No. 2:14-CR-2317

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

JAMES WILLIAM PEARSON,

APPELLANT,

v.

UNITED STATES OF AMERICA

APPELLEE.

APPEAL TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WYTHE

BRIEF FOR APPELLANT

S15365

Counsel for Appellant

April 6th 2015

QUESTIONS PRESENTED

I. Would a reasonable person feel free to walk away from a police encounter at 2:30 A.M. after two officers confront, question, take possession of identification, and retain identification in order to conduct a criminal records check?

II. Whether the discovery of an outstanding arrest warrant is an intervening circumstance sufficient to purge the taint of evidence discovered after an illegal Fourth Amendment seizure?

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Procedural History

During a search incident to arrest, an officer found evidence in Pearson's pocket and Pearson was charged with knowingly and intentionally possessing 8.2 grams of cocaine base, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 844. (R. at 4.) Mr. Pearson plead not guilty to the count of possession and motioned that the evidence found by Officer Martin be suppressed as fruit of the poisonous tree since he was illegally seized when Officer Martin retained his I.D. (R. at 22.) The United States opposed the motion contending that although there was no reasonable suspicion to justify the initial stop, the encounter between Officer Martin and Pearson remained consensual. In addition, the United States contends that even if Pearson was illegally seized, the discovery of an outstanding warrant is an intervening circumstance that should purge the taint of any illegality. (R. at 19.)

The United States District Court For the Eastern District of Wythe denied Pearson's motion to suppress, ruling that Pearson was not seized while the officer retained his identification. The opining Judge held that the encounter between Officer Martin and Mr. Pearson was consensual until the time of arrest and that the discovery of an outstanding warrant is an intervening circumstance that purged the taint of any illegal seizure. (R. at 6.) Pearson entered a guilty plea but appeals the District Court's ruling against his motion to suppress evidence. (R. at 1, 4.)

Statement of Facts

This case presents a Fourth Amendment search and seizure issue involving an encounter between a government official and an American citizen. During the encounter, Officer Charles Martin approached Pearson, questioned him about his whereabouts, requested Pearson's identification and retained the identification for the purpose of running an outstanding warrant check. The officer did all this without

any reasonable suspicion that Mr. Pearson was committing or attempting to commit a crime. (R. at 11, 19.)

On October 12, 2014, Officer Martin, an experienced law enforcement officer of the Oaktown Police Department, was on his regular duty of neighborhood patrol with his partner. Pearson was walking home from a party at 2:30 A.M. when the officers noticed Pearson and a friend. The officers pulled their vehicle into a driveway and rushed out the car to approach Pearson. Officer Martin's partner dealt with Pearson's friend while officer Martin handled with Pearson. (R. at 10.)

The officer insisted that Pearson provide a form of identification. Pearson provided a college I.D. card containing his name and date of birth. In less than one minute the officer verified that the I.D. was valid. (R. at 13.) The officer also verified that Pearson's home was just a few houses from where the encounter was taking place. (R. at 12.) Instead of returning Pearson's I.D., Officer Martin retained the I.D. and went back to his patrol car to run a criminal record check on Pearson. The officer retained the I.D. for more than ten minutes and the criminal background check revealed that Pearson had an outstanding warrant for failure to appear for a DUI charge. (R. at 11.) Officer Martin informed the defendant that he was under arrest, handcuffed him and searched him.

SUMMARY OF THE ARGUMENT

The United States did not have any reasonable suspicion or probable cause to justify the detention of James Pearson, therefore, the appellant was illegally seized when a law enforcement agent retained appellant's I.D. for the purpose of running an outstanding warrant check. The United States District Court for the Eastern District of Wythe incorrectly ruled against the suppression of evidence found as a result of this constitutional violation. First, the district court erroneously ruled that the appellant consented to the encounter with the officer. Second, the district court wrongly ruled that the discovery of an outstanding arrest warrant was an intervening circumstance that purged the taint of an

illegal seizure. Lastly, the district court erred in holding that the misconduct of the officer was not flagrant in purpose.

