

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. :

CRIM. NO. 17-238

PEDRO RAMON PAYANO :

a/k/a “Joemanuel Nunez-Suarez”

ORDER

AND NOW, this _____ day of _____, 2017, upon consideration of the government’s Motion for Reconsideration of this Court’s Memorandum of September 26, 2017, and the defendant’s response thereto, IT IS HEREBY ORDERED that the government’s motion is GRANTED. This Court will withdraw the Memorandum of September 26, 2017 and issue a Superseding Memorandum. The Order of September 26, 2017, granting the defendant’s motion to suppress shall stand.

BY THE COURT:

HONORABLE R. BARCLAY SURRICK
UNITED STATES DISTRICT JUDGE

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : **CRIM. NO. 17-238**

PEDRO RAMON PAYANO :

a/k/a “Joemanuel Nunez-Suarez”

GOVERNMENT’S MOTION FOR RECONSIDERATION OF THE COURT’S
MEMORANDUM OF SEPTEMBER 26, 2017

The United States of America, by and through Louis D. Lappen, Acting United States Attorney for the Eastern District of Pennsylvania, and Jennifer B. Jordan, Assistant United States Attorney for the District, hereby respectfully requests that this Honorable Court reconsider the conclusions regarding credibility and racial motivation in its Memorandum of September 26, 2017, for the reasons set forth below.

I. PRELIMINARY STATEMENT

On September 26, 2017, this Court issued a Memorandum and Order granting the defendant’s motion to suppress. The Government does not challenge the Court’s conclusion that the reasons for the defendant’s continued detention, after the initial car stop, were legally insufficient, and that suppression is an appropriate remedy. We believe, however, that the testimony and other evidence presented at the hearing demonstrate that Trooper Fleisher’s testimony was truthful, and that his actions were not motivated by the defendant’s ethnicity. In its Memorandum, the Court stated that “[a]fter hearing Trooper Fleisher’s testimony, we cannot ignore the fact the ethnicity of Payano and Acosta very likely figured into Trooper Fleisher’s motivation for the traffic stop.” Memorandum at 11. The Court also questioned the credibility

of Trooper Fleisher, stating that his credibility “is called into question” and he had committed “various embellishments and mischaracterizations of the traffic stop.” Memorandum at 15–16.

The government believes that a re-examination of the record would show that those statements are not fair conclusions given the evidence adduced at the hearing. We respectfully request this Court to reconsider its statements concerning racial profiling and the Trooper’s credibility, and issue a new Memorandum without those statements for the following reasons: (1) this Court’s suppression ruling did not require or depend in any way on a credibility determination; (2) the statements regarding racial profiling and the Trooper’s credibility create an indelible, and unfair, impression that his testimony was deliberately false and misleading and that he acted out of racial animus; and (3) the Memorandum’s statements regarding racial profiling and negative credibility have severe professional consequences for a dedicated law enforcement officer.

To be clear, the government is not challenging this Court’s ultimate disposition of the motion. The government does not request this Court to reconsider its suppression ruling. It seeks only a superseding memorandum that does not include statements about the Trooper’s state of mind and does not make findings regarding the Trooper’s credibility. The superseding memorandum would continue to make it clear that the factors identified by the Trooper as the basis for the stop and questioning were legally and objectively insufficient to prolong the stop, thus requiring the grant of suppression.

II. FACTUAL BACKGROUND

On September 8, 2017, this Court held a hearing to address the defendant’s motion to suppress the physical evidence and his statement made to officers following an investigatory traffic stop and consensual search of his car. The defendant asserted that there was no

reasonable basis for the initial stop and no reasonable basis to prolong the stop to ask additional follow-up questions prior to the Trooper's request to search the car.

