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CLERK SUPERIOR COURT
CHATHAM COUNTY, GA

1 THE SUPERIOR COURT OF CHATHAM COUNTY
2 EASTERN JUDICIAL CIRCUIT OF GEORGIA

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5 THE STATE OF GEORGIA)
6)
7)
8 V.)
9)
10)
11 FABIAN KEITH NOTTO)

CR13-2673-J4 - Poss. C/S W/Intent To
Distr.(2), Poss.
Marij. W/Intent To
Distr.

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14 Transcript of the proceedings heard at the CONTINUATION of the
15 MOTION FOR RECONSIDERATION in the above matter on March 24, 2016
16 at the Courthouse in Savannah, Chatham County, Georgia, before
The Honorable Louisa Abbot, Judge, Superior Court, E.J.C. of
Georgia.

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18 Appearances:

19
20 For The State: JEREMIAH JOHNSON
Assistant District Attorney
Savannah, Georgia
21
22 NOAH ABRAMS
Assistant District Attorney
Savannah, Georgia
23
24 For The Defendant: LARRY CHISOLM
Savannah, Georgia
25

1 THE COURT: This is the State of Georgia v. Fabian
2 Notto, CR13-2673-J2. He is here in court with his
3 attorney, Larry Chisolm. And we are here on a - I believe
4 it's a continuation of a hearing on a motion for
5 reconsideration of the Court's denial of the defendant's
6 motion to suppress. Is that everybody's understanding? Is
7 there any evidence? Just argument?

8 MR. CHISOLM: Just argument is my understanding.

9 THE COURT: Okay. Well, I think because it's a
10 motion for reconsideration you would have the right to open
11 and close, Mr. Chisolm. So do you want to waive opening
12 and reserve closing?

13 MR. CHISOLM: Your Honor, I'll open.

14 THE COURT: Okay. Open, okay.

15 MR. CHISOLM: And I know the last time -

16 THE COURT: Right. For the record just let me note
17 that there was evidence submitted, and the Court has
18 reviewed that evidence prior to this hearing.

19 MR. CHISOLM: I know the last time that we were here
20 you had difficulty hearing me. So I'll try to project my
21 voice a little bit better this time, and we don't have the
22 distraction in the background. And just for the record, I
23 believe that the J designation on this case is a J4.

24 THE COURT: Yes, I think you're right. I retained
25 the case because I'd heard all the motions. So it is still

1 a J4 case. You're correct.

2 MR. CHISOLM: And just so that - just for the
3 record's sake, there was a - since the time that this Court
4 had this case, there was a scheduling order put in place on
5 January 6th, 2016 by Judge Walmsley. And I'm just
6 perfecting the record as to that. And my motion for
7 reconsideration was filed on January 25th which was in line
8 with the scheduling order. There was a deadline for
9 responsive pleadings on February 1st, 2016, and there was
10 nothing filed by the State in connection with this matter.

11 There was - as you indicated previously, we began the
12 hearing on March 1st. And the witnesses that were called
13 by the defendant were - was just one, Sergeant Robert
14 Larry. And we offered one exhibit which was the DVD
15 recording of the traffic stop. And we also asked the Court
16 to review the transcript of the testimony of Officer Fikes
17 from the probation revocation hearing as well.

18 In reference to establishing a need for a motion for
19 reconsideration in this case, the defendant has shown that
20 there was newly discovered evidence in this case since the
21 time that the Court issued its order on the motion to
22 suppress. The two newly discovered pieces of evidence or
23 the two newly discovered issues were firstly the DVD
24 recording of the traffic stop itself which had the real
25 time transmissions from the law enforcement officers as

1 this incident took place.

2 And as the Court may recall, prior to the time of the
3 last motion to suppress hearing, it was our understanding
4 that the transmissions didn't exist. And as a result of
5 persistence on the part of the defendant and numerous
6 subpoenas, we were eventually able to get the recordings
7 and the DVD from Savannah Chatham Metro Police Department.

8 Also since the time of the original order by the
9 Court, there was a probation revocation hearing where
10 Officer Fikes also had the opportunity to testify before
11 the Court. And his testimony was relevant, I think, as to
12 new information and evidence that was revealed in his
13 testimony that would be relevant later in my argument.

