NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

DENZELL RUSSELL, *Petitioner,*

-vs-

UNITED STATES OF AMERICA, *Respondent.*

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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Federal Public Defender
Ohio Bar: 0051928

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APPENDIX A

31 F.4th 1009
United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Denzell RUSSELL, Defendant-Appellant.

No. 20-3756
|
Decided and Filed: April 26, 2022

United States District Court for the Northern District of Ohio at Cleveland; No. 1:19-cr-00786-2—James S. Gwin, District Judge.

Attorneys and Law Firms

ON PETITION FOR REHEARING EN BANC: Catherine Adinaro Shusky, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cleveland, Ohio, for Appellant.

Before: McKEAGUE, NALBANDIAN, and MURPHY, Circuit Judges.

The court issued an order. BUSH, J. (pp. 1010–14), delivered a separate statement respecting the denial of the petition for rehearing en banc.

***1010 ORDER**

On Petition for Rehearing En Banc.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

STATEMENT

BUSH, Circuit Judge, statement respecting the denial of rehearing en banc.

Some criminals "go free because the constable has blundered." *Mapp v. Ohio*, 367 U.S. 643, 659, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (quoting *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, 587 (1926) (Cardozo, J.)). But what happens when the constable's lawyer blunders?

The panel was presented with that rare question here: Denzell Russell moved to suppress evidence gathered in the search of a car in which he was a passenger. Because he did not own the car or have a legitimate expectation of privacy in it as a passenger, caselaw is clear that he cannot bring a Fourth Amendment challenge to the search—he lacked what courts call Fourth Amendment standing. *See* *Rakas v. Illinois*, 439 U.S. 128, 133–34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). But the government did not make that argument below; instead, the district court raised it sua sponte as an alternative reason to deny Russell's motion.

The government then asked the panel here to affirm the denial of the suppression motion solely on the district court's standing theory—the very same ground the government had forfeited below. That request is understandable. We have twice held in published decisions that we can correct the government's forfeited error on appeal under Federal Rule of Criminal Procedure 52(b), which says that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

We did so first in the sentencing context. *See* *United States v. Barajas-Nunez*, 91 F.3d 826 (6th Cir. 1996). In *Barajas-Nunez*, a district court relied on improper factors to support a downward departure of 49 months, and the government failed to object. *Id.* at 830, 833. Instead, the government raised its objection for the first time in its opening appellate brief. *Id.* at 829, 830. We concluded that the objection was forfeited, but we reviewed for plain error under Rule 52(b), citing *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). *Id.* at 830. And we reversed, finding that the "extraordinary downward departure" affected the substantial rights of the government and people of the United States to have a defendant sentenced "in accordance with the legal principles of the sentencing guidelines." *Id.* at 833.

Judge Siler dissented from that holding. He noted the well-established definition of "substantial rights" when Rule 52(b) was promulgated, which focused on *preventing* prejudice to the defendant. That focus was in serious tension with the *Barajas-Nunez* majority's finding of plain error for the government's benefit, which would ultimately *cause* prejudice to the defendant. *Id.* at 835–36 (Siler, J., concurring in part and dissenting in part). As Judge Siler saw it, the government's forfeited objections should be resuscitated only when the law ***1011** changes while an appeal is pending. *Id.* Yet the majority declined to "assume that either the *Olano* Court or the drafters of [Rule 52(b)] intended that only defendants and never the government should be able to demonstrate that a plain error affected substantial rights." *Id.* at 833; *see also* *United States v. Jackson*, 207 F.3d 910, 923 (7th Cir. 2000) (Wood, J., concurring in part and dissenting in part) (citing *Barajas-Nunez* as a possible rare case when a plain error "might" have "a serious effect on the fairness, integrity, or public reputation of judicial proceedings").

The *Barajas-Nunez* majority's reasons for giving the government the benefit of Rule 52(b) were twofold. First, the text itself makes "no distinction between the government and defendants." *Barajas-Nunez*, 91 F.3d at 833. But perhaps more importantly, the *Barajas-Nunez* majority concluded that the government has a right to secure a correct sentence. *Id.* Or as a sister circuit put it, the government has a "right to seek justice on behalf of the accuser, and society, in a criminal case," and that right could be substantially affected when a sentence is erroneously low. *United States v. Dickerson*, 381 F.3d 251, 257 (3d Cir. 2004). So at least for plain *sentencing* errors, we held that the government can raise objections for the first time on appeal. *Barajas-Nunez*, 91 F.3d at 833. And it eventually became the "majority view" that the government can seek plain-error review of a forfeited sentencing objection. *See* *Dickerson*, 381 F.3d at 257 (collecting cases).

We considered the issue next in *United States v. Noble*, 762 F.3d 509 (6th Cir. 2014), which extended *Barajas-Nunez* beyond the sentencing context. That case also involved whether a defendant had Fourth Amendment standing. *Id.* at 526. As here, he lacked standing to challenge the search. *Id.* Also, as here, the government missed its chance to make that argument at the district court. *Id.* at 526–27. But it also failed to raise the argument in its opening brief on appeal, so we held (and the government admitted) that it had "waived" the issue. *Id.* at 527, 528.

That holding first required us to determine that the government even *could* waive its argument that the defendant lacks Fourth Amendment standing. Because "Fourth Amendment standing is akin to an element of a claim and does not sound in Article III," we held that waiver was possible. *Id.* at 527 (citing *Rakas*, 439 U.S. at 139, 99 S.Ct. 421).

We next decided "how to treat" that waiver. *Id.* at 527–28. Rather than adopt a bright-line rule—either that the standing issue is always waived when the government fails to raise it or that it can always be raised on appeal because the defendant bears the burden to prove standing—we looked to the plain-error rule. *Id.* (citing *Barajas-Nunez*, 91 F.3d at 830). Failure to raise this standing argument at the district court was a forfeiture, so "we would allow the government to raise" it on appeal if it could "show that the defendant plainly lacked standing and that our failure to recognize it would seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 528 (cleaned up). But because the government failed to raise the issue in its opening brief on appeal, we held the objection waived. *Id.*

Now, "pick[ing] up where *Noble* left off[,]" we reaffirm here that the government's forfeited standing arguments are reviewable under the plain-error standard. *United States v. Russell*, 26 F.4th 371, 375 (6th Cir. 2022). We have disclaimed concern that Russell cannot adequately respond to the government's new argument; for "he has the burden of proving standing in the first place." *Id.* And as to the plain-error inquiry, we conclude that Russell plainly lacks standing, that a suppression-induced dismissal of the government's case ***1012** against Russell would affect the government's substantial rights, and that allowing Russell to benefit from the exclusionary rule would "lead to a rightfully diminished view of the judicial proceeding." *Id.* at 377–79. So we affirm the district court. *Id.* at 379.

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The panel admits that "plain error is an odd fit here." *Id.* at 376. Looking at how the Supreme Court interpreted Rule 52(b) in *Olano* makes it easy to see why. That case spells out four basic requirements for plain-error review. First, the appellate court must find error, which occurs when "a legal rule was violated during the district court proceedings" and "the *defendant* did not waive the rule." *Olano*, 507 U.S. at 733–34, 113 S.Ct. 1770 (emphasis added). That error must be plain—"clear under current law." *Id.* at 734, 113 S.Ct. 1770. Further, to prove that the error affected substantial rights, "the defendant must make a specific showing of prejudice." *Id.* at 735, 113 S.Ct. 1770. Finally, "Rule 52(b) is permissive, not mandatory," because courts generally notice forfeited errors when "the life, or as in this case the liberty, of the defendant is at stake[.]" *Id.* at 735–36, 113 S.Ct. 1770 (citing *Sykes v. United States*, 204 F. 909, 913–14 (8th Cir. 1913)). That discretion can be exercised when an error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 736, 113 S.Ct. 1770 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936)).

By applying *Olano*'s defendant-centric requirements to the government's forfeited errors, courts have forced a square peg into a round hole. Doing so required concluding that the drafters of Rule 52(b) made no distinction between the government and defendants when it came to substantial rights. *See, e.g.*, *Barajas-Nunez*, 91 F.3d at 834; *Russell*, 26 F.4th at 378 (citing *Barajas-Nunez* for the proposition that the government has a substantial right to Russell's punishment). But " 'substantial rights,' as described in *Olano*, are those rights of the defendant at bar[.]" *Barajas-Nunez*, 91 F.3d at 836 (Siler, J., concurring in part and dissenting in part); *Jackson*, 207 F.3d at 923 (Wood, J., concurring in part and dissenting in part) ("Assistant U.S. Attorneys do not serve prison time as a result of error."). So, in my view, we should reconsider our answer to whether the drafters of Rule 52(b) intended for defendants and the government alike to invoke the plain-error rule.

We could start by asking what the drafters thought they were doing. They called Rule 52(b) "a restatement of existing law." Fed. R. Crim. P. 52, 1944 Advisory Committee on Rules notes. Likewise, one member of the advisory committee contemporaneously said that the rule simply "states the doctrine of plain error." Wendell Berge, *Proposed Federal Rules of Criminal Procedure*, 42 Mich. L. Rev. 353, 381 (1943). Outside observers agreed. Judge John B. Sanborn of the Eighth Circuit—the author of the *Sykes* case cited in *Olano*, *see* 507 U.S. at 735–36, 113 S.Ct. 1770—opined in the public-comment period that the proposed rule was "substantially a correct statement of the law and the prevailing practice." 2 *Drafting History of the Federal Rules of Criminal Procedure* 274 (Madeline J. Wilken & Nicholas Triffin eds., 1991). [1]

***1013** So what was that established law and practice?

The plain-error doctrine was meant to "relieve the harshness" of the default rule that when a party fails to raise an issue before a district court, an appeals court will not consider it. Advisory Committee on Rules of Criminal Procedure, *Federal Rules of Criminal Procedure: Preliminary Draft with Notes and Forms* 198 (1943) (citing *Robinson & Co. v. Belt*, 187 U.S. 41, 50, 23 S.Ct. 16, 41 L.Ed. 65 (1902)); *accord* *Olano*, 507 U.S. at 731, 113 S.Ct. 1770 (noting that although "[n]o procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited" when not raised to a district court, Rule 52(b) grants "a limited power to correct errors that were forfeited" (cleaned up)). If a plain error was "committed in a manner so absolutely vital to defendants," the Supreme Court found itself "at liberty to correct it." *Wiborg v. United States*, 163 U.S. 632, 658, 16 S.Ct. 1127, 41 L.Ed. 289 (1896); *accord* *Clyatt v. United States*, 197 U.S. 207, 221–22, 25 S.Ct. 429, 49 L.Ed. 726 (1905). A 1909 decision explained the basics of the doctrine:

> In criminal cases courts are not inclined to be as exacting with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the

> question was not properly raised at the trial by objection and exception.

Crawford v. United States, 212 U.S. 183, 194, 29 S.Ct. 260, 53 L.Ed. 465 (1909);[2] *see also* *Weems v. United States*, 217 U.S. 349, 362, 30 S.Ct. 544, 54 L.Ed. 793 (1910) (holding that the forfeiture rule "is not a rigid one" and expressing "less reluctance to act under it when rights are asserted which are of such high character as to find expression and sanction in the Constitution or Bill of Rights").[3]

Maybe the most oft-cited description of the plain-error doctrine was *United States v. Atkinson*, which held that "[i]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." 297 U.S. at 160, 56 S.Ct. 391 (citing *N.Y. Cent. R.R. Co. v. Johnson*, 279 U.S. 310, 318, 49 S.Ct. 300, 73 L.Ed. 706 (1929) (correcting plain error where "paramount considerations are involved")); *Brasfield v. United States*, 272 U.S. 448, 450, 47 S.Ct. 135, 71 L.Ed. 345 (1926) ("The failure of petitioners' counsel to particularize an exception ***1014** to the court's inquiry does not preclude this court from correcting the error. This is especially the case where the error ... affects the proper relations of the court to the jury, and cannot be effectively remedied by modification of the judge's charge after the harm has been done." (citations omitted)).

Conspicuously absent from this summary of "existing law" is any case in which an appellate court stepped in to protect *the government* from the consequences of its errors. Likely because, as the above sources reveal, "[i]t is the special deprivation of liberty resulting from a criminal sentence that justifies relieving a defendant of the consequences of a forfeited objection." *Jackson*, 207 F.3d at 923 (Wood, J., concurring in part and dissenting in part); *accord* *Olano*, 507 U.S. at 735–36, 113 S.Ct. 1770. But "no such deprivation occurs for the government," *id.*, so I resist how easily our court and others have allowed the government to invoke its own substantial right to a successful prosecution. Neither Rule 52(b) itself nor the Supreme Court opinions interpreting it seem to embrace that conclusion.

Perhaps a final comment in closing most clearly evokes how far our interpretation of Rule 52(b) has strayed from what was apparently its original meaning. While the proposed federal criminal rules were being considered in 1943, U.S. Attorney for Colorado Thomas J. Morrissey defined a "plain error" as "those errors which the appellate court laboriously digs out of the record when the appellate court thinks the case should be reversed, even though the attorney for the appellant failed to find them." 3 *Drafting History of the Federal Rules of Criminal Procedure* 540 (Madeline J. Wilken & Nicholas Triffin eds., 1991). Morrissey was frustrated, it seems, that the Rule would advantage defendants by codifying a one-sided mechanism for the reversal of convictions hard-won by the government. Yet that was the price Rule 52(b) accepted for preventing defendants from languishing in prison for obvious errors their counsel failed to raise.

Eighty years later, we have reconfigured Rule 52(b) in a way that Morrissey might have preferred, but that he recognized the Rule itself did not codify. In the appropriate case, we should ask whether that reconfiguration was the right one and reconsider the *Barajas-Nunez* line of authority.

All Citations

31 F.4th 1009 (Mem)

Footnotes

1 One contemporary did argue that the rule "enlarge[d] the power of the prosecutor"—but not because it let the government invoke the plain-error doctrine itself. William Scott Stewart, *Federal Rules of Criminal Procedure*, 372–73 (1945). Rather, he thought that the rule made it harder for *defendants* to invoke the doctrine by codifying a narrow reading of the current law and practice. In his view, "an appeal will be futile, unless the

upper court is convinced, by such record as a defendant is permitted to make, that" the defendant is innocent, he has not waived his right to complain, and the error is the only reason for his conviction. *Id.*

2 Writing fifteen years after the *Crawford* decision, one commentator stated that the plain-error rule "is predicated upon the doctrine that where life or liberty of citizens is at stake and gross errors are made which are seriously prejudicial and result in the miscarriage of justice, the appellate court will consider questions vital to the defendant not raised and properly preserved by objection, exception, request or assignment of error." Elijah N. Zoline, *Federal Appellate Jurisdiction and Procedure, with Forms*, § 124 at 75–76 (2d ed. 1924).

3 Defining the "rights" protected by the plain-error rule as tantamount to those protected by the Constitution or Bill of Rights is revealing. Those rights are held by individuals and asserted against the government—not held by the government to be asserted against individuals. When courts developed the plain-error doctrine, it seems clear that *individual* rights were front of mind. So it seems equally clear that, as Judge Siler put it, the substantial rights protected by the plain-error rule belong to individual defendants in individual cases. *Barajas-Nunez*, 91 F.3d at 836 (Siler, J., concurring in part and dissenting in part).

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APPENDIX B

26 F.4th 371
United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Denzell RUSSELL, Defendant-Appellant.

No. 20-3756
|
Decided and Filed: February 16, 2022

Synopsis

Background: Following denial of his motion to suppress, 2020 WL 924139, defendant pled guilty in the United States District Court for the Northern District of Ohio, James S. Gwin, J., to being felon in possession of firearm, and he appealed.