The persuasive jurisprudence around the nation demonstrates that the district court's ruling was erroneous. A seizure occurs when a reasonable person would not feel free to end the encounter with an officer and continue their journey. Evidence found as a result of constitutional violations, such as an illegal seizure, is subject to the exclusionary rule unless the discovery is sufficiently attenuated from the violation.

Officer Martin randomly selected appellant for questioning. The officer requested his identification and retained the I.D. to run an outstanding warrant check. The warrant check came back with a warrant for a minor violation and the officer searched and arrested the appellant. Since the initial approach by the officer was without reasonable suspicion or probable cause, the stop and search is therefore unreasonable.

When an officer retains a citizens I.D., an officer is using his authority to restrain the movement of that citizen, causing the citizen to not feel free to leave the encounter and continue his journey. One's identification is the most important personal effect that a citizen carries and it is unreasonable to think that anyone would feel free to walk away while a law enforcement officer retains one's I.D. Additionally, evidence found as a result of an illegal act on the part of the government should be suppressed to maintain the purpose of the Fourth Amendment. If discovering an outstanding warrant is an intervening circumstance that allows evidence found after a constitutional violation to be admissible, officers will violate citizen's constitutional rights with impunity. If an officer can walk up to any citizen at random, question them and retain their I.D. to run a warrant check, the purpose of the Fourth Amendment's protection against oppressive interference by law enforcement will dissipate. For these reasons, this court should hold that the appellant was illegally seized equating a Fourth Amendment violation and that the evidence found as a result of this violation should be suppressed.

ARGUMENT

I. THE ENCOUNTER BETWEEN OFFICER MARTIN AND MR. PEARSON TURNED INTO A SEIZURE AS SOON AS OFFICER MARTIN RETAINED MR. PEARSON'S I.D. AFTER VERIFING ITS VALIDITY.

The Fourth Amendment of the constitution protects against "unreasonable search and seizure." U.S. Con, Amendment IV. The purpose of the amendment is to avoid "oppressive interference by enforcement officials with the privacy and personal secularity of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976). A seizure occurs when an officer uses a "show of authority" to restrain the liberty of a citizen. Terry v. Ohio, 392 U.S. 1, 19 (1968). Justice Stewart formulated the Mendenhall test on the basis that "a person has been 'seized' within the meaning of the Fourth Amendment when a reasonable person would have believed that he was not free to leave. United States v. Mendenhall, 446 U.S. 544, 554 (1980).

To determine if someone is seized, a court must examine the "totality of circumstances" to decide "if a reasonable person would feel free to leave" the encounter. Mendenhall, 446, U.S. 544, 554. Mendenhall provides "examples of circumstances that might indicate a seizure;" these non-exhaustive circumstances include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Id. The Tenth Circuit added "prolonged retention of person's personal effects, such as . . . identification" as a factor. United States v. Sanchez, 89 F.3d 715, 718 (10th Cir. 1996).

This Twelfth Circuit, as well as the Supreme Court, have not considered whether the I.D. retention factor is a *show of authority* that would cause a reasonable person to believe that he was not free to end the encounter; therefore, the seizure issue is a case of first impression. This Court must evaluate how other district courts have decided if a seizure occurred when I.D. retention is one of the factors. District courts have ruled in one of three ways: a number of courts have held "in the totality of

circumstances" no "reasonable person" in the current society would feel free to leave once a police officer retains his identification. See United States v. Lambert, 46 F.3d 1064 (10th Cir. 1995). Some courts look at the I.D. retention factor as "*highly material"* and weigh I.D. retention as a heavier factor under a "totality" analysis. United States. v. Waksal, 709 F.2d 653, 660 (11th Cir. 1983).

In the instant case, this Court should find that Pearson was seized when the officer requested Pearson's I.D., verified that the I.D. was valid, and still retained the identification to begin a new investigation. Under the totality of circumstances surrounding the encounter between Officer Martin and Pearson, a reasonable person would not believe that he was free to continue his journey without his I.D. This court should consider I.D. retention as a seizure *per se.* Even if the court considers I.D. retention as *highly material* the holding should stay the same. Thus, since Pearson was illegally seized, the discovery of an outstanding warrant is not a sufficient "intervening circumstance" to purge the taint of Officer Martin's illegal action, therefore the evidence found should be suppressed.