14 In reviewing the Court's order, it appears that the
15 Court has divided the issue basically into two parts. The
16 Court first analyzed the legal basis for the stop and then
17 secondarily analyzed the search of the defendant's person
18 itself. Dealing firstly with the issue of the legal basis
19 for the stop, a large part of the Court's order deals with
20 the credibility of the witnesses. Just as a reminder to
21 the Court, there were two witnesses that testified in the
22 original motion to suppress hearing. That was Officer
23 Castro who testified on behalf of the State and the
24 codefendant in this case who testified on behalf of the
25 defendant.

1 I think the Court actually implies in its order that
2 that was pretty much a matter of - I guess I would call it
3 equipoise in terms of one witness saying one thing
4 happened, and one witness saying another thing happened.
5 And the Court analyzed the case based on the credibility of
6 those witnesses and also included a footnote in its order
7 where it discusses - where you discuss the issue of
8 credibility as to the two witnesses.

9 And credibility is an important issue here, and I'd
10 like to highlight that as a part of the basis for my
11 argument as it pertains to the legal basis for the stop.
12 Officer Castro's testimony has been completely contradicted
13 by the newly discovered evidence, and that's the radio
14 transmissions. Officer Castro clearly testified, and it's
15 quoted by the Court in its order, that there was a vehicle
16 stopped at a red light at the intersection of Gwinnett and
17 Montgomery Street.

18 And as a result of allegedly my client making an
19 improper use of a turning lane, that he somehow cut off a
20 vehicle that was stopped at the red light. And he was
21 insistent and consistent in his statement - in his
22 testimony that the light was red. And at one point he even
23 tried to say it may have been stale red. And then he went
24 back to red.

25 The Court has probably had an opportunity by now to

1 review the transmissions themselves. And every time the
2 officers came - approached an intersection, even starting
3 as far back as 54th Street and Montgomery Street where my
4 client picked up the codefendant, the officers were calling
5 out the colors of the lights before they got up to them.
6 And you will hear them say at some points red. They even
7 at some points said stale red. They were very consistent
8 when they got to the intersection describing what the
9 lights were, which was good for us as far as this situation
10 is concerned.

11 And when officer Castro came to Gwinnett and
12 Montgomery Street he clearly called out green, not red, not
13 stale red. He called out green. And it was also after he
14 called out green that he made the observation that the
15 defendant had gone straight from the turning lane. So
16 there was no question about a stale red. There was no
17 question about the flow of traffic. When he came to the
18 intersection at Gwinnett and Montgomery Street he clearly
19 said green.

20 And then he clearly after that observed that my client
21 made a change from the turning lane going straight down
22 Montgomery Street. His own testimony is just - is now
23 contradicted by the evidence in this case. And when the
24 Court weighs the weight of the evidence as well as the
25 credibility of the witnesses, first you have a witness who

1 has not told you the truth under oath. Because the
2 evidence itself clearly indicates that the officer was not
3 telling the truth.

4 We also now have that evidence as well as the witness
5 that was brought by the defendant, also who indicated that
6 they never went around the vehicle. There was never any
7 almost collision at that intersection. And so I would
8 submit to the Court that the weight of the evidence now
9 clearly goes with the defendant.

10 The defendant - the officer also testified that he
11 couldn't say anything about the path that that vehicle may
12 have - the second vehicle may have been traveling at the
13 intersection. He could tell very - he could say very
14 little about it. And I think the truth of the matter is
15 there was no vehicle stopped at a green light at an
16 intersection because that would have been an impediment to
17 traffic. And I would submit that my client would even be
18 more justified in going around the vehicle if there was a
19 stopped vehicle in an intersection at Montgomery Street.

20 But if you listen further to the transmissions that
21 we've discovered from Savannah Chatham Metro Police
22 Department, when the officer was asked two more times about
23 what provided the basis for the probable cause, he said
24 nothing about another vehicle. He said nothing about
25 almost creating an accident or going around a vehicle. He

1 clearly said the only basis for the stop was the client
2 going straight from a turn lane.