Holdings: The Court of Appeals, Nalbandian, Circuit Judge, held that:

government did not waive objection to defendant's lack of Fourth Amendment standing;

defendant plainly lacked standing to challenge search of car; and

government's failure to oppose defendant's motion to suppress on ground that he lacked standing to assert Fourth Amendment challenge did not preclude it from raising standing for first time on appeal.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

***373** Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 1:19-cr-00786-2—James S. Gwin, District Judge.

Attorneys and Law Firms

ON BRIEF: Catherine Adinaro Shusky, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cleveland, Ohio, for Appellant. Laura McMullen Ford, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

Before: McKEAGUE, NALBANDIAN, and MURPHY, Circuit Judges

OPINION

NALBANDIAN, Circuit Judge.

Denzell Russell was a passenger in a car that the East Cleveland Police stopped and searched. The police found two handguns, which resulted in a felon-in-possession charge for Russell. He argues that the search violated the Fourth Amendment. But to assert a Fourth Amendment claim, Russell must have "standing" to challenge the search. And normally a car passenger without a possessory interest in the car lacks such standing.

The government, though, failed to object to Russell's lack of standing before the district court and raised the argument for the first time on appeal. Fourth Amendment standing, unlike Article III standing, is not jurisdictional and so it can be forfeited or waived. And Russell contends that here the government forfeited or even waived the argument. But under our precedent, the government can raise a forfeited argument for the first time on appeal and prevail if it satisfies the plain-error inquiry under Fed. R. Crim. P. 52(b). Because the government only forfeited its standing claim and satisfies that plain-error test, we **AFFIRM**.

I.

This story began in East Cleveland shortly after a vigil being held for the victim of a gang-related shooting. Anticipating there might be retaliation in response to the shooting, the police were on "high alert" and sent out extra patrols near the vigil. Denzell Russell attended the vigil. And when he was ready to leave, he got into Akeem Farrow's car and sat in the passenger's seat while Farrow drove.

As they were patrolling the neighborhood, the police noticed Farrow's car "slow rolling." The officers saw the car driving slowly then suddenly speed up. Suspicious that the driver was trying to avoid police detection, the officers pulled the car over.

When they approached, the officers noticed an open bottle of tequila in the back seat. So they removed the men from the

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car. They frisked them, handcuffed them, and placed them in the police cruiser. Then they searched Farrow's car.

What did they find? Two loaded firearms and two bullet-proof vests. One firearm was under Farrow's seat, the other under Russell's seat. Russell and Farrow admitted that the firearms and vests were theirs.

Because of Russell's extensive criminal record, the government charged him with being a felon in possession of a firearm. Russell moved to suppress the contraband seized during the search. But the district court denied his motion. The court gave two reasons why the search was reasonable. It explained that the police had probable cause given the open container, and that they could conduct a protective search. Alternatively, the court held that even if the search was unreasonable, Russell still couldn't challenge it. This was ***374** because he lacked Fourth Amendment standing. The court raised standing sua sponte because the government failed to raise the argument.

Unable to suppress the evidence, Russell pled guilty. But he preserved his right to appeal, which he now exercises.

II.

We review the court's factual findings for clear error and its conclusions of law de novo. *United States v. Bateman*, 945 F.3d 997, 1004-05 (6th Cir. 2019). We consider the evidence "in the light most likely to support the district court's decision" and "affirm[ ] on appeal if the district court's conclusion can be justified for any reason." *Id.* at 1005 (quoting *United States v. Moorehead*, 912 F.3d 963, 966 (6th Cir. 2019)).

III.

Because the Fourth Amendment protects "[t]he right of the people to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures," U.S. Const. amend. IV (emphasis added), Fourth Amendment rights are said to be "personal." *Rakas v. Illinois*, 439 U.S. 128, 133, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (citation omitted). So a defendant must show that "his own" rights were "infringed." *Byrd v. United States*, —— U.S. ——, 138 S. Ct. 1518, 1526, 200 L.Ed.2d 805 (2018) (quoting *Rakas*, 439 U.S. at 133, 99 S.Ct. 421). Courts use "standing" as a "shorthand" for this requirement. *Id.* at 1530. Here, the government didn't challenge Russell's Fourth Amendment standing before the district court. But this isn't fatal. The government may object to Fourth Amendment standing for the first time on appeal if it hasn't waived the argument. *See* *United States v. Noble*, 762 F.3d 509, 528 (6th Cir. 2014). And it can prevail if it meets the plain-error inquiry under Fed. R. Crim. P. 52(b). *See* *id.*

Accordingly, we proceed in two parts. We first decide if the government here waived the argument. We find that it didn't. So we ask our next question: Has the government satisfied the plain-error inquiry under Rule 52(b)? We find that it has. [1]

A.

Begin with waiver. Russell argues that the government waived any objection to his lack of Fourth Amendment standing by not raising it below. We disagree.

The terms "forfeiture" and "waiver" are sometimes used "rather loosely." *Noble*, 762 F.3d at 528. But the Supreme Court has made their distinction clear. A forfeiture is "the failure to make the timely assertion of a right" whereas a waiver is "the intentional relinquishment or abandonment of that right." *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (citation omitted). Thus, a party waives an argument only if it "expressly abandon[s]" an issue. *United States v. Denkins*, 367 F.3d 537, 542 (6th Cir. 2004). And if an argument is waived, we don't consider it. *Id.*

True, the government could waive its objection to Fourth Amendment standing. *See* *Noble*, 762 F.3d at 528. After all, Fourth Amendment standing is a merits question, not a jurisdictional one. *See* *Rakas*, 439 U.S. at 138-39, 99 S.Ct. 421. ***375** But to waive the argument, the government must either (1) take some step to "expressly abandon" it or (2) fail to raise it in its first brief on appeal. *See* *Noble*, 762 F.3d at 528.

Indeed, we confronted a similar situation in *Noble*. There, like here, the government failed to raise its objection to Fourth Amendment standing before the district court. *See*

762 F.3d at 526-28. We held this was a forfeiture, not a waiver. *Id.* at 528. So we concluded that the government could raise the argument for the first time on appeal and prevail under the plain-error inquiry. *Id.* Yet, because the government had failed to raise the argument in its opening brief on appeal, we held that it had waived the argument. *Id.* So we never had the opportunity to review for plain error.

Here we pick up where *Noble* left off. The government's failure to raise the argument below was merely a forfeiture, not a waiver. *See* *id.* at 527. This is because the government took no steps to "expressly abandon" its objection. *Denkins*, 367 F.3d at 542. And, unlike in *Noble*, the government raised its objection to Russell's standing in its opening brief on appeal. So the government didn't waive its objection to Russell's Fourth Amendment standing.

Russell pushes back. As he sees it, when he moved to suppress evidence, the government was on notice that he was invoking standing. And not only did the government fail to object to standing, it also "agreed" that the issue before the court was narrow, dealing only with the reasonableness of the search. This, he argues, was an express waiver. But, we aren't convinced.

Russell conflates waiver with forfeiture. *See* *Noble*, 762 F.3d at 528. Even if the government was implicitly put on notice, it took no action to abandon its objection to Russell's standing. Instead, by focusing on only one issue, it merely failed to object. And failing to object is not a waiver, but a forfeiture. *See* *United States v. Mabee*, 765 F.3d 666, 671 (6th Cir. 2014). So there was no "intentional relinquishment." *Noble*, 762 F.3d at 528 (quoting *Olano*, 507 U.S. at 733, 113 S.Ct. 1770). Had the government, for example, conceded that Russell has Fourth Amendment standing, then it would have waived the argument. [2] *See* *Mabee*, 765 F.3d at 673 (finding waiver if there is "a plain, explicit concession"); *cf.* *Noble*, 762 F.3d at 527 (government filing letter conceding that it waived the standing issue on appeal).

Russell next turns to policy. He claims that if we allow the government to raise standing for the first time on appeal, we will deprive defendants of an opportunity to respond and would give the government "a second bite at the apple." Reply Br. at 7.

But we have already explained why these concerns are unavailing. *See* *Noble*, 762 F.3d at 528. True, the government gets a "second bite at the apple." *Id.* But standing is "an element" of a Fourth Amendment suppression claim anyway. *Id.* at 526. So the defendant bears the "burden" of showing he has standing. *Id.* And on appeal, the defendant "continues to bear the burden of showing that he has standing." *Id.* at 528 (citing *United States v. Paopao*, 469 F.3d 760, 764 (9th Cir. 2006)). In other words, there is no worry that the defendant will be unable to respond because he has the burden of proving standing in the first place.

***376** In sum, the government hasn't waived its objection to Russell's standing. And, since it properly raised standing in its first brief on appeal, it can prevail if it meets the plain-error hurdle under Rule 52(b). *See* *Noble*, 762 F.3d at 528.

B.

Turning to plain error, the government must show that the forfeited error was clear and affected its substantial rights. *See* *Olano*, 507 U.S. at 733-34, 113 S.Ct. 1770; *United States v. Cavazos*, 950 F.3d 329, 334 (6th Cir. 2020). But even if the government makes all these showings, we don't automatically remedy the error. *Olano*, 507 U.S. at 735, 113 S.Ct. 1770 ("Rule 52(b) is permissive, not mandatory."). Instead, we have discretion to remedy the error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736, 113 S.Ct. 1770 (citation omitted).

Admittedly, plain error is an odd fit here. *Cf.* *United States v. Barajas-Nunez*, 91 F.3d 826, 833 (6th Cir. 1996). After all, it's generally the defendant, not the government, who receives plain error review. *Id.* But we have already held that the government can benefit from plain error for its forfeited claims. *Id.* We explained that the language of Rule 52(b) doesn't distinguish between the government and defendants. [3]

Id. So we couldn't "assume that either the *Olano* Court or the drafters of Fed. R. Crim. P. 52(b) intended that only defendants and never the government should be able to demonstrate that a plain error affected substantial rights." *Id.* Indeed, we noted that the language of Rule 52(b) allows the court to take "notice[ ]" of a plain error even if the error wasn't brought to its attention by one of the parties. [4] *Id.* And our conclusion is not an outlier either. Most of our sister courts have also allowed the government to do this. [5]

With that in mind, we embark on the plain-error inquiry.

***377** *Clear Error.* To show that an error was clear, the government must prove that the defendant "plainly lacked standing." *See* *Noble*, 762 F.3d at 528. And a defendant has standing only if he has a Fourth Amendment interest in the property searched. *Byrd*, 138 S. Ct. at 1530. This interest can either be a property or a privacy interest. *Id.* at 1526. As a car passenger who didn't own or lease the car, Russell has neither. *See* *Rakas*, 439 U.S. at 148-49, 99 S.Ct. 421 (holding that a car passenger has no Fourth Amendment standing in the car); *United States v. Pino*, 855 F.2d 357, 360 (6th Cir. 1988) (same).

Russell has no property interest in the car because he has no ownership or possessory interest in it. The record is clear that he wasn't driving, and that the car belonged to Farrow. And Russell makes no claim to the contrary. Nor does Russell have a privacy interest in the car. Why? Because a car passenger doesn't have a legitimate expectation of privacy in the area under the passenger's seat—which is where the contraband here was found. *See* *Rakas*, 439 U.S. at 148-49, 99 S.Ct. 421; *see also* *United States v. Pino*, 855 F.2d 357, 360 (6th Cir. 1988) (no privacy interest for a passenger in a rental car). So as a passenger without a privacy or property interest in the car, Russell lacks standing. *See* *United States v. Bah*, 794 F.3d 617, 626 (6th Cir. 2015).

Russell responds that it would be unfair to find that he lacks standing since he had no reason to put forward evidence of his standing. But this is not a worry here. As we already said, the defendant bears the burden of establishing standing. *Noble*, 762 F.3d at 526, 528. And this burden "continues" even on appeal. *Id.* at 528. So even if the government didn't object, Russell had at least some burden to establish standing, and it's only fair to require him to meet it. *Cf.* *Rakas*, 439 U.S. at 133, 99 S.Ct. 421.

And even if the government's litigating conduct gave Russell no incentive to put his best foot forward in the proceedings below, we still don't think there is unfairness here. After all, the government will prevail on appeal in this context only if it can show that the defendant clearly has no standing. And it's obvious from the record that Russell checks this box. He admitted to being a passenger in a car that he didn't own and he doesn't contest that claim now. In fact, it's not apparent what kind of evidence Russell could present to establish his standing. On appeal, in the face of the government's argument, he hasn't told us what kind of evidence he would use to establish his standing. So we are not persuaded that there is any unfairness here.

Substantial Rights. Next, the government must show that the error affected its substantial rights. Again, this is an "unusual" requirement. *See* *Barajas-Nunez*, 91 F.3d at 833. After all, it's "far easier for a defendant to show violation of his substantive rights." *Id.* But as we already noted, the language of Fed. R. Crim. P. 52(b) doesn't distinguish between the government and defendants. So just as with defendants, an error affects the government's substantial rights if "the error affects the outcome of the district court proceedings." *Id.* And here it does.

***378** In *Barajas-Nunez*, we held that an error that decreases a sentence affects the government's substantial rights in having a defendant "be sentenced correctly." *Id.* So too here. Any error as to Russell's standing would likely lead to the suppression of the firearm evidence, the only evidence against him for the felon-in-possession charge. This would likely result in the dismissal of the government's case against Russell. So Russell would likely receive no sentence. And, as in *Barajas-Nunez*, this affects the government's substantial rights. *See* *id.*; *cf.* *United States v. St. Pierre*, 488 F.3d 76, 79 n.2 (1st Cir. 2007) (finding no plain error as to *defendant* when court failed to suppress evidence because there was "other substantial evidence of guilt").

Fairness Standard. Finally, we only exercise our discretion to correct a plain error if it would "seriously affect the fairness, integrity, or public reputation of the judicial proceeding" not

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to. *See* *Olano*, 507 U.S. at 736, 113 S.Ct. 1770 (alterations omitted). The government argues that this standard is met because an error as to Russell's standing would lead to the suppression of a firearm as evidence against Russell when none of his rights were violated. We agree. In fact, we find it hard to imagine a case where the government won't be able to meet this standard if it has met the others.

An error seriously affects the fairness, integrity, or public reputation of the judicial proceeding if it leads a "reasonable citizen" to "bear a rightly diminished view of the judicial process and its integrity." *Rosales-Mireles v. United States*, —— U.S. ——, 138 S.Ct. 1897, 1908, 201 L.Ed.2d 376 (2018) (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014) (Gorsuch, J.)). In the Fourth Amendment standing context, an error as to a defendant's standing would do just that. Why? Because it would allow the defendant to benefit from the exclusionary rule when none of his rights were violated.

The Supreme Court has explained that indiscriminate application of the exclusionary rule—even when, unlike in this case, a defendant's Fourth Amendment rights were violated—"generat[es] disrespect for the law and administration of justice." *Stone v. Powell*, 428 U.S. 465, 491, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). This is why the Court has been cautious in extending the exclusionary remedy to cases where it won't deter government action. *See* *id.* at 486-87, 96 S.Ct. 3037 (refusing to extend the remedy to habeas cases). So when the remedy wouldn't deter the government, the costs of "deflect[ing] the truthfinding process" and "free[ing] the guilty" outweigh any benefit of using the remedy. *Id.* at 490, 96 S.Ct. 3037; *see also* *Barajas-Nunez*, 91 F.3d at 833 (holding that an error that would result in a lesser punishment affects the fairness of the judicial proceeding).

In fact, the standing doctrine is "premised on the view that" whatever the benefits are of extending the remedy to someone without standing, they "are outweighed by the further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Stone*, 428 U.S. at 488-89, 96 S.Ct. 3037 (quotation marks omitted). In other words, allowing a defendant whose rights weren't violated to benefit from the exclusionary remedy would be too costly and would generate disrespect for the law.