A. OFFICER MARTIN'S ENCOUNTER WITH PEARSON IMPLICATES A FOURTH AMENDMENT SEIZURE WHEN OFFICER MARTIN RETAINED PEARSON'S I.D FOR THE PURPOSE OF RUNNING A WARRANT CHECK

1. Under the "per se" analysis, the police officer's retention of Pearson's I.D. would communicate to a reasonable person that he is not free to terminate the encounter and continue on with his journey.

Officer Martin's words and actions would communicate to a reasonable person that he had no choice but to cooperate with the officer. Identification retention is a factor that would make a reasonable person not feel free to terminate the encounter with a police officer. It is reasonable that an officer request a citizen's identification merely to confirm one's identity. Once an officer has the identification card, an officer with no reasonable or probable cause is limited to checking the I.D. for "validity." State v. Backstrand, 354 Or. 392 (2013).

Officer Martin's approach, questioning and retention of Pearson's I.D. was a "*show of authority"* that would communicate objectively to Pearson that he was not free to "continue his journey" by just

walking away. United States v. Berry, 670 F.2d 583, 587 (5th Cir. 1982). For example, in Lambert, the court held that the defendant "would not reasonably have felt free to leave or terminate the encounter with the agents because his driver's license had not been returned to him" United States v. Lambert, 46 F.3d 1064, 1068 (10th Cir. 1995). In Lambert, an officer approached the defendant as he was nearing his car with keys in hand. Officers asked for the defendant's ticket and driver's license, which the defendant supplied. Agents asked if they could search defendant's luggage and the defendant refused to consent. The agents seized the bag, ran a warrant check and then let Lambert go without his suitcase. Agents obtained a search warrant for the luggage and eventually found drugs. In determining that the defendant was seized, the court held that "what began as a consensual encounter quickly became an investigative detention once the agents received [defendant's] driver's license and did not return it to him." Id. at 8.

Similarly, in Daniel, the Tennessee Supreme Court held that a consensual encounter turned into a seizure when the officer "retained Daniel's I.D. to run a computer warrants check." State v. Daniel, 12 S.W. 3d 420, 422 (Tenn. 2000). In Daniel, when an officer approached the defendant and a group of men and asked for identification, they complied. The officer examined and retained the I.D. for the purpose of a warrant check. Daniel had a warrant and the officer arrested him. In holding that the defendant was seized, the court relied on Royer's ruling that "abandoning one's identification is simply not a practical or realistic option for a reasonable modern society." Id. at 19 (quoting Fla. v. Royer, 460 U.S. 491 (1983)). Therefore, "no reasonable person would believe that he or she could simply terminate the encounter by asking the officer to return the identification." Id. at 19.

In the instant case, Pearson would not have reasonably felt that he could terminate the encounter with Officer Martin by just asking for his I.D. back or walking away without his I.D. Additionally, the time of the encounter further lessens any claim that the encounter was consensual. Pearson's I.D. was retained at 2:30 A.M. and the questioning and retention lasted more than ten

minutes. Officer Martin made a *show of authority* when he stopped Pearson in the presence of his partner. Officer Martin was also armed and uniformed, an explicit show of his authority as a law enforcement official. Moreover, the officers were driving a marked police car and used the car to intimidate and possibly block the path in which Pearson was walking. Therefore, Officer Martin's show of authority combined with his retention of Pearson's identification would lead any reasonable citizen to believe that they no longer had the freedom to terminate the encounter.

2. Even if the retention of identification is not a seizure *per se*, it is highly material, especially when the identification is used to begin another investigation outside of the reason of the original encounter.

If the retention of identification factor in a "totality" analysis is *highly material,* Officer Martin's retention of Pearson's I.D. was excessive. After the officer verified the validity of the I.D. and continued to retain it to run an outstanding warrant check, the officer began a new investigation. Although the I.D. retention factor is not dispositive in a *highly material* analysis, it heavily weighs towards seizure. United States v. Waksal, 709 F.2d 653, 657. (11th Cir. 1983). Had Officer Martin returned the identification to Pearson after checking for validity, the encounter could have remained consensual. Unfortunately, the officer illegally detained Pearson while conducting his second investigation on a citizen that the officer did not reasonably suspect was committing a crime.