3 I submit to you that the law is very clear that that
4 is not improper lane usage. And I've briefed that a couple
5 of times now, and the Court has had an opportunity to see
6 both briefs. The question about - oh, and even beyond
7 that, in his testimony at the last motion to suppress
8 hearing the officer testified to the Court that he was so
9 unsure about whether or not that that was improper lane
10 usage on the day in question that he had to go research the
11 issue after the fact.

12 He had doubts even in his testimony at that time about
13 whether or not there actually was any improper lane usage.
14 And at a minimum he didn't understand what improper lane
15 usage was at the time. And so I would submit that that
16 goes to his credibility and the weight of his testimony.

17 But finally as to the credibility of the witnesses, I
18 did call Officer Larry to the stand to talk about an
19 incident that took place on August 17th, 2013 in which the
20 officer Castro himself was found having given false
21 information in a report and who admitted to covering up
22 evidence in his report that he knew he should have
23 presented to his supervisors and included in his report.

24 And he went further to say that he was intentionally
25 deceitful because he knew that he had violated policies and

1 procedures that should have been in play as far as that
2 particular situation is concerned. Now, ordinarily that
3 information in and of itself probably wouldn't take on as
4 much significance because it goes maybe generally to
5 credibility. But I think what's more unique about this
6 particular situation is that my client was arrested on
7 October 8th, 2013.

8 And the testimony of Officer Larry was that this
9 incident involving where he was - where the officer was
10 disciplined for not being truthful in his report and
11 violating procedures, it took place on August 17th, 2013.
12 And the first interview that Officer Larry had with Officer
13 Castro was on October 17th. So this incident involving my
14 client was very contemporaneous to a point in time where
15 Officer Castro admitted to not being honest in his report.

16 He admitted to violating procedures and covering up
17 those procedures. And also the officer indicated that he
18 needed additional counseling as to search and seizure
19 procedures. So I would submit to the Court that it's
20 instructive to the Court, and it bears to the credibility
21 of Officer Castro when we look at the fact that this
22 happened almost at the same time that this incident with my
23 client took place. And it shows his attitude about
24 evidence, about coming forward with evidence, and about
25 procedures and being very cavalier when it comes to the

1 rights of other individuals in Chatham County.

2 So essentially the argument of the defendant is that
3 this stop was not lawful. That there was no probable cause
4 to make the stop. And that the evidence now shows that he
5 did not - he was able to move from whatever lane he was in,
6 assuming that the officer told the truth that he was in the
7 turning lane. If he moved from a turning lane and went
8 straight on Montgomery Street with safety, that is not a
9 violation of the statute.

10 And it is clear that in order for there to be a
11 violation the movement has to be without safety. And
12 there's a number of cases that speak to that issue, and
13 we'll get to that in the moment because I do have a case to
14 present to the court that is a little bit more on fours to
15 this particular case.

16 Now, when we turn our attention to the second part of
17 the court's order which was the search of the defendant's
18 person, the question was whether or not this was the
19 product of an illegal detention. And I do have a case for
20 the court, Bowers v. State. Bowers v. State is a case that
21 arose in the context of an improper lane use and was a case
22 out of Camden County, an I-95 case from 1996.

23 In that particular case there was a finding that the
24 police officer's citation of two defendants, similar to
25 this case, who were traveling together in a rental car had

1 not violated the improper lane use's statute. And it goes
2 into some discussion about this issue of moving with
3 safety. And again I think it's very similar to what we
4 have in this particular case. It's not a question of
5 whether or not the defendant used another lane while he was
6 in the turning lane. The issue is whether or not he made
7 his maneuver with safety, whether or not he moved outside
8 of the standard lane with safety.

9 And in this particular case, the Bowers case, it
10 addresses that same issue. And it indicated that the lower
11 court was - that the finding or the initial citations of
12 the parties in question was not valid. And it was an
13 illegal stop. In this situation I would submit to the
14 Court that we have a stop that was not supported by
15 probable cause and was an illegal stop. There was no
16 articulated basis for stopping the vehicle other than the
17 assertion by Officer Castro that there had been an improper
18 lane usage.