So too here. Allowing Russell to benefit from the exclusionary remedy would lead to a rightfully diminished view of the judicial proceeding. After all, because he has no standing, Russell would be benefiting from the exclusionary rule when none of his rights were violated. Without the firearm ***379** evidence against him, Russell would go free. True, the Supreme Court is sometimes willing to bear the costs of letting the criminal "go free because the constable has blundered." *Herring v. United States*, 555 U.S. 135, 148, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009) (quoting *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, 587 (1926) (Cardozo, J.); *United States v. Calandra*, 414 U.S. 338, 350-51, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). But that's only when it would serve the purposes of enforcing the Fourth Amendment by deterring government action. *Stone*, 428 U.S. at 494-95, 96 S.Ct. 3037. That purpose isn't served when the defendant can't even show a Fourth Amendment violation. So allowing Russell to benefit from the exclusionary rule when none of his rights were violated would seriously affect the fairness, integrity, or public reputation of the judicial proceeding.

IV.

As a passenger, Russell has no Fourth Amendment standing to challenge a search of Farrow's car. The government for some reason failed to make that argument before the district court. But it caught its mistake, raised the argument in its opening brief, and satisfied plain-error review. So we **AFFIRM**.

All Citations

26 F.4th 371

Footnotes

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1 Since Fourth Amendment standing is enough to decide the case, we don't address the reasonableness of the search under the Fourth Amendment. This is especially because the government concedes that the open liquor bottle doesn't provide the police with probable cause.

2 Russell's waiver argument proves too much anyway. If we accepted his view, the government will presumably always be on notice of standing when a defendant makes a motion to suppress. So any time it fails to object it would waive the argument. But this would create precisely the per se rule that we rejected in *Noble*. *See* 762 F.3d at 527.

3 Rule 52(b) in its entirety provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

4 There is another reason, specific to this case, why plain error is an odd fit. The district court raised the standing issue sua sponte and found that Russell lacked standing. So unlike a typical plain-error case where the trial court has no opportunity to rule on the relevant question, here the district court did so after raising the issue itself. And, as it turns out, the court didn't err in finding that Russell lacked standing.

The parties, for their part, argue over whether the district court's raising of the issue sua sponte was proper. The government, relying on our published decision in *United States v. Bah*, 794 F.3d 617 (6th Cir. 2015), contends that the trial court properly raised Russell's lack of standing sua sponte, and that we should affirm on that ground. And nothing in Rule 52(b) would seem to preclude a court from raising an issue sua sponte. Russell counters that the trial court erred in raising the issue sua sponte, citing our unpublished decision in *United States v. Knowledge*, 418 F. Appx 405, 407-08 (6th Cir. 2011). But, we don't need to decide the issue. This is because even assuming the district court erred in raising the issue sua sponte, *see* *United States v. Sineneng-Smith*, —— U.S. ——, 140 S.Ct. 1575, 1579, 206 L.Ed.2d 866 (2020), that would only mean that the government forfeited the issue. So it still would have had the right to raise standing itself for the first time on appeal if it can satisfy plain error. And because this is enough to decide the issue, we will not consider whether the district court erred in raising it sua sponte.

5 *United States v. Mix*, 791 F.3d 603, 612 (5th Cir. 2015) (holding that the government is "entitled to plain error review" of forfeited arguments); *United States v. Blatstein*, 482 F.3d 725, 729 (4th Cir. 2007) (same); *United States v. Dickerson*, 381 F.3d 251, 257 (3d Cir. 2004) (same); *United States v. Clark*, 274 F.3d 1325, 1328 (11th Cir. 2001) (same); *United States v. Sprei*, 145 F.3d 528, 533-34 (2d Cir. 1998) (same); *United States v. Edelin*, 996 F.2d 1238, 1245 (D.C. Cir. 1993) (same); *United States v. Rodriguez*, 938 F.2d 319, 322 & n.4 (1st Cir. 1991) (same); *United States v. Mendoza*, 543 F.3d 1186, 1191 n.2 (10th Cir. 2008) (calling it a "settled proposition"). *Compare* *United States v. Jackson*, 207 F.3d 910, 917 (7th Cir.) (calling it "unusual" but saying nothing "prevent[s] it), *vacated on other grounds*, 531 U.S. 953, 121 S.Ct. 376, 148 L.Ed.2d 290 (2000); *with* *United States v. Jones*, 713 F.3d 336, 351 (7th Cir. 2013) (saying it's "not obvious" as a rule but recognizing a "few compelling cases").

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APPENDIX C

NOT RECOMMENDED FOR PUBLICATION

No. 20-3756

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 02, 2021
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE NORTHERN DISTRICT OF
DENZELL RUSSELL,	)	OHIO
	)	
Defendant-Appellant.	)	

O R D E R

Before: NORRIS, WHITE, and BUSH, Circuit Judges.

Denzell Russell appeals the district court's judgment of conviction and sentence upon his plea of guilty to one count of being a felon in possession of a weapon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Russell's attorney has filed a brief and a motion to withdraw in accordance with *Anders v. California*, 386 U.S. 738 (1967).

On the evening of August 7, 2019, officers Nicole Link and Tyler McClamroch pulled over a vehicle for a missing brake light and failure to use a turn signal. When Officer Link approached the rear driver's side door of the car, she observed three people inside and a bottle of liquor in the back seat. Officer McClamroch asked the passenger in the back seat, Anthony Coleman, to get out of the car. As McClamroch patted him down, Coleman admitted to having marijuana in his pocket. The other two individuals—the driver, Akeem Farrow, and Russell, who was sitting in the front passenger seat—were eventually removed from the vehicle, and the car was searched. Under the front passenger seat where Russell had been sitting, officers discovered a firearm. They also discovered a firearm under the driver's seat and two bulletproof vests. During an interview

with a detective the following day, Russell admitted that the firearm located under the passenger seat belonged to him. Both Farrow and Russell were charged with being felons in possession of a firearm. Coleman was cited for marijuana possession and having an open container in a motor vehicle, but the open container charge was later dismissed.

Farrow filed a motion to suppress, arguing that his removal from the vehicle and roadside detention were unlawful and that the subsequent search of the vehicle was improper. Specifically, Farrow argued that the presence of an old, empty liquor bottle without any evidence of consumption or impairment did not create probable cause for a search. Farrow did not challenge the validity of the traffic stop. Russell also filed a motion to suppress the two firearms and the bulletproof vests seized from the car and his statements to law enforcement officers. He did not dispute the validity of the traffic stop or his removal from the vehicle but challenged the validity of the search of the car and the frisk of his person.

The district court held a hearing on the motions at which Officer Link and Coleman testified. Officer Link testified that, on the night of the traffic stop, she and McClamroch were patrolling an area where a vigil was being held for the victim of a gang-related shooting. She stated that they were on "high alert" because they had been alerted of possible retaliatory activity. As the vigil was ending, she observed a car "slow rolling" in the area where the vigil was taking place. When the occupants of the car observed marked police cars, the car began to speed up. As the car approached a stop light and then turned, Link saw that it had only one working brake light and that the driver had failed to use a turn signal. Link and McClamroch then initiated a traffic stop. Link testified that she approached the rear window of the car and made contact with Coleman who was in the back seat. She noticed a liquor bottle on the seat next to Coleman and observed that there was liquid inside it. Link stated that she did not observe any signs of impairment from the passengers, nor did she administer any field sobriety tests. Link confirmed that the primary reason for searching the vehicle was the presence of an open bottle of liquor in the back seat. Coleman maintained that the bottle was empty.

The district court denied the motions. The court first found that the officers had reasonable suspicion to frisk the occupants of the car given Link's testimony that she and McClamroch were patrolling an area where there was potential for gang-related retaliatory violence and that she observed the vehicle slow down and then speed up when the occupants saw marked police cars. Crediting Officer Link's testimony that the liquor bottle was not empty and noting that footage from the officers' body cameras appeared to show liquid in the bottle, the court found that the officers had probable cause to conduct a search of the vehicle. Alternatively, the court found that the search of the vehicle was a permissible protective search of the passenger compartment for weapons under *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983). Finally, the court held that, even if there were not probable cause to conduct the search, Russell lacked standing to challenge the search of the car as a passenger with no possessory interest in the vehicle.

In March 2020, Russell entered a conditional plea agreement with the government. Russell agreed to plead guilty to the indictment but reserved his right to appeal the denial of his motion to suppress. The parties made no agreement as to sentence or a sentencing range but agreed to a total offense level of 22 before any reduction for acceptance of responsibility. Russell waived his right to appeal or collaterally attack his conviction and sentence but reserved the right to appeal any sentence in excess of the statutory maximum or any sentence to the extent it exceeded the maximum of the imprisonment range determined under the Sentencing Guidelines in accordance with the stipulations and computations in the plea agreement and using the criminal history category determined by the court. Russell also reserved the right to raise claims of ineffective assistance of counsel and prosecutorial misconduct on appeal. The district court conducted a plea hearing and accepted Russell's guilty plea.

Like the plea agreement, the presentence report assigned a base offense level of 20, pursuant to USSG § 2K2.1(a)(4)(A), and added two levels because Russell possessed a stolen firearm, pursuant to USSG § 2K2.1(b)(4)(A). After a two-level reduction for acceptance of responsibility, the total offense level was 20. That total offense level and Russell's criminal history category of VI resulted in guidelines imprisonment range of 70 to 87 months.

In his sentencing memorandum, Russell asked that the district court grant a downward departure or a variance below the guidelines range and sentence him to 42 months' imprisonment, citing his physical and mental health issues and arguing that this criminal history category overrepresents his criminal history. The court denied Russell's request and sentenced him to a within-guidelines sentence of 80 months of imprisonment to be followed by three years of supervised release.

On appeal, Russell's counsel has filed a brief and a motion to withdraw pursuant to *Anders*, addressing the following issues: (1) whether the district court erred in denying Russell's motion to suppress; and (2) whether the 80-month sentence is substantively unreasonable. Russell was notified of his right to respond but has not done so, and the deadline for filing a response has passed.

On review of the denial of a motion to suppress, we review a district court's factual findings for clear error and its legal conclusions de novo. *United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006). In her brief, counsel demonstrates that there may be some arguable merit to a challenge to the district court's denial of Russell's motion to suppress. Specifically, counsel argues that the district court erred in finding that the officers had a reasonable belief that the occupants of the vehicle were armed and dangerous, noting that no officer testified that they searched the vehicle for their own protection and that the government never argued that the vehicle was searched out of concern for the officers' safety. Counsel thus contends that the district court erred in concluding that there was a basis for conducting a protective search of the car. Pointing to evidence in the record to support a finding that the liquor bottle contained no liquid, counsel further argues that the court erred in crediting Officer Link's testimony that the bottle was not empty and that therefore the bottle did not establish probable cause to search the vehicle. Counsel, however, concludes that any challenge to the denial of the suppression motion would be frivolous given the district court's alternative ruling that Russell lacked standing to challenge the search of the vehicle. But the government never raised lack of standing as a defense to Russell's suppression motion. And this court has explicitly held that the government "can forfeit or waive an argument that defendants

lack Fourth Amendment standing." *United States v. Noble*, 762 F.3d 509, 527 (6th Cir. 2014). Russell therefore has a non-frivolous argument that the government forfeited the standing argument by failing to raise it in the district court and that the district court erred in raising the issue sua sponte. *See United States v. Knowledge*, 418 F. App'x 405, 408 (6th Cir. 2011).

Because the record reveals a non-frivolous ground for appeal, counsel's motion to withdraw is **DENIED**, and the Clerk's Office is directed to issue a supplemental briefing schedule. In addition to other issues counsel may wish to raise, counsel should address the merits of Russell's motion to suppress and whether the district court erred in raising sua sponte the issue of Fourth Amendment standing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX D

2020 WL 924139
Only the Westlaw citation is currently available.
United States District Court, N.D. Ohio.

UNITED STATES, Plaintiff,
v.
Akeem FARROW, et al., Defendant.

Case No. 1:19-cr-00786-JG
|
Signed 02/26/2020

Attorneys and Law Firms

Scott C. Zarzycki, Office of the U.S. Attorney, Northern District of Ohio, Cleveland, OH, for Plaintiff.

OPINION & ORDER

[Resolving Docs. 25, 43]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

***1** On December 18, 2019, a grand jury indicted Akeem Farrow and Denzell Russel for being felons in possession of firearms and ammunition, 18 U.S.C. §§ 922(g)(1), 924(a)(2).[1] In January 2020, Defendants moved to suppress evidence that the Government seized during the traffic stop that led to their indictment.[2] The Government opposed.[3]

On February 19 and 21, 2020, the Court held an evidentiary hearing on the motions.[4] For the following reasons, the Court DENIES the motions to suppress evidence.

I. Background[5]

On August 6, 2019, an East Cleveland double shooting resulted in a death and an injury. After the murder and shooting, East Cleveland police "were basically doing extra patrol." East Cleveland police were on high alert because they "had been getting alerts that something along the lines of retaliation was going to happen ... we were getting alerts that some type of retaliation was going to happen ..."

On August 7, 2019, East Cleveland Patrolmen Tyler McClamroch and Nicole Link patrolled East Cleveland. They patrolled an area near a location where a vigil was scheduled for the shooting victims.

Around 9:00 p.m., Patrolmen McClamroch and Link saw a car with three occupants proceeding slowly, about 5 to 10 miles an hour, near the vigil area. The car had only one working brake light. When the car turned right on Superior Avenue, the driver failed to signal.

Patrolmen McClamroch and Link pulled the car over due to the faulty brake light and the failure to signal.

Patrolman Link approached the driver's side of the car; Patrolman McClamroch approached the passenger's side.

Upon approaching the car, Patrolman Link looked into the backseat, where Anthony Coleman was sitting. Patrolman Link observed an opened bottle of tequila on the seat next to Coleman. Link asked Coleman about the bottle.

In response, Coleman raised the bottle, shook it, and said, "It's empty."[6] Despite the claim that the tequila bottle was empty,[7] Patrolmen Link and McClamroch's body camera videos show that the bottle contained a small amount of liquid. Patrolman Link testified that Anthony Coleman admitted "we've been drinking." Coleman denied making this statement.

Patrolmen Link, McClamroch, and newly arrived police officers removed the three car occupants from the car: the backseat passenger, Coleman; the driver, Defendant Akeem Farrow; and the front seat passenger, Defendant Denzell Russell.

The police officers frisked each occupant before detaining them in squad cars. Patrolman Link testified that the car occupants were frisked for officer safety in reaction to the tensions associated with the recent shooting. The East Cleveland police removed the car occupants to ensure officer safety during the vehicle search.

***2** Officer McClamroch frisked Anthony Coleman, and Coleman admitted to possessing a small amount of marijuana.

The police searched the car. During the search, officers found two guns and two body armor vests.

II. Discussion

The Court will address whether (1) police had reasonable suspicion to frisk the car's occupants; (2) police had violated the Fourth Amendment by searching the car; and whether (3) Defendant Russell has standing to challenge the search. [8]

A. Police Had Reasonable Suspicion to Frisk the Car Occupants.

The parties agree that the police lawfully stopped Defendant Farrow's car. After police lawfully stop a vehicle for a traffic violation, "the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." [9]

The relevant question is whether the police had reasonable suspicion to frisk the car occupants. [10]

Lawful stops do not necessarily carry with them the authority to conduct a *Terry* frisk. [11] Instead, the officer must have a reasonable suspicion that the individual to be searched may be armed and dangerous." [12] The "reasonable suspicion" standard for a *Terry* frisk requires a lower showing than probable cause: "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." [13]

Here, Deputy Link testified that a murder and a shooting occurred in East Cleveland the day before the traffic stop. She testified that East Cleveland police received cautions that retaliation was planned. Accordingly, she and Deputy McClamroch were on "high alert" for retaliatory shootings. She testified that she was stationed near a shooting victim vigil location.

Patrolman Link observed Defendant Farrow's car drive slowly near the vigil area. Once Defendant Farrow's car observed her police car, it inexplicitly accelerated to the speed limit.

Under these circumstances, the police had reasonable suspicion that the vehicle occupants presented a threat.

B. Police Did Not Violate the Fourth Amendment by Searching the Car.

The Court next considers the police officers' warrantless search of the car.

