk through the cube (ph) and I'll sign them up on presentation.

MR. HADDAD: Thank you, Judge.

MR. ZEMAN: And counsel, if you could please send your drafts to me prior to submission, I would appreciate it.

MR. HADDAD: I will do that.

THE COURT: Oh, absolutely. Yeah.

MR. HADDAD: Thank you, Judge.

THE COURT: All right, thank you. Have a good day, everyone. Call the next case.

(At 11:14 a.m., proceedings concluded.)

* * * * * *

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STATE OF MICHIGAN)

COUNTY OF OAKLAND)ss.

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Dated: August 31, 2020

/S/ Krista S. Michels

Krista S. Michels, CER #8490

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