In Waksal, the court held that the defendant was seized when the officer coercively retained the defendant's identification and ticket since the court "fail[s] to see how [defendant] could have felt free to walk away from police officers when they still possessed the documents necessary for him to continue his journey." Id. at 658. The facts in Waksal are similar to our instant case; two officers approached defendant at a Florida airport and asked defendant for identification and airline ticket, the defendant provided a driver's license. The officers escorted defendant to a nearby room where they found drugs. In holding that the defendant was seized prior to the discovery of the drugs, the court stated that I.D. retention is "highly material in analyzing the coerciveness of police conduct." Id.

Similarly, in Cordell, the Fourth Circuit found that the defendant was seized when an officer handed the defendant's I.D. to another officer and began "conducting a narcotics investigation." United States v. Cordell, 723 F.2d 1283, 1284 (7th Cir. 1983). In Cordell, two officers approached the defendant at a Chicago airport. The officers asked the defendant for his identification and airline ticket, and defendant provided both. The officers asked to search defendant's bags, where they discovered drugs and arrested him. In holding that Cordell was seized, the court reasoned that the officer's encounter moved to an "investigatory stop" that needed reasonable suspicion when they retained the defendant's I.D. Id. at 1285.

Analogously, in White, the court held that White was not seized while the officer retained his I.D because the "initial encounter" was consensual until the defendant began running. United States v. White, 670 F. Supp. 2d 462, 477 (W.D. Va. 2009). In White, an officer approached the defendant during an investigation of a shooting. The officer requested defendant's I.D. for the purpose of running a warrant check. The warrant check came back negative but the officer further questioned the defendant about having any weapons. Id. at 472. As the officer began to pat down the defendant he felt "a rigid, cylindrical object" then the defendant began to flee. The officer pursued the defendant, found the gun and arrested him. Id. at 475. In holding that the encounter remained consensual, while the officer retained the defendants I.D., the court noted that the "stop and frisk was supported by reasonable cause." Id. at 477

Thus, in the instant case, since Officer Martin retained Pearson's I.D. for ten minutes without informing Pearson that he was free to leave, Officer Martin displayed a *show of authority.* The government has conceded that they did not have any reasonable cause to detain Pearson, therefore, when officer Martin retained Pearson's I.D., he began another investigation different from the reason of his original stop. The retention of Pearson's I.D. shows the coerciveness of Officer Martin's action.

Running a warrant check on Pearson was a way for Officer Martin to attempt to justify violating Pearson's constitutional right to be free from oppression by government officials.

II. THE DISCOVERY OF AN OUTSTANDING ARREST WARRANT DOES NOT SUFFICENTLY "ATTENUATE" THE INITIAL ILLEGALITY OF THE OFFICERS STOP OF JAMES WILLIAM PEARSON.

The exclusionary rule "suppresses the admission of evidence obtained in violation of the Constitution." Mapp v. Ohio, 367 U.S. 643, 645 (1961). The Supreme Court has held that the "sole purpose" of the exclusionary rule, "is to deter future Fourth Amendment violations." Davis v. United States, 131 S.Ct. 2419 (2011). To balance some of the effect of the rule, the Supreme Court held that "the deterrence benefit of suppression must out-weigh its heavy costs." Herring v. United States, 555 U.S. 135, 141 (2009). When evidence discovered is "direct or primary in its relation" to an officer's illegal act, evidence is usually suppressed, but if the evidence is sufficiently "attenuated" from the illegality, the evidence may be admitted. See Brown v. Illinois, 422 U.S. 590 (1975) and 3 Wayne R. LaFave., Criminal Procedure, § 9.3(a) (3d ed. 2007) (internal quotation marks omitted).