1. Police Had Probable Cause to Search the Car Under the Fourth Amendment Automobile Exception.

In general, the Fourth Amendment does not require that police obtain a warrant to search an automobile when they have probable cause to believe it contains contraband or evidence of criminal activity. [14] Probable cause to search exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." [15] Probable cause must be assessed by looking to the "totality-of-the-circumstances." [16]

***3** Here, the Government says Patrolman Link saw evidence of a crime in plain view—the opened liquor bottle. Ohio Revised Code Section 4301.62(B)(4) states that "no person shall have an opened container of beer or intoxicating liquor while operating or being a passenger in or on a motor vehicle on any street, highway, or other public or private property open to the public for purposes of vehicular travel or parking."

Accordingly, the opened liquor bottle was contraband. The Government says the police had probable cause to search the car because there was a fair probability that a search could reveal further contraband, i.e., other opened containers.

The Government's argument is bolstered by *United States v. Howton*. [17] In that case, a Kansas state trooper stopped a van for drifting over the right lane onto the shoulder. [18] When the trooper approached the van, the trooper observed an open beer can in the dashboard cup holder, that violated Kansas state law. [19]

The Howton driver refused to consent to a search. [20] The trooper nonetheless searched the van for any other open containers of alcohol. [21] The district court denied Howton's motion to suppress, [22] and the Sixth Circuit affirmed: "[After] discover[ing] that at least one passenger in the van had violated [Kansas's opened container law,] ... [t]he troopers then had probable cause to search for any other

similar contraband, i.e., any open containers of alcohol being transported in the vehicle in violation of state law." [23]

In view of *Howton*, the Court holds that Patrolman Link had probable cause to search Defendant Farrow's car because there was a fair probability that a search would reveal further evidence of criminal activity—namely, other opened containers.

Defendants' arguments in opposition are unpersuasive. Most forcefully, Defendants argue that there was no evidence of a crime because the liquor bottle was empty.

The Court disagrees. There is enough evidence to conclude that the bottle was not empty. The Court credits Deputy Link's testimony that the bottle contained liquid. And, more importantly, the police body camera videos—though not completely clear—seem to show that the bottle contained liquid.

Defendants' further arguments that the bottle (1) had been opened two to three days before and (2) was surrounded by trash are likewise unpersuasive. Ohio Revised Code Section 4301.62(B)(4) does not distinguish between recently opened containers versus older opened containers. The statute also does not say that opened containers are fine as long as they are among trash. An older opened container surrounded by trash is still illegal.

Given the totality of the circumstances, the police had probable cause to search the car for other opened containers.

2. Police Could Perform a Permissible Protective Search of the Car Under *Michigan v. Long.*

Separately, Patrolmen Link and McClamroch could search the vehicle for reasons related to their authority to conduct a *Terry* pat-down. [24]

***4** The vehicle search was a permissible protective search under *Michigan v. Long.* [25] During a *Terry* stop, *Long* allows officers to search an automobile's passenger compartment for weapons if the officers have a reasonable belief "based on 'specific and articulable facts' " that the suspect may be dangerous and could "gain immediate control of weapons." [26] This rule recognizes that "investigative detentions involving suspects in vehicles are especially fraught with danger to police officers." [27]

Here, Patrolmen Link and McClamroch had received information that a retaliatory shooting could occur near the location they stopped Defendants. Defendants drove at strange speeds and then sped up as police approached. Against the backdrops of the day-before killing and shooting, Patrolmen Link and McClamroch could believe Defendants were armed and dangerous.

Patrolmen Link and McClamroch did not originally arrest Coleman for the alcohol violation. Instead, they issued him a citation. But defendants who are not under arrest could regain access to the vehicle and any weapon within the vehicle. *See* *Arizona v. Gant*, 556 U.S. 332, 352 (2009) (Scalia, J., concurring) ("In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed.").

Both at the time the Defendants left the vehicle and at the time the Defendants were outside the vehicle, the police officers could reasonably believe the Defendants might have arms in the vehicle. Under *Long*, the vehicle search was permissible.

Given their reasonable belief that the vehicle might include weapons that the Defendants would return to if not arrested, the police could search the vehicle.

In summary, the police did not violate the Fourth Amendment by searching the car.

C. Even If There Was Not Probable Cause for a Search, Defendant Russell Lacks Standing to Challenge the Car Search.

Fourth Amendment rights are considered "personal rights," and they cannot be vicariously asserted. [28] This means that a defendant seeking to suppress evidence "must demonstrate that he or she personally has an expectation of privacy in the place searched, and that the expectation is reasonable." [29]

The Sixth Circuit has repeatedly held that a passenger with no possessory interest in a stopped vehicle lacks a Fourth Amendment privacy interest to challenge the validity of a subsequent search of that vehicle. [30]

***5** Here, front seat passenger Denzell Russell does not claim to have any property or possessory interest in the relevant car. Thus, even if the police would have violated the Fourth Amendment in searching the car, Russell would lack standing to challenge the search.

ORDER

For the foregoing reasons, Defendants' motions to suppress evidence are **DENIED**.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2020 WL 924139

Footnotes

1 Doc. 1.

2 Doc. 25; Doc. 43.

3 Doc. 33; Doc. 47.

4 Doc. 52; Doc. 54.

5 The facts in this section are drawn from testimony at the suppression hearing.

6 Both Deputy Link and Coleman's account of this interaction differed from the video evidence. Deputy Link testified that Coleman said "Yeah, we've been drinking. That's all he said." Coleman testified that he told Link that the bottle was two or three days old. Neither account is wholly supported by the video.

7 In addition to Coleman's statement on the video, he testified that the bottle was empty.

8 The Government does not argue that Coleman's marijuana was a basis for the probable cause.

9 *Arizona v. Johnson*, 555 U.S. 323, 331 (2009) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977)).

10 See *United States v. Campbell*, 549 F.3d 364, 372 (6th Cir. 2008) ("The key issue in the present case, however, is whether [the officer] exceeded the permissible scope of the initial stop by removing [the defendant] from the car and conducting a patdown.").

11 *Id.*

12 *Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009); *see also United States v. Tillman*, 543 F. App'x 557, 560 (6th Cir. 2013).

13 *Tillman*, 543 F. App'x at 560 (quotation omitted); *accord Campbell*, 549 F.3d at 372 (same).

14 *Arizona v. Gant*, 556 U.S. 332, 347 (2009) ("If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820–821 (1982), authorizes a search of any area of the vehicle in which the evidence might be found."); *United States v. Lyons*, 687 F.3d 754,

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770 (6th Cir. 2012) ("Under the automobile exception to the warrant requirement, an officer may perform a warrantless search of a detained vehicle should the officer have probable cause to believe the vehicle contains contraband or evidence of criminal activity."); *Smith v. Thornburg*, 136 F.3d 1070, 1074 (6th Cir.1998) ("[A]n officer may search a readily mobile vehicle without a warrant if he has probable cause to believe that the vehicle contains evidence of a crime.").

15 *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

16 *Id.* at 230.

17 *United States v. Howton*, 260 F. App'x 813 (6th Cir. 2008).

18 *Id.* at 814.

19 *Id.*.

20 *Id.* at 815.

21 *Id.*

22 *Id.*

23 *Id.* at 817 (citing *United States v. McGuire*, 957 F.2d 310, 314 (7th Cir.1992) ("Once Trooper Newman discovered that McGuire was transporting open, alcoholic liquor in violation of Illinois law, ... he had probable cause to believe that the car contained additional contraband or evidence," which "gave Newman the authority to search every part of the vehicle and its contents that could conceal additional contraband.")).

24 *Terry v. Ohio*, 392 U.S. 1, 5 (1968).

25 463 U.S. 1032, 1049–50 (1983); *see also United States v. Lambert*, 770 Fed. Appx. 737 (2019).

26 *Long*, 463 U.S. at 1049.

27 *Id.* at 1047; *accord United States v. Lurry*, 483 Fed. Appx. 252 (2012).

28 *United States v. Noble*, 762 F.3d 509, 526 (6th Cir. 2014) (citing *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

29 *Id.* (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)).

30 *See, e.g.*, *United States v. Bah*, 794 F.3d 617, 626 (6th Cir. 2015) (holding that the defendant did not have standing to directly contest the legality of the vehicle search on Fourth Amendment privacy grounds because he had no possessory interest as a passenger in a rental vehicle); *United States v. Torres-Ramos*, 536 F.3d 542, 549 (6th Cir. 2008) ("We agree that Rakas controls this particular issue and that the defendants did not have a reasonable expectation of privacy [as passengers] in the van."); *United States v. Ellis*, 497 F.3d 606, 612 (6th Cir. 2007) (recognizing that "a passenger does not have a legitimate expectation of privacy in the searched vehicle").

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APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,

vs.

AKEEM FARROW,
DENZELL RUSSELL, Defendants.

Case No. 19CR786

February 19, 2020
10:30 a.m.

Volume 1

TRANSCRIPT OF SUPPRESSION HEARING PROCEEDINGS
BEFORE THE HONORABLE JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

WEDNESDAY, FEBRUARY 19, 2020, 10:30 A.M.

THE COURT: Good morning.

Why don't you take a seat? I'll ask you to hold for a minute.

10:31:25 (Pause).

We're here on 19CR786, United States versus Farrow and Russell.

The case is here today for a hearing on the motions to suppress that have been filed by the

10:32:53 defendants.

Does the -- do you, Mr. Robey or Mr. Lazarus, want to make any opening statement?

MR. ROBEY: I would, Judge, but as a preliminary matter there's one thing that I want to

10:33:06 address with the Court.

We had filed a subpoena for the rear seat passenger in the car that was stopped. His name is Anthony D. Coleman.

We filed a subpoena for him. I had spoke

10:33:21 with him on the phone, indicating that I would hand-deliver it to him, made arrangements to go to his house to do that.

When I spoke with him on the phone he ultimately said "I have other business," so I indicated

10:33:33 to him that I would bring it out to his house again.

And on the 14th I tried to call him again, he wasn't there. I left the subpoena on his side door, taped to his side door, and then after that called him and left him a voicemail message and a text indicating the subpoena was there and there was a hearing today.

10:33:49

And he's not here.

We believe he's necessary for the defense, so we would ask the Court to consider issuing an order for the Marshals to go get him.

10:34:03

THE COURT: Okay. Do you have any position on that?

MR. ZARZYCKI: No, Your Honor.

THE COURT: I'd ask you to prepare it. We may have to recess this, and but certainly

10:34:16

wouldn't -- I'd be inclined to issue the order and take him into custody. If he received the subpoena and failed to abide by it, I'll enforce the subpoena.

But my recommendation would be we proceed today with as much as we can, and if at the conclusion of

10:34:37

the day you believe -- you ask for a recess to bring him into custody, we'll try to do that.

Do you have any other opening statement?

MR. ROBEY: We do, Your Honor.

THE COURT: Why don't you go to the podium?

10:34:55

MR. ROBEY: Thank you.

So may it please the Court, this case is a pretty simple story, Your Honor.

The story begins in August of 2019. It's about 9:00 p.m. Akeem Farrow and two of his friends are driving in East Cleveland. They're on Emily Street approaching the intersection of Superior Avenue. They stop at that intersection.

10:35:19

The police then notice the car that Akeem is driving only has one working brake light. They make their right turn. The police follow them and say that he failed to use a turn signal.

10:35:37

They then do a traffic stop on the car, and what would typically be a warning or at most a traffic ticket for a minor equipment violation, the East Cleveland police had a much different view of this.

10:35:57

You're going to hear that when they approached, two officers approached, one on the passenger side and one on the driver's side. And as they approached, there are no furtive movements by the three occupants inside the vehicle. But the officer on the driver's side stops, takes her flashlight and looks in the back seat. And you're going to hear the back seat is filled with clothes and trash and things, which she puts her light on a liquor bottle.

10:36:13

The rear passenger then grabs the liquor

10:36:33

bottle and says, "This is empty," and shakes it. Puts it back down.

The officer then continues to make contact with the driver who is Mr. Farrow. He's got a valid
10:36:50 license. He attempts to hand out his valid license. There's no effort by East Cleveland to radio that license back into dispatch or start writing a traffic ticket.

Instead, they immediately order him out of the vehicle. And they immediately put him up against the
10:37:09 vehicle, and without any indication that he's armed or dangerous, pat him down. He doesn't have anything on him.

But they cuff him, and then they walk him back to the zone car and lock him in the zone car. What
10:37:24 is significant, you'll hear, is there's no effort to determine if he's impaired. They don't do any roadside field sobriety test. There's no notation that he smells like alcohol or that he's slurring words.

The same procedure then is done for the
10:37:43 rear passenger. He's taken out, he's patted down, he's cuffed, taken back to the car. And once again we see the same procedure with the front passenger who is Mr. Russell.

The police then make the decision to search
10:38:01 the car, and what we believe is primarily based upon this

liquor bottle.

When they search the car, on the driver's side they find a firearm and on the passenger side a firearm. They continue to search and find on the floor of the passenger body armor and on the floor of the back seat body armor.

10:38:21

Ultimately, in our case and in this motion, we've raised two issues. The first is the removal from the car, and ultimately then the pat-down, and then taking him to the rear of the zone car, all based upon an open container violation, which ultimately you'll hear Mr. Farrow never got charged with.

10:38:42

The second issue, and I think this is the key issue, is the search of the vehicle. It appears that the search of the vehicle is primarily based upon this open container. And here's where the parties have a factual dispute.

10:39:03

The factual dispute is the Government says it's an open container, containing some alcohol. Our position was this was an empty bottle, located in the back seat amongst a bunch of trash, and that at no point did Mr. Farrow ever get charged with that.

10:39:19

At the end of the day, it's the Government's burden because we have a warrantless seizure and a warrantless search. We don't think they are going

10:39:37

to be able to carry that burden, and we're going to ask the Court to grant our motion.

Thank you.

THE COURT: Mr. Lazarus.

10:39:53 MR. LAZARUS: Thank you, Your Honor.

Your Honor, I don't have too much to add. Mr. Robey provided a detailed narrative that we believe accurately depicts our facts in this case.

But we just believe that at the end of the 10:40:04 day, when this Court has heard all the evidence from the Government and from the defense, that the Government is going to be unable to prove that they had reasonable suspicion to conduct a frisk of my client or Mr. Farrow, and did not have probable cause to search the car.

10:40:20 That the law enforcement violated my client's and Mr. Farrow's Fourth Amendment rights, and we would ask this Court to suppress any evidence as fruit of the poisonous tree and make such an order.

Thank you.

10:40:34 THE COURT: Mr. Zarzycki.

MR. ZARZYCKI: Thank you, Your Honor.

THE COURT: I'm somewhat curious.

Is possession of body armor itself illegal?

MR. ZARZYCKI: I don't believe so, Your 10:40:56 Honor.

THE COURT: Okay.

MR. ZARZYCKI: So to begin, I would agree with counsel for Mr. Farrow that I think the issues here are fairly simple.

10:41:06 I think this is -- there's no dispute as to the legality of the traffic stop, one for the broken brake light and one for failure to use a turn signal.

It's the Government's argument that the officers had the authority during the course of an -- 10:41:19 under *Pennsylvania versus Mimms* to ask the occupants out of the car for officer safety while conducting this traffic stop.

It wasn't just a traffic stop. At the very moment when Officer Link -- and you will hear her 10:41:37 testify -- when she approached the vehicle, she saw there were three occupants in this vehicle so at first she remained at the back seat just so she can see all of the occupants, both the driver, the front seat passenger as well as the back -- I'm sorry -- the front seat passenger 10:41:51 as well as the back seat passenger.

While standing there, she noticed an open bottle of liquor. Once she saw the open bottle of liquor, that's when she determined that there was probable cause to search the vehicle for other open 10:42:02 bottles of liquor that could be inside of this vehicle

within reaching distance of the occupants.

And that is the Government's position under Sixth Circuit case law that's directly on point, it was *United States versus Howton*, that an open container of alcohol gives the officers probable cause to search for any similar contraband. That, that is the Sixth Circuit case that is directly on point to this case.