19 Similar to the Bowers case, I would submit to the
20 Court that our case is a situation where we had a tainted
21 stop. And as a result of the tainted stop, there was
22 evidence that was uncovered. And the question is whether
23 or not there was sufficient time between the tainted stop
24 and the actual discovery of the evidence by the police from
25 the defendant in this case to support a justifiable stop.

1 There are several other issues that I think are - that
2 address issues and findings that were brought out by the
3 Court in its order. The radio transmissions clearly show
4 that Officer Fikes was not having any difficulty stopping
5 the vehicle. And that was one of the things that the Court
6 relied on in making its determination that even if there
7 was - if there was some issue or challenge with regard to
8 the improper lane that maybe the search of the defendant
9 and the stop of the vehicle subsequent to that was proper.

10 And again the Court indicated that and quoted from
11 Officer - one of the officers who indicated that Officer
12 Fikes was having difficulty stopping the vehicle. In the
13 radio transmissions there's absolutely no transmission that
14 says that there was any difficulty stopping that vehicle.
15 It says that the vehicle was lit up at Barnard and
16 Oglethorpe, and it was stopped at Whitaker and Oglethorpe
17 which was within a block. It's the only - which is the
18 very next intersection after Barnard.

19 There was no statement by Officer Fikes saying that
20 they won't stop or I need assistance or anything along
21 those lines. And so there was nothing - there's no
22 evidence to support the assertion of Officer - I believe it
23 was - whoever the next officer was who made the stop in
24 saying that Officer Fikes was having difficulty stopping
25 the vehicle.

1 Also during the radio transmissions Officer Fikes
2 could clearly be heard indicating to our radio operators
3 what he needed and what was going on. He never said
4 anything about needing any backup because he had any
5 concerns about safety. He never said anything about
6 smelling any smell of marijuana or having any suspicions of
7 anything like that going on.

8 Officer Fikes testified at the probation revocation
9 hearing ironically that - two things that were inconsistent
10 with the evidence that the Court was given at the prior
11 motion to suppress hearing. And that is first he said when
12 he got out of - when he noticed that the officer was trying
13 to get his attention or that something was going on, he
14 said there was no words. But he noticed that something was
15 going on, and he got out of his vehicle.

16 He immediately went up to the vehicle, and he put his
17 hands on the defendant, Mr. Notto, and assisted in
18 extracting Mr. Notto out of the vehicle. If in fact he put
19 his hands on the defendant, and they were forcefully taking
20 the defendant out of the vehicle, that cuts against any
21 assertion or argument that this was a voluntary consent to
22 do anything. He was already being held by them, and he was
23 in their custody.

24 And that goes to the voluntariness and whether or not
25 he was willingly allowing them to pat him down or search

1 him. He wasn't willingly doing anything if they had hands
2 on him and were forcing him out of the vehicle. And that
3 was essentially almost the confinement of his person, and
4 it was - and that goes to the issue of whether or not his
5 consent, if he had given any, would have been voluntary.

6 THE COURT: I guess I think that the original motion
7 was essentially based on the stop. And that I determined
8 that that was the crux of the matter. The salient legal
9 issue I think is what I said in the order. So I'm not sure
10 you really need to go into the other matters. Because the
11 real issue here is whether or not there was probable cause
12 for a stop from the get-go.

13 MR. CHISOLM: Then I'll reserve any other argument in
14 rebuttal.

15 THE COURT: Okay. Thank you. Mr. Johnson.

16 MR. JOHNSON: Your Honor, the Court issued a order on
17 August 8th, 2015. Reading that order will tell us that
18 Officer Castro's testimony as it was heard on January 6th,
19 2015 and between that time and August 8th, 2015 was
20 unimpeached. Really the only determination that we have
21 here today is given the two new pieces of evidence, the
22 radio calls as well as the testimony given by Sergeant
23 Robert Larry on March 1st, 2016, would lead this Court to
24 now believe that the evidence received from that January
25 6th hearing, 2015, from Officer Castro is now unworthy of

1 belief.

2 I don't think that the case - I have a very different
3 assessment of looking at the evidence than Mr. Chisolm
4 which I guess might be expected. But I believe that, you
5 know, that testimony from January 6th is both consistent
6 and corroborated by the other testimony that we hear. It's
7 consistent and corroborated by the report that was written
8 on October 9th, 2013. That was made a part of the court
9 record on March 13th, 2014 when it was included in the
10 discovery. That's one day after the October 8th, 2013
11 stop.