To determine whether evidence seized after an officer violates a citizen's Fourth Amendment right is exempt under the "exclusionary" rule, the evidence must have either been an inevitable discovery, or be "so attenuated as to dissipate the taint." Wong Sun v. United States, 371 U.S. 471, 491 (1963). In determining if evidence falls under the "attenuation" exemption, Wong Sun and Brown established three "relevant" factors in evaluating if the illegal encounter was separate from the discovery of the evidence: "temporal proximity," "intervening circumstances," and "purpose and flagrancy." Wong Sun, 371 U.S 491. The attenuation analysis is a "fact-intensive, case-by case analysis." Brown, 422 U.S 604. This court is asked to decide if evidence discovered shortly after an illegal seizure should be suppressed. Therefore, this court must examine the *Wong-Brown* factors and decide if admitting the evidence will deter or promote Fourth Amendment violations. Thus, these factors will be discussed below.

In the instant case, since all weighed factors suggest exploitation, this Court should suppress the evidence. If the sole purpose of the exclusionary doctrine is to deter violations of constitutional rights, a ruling other than for suppression, would fail to meet said purpose. All of the *Wong-Brown* factors weigh in favor of suppression. The "intervening circumstances" of discovering an outstanding warrant on a petty crime, does not break "the legal chain of events leading to the discovery" of the evidence. United States v. Green, 111 F.3d 515, 519 (7th Cir. 1997). In other words, Officer Martin's discovery of an arrest warrant is not "so distinct" to distinguish if Officer Martin "exploited" his initial illegal seizure when he found the evidence at bar. Wong Sun, 371 U.S 493. Officer Martin's actions when he stopped Mr. Pearson without any reasonable suspicion, requested his I.D., and retained it for the sole purpose of running an outstanding warrant check, was "flagrant" conduct supporting suppression. Additionally, Officer Martin's conduct was "purposeful" to find something to justify his stop of Pearson, since he had no reasonable or probable cause to otherwise justify the stop. Finally, the brief temporal proximity between Officer Martin's violation of Mr. Pearson's constitutional right "indicate[s] exploitation because the effects of the misconduct have not had time to dissipate." (Shoulderblade, 905 P.2d 289, 293). Thus, all weighed factors of the "attenuation" exemption to the "exclusionary rule" weigh in favor of suppression due to the officer's exploitation.

A. OFFICER MARTIN FINDING AN OUTSTANDING WARRANT DOES NOT SUFFICENTLY PURGE THE TAINT OF THE ILLEGAL SEIZURE OF PEARSON

1. Discovery of an outstanding warrant, after an illegal seizure is not an "intervening circumstance" that dissipates the taint of the illegally seized evidence.

The "intervening circumstances" factor of the doctrine of attenuation strongly intersects with the "purpose and flagrancy" factor. Flagrant and purposeful conduct to violate a citizen's Fourth Amendment right cannot in turn be used to justify the illegality. Therefore, since Martin's actions of stopping a citizen without any reasonable suspicion are "flagrant and purposeful" behavior, the "intervening" factor does not dissipate the taint of Officer Martin's illegality. Pearson had no free will in

determining if Officer Martin could run a warrant check and was randomly selected in the street by Officer Martin and detained. An act of free will indicates that "there is a break in the chain of circumstance" between the constitutional violation and the discovery of evidence. State v. Frierson, 926 So. 2d 1139 (Fla. 2006).

In our instant case, since Pearson displayed neither free will nor made a statement or confession there can be no separation between the illegality of Officer Martin's behavior and an independent act by Mr. Pearson. Officer Martin exploited his illegal act of seizing Pearson to find the evidence at question. Therefore, the evidence should be suppressed in order to maintain the enforcement of the Fourth Amendment and deter other officers from violating constitutional protected rights.