10:42:16

You'll hear from counsel for Mr. Russell, they cite to the District Court case out of the Western District of Kentucky, *United States versus Thomas*, where they decided that *Howton* is not a per se rule.

10:42:33

But the distinguishing factor in that case in Kentucky is that it's not illegal to have an open container in your vehicle, whereas Ohio it is a criminal offense to have an open container which would probable cause -- just having the open container, not driving under the influence, just having the open container is a criminal --

10:42:53

THE COURT: Is -- in the briefing in this, do you argue that for everybody in the vehicle it becomes illegal that there is an open container, or do you -- is that limited to the driver?

10:43:11

MR. ZARZYCKI: It's illegal under Ohio law for anybody in the vehicle to have an open container, whether they be the driver or the passenger.

10:43:26

THE COURT: Okay. Do they have to have possession of the open container?

MR. ZARZYCKI: No. It's just it is illegal for an open container, for anyone -- I believe the law states that it is illegal for anyone, an occupant or a driver, to have an open container in a motor vehicle on any traffic -- or on any public road.

10:43:39

THE COURT: Okay. So your argument is once she sees the open container, then all three of them could have been charged -- excuse me -- could have been charged with the open container?

10:43:57

MR. ZARZYCKI: Yes, Your Honor.

I believe that even under *Howton*, there were three occupants in that vehicle as well, and that open container, if my memory serves me correctly, was found on the passenger seat or somewhere in that area.

10:44:11

And so because no one in the vehicle can possess an open container, it gives the officer probable cause to search for other illegal contraband in that vehicle, which is other potential open containers.

10:44:28

THE COURT: Okay. Are you relying at all upon the response that one of the defendants had marijuana?

MR. ZARZYCKI: Your Honor, I actually -- there was a defendant or there was -- the

10:44:41

back seat passenger, did have marijuana. They did recover the marijuana prior to the search of the vehicle, which is in addition to the open container.

However, Officer Link, her justification for searching this car was based upon the open container, which is why you'll see in the body camera that upon seeing the open container, she had the driver exit the vehicle and they detained, they didn't arrest the occupants, they detained them while they were able to search his vehicle for additional bottles of liquor, as this bottle being on the back seat, not in the possession of the back seat passenger but on the back seat, was accessible to anyone in this vehicle.

THE COURT: Okay. Thank you.

Would you call your first witness?

MR. ZARZYCKI: Yes. The Government calls Officer Nicole Link.

THE COURT: If you'll raise your right hand.

NICOLE LINK,

of lawful age, a witness called by the Government, being first duly sworn, was examined and testified as follows:

THE COURT: And if you'll come forward, take a seat, tell us your name and tell us the spelling

of your last name.

THE WITNESS: My name is Nicole Link, the spelling of my last name is L-I-N-K.

THE COURT: Counsel.

10:46:09 MR. ZARZYCKI: Thank you.

DIRECT EXAMINATION OF NICOLE LINK

BY MR. ZARZYCKI:

Q. Good morning.

A. Good morning.

10:46:11 Q. Where are you employed?

A. Lake County Sheriff's Office.

Q. And what's your position there?

A. Deputy sheriff in the road patrol division.

Q. And how long have you been employed with the Lake

10:46:22 County Sheriff's?

A. Three months.

Q. Prior to being employed with the Lake County Sheriff's, where were you employed?

A. East Cleveland Police Department.

10:46:28 Q. And for how long were you employed with East Cleveland?

A. Eleven months, I believe.

Q. Okay. Were you employed on August 7th of 2019?

A. Yes, sir.

10:46:39 Q. How long had you been on the job on August 7th?

A. Since January.
Q. Okay. So approximately how long would that be?
A. Eight months.
Q. Okay. And at that time did you work alone, or did you work with a partner?
A. I had my training officer, Sergeant McClamroch.
Q. Sergeant McClamroch.

Can you spell McClamroch?

A. M-C-C-L-A-M-R-O-C-H.
Q. Okay. And how long were you required to have a training officer with you?
A. They tried to do it for about a year unless you showed otherwise and you could be released early.
Q. All right. So you were on duty on August 7th of 2019?
A. Yes, sir.
Q. Do you wear body cams?
A. Yes.
Q. And how do those work?
A. When you go onto a call or onto a traffic stop, you have to initiate by pressing the button to turn on your body camera, and then turn it off when everything is concluded.
Q. Did you conduct a traffic stop on that day?
A. Yes.

Q. Could you tell the Court about the nature of the traffic stop and the circumstances surrounding it?

A. We were parked on Emily Street in the Emily Street parking lot which is right next to R.T.A. We just had had a homicide the day prior, and we were basically doing extra patrol for the vigil that was going on for Quindell Young.

10:47:52

We had been getting alerts that something along the lines of retaliation was going to happen because the shooting was a rivalry shooting; somebody had been shot, somebody had also been shot and killed so it was a double shooting, one turned to homicide.

10:48:08

So we were getting alerts that some type of retaliation was going to happen so we were on high alert in the parking lot.

10:48:23

Q. Parking lot of what?

A. Of Emily Street.

Q. Okay.

A. Right actually where the homicide had happened. We were in that same exact parking lot.

10:48:29

When the vigil was starting to kind of wrap up, a few people have left, we saw Akeem Farrow's car come down Emily Street towards Superior. It initially started slow rolling when it turned onto Emily Street.

10:48:47

Q. What is slow rolling?

A. Maybe about five to ten miles per hour when the speed limit is 25 miles an hour on that street.

And then when the vehicle approached the vigil in what we -- what was apparent it saw the police because we had, I think, three or four marked units in the parking lot, they had sped up to the stop sign, which is where we saw that they had one broken brake light, and then they failed to use their turn signal when turning right onto Superior.

10:49:14 And that's when we initiated a traffic stop.

Q. Okay. What is Emily Street, what kind of a street is that?

A. It is a residential street.

10:49:20 It's not commonly used. It's a cut -- it's basically a cut from -- cut-through from Eddy Road to Superior. It connects the two, but it's not commonly used because you can -- it's not -- it's mostly just people who live on that street that frequent that street.

10:49:37 Q. Okay. So what happened from that point?

A. From that point on, I made contact with the back seat passenger Anthony Coleman.

When I do a traffic stop, especially in East Cleveland, for officer safety, I, when there's more

10:49:52 than one or two occupants, I stop at the rear window,

just so I could see everybody, see what's going on in the vehicle, just have a good view of everything.

My training officer, he made contact with the -- on the passenger side of the vehicle. I made contact with Anthony Coleman.

Everybody was very respectful, and I noticed that there was an open bottle of Patrón on the vehicle.

Anthony Coleman was sitting in between the middle back seat and the right passenger's back seat. The bottle was sitting directly next to him on the left side of the back seat. There was no trash on the seat. There was no clothes on the seat. It was just solely the bottle.

I asked him about the bottle. He said, "Yeah, we've been drinking," that's all he said. Couldn't smell anything else, I wasn't that close to him, but he did admit to drinking. There was liquid in the bottle.

So I told him, "Well, because of the bottle, we do have probable cause to search the vehicle now." So we removed everybody from the vehicle.

In East Cleveland we don't put anybody in the back seat of our car without at least a pat-down especially because of the reasonable suspicion that we

had of the high alerts that we were getting from retaliation to the shootings, and then we see a car go under the speed limit down the road, when they see police activity, speed up to what was apparent to not be observed by the police.

10:51:08

So we did conduct a pat-down on all the occupants for that reason.

A full vehicle search was done which two guns were recovered along with body armor, which is not illegal, but it is reasonable suspicion that something else was afoot.

10:51:22

Q. Now, the purpose, just to be clear, when you looked in the vehicle, what gave you the reason to search?

What provided in your mind the reason to search the vehicle?

10:51:38

A. The open bottle of Patrón liquor.

Q. Okay. And at some point was the open bottle -- you called it Patrón.

What is that?

10:51:48

A. It's Patrón. It was tequila.

Q. Okay. What -- did you collect the bottle at some point?

A. Can you say it again?

Q. I'm sorry. Did you get the bottle out of the vehicle?

10:52:00

A. Yes. I removed the bottle from the vehicle. I initially placed it on top of the trunk, and I -- you can see clear in my body cam footage I held it out, you can see the liquid moving in the bottle, and I placed it on
10:52:13 the rear of the trunk.
Q. Okay. Now, did you have a chance, prior to coming in to testify today, to review your body camera footage?
A. Yes, sir.
Q. Did you also have an opportunity to review body cam
10:52:26 footage from another officer?
A. Yes, sir. My training officer Sergeant McClamroch.
Q. Okay. Now, was your body cam, body camera turned on immediately, or was it turned on later?
A. It was turned on later.
10:52:40 Q. What was the reason for that?
A. I forgot.
Q. Okay. Now, was the initial stop, a portion of the initial stop visible on another body cam while yours was turned off?
10:52:53 A. Yes, sir. Sergeant McClamroch's.
Q. Okay. You have had a chance to view that?
A. Yes.
Q. All right. I'm going to show you what I've marked for identification purposes as Government's Exhibit 3.
10:53:03 Just at the very beginning there, do you

recognize Government's Exhibit 3?

A. This will be Sergeant McClamroch's body camera.

Q. Okay. And when you reviewed it previously, are you visible in this body camera footage?

10:53:23 A. Yes, you will see me approach the driver's side.

Q. Okay. Go ahead.

(Tape playing).

BY MR. ZARZYCKI:

Q. Now, at that point what was said by the back seat

10:53:51 passenger?

Were you able to hear that?

A. I believe he said "It's empty." As he was shaking it, though, you can see the liquid move in it, but I believe he said "It's empty."

10:54:01 Q. Okay. Go ahead.

(Tape playing).

BY MR. ZARZYCKI:

Q. Now, Officer, are you visible at this portion of the body camera video?

10:55:02 A. Yeah, that will be me on the driver's side.

Q. Okay. And what are you doing right there?

A. At this point I am detaining Mr. Farrow.

Q. Okay. Go ahead.

(Tape playing).

BY MR. ZARZYCKI:

Q. And where are you bringing him?

A. To the rear of my unit.

(Tape playing).

10:56:54 Q. Now, have you returned to the vehicle at this point?

A. Yes.

Q. Okay. And where are you located in this video?

A. The driver's side.

10:57:01 Q. Okay. And what are you doing?

A. Waiting for Patrolman Hartman to remove the front seat passenger from the vehicle so we can search it.

Q. Okay. Now, is there a reason why you wait until -- why you did that?

10:57:15 A. Just officer safety. I'm not going to go in the vehicle while there are still occupants in there. Anything can happen. I don't know what's in the car.

So we remove everybody, place them in the rear of the units, and then we proceed to search.

10:57:27 Q. Okay. Now, at some point does your own body camera turn on?

A. Yes.

Q. Okay. And how -- again how did that happen?

A. I pressed the button.

10:57:39 Q. Okay. And if I -- have you had a chance to view

your own body camera footage?

A. Yes.

Q. Okay. Actually, can you play just a little more of this?

10:57:50 (Tape playing).

BY MR. ZARZYCKI:

Q. Now, was there a conversation there with the back seat passenger between you and him?

A. Yes.

10:58:08 Mr. Coleman said he's got his L's and I's which is license and insurance, and he said, "Can I ask what this is all about?"

And I said -- he wouldn't let me talk. He just kept talking in the back seat, so I never even got a 10:58:20 chance to tell them this is why we pulled you over because he just kept talking the entire time, and I told him "You didn't let me talk" so --

Q. And was that on your initial approach to the vehicle when you pulled it over?

10:58:30 A. When he kept talking?

Q. Yes.

A. Yes.

Q. Okay. Now, showing you what I've marked as Exhibit Number 1, do you recognize what you're looking at here?

10:58:47 (Tape playing)

A. Yes.
Q. What is it?
A. My body camera footage.
Q. Of the same evening?
10:58:50 A. Yes.
Q. Okay. Now, where are you standing at this point?
A. I'm standing at the front of my patrol vehicle.
Q. And where is the driver that you had secured?
A. He is in the back of my patrol vehicle.
10:59:22 Q. Okay. Go ahead.
(Tape playing).
Q. Now, what did you just do there?
A. I removed the bottle of Patrón from the vehicle.
Q. Okay. And where did you put it?
11:00:22 A. On the rear of the vehicle.
Q. Okay. Go ahead.
(Tape playing).
Q. So that conversation about, "You wouldn't even let me get there or finish my sentence," was that also
11:00:52 visible on Sergeant McClamroch's body cam footage?
A. Yes.
Q. Okay. And this, what do you do after you take the bottle of liquor out of the vehicle and put it on the back?
11:01:03 What do you then proceed to do and why?

A. Once all the occupants are removed from the vehicle, we proceeded to search the vehicle.

Q. For what?

A. More open containers of alcohol.

11:02:15 (Tape playing).

Q. Now, at this point is it -- is the car, the rest of the vehicle, searched?

A. Yes.

Q. And is it -- who participates in the search of the

11:02:56 vehicle?

A. I am unsure.

Q. Okay. Were you a part of the search of the vehicle?

A. Yes.

11:03:02 Q. Okay. And going forward to about ten minutes, exactly ten minutes into this.

(Tape playing).

Q. All right. Pause it.

And what did you do just there at that

11:03:39 portion of the video?

A. I took the bottle of Patrón liquor and I'm unsure, I most likely placed it in the back of our car, but I'm unsure.

Q. Okay. Continue.

11:04:15 (Tape playing).

Q. Pause it.

That vehicle right there, whose vehicle is that?

A. That would be Sergeant McClamroch's vehicle, unit 3141.

11:04:33

Q. And were you -- are you aware of what happened to that bottle of liquor after it's collected on scene?

A. I believe it was disposed of.

Q. Okay. And what do you mean by that?

11:04:46

A. Dumped out and thrown away.

Q. Okay. Now, in your recollection, what was the condition of the bottle, you know, its contents?

Was it full, was it not?

A. It had a clear liquid in it that was, I believe, to

11:04:57

the beginning of the bottom of the label. It wasn't completely full, but there was liquid in the bottle.

Q. Okay. I'm going to show you what I've marked as Exhibit Number 2.

Do you recognize what you're looking at

11:05:11

here?

A. The bottle of Patrón liquor.

Q. Okay. And what does this picture show?

A. You can see the liquid in the bottle.

Q. Okay. With your finger can you indicate what

11:05:32

you're referring to on the screen?

A. This liquid that's right here, you can see that it's waved over from tipping it sideways.

Q. Okay. And is that what you recall from that evening, there being about that much liquor being in the bottle?

A. Yes, sir.

Q. Okay. And when and at what point upon approaching, once you pulled the car over, at what point did you notice the open bottle of liquor in the vehicle?

A. Immediately as I started talking to Anthony, Mr. Coleman.

Q. And who was that?

A. He was the back seat passenger.

Q. Okay. And what's the reason for having the two officers approach the vehicle?

A. I was in training at the time, so we were obviously together, but it's nighttime, it's East Cleveland, we always, on a traffic stop, we always have backup. It's just policy.

Q. Okay. And what's your recollection as to the condition of the back seat of the vehicle?

A. Before I reviewed my body camera footage, I didn't see, I've seen worse vehicles filled with junk and trash to the top of the seats, but this vehicle had some clothes in it, but the bottle was sitting directly on top

of all the clothing.

MR. ZARZYCKI: Okay. All right. Thank you very much.

Nothing further.

11:07:14 THE COURT: Cross-examination.

MR. ROBEY: Thank you.

CROSS-EXAMINATION OF NICOLE LINK

BY MR. ROBEY:

Q. Good morning, Officer Link.

11:07:32 A. Good morning.

Q. I want to begin by asking you some questions about your training and your experience as a police officer.

A. Okay.

Q. Do you understand?

11:07:36 A. Yep.

Q. So if I heard you right, you're currently with the Lake County Sheriff's Department?

A. Yes, sir.

Q. And you've worked there three months?

11:07:45 A. Yes, sir.