12 I believe that the recordings that we hear of the
13 radio traffic is extremely consistent with what occurred.
14 Obviously we're relaying information in a quick manner over
15 the radio, and we're really only putting forth the most
16 important fundamental things that happened. Obviously we
17 don't have a time to give a paragraph type response on
18 what's happening as the car is driving quickly past
19 different blocks.

20 And you hear essentially from my understanding of when
21 I listen to the radio traffic - and of course Your Honor
22 has had the opportunity to hear it. I believe Agent Castro
23 picks up behind Agent Cogswell on around 37th and
24 Montgomery. That at 435, 20 seconds later, Agent Castro
25 takes over the primary follow. He's calling out the

1 streets as he's passing them, passing 34th, passing
2 Anderson, passing Henry, Duffy, Park.

3 He goes 13 blocks before seeing any PC. I think we're
4 all familiar living in the downtown area or frequenting the
5 downtown area Gwinnett and Montgomery. If you don't - so
6 basically when you're driving on Montgomery, if you don't
7 move to the right you will end up in the turn lane. So he
8 would have had to physically move right. It's very
9 understandable that that infraction would occur.

10 And what you hear Officer Castro say is the defendant
11 went straight from turning lane at Gwinnett, through that
12 intersection. The question is not - I believe that was a
13 traffic infraction. But that's really not the question.
14 The question is whether if he observed that conduct, is it
15 reasonable for him to believe that a traffic infraction
16 occurred. I believe any of us objectively seeing that
17 conduct would believe that that was a traffic infraction.

18 Two minutes later the officer is going to eventually
19 pull over the defendant at - again where was that PC at.
20 Castro said, I quote, it was at Gwinnett. He went into the
21 turning lane but went straight. And that's a direct quote
22 from the radio traffic. I believe that corroborates both
23 the report that he filed as well as his testimony that he
24 gave on the 6th of January 2015.

25 I mean you're basically relaying the information as

1 quickly as possible. That is essentially what happened.
2 He drove straight through the intersection from the turn
3 lane. Whether another car was there, that's something that
4 he would relay later. But essentially what you're looking
5 for at that time is the traffic infraction which was what I
6 believe occurred and saw. We're two and a half years into
7 this now, and I believe that the State's testimony and
8 evidence has remained consistent from the date of the
9 arrest all the way to today. Thank you.

10 THE COURT: Thank you, Mr. Johnson. Mr. Chisolm,
11 anything further?

12 MR. CHISOLM: Nothing further.

13 THE COURT: All right. I'm ready to rule. I do
14 believe that the evidence presented, particularly with
15 regard to the radio transmissions, seriously undercuts the
16 testimony of Officer Castro at the original hearing and
17 casts not only just doubt about whether or not there was
18 probable cause. That causes me to wonder whether or not
19 this was all a pretext. That's a very rare thing to
20 happen. He was looking for probable cause. He was
21 following him to get probable cause.

22 We all know that's what was going on. And I certainly
23 at the time of the hearing thought that cutting off another
24 car because of not being - of moving over into another
25 lane, that that was a serious problem. But it does not

1 appear that that's what occurred. And I don't think that
2 Officer Castro's omission of that was something that was
3 anything other than just the fact that it didn't happen.
4 So his credibility is in significant doubt.

5 There was a witness who was there who said there was
6 not another car there at all. And now the Court does not
7 believe there was another car. I don't believe that Mr.
8 Notto violated the law in a way that would create a
9 probable cause to stop him. I am putting some weight on
10 the evidence regarding the Michon Green (phonetic) matter
11 testified to by Detective Larry. Because it shows a
12 tendency on the part of this particular officer to either
13 omit or even worse alter facts.

14 So I would grant the motion for reconsideration. I am
15 granting the motion to suppress. There will be a written
16 order. You have 48 hours from the date that written order
17 is granted to appeal, if you do intend to appeal. And
18 whatever you decide to do is fine. In the meantime is Mr.
19 Notto held only on these charges?

