

LOWER COURT Wayne County Circuit Court	Electronically Filed BRIEF COVER PAGE	CASE NO. Lower Court 11-012905-01 Court of Appeals _____
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(Short title of case)

Case Name: **People v. Varies Pickens**

1. Brief Type (select one):
- APPELLANT(S) APPELLEE(S) REPLY
- CROSS-APPELLANT(S) CROSS-APPELLEE(S) AMICUS
- OTHER [identify]: Interlocutory Application for Leave to Appeal

2. This brief is filed by or on behalf of [insert party name(s)]: **Varies Pickens**

3. This brief is in response to a brief filed on _____ by _____ .

4. ORAL ARGUMENT: REQUESTED NOT REQUESTED

5. THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
[See MCR 7.212(C)(12) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]

- Table of Contents [MCR 7.212(C)(2)]
- Index of Authorities [MCR 7.212(C)(3)]
- Jurisdictional Statement [MCR 7.212(C)(4)]
- Statement of Questions [MCR 7.212(C)(5)]
- Statement of Facts (with citation to the record) [MCR 7.212(C)(6)]
- Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
- Relief Requested [MCR 7.212(C)(9)]
- Signature [MCR 7.212(C)(9)]

7. This brief is signed by [type name]: **Jonathan Sacks**

Signing Attorney's Bar No. [if any]: **(P67389)**

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STATEMENT OF JURISDICTION

Judge Daniel Hathaway denied a motion to dismiss the charges in the Wayne County Circuit Court on March 6, 2012. (Order attached as Appendix C). In the same order, the court stayed proceedings and appointed the State Appellant Defender Office to represent Varies Pickens, the indigent Appellant-Defendant.

This Interlocutory Application for Leave to Appeal is being filed pursuant to MCR 7.205(A)(1), within 21 days of the trial court order.

This Court has jurisdiction pursuant to Mich Const 1963, art 1, § 20 [as amended at the November 1994 general election] and as implemented by MCL 600.308(2)(d); MCL 770.3; MCR 7.203(B)(1); and MCR 7.205(A)(1).

STATEMENT OF QUESTIONS PRESENTED

- I. SHOULD THE CHARGES BE DISMISSED AS A VIOLATION OF DUE PROCESS RIGHTS, WHERE THE DETROIT POLICE DEPARTMENT ACTED IN BAD FAITH BY FAILING TO MAKE A SCOUT CAR VIDEO OF THE OBSERVATION AND ARREST OF MR. PICKENS?

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS AND PROCEEDINGS

Varies Pickens is charged in the Wayne County Circuit Court as a third habitual offender with one count of possession of firearms by a felon, MCL 750.224f, one count of carrying a concealed weapon, MCL 750.227, one count of possession of a firearm in the course of a felony, MCL 750.227b, and one count of delivery of marijuana, MCL 333.7401(2)(d)(iii).

The arrest of Mr. Pickens

On December 10, 2011, Officer Jason Mays and Officer Allen Ibrahimovic of Eastern District Special Operations were on patrol at 3:00 AM. (PE¹, 5-6, 29-30). They drove in an unmarked black cruiser to 11700 Chalmers, a gas station that is a high narcotic and robbery attempt location. (PE, 6-7). They observed Mr. Pickens walk outside the gas station, holding a mini shot of liquor, and drinking. (PE, 8-9, 31). Officer Mays believed it to be a liquor bottle because of the narrow neck. (PE, 20). Officer Mays testified that Mr. Pickens stood about thirty feet away during this observation, while Officer Ibrahimovic estimated ten feet. (PE, 23, 38).

Officer Mays stopped to investigate Mr. Pickens because public consumption of alcohol is a citation offense in Detroit. (PE, 9, 32). Mr. Pickens appeared stunned and clinched up, but made no attempt to flee. (PE, 9-10, 25). Officer Mays and Officer Ibrahimovic felt he might be armed because of the way he tucked his arm and clutched his hip. (PE, 10, 33). Officer Mays ordered Mr. Pickens to the back of the scout car and frisked him for safety. (PE, 10). He recovered a small caliber handgun, a blue steel automatic RG 25 caliber with ten live rounds, from his waistband. (PE, 11). Mr. Pickens indicated that he did not have a CCW permit. (PE,

¹ “PE” denotes the preliminary exam, held on December 22, 2011.

12). Officer Mays and Officer Ibrahimovic arrested and handcuffed Mr. Pickens. (PE, 13). Officer Mays recovered and placed a Jose Cuervo Margarita bottle in evidence. (PE, 14).

At the Eastern District, following the arrest, Officer Ibrahimovic smelled an odor of marijuana on Mr. Pickens. (PE, 34). When Officer Ibrahimovic asked, Mr. Pickens said he had some marijuana in his right sleeve. (PE, 34). Officer Ibrahimovic then recovered a clear plastic bag with fourteen small Ziplocs of suspected marijuana. (PE, 13, 35-36). Officer Ibrahimovic felt that quantity consistent with drugs for sale. (PE, 36). The baggies contained 12.6 grams of marijuana. (PE, 45).

For purposes of the felon in possession charge, Mr. Pickens had been convicted of attempted possession of a controlled substance under 25 grams in 2004. (PE, 4).

Trial court proceedings

Following a preliminary exam, Judge Marilyn Atkins bound over Mr. Pickens on all charges. (PE, 45). Trial attorney James Howarth filed an Emergency Motion for preservation of any videotapes from the gas station and the police car camera. Judge Daniel Hathaway granted this motion and signed an order to preserve the scout car video tapes and any gas station video of the police officers encounter with and arrest of Mr. Pickens. (Motion and order, attached as Appendix A).