The defendant's acts of free will are at the center of all the seminal cases of the attenuation doctrine, particularly the "intervening circumstances" factor. For example, in Wong Sun and Brown**,** the evidence in question were confessions provided by the defendant, an act of free will. In Wong Sun, the court held that the confession provided by the defendant was not "sufficiently an act of free will to purge the primary taint" of an illegal act. Id. at 486. In Sanchez, the court held that "since the interaction between the officer and Sanchez" was "without probable cause, the evidence . . . should be excluded as fruit of the poisonous tree." Sanchez v. State, 803 N.E.2d 215 (Ind. Ct. App. 2004). In Sanchez, the police officer stopped the defendant while defendant was walking to ask if he knew the whereabouts of a person the officer was attempting to serve a warrant. Id. at 218. The officer then asked for an identification card but the defendant refused to provide one. The officer handcuffed the defendant and took him to the police station. Id. at 220. Once they learned of the defendant's identity they searched him, found drugs then arrested the defendant. The court held that "all three factors weighed against attenuation" and that "despite the discovery of an outstanding warrant, there were no intervening circumstances" to attenuate the constitutional violation. Id. at 222

Similarly, lack of an act of free will by the defendant was the main reason a sixth district court found that there was not an "intervening circumstance" to justify attenuation. The court in Williams held that evidence obtained after the defendant verbally communicated that he had outstanding warrants, was not a "product of free will." United States v. Williams, 615 F.3d 657, 661 (6th Cir. 2010). In Willaims, an officer approached a suspected trespasser. The officer asked if the citizen had any outstanding warrants or weapons. The citizen suggested that he may have a warrant and that he "had to protect himself," suggesting that he was armed. The officer searched the citizen, found the gun and arrested him. Id. at 662. This court found that the citizen was seized prior to his utterance and that the discovery of a gun along with the citizen's verbal indication of possible outstanding warrants were not attenuated from the initial illegality since the statement was not an "intervening spontaneous action that typically support attenuation." Id. at 669. Therefore, since the defendant did not have any "free will" when he was approached and questioned by the officer, the attenuation analysis lacked the "intervening circumstance" that would favor suppression. Thus, forced actions, such as an officer approaching you and asking for identification, cannot be the intervening circumstance used to justify admission of evidence that is *fruit of the poisonous tree*.

In our instant case, Mr. Pearson did not commit an act that led Officer Martin to discover the evidence in question. The evidence discovered came after an unconstitutional detention, therefore, there is no "intervening circumstance" that sufficiently attenuates the discovery from the illegality. Admitting evidence that is not sufficiently attenuated from the illegality does not deter future constitutional violations rather it promotes it. The United States has conceded that the officer did not have a reasonable suspicion to justify the detention of Mr. Pearson. At the point that Pearson provided his identification to the officer, Pearson lacked the ability to exercise any "free will" as he was now under the control of a government official. Thus, since Pearson did not commit an act that led to the

discovery of the evidence, the factor of "intervening circumstance" in the instant attenuation analysis weighs towards suppression.

2. Officer Martin's illegal detention of Pearson was flagrant in nature and benefited the police at the expense of Mr. Pearson's constitutional right.

In addition to the "intervening circumstances" factor weighing in favor of suppression, the "purpose and flagrancy" of the officer's illegal actions also point to suppression. The "purpose and flagrancy" factor focuses on the "manner in which . . . arrest was affected," and is the "most important factor because it is directly tied to the purpose of the exclusionary rule." Brown v. Illinois, 422 U.S. 590, 604 (1975), United States v. Simpson, 439 F.3d 490, 496 (8th Cir. 2006).

If the "manner" gives "the appearance of having been calculated to cause surprise, fright and confusion" the "purpose and flagrancy" factor moves towards suppression. Brown, 422 U.S 605. The confusion, fright or surprise caused is a strong indication that any evidence discovered is a result of the officer's misconduct. Thus, an officer's conduct is "flagrant" when an "officer detains a person without justification in violation of an established constitutional right." United States v. Walker, 807 F. Supp. 115, 117 (D. Utah 1992). Additionally, an officer's behavior is purposeful when an officer "knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless" or when the police action is "an effort to benefit the police at the expense of the suspects' protected rights." United States v. Fazio, 914 F.2d 950, 958 (7th Cir. 1990). Lastly, "the intervening factors and flagrancy factors can become intertwined." State v. Shaw, 213 N.J. 398, 419 (2012).