Q. Prior to that, you worked for eleven months with East Cleveland?

A. Yes.

Q. And at the time of this stop, you had worked at

11:07:54 East Cleveland about eight months?

A. Yes.
Q. Is that the sum and substance of your law enforcement experience?
A. I worked at Case Western Reserve University police department for three months, but so I've been a cop since September of 2018.
Q. On this particular day in August of 2019 when you were on duty with East Cleveland, you were still in training?
11:08:21 A. Yes, sir.
Q. So tell us now, can you estimate how many times that you've issued citations for open containers?
A. An exact number?
Q. Can you give us an estimate, please?
11:08:38 A. I would say a handful of times.
Q. A handful?
A. Yeah.
Q. Would that be less than ten?
A. Maybe a little bit more. Less than 20.
11:08:49 Q. Have you issued open container citations for empty bottles?
A. Empty bottles? No.
Q. Your understanding is an empty bottle is not an open container?
11:09:00 A. It's still an open container, but it's not full.

Q. So now let's shift gears and talk a little bit about your stop of Mr. Farrow's car on this night, okay?
A. Okay.
Q. So we know this was August 7th, 2019?
11:09:16 A. Yes.
Q. And it's about 9:00 p.m.?
A. Yes.
Q. We know you're on duty in a two-person car?
A. Yes.
11:09:29 Q. And you observe Mr. Farrow's car at the intersection of Emily and Superior?
A. I observed it prior to the intersection, yes.
Q. And you noted at Emily and Superior that it doesn't have a working brake light?
11:09:39 A. Yes.
Q. You observed the car then turns right onto Superior?
A. Yes.
Q. At this point do you decide to follow it?
11:09:45 A. Yes.
Q. And how long do you follow it for?
A. Not even ten seconds.
Q. Not very long?
A. No.
11:09:53 Q. And you told us about the failure to signal?

A. Yes.
Q. In this short period of time that you're driving behind the car, any indication of impaired driving?
A. Minus the traffic violations, no.
11:10:07 Q. Okay. My question is is any impaired driving that you could see; weaving, crossing the lines?
A. Driving under the speed limit prior to the stop, yes.
Q. So that alerted you?
11:10:19 A. Yes.
Q. Okay. So now you stop -- the car gets stopped?
A. Yes.
Q. There was no issue in them stopping the car immediately?
11:10:28 A. No.
Q. And you and your colleague then approach the vehicle?
A. Yes.
Q. On your approach then, there are no furtive
11:10:39 movements by the occupants?
A. No.
Q. And you're on the driver's side?
A. Yes.
Q. And this is when you stopped at the rear
11:10:51 passenger -- or rear driver's door?

A. Yes.

THE COURT: Why don't you try to ask questions?

BY MR. ROBEY:

11:10:58 Q. Am I right in saying you looked in with your flashlight in the back seat?

THE COURT: I think the question would be: Did you look in with a flashlight? I think that's a question.

11:11:08 BY MR. ROBEY:

Q. Did you look in --

A. Yes.

Q. -- the back seat with your flashlight?

A. Yes. It was nighttime.

11:11:16 Q. And did you see this bottle of Patrón?

A. Yes.

Q. You told us that you had some conversation with the rear passenger, is that right?

A. Mr. Coleman, yes.

11:11:30 Q. You saw the video where he picks up the bottle and shakes it?

A. Yes.

THE COURT: Again questions.

Q. And what did he say at that point?

11:11:42 A. I'm not a hundred percent sure what he said. Along

the lines of, "We've been drinking."

Q. You believe that's what he said?

A. I'm not a hundred percent sure.

Q. So the next thing you do then is you make contact with Mr. Farrow, the driver, is that right?

11:11:56

A. Yes.

Q. Mr. Farrow, does he identify himself?

A. I'm not sure.

Q. Do you recall if he has a valid license?

11:12:11

A. He was valid, yes.

Q. Did you radio that back in to your dispatch to verify at that point?

A. He was the registered owner of the vehicle. When the plate was ran through LEADS through our dispatch when they called it out, they gave the information back on the vehicle Mr. Farrow was valid.

11:12:24

Q. At this point do you decide then to immediately remove Mr. Farrow?

A. Yes.

Q. And do you place him up against the car?

11:12:34

A. Yes.

Q. We see on the video you conducted this pat-down, right?

A. Yes.

Q. What was the specific reason for the pat-down?

11:12:44

A. We had reasonable suspicion to believe criminal activity was afoot due to the vehicle slow rolling, five to ten miles an hour down a street that is 25 miles an hour, when we're getting alerts that retaliation is going to happen during the vigil, and then when they do observe police on scene, the car then speeds up and what was apparent to not be observed by the police.

That right there was enough reasonable suspicion that we just wanted to pat them down for officer safety before placing them in the rear of our vehicle.

Q. My question is what did you see on him that made him appear to be armed or dangerous?

A. Nothing.

Q. Did you see anything?

A. He was in the vehicle.

Q. You pat him down and he -- and am I correct he's saying he doesn't have anything on him?

A. No.

Q. The next step that you do is you handcuff him, is that right?

A. Yes.

Q. He then is removed back to your zone car?

A. Yes.

Q. At this point prior to taking him back to the zone

car, did you notice an odor of alcohol on him?

A. I'm not sure.

Q. Did you get close enough to ask him questions?

A. I'm -- I'm not sure.

11:14:02 Q. You're not sure?

A. I don't remember.

Q. Do you recall him having an odor of marijuana?

A. No.

Q. Do you recall him slurring speech?

11:14:14 A. No.

Q. Do you recall any signs of impairment by alcohol or drugs?

A. No.

Q. Do you decide to administer any roadside field

11:14:25 sobriety test?

A. No.

Q. After the remaining occupants are removed, the decision is made to search the vehicle?

A. Yes.

11:14:47 THE COURT: Questions.

BY MR. ROBEY:

Q. What was the primary basis for searching the vehicle? What was your primary reason?

A. The open bottle of Patrón liquor in the back seat.

11:14:56 Q. That bottle was secured in your cruiser, am I

right?

A. At the end of the search.

Q. Was it ever logged in as evidence?

A. No.

11:15:19 Q. Did you take photos of the guns that were seized?

A. I believe so.

Q. Did you take a photo of the Patrón bottle?

A. I'm not sure.

Q. Would you remember?

11:15:35 Would your report help you refresh your memory?

A. Yes.

Q. Question: Was Mr. Farrow cited for an open container?

11:15:51 A. No.

Mr. Coleman admitted it was his and he had been drinking.

Q. You tell us that you believe -- am I right in saying that you believe it had some liquor -- liquid in

11:16:10 it?

A. Yes.

Q. Your testimony is it's clear liquid?

A. Yes.

MR. ROBEY: I have nothing else. Thank you

11:16:18 very much.

THE COURT: Mr. Lazarus.

CROSS-EXAMINATION OF NICOLE LINK

BY MR. LAZARUS:

Q. Good morning, Officer Link.

11:16:29 A. Good morning.

Q. My name's Jeff Lazarus, I'm an attorney for Mr. Russell. I have a few questions for you.

Now, you had talked earlier about the traffic stop that was done.

11:16:50 Once that was completed -- I'm sorry, let me back up.

When you approached the vehicle, I believe you said on your direct testimony that everyone was respectful of you.

11:16:59 Is that -- is that the case?

A. Yep.

Q. That no one was making any furtive movements?

A. No.

Q. No one was trying to hide anything?

11:17:09 A. No.

Q. And is it true that you saw Mr. Coleman shake the bottle from the back seat?

A. Yes.

Q. Okay. But it was only accessible to him, is that

11:17:20 correct?

A. It could have been accessible to anybody.
Q. It was on the back seat?
A. Yes.
Q. You didn't see Mr. Russell or Mr. Farrow reaching for it, did you?
11:17:26
A. No.
Q. Okay. And it was because you saw this bottle, that it was your decision to search the car, is that right?
A. Yes.
11:17:41
Q. That's the only reason?
A. The open bottle of liquor, yes.
Q. Okay. Well, now, you say "open bottle," but I want to direct you to Exhibit 2.
MR. LAZARUS: Could I have access to the
11:17:59
Elmo, Your Honor?
Is this not connected?
Q. Now, I've shown on the screen what the Government has marked as Exhibit 2.
This looks like the same picture
11:19:50
Mr. Zarzycki showed you?
A. Yes.
Q. And you said this is an open container, but just to be clear, if we zoom in, there is a cap on the bottle?
A. Yes.
11:19:58
Q. So the bottle, was the bottle open?

A. No.
Q. And it's your contention that there was clear liquid in this bottle?
A. Yes.
11:20:05 Q. And I think you pointed to an area around here where you said it was sloshing around?
A. Yes.
Q. Okay. I want to show you another picture.
And I'm showing you what has been marked as
11:20:19 Defendant's Exhibit B.
This is also from your body cam video?
A. Yes.
Q. And I believe you talked about this area here, seeing some liquid?
11:20:35 A. Yes.
Q. Do you see that same liquid in this picture to the right?
A. It's blurry. I can't.
Q. That's right, both pictures are kind of blurry,
11:20:42 right?
A. Yeah.
Q. So and there were a lot of lights in that area, is that correct?
A. It was going to be our patrol lights so our
11:20:54 spotlight and then our overhead lights.

It's under a bridge, though, so there's no street lights.

Q. But between your cruiser lights and your spotlight and your body cam light, there were a lot of lights in the area?

A. The body cam doesn't show light, it doesn't emit light.

Q. Okay. But the other lights that were on?

A. Yes.

Q. Okay. And when you -- when did you first take notice, we know that you saw the bottle when Mr. Coleman held it up and when it was in the back seat, but when he held it up, did you actually see the liquid sloshing around?

A. Yes.

Q. You did at that point. You saw it shaking?

A. Yes.

Q. And you were sure at that point that you were going to conduct a search of the car because of that bottle?

A. Yes.

Q. Okay. May I pull up Government's Exhibit Number 3? At seven minutes and 30 seconds.

(Tape playing).

Q. I'm sorry, I have the wrong exhibit. I don't think you've marked as an exhibit, do you know this file?

Scott, do you have all the body cam footage? I don't know if you marked it as exhibits.

(Discussion had off the record).

MR. LAZARUS: I'll just ask the question.

BY MR. LAZARUS:

Q. Do you remember being -- having Mr. Farrow and Mr. Coleman in the back seat of your cruiser?

A. Yes.

Q. And do you remember talking to them about the bottle?

A. About the bottle?

Q. About the bottle that was found.

A. I do not.

Q. Okay. You don't remember asking if -- who the bottle belonged to?

A. Mr. Coleman stated it was his in the beginning.

Q. And did -- at that point did he say that it had been in that car for several days?

A. I don't remember.

Q. You don't remember that?

Do you remember saying to him, "I might have to cite you for it. I'm going to have to ask, though, but because it was next to you, I might have to cite you for it."

A. Sure.

Q. If I told you that was on the body cam, would you agree with me?

A. I believe you, yeah.

Q. So you expressed some doubt, is it true THAT you expressed some doubt to Mr. Coleman and Mr. Farrow about whether you would even give them a citation?

A. Yes.

Q. And did you end up talking to anybody like a supervisor about whether you could even cite him for it?

A. Yes.

I had talked to my sergeant who, because we don't rarely give citations for it, just depends on the situation, so I had to go through him to see if we were going to give a citation for it or not.

Q. So you had to get some confirmation from a supervisor?

A. Yes.

Q. Okay. But ultimately a ticket was written, is that correct?

A. Yes.

Q. And I believe Mr. Robey asked you, in regards to Mr. Farrow, that you didn't do any impairment testing or DUI testing on him?

A. No.

Q. And are you aware of whether any of that was done

on Mr. Russell?

A. No.

Q. Now, you told us earlier that Mr. Coleman had said that he had been drinking, is that correct?

11:25:18 A. I'm unsure of his exact words.

Q. Okay.

A. It was along the lines of, "We've been drinking, I've been drinking."

Drinking was involved.

11:25:28 Q. Okay. But you're not sure if he said that it was just him, or whether it was others in the car as well?

A. I'm unsure.

Q. And you saw the video played, and we didn't hear those statements on the video, did we?

11:25:38 A. No.

Q. And you didn't have your body cam on at that time?

A. Not at that time.

Q. You didn't actually see anyone drinking from this bottle, did you?

11:25:44 A. No.

Q. As you approached the car, no one tried to chug it and finish it off; you didn't see any of that, did you?

A. No.

Q. Okay. You testified earlier that the bottle was

11:26:00 not logged into evidence, is that correct?

A. No.
Q. And that you didn't take any pictures, to your recollection?
A. I'm unsure.
11:26:06 Q. Okay. You said that the bottle was destroyed.
Did you personally dispose of the bottle?
A. I'm not sure who -- who disposed of it.
Q. But you would remember if it was you, correct?
A. Possibly.
11:26:19 Q. Okay. So you don't remember having to pour out or empty out the bottle?
A. I'm unsure.
Q. Okay. Were there any other liquor bottles found in the car?
11:26:33 A. No.
Q. There were a bunch of water bottles, though, in the car, is that right, on the floor?
A. Possibly.
Q. Okay. And just to be clear, when Mr. Russell and
11:27:12 Mr. Farrow and Mr. Coleman were placed in the back of the cruisers, they were not under arrest at that point; they were just being detained for your safety, is that correct?
A. Yes.
11:27:20 Q. Okay.

MR. LAZARUS: Thank you. I have nothing further.

THE COURT: Any redirect?

MR. ZARZYCKI: No, Your Honor.

11:27:25 THE COURT: Okay. Thank you.

(Witness excused).

THE COURT: Would the United States call your next witness?

MR. ZARZYCKI: Your Honor, no further

11:27:31 witnesses.

I would move for the admission of Exhibits 1 through 3.

THE COURT: Is there any objection to Government's Exhibits 1 through 3?

11:27:39 MR. ROBEY: None on behalf of Mr. Farrow.

MR. LAZARUS: No, Your Honor. Thank you.

THE COURT: Okay. Without objection, those will be received.

Would the defense, Mr. Farrow, call your

11:27:50 first witness?

MR. ROBEY: Judge, as I indicated before, our witness would be --

THE COURT: Do you have any other witnesses other than that?

11:27:58 MR. ROBEY: No.

THE COURT: Do you have any witnesses, Mr. Lazarus?

MR. LAZARUS: None besides Mr. Coleman, Your Honor.

11:28:04 THE COURT: Okay. We will ask that a warrant be issued for his arrest, and we'll try to alert you as soon as we can take him into custody, and we'll reschedule hopefully for sometime later this week.

Okay?

11:28:27 Anything else on this, though? Any other witnesses you want to deal with now?

MR. ROBEY: Not on behalf of Mr. Farrow. Thank you.

MR. ZARZYCKI: No, Your Honor. Thank you.

11:28:36 THE COURT: Okay. We'll stand in recess, and we'll prepare an arrest warrant.

I'd ask, before you leave, that you leave us as much contact information.

MR. ROBEY: Yes, sir.

11:28:48 MR. LAZARUS: Your Honor, I was going to offer that Mr. Robey did file the return of service on the ECF docket, so his legal address is listed on the docket.

THE COURT: Okay.

11:28:58 MR. LAZARUS: If that will assist the

Marshals.

THE COURT: Okay. But if you come up with any other locations where he might be, I'd ask you to forward it to us so we can try to take him into custody as soon as possible.

11:29:12

MR. ROBEY: I do have a phone number for him, Your Honor. I don't know if that --

THE COURT: Okay. Why don't you leave that for us as well?

MR. ROBEY: Yes, sir.

11:29:20

THE COURT: So we'll stand adjourned at this time.