20 MR. JOHNSON: No, he's had his probation revoked by
21 Your Honor.

22 THE COURT: Okay. Based on this charge.

23 MR. CHISOLM: That's correct, Your Honor.

24 THE COURT: What's the end date on that? Do we know?

25 MR. ABRAMS: I believe he also may have a federal

1 hold as well.

2 THE COURT: Well, the only reason I ask is because,
3 you know, if this was the sole basis for the revocation, I
4 might be willing to revisit that. But if there's another
5 hold, obviously that would be an issue. I just didn't know
6 whether or not I might need to consider a bond. But if
7 he's been revoked, I can't really consider bond. And if
8 there's a federal hold, then that would be another issue.
9 We could take that up, Mr. Chisolm, at a later time.

10 MR. CHISOLM: I apologize, Your Honor. My client
11 spoke to me, and I couldn't hear your last -

12 THE COURT: I was just saying that my question was
13 whether or not I should consider granting a bond. But
14 because he's already been revoked, you know, typically
15 speaking, absent an appeal which would be out of time
16 anyway, I can't grant a bond on the probation revocation.
17 And if there's a federal hold, that would clearly be
18 something I would need to consider impacting the matter of
19 bond. So if you want to just file a motion if you think
20 it's appropriate, then I can schedule it.

21 Now, I will say that the next week or so for me, I
22 have a two codefendant case starting next week. And so I
23 have very little time. But we'll get an order out very
24 shortly, and then you all can make a determination whether
25 or not you want to file an appeal. And I'm sure you would

1 want the transcript of this to go on. And my ruling will
2 be consistent in the written order with what I said here
3 today. That essentially I have found that the officer's
4 testimony is not credible, and therefore the Fourth
5 Amendment issue is going in favor of the defendant.

6 MR. CHISOLM: One other thing. In reference to your
7 question to me about filing something subsequent, I would
8 like to have an opportunity to discuss it with my client
9 and to review the record so that I don't mislead the Court.
10 So I would like to reserve the opportunity to file if
11 necessary any additional motions that we may need to do
12 once we've done some more investigating. And I understand
13 you to say that your schedule is pretty involved. And so
14 we will expect that it may be some time before we'd be able
15 to have -

16 THE COURT: Right. And there are a lot of decisions
17 to be made along the way here that have nothing to do with
18 me. For instance, once the written order is entered the
19 State does have - I think it's 48 hours. They gave y'all a
20 little short time period there to file a notice of appeal.
21 And if that happens, obviously that alters things. If that
22 doesn't happen, then I would guess the State would make a
23 decision whether or not to try to proceed.

24 And if the State doesn't appeal, and the State nolle
25 prosses the case, then we go back and revisit some other

1 things. So we've got a whole lot of decisions that have to
2 be made between now and then. And they're not - I've made
3 my decision. Now the State has to make its decisions. And
4 if we can get that transcript done pretty quickly from
5 today. I think all the other transcripts have been done.

6 MR. JOHNSON: Yes.

7 THE COURT: And I think the evidence, the radio
8 transmissions, all of that was put into evidence. And so
9 Tamara has that. All right. Anything else, lawyers?

10 MR. JOHNSON: Nothing from the State.

11 THE COURT: All right. Very good. We're adjourned.
12 Thank you.

13 MR. CHISOLM: Thank you, Your Honor.

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15 END OF PROCEEDINGS.
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C E R T I F I C A T E

I, JANET M. DELOACH, do hereby certify that the foregoing twenty-one (21) pages of typewritten material were taken down and transcribed by me and that the same contain a true, correct, and complete transcript of the proceedings as stated in the caption.

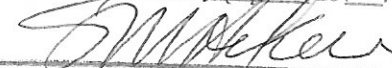
I further certify that I am not of kin nor counsel to any of the parties hereto and, further, that I have no interest whatsoever in the outcome of said proceedings.

SO WITNESS MY HAND AND SEAL this 26th day of March, 2016.


Janet M. DeLoach, CCR B-1993
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This document is a certified copy of the original document placed on record in the office of the Clerk of Superior Court, Chatham County, GA. Given under my hand and seal this 28 day of March 2018.


Deputy Clerk, S.C.C.C., GA