The gas station had no video because it recorded over video every four days, while the scout car had no video available during the time period of November 30, 2011 through December 13, 2011. (Responses, attached as Appendix B). Trial counsel subsequently filed a motion to dismiss information, arguing that the failure to produce a scout car video violated Mr. Picken's due process rights, where a Detroit Police Department Consent Judgment required creation of these videos. On March 2, 2012, the court heard argument and denied the motion.

(M², 10-12). On March 6, 2012, the trial court issued an order denying the motion to dismiss, staying the proceedings for appeal, appointing the State Appellate Defender Office, and cancelling bond. (Motion to Dismiss and brief in support, Prosecution's Response, and Order Denying, attached as Appendix C).

Mr. Pickens now files this interlocutory application for leave to appeal the order denying motion to dismiss.

² "M" denotes the motion to dismiss, held on March 2, 2012.

I. THE CHARGES SHOULD BE DISMISSED AS A VIOLATION OF DUE PROCESS RIGHTS, WHERE THE DETROIT POLICE DEPARTMENT ACTED IN BAD FAITH BY FAILING TO MAKE A SCOUT CAR VIDEO OF THE OBSERVATION AND ARREST OF MR. PICKENS.

Issue Preservation / Standard of Review

Mr. Pickens litigated a motion to dismiss information based upon a denial of due process for failure to create a video of the incident. Appendix C.

Issues of constitutional law are reviewed *de novo*. *People v LeBlanc*, 465 Mich 575; 640 NW2d 246 (2002).

Argument

The United States Supreme Court analyzed a similar potential due process violation in a case involving the preservation of semen samples. *Arizona v Youngblood*, 488 US 51; 109 S Ct 333 (1988). The Court in *Youngblood* held that “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *Id.* at 58. The Court defined “potentially useful” evidence as evidence “which might have exonerated the defendant.” *Id.* at 57. This means that “no more can be said than that [the evidence] could have been subject to tests, the results of which might have exonerated the defendant.” *Arizona, supra* at 57-58.

In the instant case, the video would be critical to a resolution of the case. A video of the incident would be the only method of resolving the police account that Mr. Varies carried an open container of alcohol versus his account that he had nothing in his hands. (M, 5-6). A video of the incident would allow the court to properly determine whether the police unlawfully searched and seized Mr. Pickens. (M, 6).

Mr. Pickens must show that the government acted in “bad faith” in failing to create the scout car video, therefore violating his due process rights. *Youngblood, supra* at 58; US Const Am XIV. In this case, Mr. Pickens can make such a showing. A binding federal court Consent Judgment requires “activation of scout car video cameras at all times the officer is on patrol,” and that “[t]he DPD shall repair or replace all non-functioning video cameras.” *United States v City of Detroit*, No. 03-72258 (EDMI), paras. 100-101. (Excerpt attached as Appendix D). The Detroit Police Department had no video available in the scout car for a two week period that included the date of the arrest of Mr. Pickens. Appendix B. As this lack of an operating video is contrary to a standing federal court order, the Detroit Police Department acted in bad faith in failing to tape the incident and arrest of Mr. Pickens.

When evidence has been destroyed in accordance with a reasonable police policy, courts have generally not found bad faith. For example, the policy to routinely destroy taped police broadcasts only 30 days after their creation does not amount to bad faith. *People v Hardaway*, 67 Mich App 82; 240 NW2d 276 (1976). (See also, *People v Petrella*, 124 Mich App 745, 753; 336 NW2d 761 (1983), aff’d. on other grounds, 424 Mich 221 (1985) (evidence which is destroyed intentionally pursuant to departmental policy to save space does not indicate bad faith or an intent to deprive a defendant of evidence); *People v Johnson*, 113 Mich App 650, 657; 318 NW2d 525 (1982) (evidence destroyed in accordance with police policy and procedure does not mandate reversal absent intentional misconduct, suppression or bad faith). However, in Mr. Pickens’ case, the state failed to create the video evidence in violation of a known Detroit Police Department Consent Judgment. This violation amounted to bad faith because there is no reasonable public policy to justify the lack of a video.

The trial court provided three explanations for denying the motion to dismiss. First, the court noted that no preliminary exam testimony clearly demonstrated that a working video would have recorded the initial observation of Mr. Pickens. (M, 11). However, the fact remains that objective and potentially dispositive evidence was never produced. The fact that it may not have been exculpatory is not controlling, when it potentially represents the key evidence in any suppression hearing.

Second, the trial court found no bad faith on the part of the police. (M, 11). This finding belies the fact the Detroit Police Department's actions in this case directly violate a standing federal court order. There is necessarily bad faith in failing to have a working video on the scout car.

Finally, the court noted that Mr. Pickens had no standing to raise a motion to dismiss in relation to a federal court Consent Judgment. (M, 11-12). This ruling is also in error because Mr. Pickens is not attempting to somehow obtain standing in the federal proceeding. Instead, the Consent Judgment provides evidence of bad faith in failing to make the video of the observations, stop, and arrest of Mr. Pickens.

The failure to preserve and produce evidence in his case means that it is impossible to evaluate the constitutionality of the initial stop. Mr. Pickens is entitled to dismissal of charges since his due process rights were violated when potentially exculpatory forensic evidence was never created, in violation of the Consent Judgment. Const 1963, art 1, § 17, 20; US Const, Ams XIV. Mr. Pickens awaits trial in custody. Should this case follow the standard appellate process rather than interlocutory appeal, he could spend years unnecessarily incarcerated.

SUMMARY AND RELIEF

WHEREFORE, Defendant requests that his Court grant leave to appeal or order dismissal of charges.

Respectfully submitted,

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