In Faulkner, the court held that "because it was such a close call" as to whether the defendant committed a crime the officers action was not flagrant. United States v. Faulkner, 636 F.3d 1009 (8th Cir. 2011). In Faulkner, a drug dealer known by law enforcement was pulled over for what seemed like an illegal left turn. The officer ran an outstanding warrant check and found a warrant. The officer arrested the defendant and searched his car, finding crack cocaine. Id. at 1012. The defendant argued

that because there was video evidence that he entered the intersection before the light turned red, the officer's behavior of stopping the known drug dealer was "purposeful," and to justify the stop and search the officer ran an outstanding warrant check. Id. at 1013. The court reasoned that the officer's behavior was an "honest mistake" therefore it was not a stop "in the hope that something might turn up." Id. at 1017.

On the other hand, the supreme court of New Jersey ruled that an officer's conduct was "flagrant" when he arrested the defendant to run a warrant check. Shaw 213 N.J. 398. In Shaw, an officer went to an apartment complex to execute a search for a fugitive. Upon arrival to the apartments, the defendant was stopped and asked to identify himself, and the defendant refused. The only commonality apparent to the officer that the fugitive and the defendant shared was their racial background. Soon after, the officer determined that the defendant was not the fugitive, but that he had a probate warrant so the officer arrested the defendant. In ruling that the flagrancy of the officer action favored suppression, the court reasoned that all individuals should "be free from random stops" therefore suppressing evidence is "the strongest possible message that constitutional misconduct will not be tolerated." Id. at 422.

Thus, in the instant case, since Pearson was not committing a crime or doing anything that can remotely be inferred as illegal, Officer Martin's actions of stopping, detaining, questioning and arresting Pearson indicates the flagrancy of the officer's behavior. Further, Officer Martin, as an experienced officer knew or should have known that his actions resulting in the arrest were in violation of Mr. Pearson's constitutional rights. Additionally, the search for an outstanding warrant benefits the police officer at the expense of Mr. Pearson's constitutional rights. If this court allows officers to walk up to citizens without reasonable or probable cause, demand identification, run a warrant check and arrest the citizen, the court would essentially encourage officers to violate any citizen's constitutional rights

with impunity. If the "purpose and flagrancy" factors weigh towards suppression, then the "intervening circumstances" factors should weigh towards suppression as well.

3. The temporal proximity between the illegal seizure of Pearson and the discovery of an outstanding warrant did not sufficiently break the chain of events leading to the illegal seizure.

The "temporal proximity factor" usually weighs in favor of suppression, since it is typically a "brief time lapse" between a Fourth Amendment violation and the evidence obtained. State v. Shoulderblade, 905 P.2d 289, 293 (Utah 1995). Accordingly, in Green, the court held that five minutes between the illegal stop and the search of defendant's car "weighs against finding the search attenuated." United States v. Green, 111 F.3d 515 (7th Cir. 1997). On the other hand, in Gross, the court held that two months after an unlawful seizure, a voluntary confession "weigh[s] significantly towards attenuation" United States v. Gross, 662 F.3d 393, 402 n.2 (6th Cir. 2011). Brown helps balance the two extremes and held that "less than two hours" passing between the unlawful arrest and discovery of evidence "weighed against dissipation." Brown, 422 U.S 604. and n11. The temporal proximity factor is the "least determinative factor." Shaw 213399. In our instant case, the time between the illegal seizure and the discovery of evidence was only about ten minutes and therefore weighs in favor of suppression.

PRAYER FOR RELIEF

For the reasons set out above, James William Pearson respectfully requests that this Court adopt the *per se* approach and oppose a holding that James Pearson was not seized prior to the criminal record check revealing Pearson's outstanding warrant, therefore, the evidence found as a result of the violation of Pearson's constitutional rights should be suppressed.

S15365
Student #S15365
Counsel for the Appellant
April 6th 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2015, a copy of the foregoing plaintiff's brief arguing Mr. James William Pearson was seized prior to arrest and any evidence found as a result of the illegal seizure should be suppressed was electronically delivered to counsel for the defendant and the court.

S15365
Student #S15365
Counsel for the Appellant