(Proceedings concluded at 11:29 a.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Susan Trischan
/S/ Susan Trischan, Official Court Reporter
Certified Realtime Reporter

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I N D E X

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APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	Case No. 1:19-cr-0786-JG-1
	Cleveland, Ohio
Plaintiff,	Friday, February 21, 2020
	11:00 a.m.
vs.	
AKEEM FARROW,	Volume 2
DENZELL RUSSELL,	
Defendants.	

TRANSCRIPT OF CONTINUATION OF
MOTION TO SUPPRESS PROCEEDINGS
BEFORE THE HONORABLE JAMES S. GWIN,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Appearances continued to Page 2.)

Official Court Reporter: Heidi Blueskye Geizer,
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United States District Court
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Cleveland, Ohio 44113
216-357-7092

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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MORNING SESSION, FRIDAY, FEBRUARY 21, 2020 11:00 A.M.

THE COURT: We're reconvened on 19-cr-786, United States versus Farrow and Russell.

The Court would ask the defendant to call your first witness this morning.

11:03:42

MR. LAZARUS: Your Honor, we call Anthony Coleman.

THE COURT: And if you'll raise your right hand.

11:03:58

(The witness is sworn.)

THE COURT: Take a seat, get close to the microphone.

Tell us your name, and tell us the spelling of your last name.

11:04:12

THE WITNESS: Anthony Coleman, C-O-L-E-M-A-N.

THE COURT: Mr. Lazarus.

MR. LAZARUS: Thank you, Your Honor.

DIRECT EXAMINATION OF ANTHONY COLEMAN

BY MR. LAZARUS:

11:04:18

Q. Mr. Coleman, how old are you?

A. 26.

Q. And do you know Mr. Farrow and Mr. Russell, who are here in court?

A. Yes, sir.

11:04:26

Q. How long have you known them?

A. I knew Farrow since I was probably like 12, and I knew -- probably just like two and a half years.

Q. Do you remember driving in a car with them on August 7 of 2019?

11:04:45 **A.** Yes, sir.

Q. And about what time of day was it?

A. It was dark, so I want to say around like 6:00, 7:00, because that's when it just started getting dark.

Q. Do you remember getting pulled over by the police?

11:05:00 **A.** Yes.

Q. When you were pulled over did you have anything sitting next to you?

A. A liquor bottle.

Q. Can you describe that liquor bottle for us?

11:05:09 **A.** It was an empty Patrón bottle.

Q. Okay. Did the officers take notice of that bottle?

A. Yes.

Q. When they did that, what did you do?

A. I lifted the bottle up and told them the bottle was a

11:05:22 couple days old.

Q. Okay. How did you show it to them?

A. Put it in their face like this, and "Ain't nothing in here."

MR. LAZARUS: Your Honor, I'd like to show

11:05:34 Mr. Coleman a copy of Government's Exhibit 3, which is a

body cam video identified by Officer Link.

I'm sorry, Officer McClamroch.

(Video played.)

MR. LAZARUS: You can stop it.

11:06:13 **Q.** Mr. Coleman, do you recognize you in that video?

A. Yes.

Q. And where are you sitting?

A. In the back seat.

Q. And is that you who held up the bottle?

11:06:23 **A.** Yes.

Q. Was there any liquor at all in that bottle?

A. No.

Q. Was there any liquid at all?

A. No.

11:06:30 **Q.** And where was that bottle located?

A. Sitting in the back seat, next to me.

Q. Did the officer ask if you had been drinking?

A. No.

Q. Did you make any comments about drinking that night?

11:06:42 **A.** Yes.

Q. While you were in the back seat?

A. Yeah. I told them that the bottle was old.

Q. How old?

A. Like a couple days old, two, three days old.

11:06:55 **Q.** And how do you know that?

A. Because I was around when he first had bought the bottle.

Q. When who had first bought the bottle?

A. Akeem.

11:07:04 **Q.** And you were ultimately removed from the car and placed in the squad car. Is that right?

A. Yes.

Q. Do you remember sitting in the back of the car?

A. Yes.

11:07:14 **Q.** And was one of the officers with you when you were back in the car --

A. Um --

Q. -- at some point?

A. At some point in time, yeah.

11:07:23 **Q.** Do you remember the female officer asking you about the bottle?

A. Not -- I don't even remember -- after they said something about the bottle, they didn't even ask me anything about the bottle. They didn't ask us had we been drinking, anything like that. Once they seen the empty bottle, they did what they did.

Q. I'd like to show you the clip of another body cam video. This is Defendant's Exhibit C. This is Officer Link's body cam.

11:07:51 MR. LAZARUS: And if you would pull it up at

7 minutes and 35 seconds.

(Video played.)

Q. So do you remember being asked about the bottle?

A. Yes.

11:08:27 **Q.** And it was kind of hard to hear, but did you hear what you had responded to the officer?

A. I told her, yeah, it was my bottle.

Q. Say one more time?

A. I told her, yes, it was my bottle.

11:08:37 **Q.** Did you say how long it had been there?

A. Yeah. When she first walked up to the car, I told her two to three days when I put the bottle in her face.

Q. No, but I mean on this camera, did you hear that you had said that it had been there a few days?

11:08:48 **A.** Oh, yeah. Yeah.

Q. Do you agree with me on that?

A. Yes.

Q. Now, the officer said she might have to cite you, but you ultimately did get a ticket for this. Is that correct?

11:08:57 **A.** Yes.

THE COURT: This is your witness.

MR. LAZARUS: That's correct, Your Honor.

Q. Were you cited with a ticket?

A. Yes, I was.

11:09:05 **Q.** And did you have to appear in court for that?

A. Yes, I did.

Q. Why don't you tell us about that.

A. When I went to East Cleveland Court I had got cited for a liquor ticket and a weed ticket, and I got the liquor ticket threw out.

Q. Can you explain that? Why was the -- and when you say a liquor ticket, do you mean an open container violation?

A. Yes, sir.

Q. Why was that thrown out?

A. I told the prosecutor it was empty, like I'm telling you-all today, and he threw it out.

Q. Okay. Do you remember whether you pled guilty to any charges?

A. Um, the marijuana.

Q. Okay. And what was the result of that?

A. A ticket.

Q. Have you seen copies of the court records?

A. Yes.

MR. LAZARUS: Your Honor, may I approach?

THE COURT: Yeah, but try not to completely lead every question.

MR. LAZARUS: Yes, Your Honor.

Q. I'm showing you a copy of what's been marked as Defendant's Exhibit A. What is that?

A. You said under A? That I didn't get charged.

Q. Is there anyone's signature at the bottom of that document?

A. Yes, sir.

Q. Do you know who?

11:10:31 **A.** I said yes, sir.

Q. Do you know whose signature is at the bottom of the first page?

A. My name.

Q. No, no. The signature at the bottom of the first

11:10:43 page. Can you read what that says?

A. No. I can't see it, sir.

Q. I want to make sure you're looking at the right page.

A. I'm looking at this one, the one down at the bottom of this one.

11:10:57 **Q.** Yes, where you're pointing. Can you read what that says?

A. Judge Wilson L. Dawson.

Q. And does that depict what happened with the charges in East Cleveland?

11:11:10 **A.** Yes.

MR. LAZARUS: Thank you. I have nothing further.

THE COURT: Do you have any questions?

MR. ROBEY: We have none. Thank you.

11:11:17 THE COURT: Cross-examination?

MR. ZARZYCKI: Thank you, Your Honor.

CROSS-EXAMINATION OF ANTHONY COLEMAN

BY MR. ZARZYCKI:

Q. Good morning, Mr. Coleman.

11:11:40 **A.** Good morning.

Q. You were shown just now Defendant's Exhibit A. Is it still in front of you right now?

A. Yeah, it's still in front of me.

Q. And your testimony previously was that you were

11:11:53 initially cited for having an open container in your vehicle, is that right, initially?

A. Yes.

Q. Okay. And you said -- did you -- was it your testimony that you said it was thrown out?

11:12:06 **A.** Yes.

Q. And when it was thrown out, was that at the same time you were pleading guilty to another charge?

A. No.

Q. Was it at the same court hearing where you pled guilty

11:12:17 to the possession of the marijuana, or no contest?

A. Yeah, I pleaded no contest.

Q. Okay. Did that happen at the same time your violation for the open container was dismissed?

A. Yes.

11:12:31 **Q.** Okay. Also, you were -- do you recall, having just

heard Government's Exhibit 3 and watched the video, where you shook the bottle?

A. Yes, I recall when I shook the bottle.

Q. Do you remember what it was that -- or what you said while you were shaking the bottle?

11:12:51

A. I said "This bottle been here for like two, three days."

Q. Okay. Is that what you said, or was it "This bottle is empty"?

11:13:00

A. I don't recall.

Q. I'm going to play for you again what's been marked as Government's Exhibit Number 3.

(Video played.)

MR. ZARZYCKI: You can stop it right there.

11:13:42

Q. What did you hear yourself say in that video?

A. "This bottle empty."

Q. Okay. Did you hear right then and there you say that it's two months -- or two days old? Did you hear it?

A. I never said two months.

11:13:52

Q. Okay. Did you hear in that video yourself saying it was two days old or that it was old?

A. No, sir.

Q. Okay. So in that video, all you can hear yourself saying is that it's empty?

11:14:03

A. Yes, that's all I can hear myself say.

Q. Now, in another video you were shown here today did you hear yourself say something in addition to it being empty?

A. You said what, sir?

11:14:18 **Q.** I'm sorry, let me try to be a little bit more clear.

Do you remember watching another video during your testimony before?

A. Yeah.

Q. Okay. And did you say at that time something else to

11:14:29 the officer about the bottle in the vehicle?

A. When I was in the officer vehicle, when she told me I was getting charged with the container, yes.

Q. Okay. And is that the time where you told her that it was older or that it was two days old?

11:14:43 **A.** More than likely that's when I said that.

Q. Okay. So it was after the car was already searched and the guns were found and you were being cited for the open container that you told the officer that it was two days old. Is that how it happened?

11:14:59 **A.** I don't recall, but I more than likely -- I know I said that before they even did all that.

Q. Again, did you hear that when we played for you Exhibit Number 3?

A. No, sir. No, sir.

11:15:11 **Q.** Okay. Now, the bottle of liquor that was in the

vehicle, what kind of liquor was it?

A. It was an empty bottle of Patrón.

Q. Okay. And Patrón is what?

A. Tequila.

11:15:24 **Q.** Any type of Patrón?

A. It was regular tequila.

Q. Okay. And the tequila was purchased when?

A. Two days earlier.

Q. And by whom?

11:15:38 **A.** By Akeem.

Q. Okay -- by who?

A. Mr. Freeman.

Q. Okay. And were you present when it was purchased?

A. No, but I was around.

11:15:53 **Q.** Okay. And if it was purchased by Akeem, why did you tell the officer that it was your bottle?

A. Because I did.

Q. What do you mean by because you did?

A. Because I took up for the liquor bottle, nothing else

11:16:15 to it.

Q. You took up for the liquor bottle when it wasn't really your liquor bottle?

A. It was my liquor bottle.

Q. Was the liquor bottle purchased by you?

11:16:22 **A.** No.

Q. Was it in your vehicle?

A. No.

Q. Whose vehicle was it?

A. Akeem's.

11:16:30 **Q.** Okay. But regardless, you said that it was your liquor bottle to the officer?

A. Yes.

Q. And was that true at the time?

A. If I said it, yes. Yes.

11:16:48 **Q.** Okay. Now, when was the time that you or Akeem or anybody had drank out of that liquor bottle?

A. None that day, none the day before. Probably the day before that, three days earlier.

Q. So now the liquor bottle was three days old and not

11:17:08 two days old?

A. Two, three days old. It's all the same.

Q. Oh, two or three days old. Is that what you're saying?

A. Next question.

11:17:17 **Q.** No, you have to answer my questions.

A. Um, two days old then if you -- two days old.

Q. Okay. But it's your testimony here that nobody was drinking that bottle in the car on the day it was pulled over, but only the day prior?

11:17:32 **A.** No, not the day before like you trying to say, the day

prior. That bottle had been there for at least two days.

Q. Okay. And so is it your testimony that the last time anybody drank from that liquor bottle was three days before it was pulled over? Is that right?

11:17:51 **A.** You just said two days, didn't you?

Q. Why don't you tell me exactly what the circumstances were when people were drinking out of that bottle, and when it was.

A. The day we drunk that bottle?

11:18:07 **Q.** Yes.

A. We was all chilling where we grew up at. The day we got pulled over, nobody had no drink or none of that.

Q. Okay. Tell me about when you were chilling and when you were all drinking out of that bottle. Were you in the

11:18:20 vehicle then?

A. No.

Q. You were out of the vehicle?

A. Yes.

Q. How did the liquor bottle then come to be in the

11:18:27 vehicle?

A. Because we save liquor bottles. You ever went to somebody house and seen a lot of liquor bottles on the shelf? I asked -- I asked my friend the same thing, I said, dang, brother, this liquor bottle old. Why is it still in

11:18:43 there? It was old.

Q. You were saving a liquor bottle? Was it an expensive bottle of liquor?

A. Yes. It had just came out, actually.

Q. What kind of liquor was it?

11:18:53 **A.** It was called Roc Patrón.

Q. Roc Patrón?

A. Yeah. It's a bumblebee on front of the bottle.

Q. So it was one of the more expensive Patróns?

A. Yes.

11:19:04 **Q.** Is that the brownish color Patrón then?

A. No. I don't know where you-all getting that brownish color from.

Q. Well, did you know that three out of the four Patrón liquors were brown in color?

11:19:15 **A.** But I told you once before earlier, it was a clear Patrón bottle.

Q. But you're saying it was what variety?

A. I told you.

Q. Roca?

11:19:25 **A.** Patrón Roc, or something like that. It's clear, it's a clear bottle with a gray bee on there.

Where the brown come froms, something being brown in there, that don't read.

Q. Okay. So who was going to save this liquor bottle

11:19:41 that was in the car?

A. You say what?

Q. Who was going to save it as a souvenir, this liquor bottle?

A. Um, I don't know. Maybe he was going to get rid of it probably the next day or something. Who knows.

Q. Oh, so you don't really know why it was in the car, you're just guessing he was saving it as a souvenir.

A. I'm just guessing he probably forgot to throw it out.

Q. So he put it in the car instead?

A. It was found in the car, wasn't it?

Q. Just answer my question; that's how this works.

A. Okay. It was found in the car. Yes, it was in the car.

Q. And so it's your testimony here today that your suspicion is that he put it in the car; either Mr. Farrow was throwing it out or that he was saving it as a souvenir, so he put it in his car.

MR. LAZARUS: Your Honor, objection. Calls for speculation.

THE COURT: Well, I don't understand the question. And try to ask it in the form of questions.

MR. ZARZYCKI: Yes, Your Honor.

Q. So I'll rephrase the question.

A. Thank you.

Q. The bottle of liquor that was in the car, do you know

how it was put in the car?

A. I just told you that.

Q. Answer the question.

A. We had bought the bottle a couple days earlier. Maybe

11:20:59 he forgot to throw it out and was going to throw it out, or --

Q. I'm not asking for maybe. I want to know if you know --

A. I can't tell you that.

11:21:08 **Q.** Then that's the answer to the question, if that's your answer.

A. I don't know why he left it in there, if he was saving it, or if he meant to throw it out. I don't know. I keep telling you. You keep asking me the same question.

11:21:20 **Q.** So it is your testimony that you don't know how that bottle ended up in the car?

A. I told you I know how it ended up in the car, I just don't know why it wasn't gone out of the car.

Q. Okay.

11:21:34 **A.** Evidently if the bottle was in his car --

MR. ZARZYCKI: Nothing further, Your Honor.

A. -- it's in his car.

THE COURT: Do you have any redirect?

MR. LAZARUS: No, Your Honor. Thank you.

11:21:43 THE COURT: Okay. You can step down.

THE WITNESS: Thank you.

THE COURT: Do you have any other witnesses?

MR. LAZARUS: No, Your Honor.

The defense rests subject to admission of our

11:21:54 exhibits.

THE COURT: Which exhibits do you move the admission of?

MR. LAZARUS: Exhibit A, which is the journal entries that Mr. Farrow just -- I'm sorry -- Mr. Coleman

11:22:05 just identified.

Exhibit B, which is a picture of the bottle that was identified by Officer Link.

And Your Honor, I'm going to hand a copy to your deputy.

11:22:16 THE COURT: Is there any objection?

MR. ZARZYCKI: No, Your Honor.

MR. LAZARUS: Your Honor, also Exhibit C, which is a copy of the video that Mr. Coleman identified. That was actually attached to our original motion to

11:22:26 suppress.

THE COURT: Is there any objection as to C?

MR. ZARZYCKI: No, Your Honor.

THE COURT: Okay. A, B, and C, will all be received.

11:22:34 And with that, do you rest?

MR. LAZARUS: Yes, Your Honor.

THE COURT: And Mr. Robey, do you move the admission of anything else for Mr. Farrow?

MR. ROBEY: Nothing else. Thank you.

11:22:43 THE COURT: And do you rest?

MR. ROBEY: Yes, sir.

THE COURT: Do you have any rebuttal?

MR. ZARZYCKI: No, Your Honor. Thank you.

THE COURT: Let me ask Mr. Robey or

11:22:53 Mr. Lazarus to make argument in support of the motion.

ARGUMENT

MR. ROBEY: Thank you. May it please the Court, I think we've seen that there are several important issues in this case and we have heard during this hearing,

11:23:17 and I will address them one at a time. And I think the first issue that's important here is the removal, the pat-down, and ultimately the handcuffing.

I think we need to look at the surrounding circumstances. So we've heard this was a traffic stop for a

11:23:31 very minor violation. No evidence of or any observation of any reckless driving. At most, the officer said that at one point the car was driving slowly. When the officers approach, there's no furtive movements by any of the three occupants.

11:23:49 We see the officer on video stop at the rear driver's

side, spot the bottle with her flashlight, which is sitting next to the rear passenger. And despite the officer's claim that she didn't see any trash, I think when we look at the video and look very closely, the rear seat is filled with
11:24:07 clothes and trash.

The officer talked about hearing Mr. Coleman say "I was drinking" or "We were drinking." When we played that over in court a number of times, I never heard that statement. What I did hear --

11:24:25 THE COURT: Generally, it sounded like you conceded that there was a reasonable suspicion to stop the car for the traffic violation.

MR. ROBEY: Yes, Your Honor.

THE COURT: So the officer approaches the
11:24:38 vehicle. Is it generally constitutionally permissible for the officer to ask the occupants to exit the car?

MR. ROBEY: I would say generally so.

THE COURT: So they exit the car in this case.

It sounds like the prosecutor largely relies upon the
11:25:00 observing the liquor bottle and having the liquor bottle handed.

So if the liquor bottle is handed it's an open bottle, right?

MR. ROBEY: Well, in this situation our
11:25:13 position is --

THE COURT: What I meant was the original seal had been broken at some point.

MR. ROBEY: Sure.

THE COURT: And that was broken either a couple days before, and your argument is there's no alcohol left in the bottle, but the government suggests from some pictures that there is at least some residue of alcohol in the bottle.

But first of all, under Ohio law, can somebody be cited for open container only if there is demonstrable alcohol remaining in the container?

MR. ROBEY: If there's some liquid in that container I would agree with the government that that would be an open container citation, in this case for the rear passenger.

THE COURT: And so under Ohio law, if there's an open container and there's three separate occupants of the vehicle, is there reasonable suspicion to charge more than one person?

In other words, being present in a vehicle where there's an open container, even if you don't have immediate possession of that open container at the time of the arrest, does that give reasonable suspicion for the stop or probable cause for an arrest?

MR. ROBEY: I don't think so. I think we're

talking about citing someone for an open container, they have to be in possession of those things. And clearly the officer's decision, the officer was wrestling on whether to charge the rear passenger, and ultimately did charge the
11:27:03 rear passenger, not the other front two occupants.

THE COURT: So if you're charging the rear passenger, what's the rule on vehicle searches in terms of whether police officers are permitted to search vehicles that either a cited or an arrested person had been
11:27:28 occupying?

MR. ROBEY: Well, in this situation, okay, this would be a minor misdemeanor citation; not subject to arresting the rear passenger, not subject to arresting any of the occupants.

11:27:41 THE COURT: Well, I'm not sure, but let's say that's true. Do police officers generally have a right to search a vehicle even if they're just giving a misdemeanor citation?

MR. ROBEY: Well, I don't think it's
11:27:55 automatic, Judge, I think that they have to have some probable cause to believe that there is contraband in the vehicle. And I think that's the basis for the officer's claim that there was a belief that there could be other liquor bottles.

11:28:10 THE COURT: Okay. So your argument in large

degree rests upon the government is only permitted to do the search if there's reasonable suspicion that other liquor bottles might be present in the vehicle.

MR. ROBEY: I think it has to be -- I think
11:28:32 it's a probable cause standard, Your Honor. And so if I can address that issue, I think that the big point of dispute here is the search.

And again, I'll return to it was a minor traffic violation with no reckless driving. There's no furtive
11:28:51 movements. When they ultimately pat him down and search him he has absolutely nothing on him, and there's no indication that he's impaired in any way. There's no field tests, there's no odor, there's no slurred speech.

So the liquor bottle is the big point of contention
11:29:06 here. The government claims that it was open, and they rely upon one video clip where they believe it shows liquid inside of it. In my view, I think that we're looking at its glare, but I think that has to be weighed against Mr. Lazarus showed us a second clip of that bottle in the
11:29:28 trunk that sure looks like it's empty. And I'll concede that both are blurry.

I think what is important here is the testimony of Mr. Coleman. He's completely consistent with what he talked about on the video. He held the container up, and he said
11:29:43 "This is empty." And later you hear him saying "This is two

days old."

THE COURT: But until they conduct the search, how do they know there's not another bottle?

MR. ROBEY: Well, I don't know that they would
11:29:58 have the ability to know that. The question in my mind here is that did they have probable cause to believe that there were other bottles. And I think quite frankly, Judge, I think that there are two things that could help us resolve it.

11:30:12 THE COURT: Let me try to take this step by step. It sounds like you acknowledge that there was probable cause to believe that an open container violation occurred.

MR. ROBEY: I'm not so sure --

11:30:30 THE COURT: But are you suggesting that probable cause died when one container was identified and the officer did not testify to seeing other open containers?

MR. ROBEY: My point I think I would argue here, Your Honor, is that probable cause, if there was even
11:30:53 the beginnings of probable cause, it dies when clearly that bottle is empty, the rear passenger shakes it and says "It is empty."

THE COURT: After so many years, we usually recommend that attorneys should never use the word
11:31:10 "clearly."

MR. ROBEY: Understood.

THE COURT: It's almost a flag saying something is going to be disputed.

Okay. So do you have any differing arguments, Mr. Lazarus?

11:31:21

MR. LAZARUS: Yes, Your Honor.

MR. ROBEY: Thank you.

ARGUMENT

MR. LAZARUS: Your Honor, in this case the government has the burden of proof. They have the burden of proof to show that a warrantless search was justified by probable cause.

11:31:30

The government chose to only put on one officer, one officer with about seven months experience, who was being trained, and an officer who failed to preserve evidence in this case. She failed to preserve the bottle. She failed to take any pictures.

11:31:43

THE COURT: I'm sorry, failed to preserve the bottle?

MR. LAZARUS: That's correct.

11:31:52

THE COURT: What about the one picture -- I'll have to take a look, it's been offered. You didn't think that one picture used by the prosecutor showed at least some alcohol in the bottle?

MR. LAZARUS: No, Your Honor, it's not clear

11:32:06

to me that it is alcohol. It is a blurry picture. The officer said there were multiple cruiser lights and other floodlights, we don't know what that came from.

And the government had an opportunity to put on any other officers at the scene to say there was liquor in the bottle, and did not do that.

THE COURT: Just kind of back, the standard we're looking at is not subjective, right? We're looking at whether there's objective grounds, either probable cause or reasonable suspicion, right?

MR. LAZARUS: Well --

THE COURT: Even if the police officer was using the alcohol as a ruse for conducting the search, that doesn't control, does it?

MR. LAZARUS: No, Your Honor. The officers cannot do a search as a matter of course. They need to show that there's probable cause to search the vehicle.

THE COURT: But it's an objective, right, it's whether objectively there was enough evidence to justify the search.

MR. LAZARUS: That's correct, Your Honor. And I believe the most -- the case on point is *Arizona v. Gant*, which is a case in which the Supreme Court says that there is no blanket rule that says just because there's a traffic citation that there's all of a sudden carte blanche just to

have probable cause.

And that case is discussed in the case that we cite in our brief, *U.S. v. Thomas*, a case from last month that deals with this exact issue, the issue of whether an open

11:33:26 container allows to search. In that case the District Court said no. The facts are exactly on point. And the Court distinguishes the case that the government relies on, *United States v. Houghton*.

THE COURT: Let me go through, because the

11:33:40 original case was *Carroll*, right?

MR. LAZARUS: *Carroll*?

THE COURT: *Carroll v. United States*.

MR. LAZARUS: Okay.

THE COURT: It's a 1925 case.

11:33:52 But in that case, it was a warrantless automobile search because the police had probable cause to believe that it contained alcohol after the people in the vehicle offered to sell alcohol. It must have been during Prohibition.

I thought that was kind of the leading or original

11:34:18 automobile search case.

MR. LAZARUS: Well, Your Honor, there's been 95 years of Supreme Court precedent since then.

THE COURT: But the circumstances are somewhat similar to this, aren't they? They're doing a search based

11:34:29 upon at least some suspicion that alcohol is in the vehicle.

MR. LAZARUS: Your Honor, I'm not familiar with the facts of *Carroll*. I'm familiar with the facts of *Gant*, which is the most recent case from the Supreme Court in 2009, in which they say there should be no blanket rule, 11:34:46 that just because there's a citation issued doesn't give the police carte blanche.

And I would also support that with *Knowles v. Iowa*, a 1998 Supreme Court case, that says officers may not search a vehicle incident to issue of a traffic citation. They need 11:35:00 to show some probable cause that additional evidence exists in that vehicle. They didn't show that.

It's clear from the timeline in which they stopped the car, they saw the bottle, they pulled these guys out, they searched them and they searched the car, that this is a 11:35:13 matter of course; that they did not have any additional probable cause to justify that there would be additional contraband in that car.

They didn't ask if they had been drinking, they didn't do any type of -- they didn't say they smelled liquor on 11:35:26 their breath, they didn't say they saw any other bottles or had any indication anyone had been drinking or was driving impaired.

And to the Court's point about the citation, under the East Cleveland statute they have to show that the bottle is 11:35:40 in possession. So there was no testimony that Mr. Russell

or Mr. Farrow, who were sitting in the front seat, had any access to the bottle which was sitting on the back seat. Mr. Coleman said the bottle was sitting right next to him, it's in his possession; therefore, an open container
11:35:53 violation would not be found.

But more to the point, this is a minor misdemeanor, and that's stated under the state code, Ohio Revised Code 4301.99. It says that this is a minor misdemeanor violation.

11:36:07 And to that point, none of these three guys were arrested at the time that they were pulled out of the car. Officer Link herself said they were detained, so this was not anything search incident to arrest. In fact, this was just a detention in which the officers then took the
11:36:22 unnecessary and unreasonable next step to then search the car without probable cause.

The government has the burden of proof. We believe that they've failed to meet that burden. We believe that there should be no per se rule. The *Houghton* case is an
11:36:36 unpublished case from 2006. And as described by the *Thomas* court, *Arizona v. Gant* changed the landscape. That's the most -- that's the best case on point.

Gant and the Western District of Kentucky's opinion in *Thomas* lay out facts that are exactly on point. We believe
11:36:52 the Court should follow that, and suppress the evidence.

Thank you.

THE COURT: Mr. Zarzycki?

ARGUMENT

MR. ZARZYCKI: Thank you, Your Honor.

11:37:06 Your Honor, it's the government's position that the probable cause to search the vehicle did not have anything to do with the initial citation, obviously, for pulling over the vehicle. It was for a broken brake light and for not using a turn signal. Upon approaching the vehicle is what 11:37:20 gave the officer the probable cause to search the vehicle for other evidence of criminal activity.

We are not alleging, the government is not alleging that they were under arrest, that this was a search incident to arrest. That's not the case at all. The only argument 11:37:38 here and the only point is whether that bottle of liquor provided probable cause to search for additional items of a criminal offense, additional bottles of liquor.

The government is relying on a Sixth Circuit opinion in *United States v. Houghton.* And the facts are nearly 11:37:57 identical to this case, where there are multiple people/occupants, at least two, in the vehicle. Houghton was the passenger in the vehicle.

When the officer approached they observed nothing more upon the first approach, spoke with the driver, noticed an 11:38:13 open can of beer on the dashboard cup holder. And because

it is illegal to transport an open container in a vehicle, the trooper in that case believed he had probable cause to believe that he had probable cause to search for other open containers of alcohol.

11:38:33 There's no negative history from the Sixth Circuit with respect to that case. This is -- the holding was that when he discovered that at least a passenger, at least one passenger in the van had violated Kansas state code, that there was an open container of alcohol neither locked in the

11:38:52 trunk nor behind the last upright seat, or in an area not normally occupied by the driver or passenger, the trooper then had probable cause to search for other similar contraband, i.e., any open containers.

That's the Sixth Circuit case on point that I believe

11:39:10 is nearly identical to this case. The defense cites to, again, as I said in my opening argument, the *Thomas* case, which is a District Court case out of Kentucky, where there was an open container, yes, in that vehicle. That did not provide probable cause because it's not a criminal offense

11:39:31 just to merely have an open container in a vehicle in that state, that there has to be more.

THE COURT: You're saying Ohio is different?

MR. ZARZYCKI: Ohio is different.

THE COURT: You're arguing Ohio is different?

11:39:42 MR. ZARZYCKI: Albeit not arrestable, it is a

criminal offense to have an open container in the vehicle.

"Open container. No person shall have in the person's possession an open container of beer or intoxicating liquor while operating or being a passenger in or on a motor
11:40:03 vehicle on any street."

The defense -- *Thomas* was the only case that would contradict *Houghton;* however, again, that's a District Court case where it wasn't illegal to have merely an open container in the vehicle.

11:40:19 Defense also cites to another case, *United States v. Neumann* out of the Eighth Circuit, for the proposition that an empty liquor bottle in a car without something more does not establish probable cause.

United States v. Neumann does not stand for that
11:40:34 proposition. There was no open container in plain view upon the officer's approach. That motorist was pulled over for speeding, said he wasn't drinking or consuming alcohol, and they put him in the back seat of their police car. They noticed only at that point that he smelled of alcohol and
11:40:54 asked him again, have you been drinking, and he said about an hour prior I had one beer.

So because his statements were inconsistent and he smelled a little bit of alcohol once in the back of the police cruiser, in that case there was probable cause for
11:41:09 them to search for an open container in the vehicle, where

then an empty can of beer was found in the vehicle.

So there was no open container in that case in plain view which provided the probable cause, so that's also distinguishable from our situation here.

11:41:26 THE COURT: Okay. Well, thank you for the argument.

Remind me, the case is set for trial when?

DEPUTY CLERK: March 10th.

THE COURT: March 10th. I'll get a decision

11:41:41 out. It's an interesting question.

And I thank the parties. I think they both did a good job on behalf of their respective clients.

We'll get a decision out hopefully within the next days, week. Thank you.

11:41:58 MR. ROBEY: Thank you.

MR. ZARZYCKI: Thank you, Your Honor.

THE COURT: I'll recall the warrant that had been issued for the witness.

MR. LAZARUS: Thank you.

11:42:10 - - - - -

(Proceedings adjourned at 11:42 a.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Heidi Blueskye Geizer March 27, 2020

Heidi Blueskye Geizer Date
Official Court Reporter