During the September 8 hearing, the only witness was Pennsylvania State Trooper Thomas R. Fleisher, a 10-year veteran of the force. Trooper Fleisher testified about his extensive experience and training in law enforcement, including car stops and drug interdiction, as well as his experience patrolling the particular area where the defendant's car was located on April 3, 2017. Tr. at pg. 7–20. Trooper Fleisher testified about the basis for the initial traffic stop for suspected driver's license fraud, as the CLEAN/NCIC report associated the defendant's car with a registered owner who was a suspect for driver's license fraud. Tr. at 34:11-21. Trooper Fleisher testified that driver's license fraud involves false identifications, pictures and other false information, and the picture of the registered owner did not come up when he initially ran the information. Tr. at 31:15-20; 30:3-8. During Trooper Fleisher's testimony, the government played the Trooper's own dash-cam video, and asked the Trooper to comment on pertinent parts of that video. Trooper Fleisher was not asked on direct examination or cross-examination about the race or ethnicity of the car's occupants.

A. A Re-examination of the Record Will Allay the Court's Credibility Concerns.

1) The reasons for the specific location of the car stop was credibly explained by Trooper Fleisher.

On the question of the Trooper's stated basis for location of the car stop, the Memorandum states "Trooper Fleisher followed the Ford Focus for almost fourteen miles." And, later, "Perhaps this is why Trooper Fleisher drove for fourteen miles before initiating the traffic stop; he was either waiting for the Ford Focus to commit a traffic violation, or was mulling over whether 'suspected license fraud' was enough to justify the stop." Mem. at 4, 15–

16. The evidence presented at the hearing does not establish that Trooper Fleisher followed the defendant's car for fourteen miles, or that he was waiting for him to commit a traffic violation.

Trooper Fleisher did not dispute that the distance between where he originally saw the defendant's car and where he stopped it was approximately 14 miles. But the distance between where the Trooper first saw the car and where it eventually was stopped was not as a result of any decision to follow the car and await a traffic violation. The Trooper's cruiser was stationary, off the highway, when the defendant drove past him and entered the highway. As the defendant's car passed the Trooper's location, the Trooper took note of the license plate. He then entered that information into his computer system. He waited for a result. He received a result and read it. Based on his understanding of that information, he decided that the license fraud information needed to be investigated by stopping the defendant's car. The Trooper then waited for a safe opportunity to enter the highway. Of course, during this entire time, the Trooper's car was motionless and the defendant's car was continuing down the highway, at highway speeds.

Trooper Fleisher entered the highway and eventually caught up to the defendant. The Trooper further explained why, even after he was able to catch up to the defendant's car, he did not immediately activate his lights to pull the car over. The Trooper described in careful detail the characteristics of the area of the highway he patrols, how he pulls out into traffic, the various narrow areas and curves along the route, the speed at which traffic is moving, and how he considers the safety of himself and the other cars on the highway before initiating a stop. The Trooper testified that he pulled the defendant over when they reached an area he believed was safe for him, the defendant, and the other motorists on the highway. Tr. at 59:9-61:4.

2) **There was no conflict between the Trooper's testimony and the dash-cam videotape regarding the delay between the time the Trooper activated his lights and the time the defendant pulled over.**

The Memorandum states: "Trooper Fleisher testified that Payano took too long to pull over once Trooper Fleisher activated his emergency lights. He stated that Payano continued to travel for another tenth of a mile, passing by a safe area of the shoulder to pull over. Contrary to Trooper Fleisher's testimony, on the dash cam video, the defendant can be seen pulling over onto the side of the highway four to five seconds after Trooper Fleisher activated his emergency lights." Memorandum at 4 (citations to the record omitted). The Memorandum states later that "Trooper Fleisher became suspicious based on the length of time it took Payano to pull over after Trooper Fleisher activated his emergency lights. However, the video shows only four to five seconds elapsed before Payano safely pulled over to the side of the Turnpike." Mem. at 15.

Trooper Fleisher provided detailed testimony regarding the length of time it took the defendant to come to a stop after the patrol car's lights were activated. He compared the defendant's time to his years of experience stopping thousands of cars on this road, and while the dash-cam video was playing, described for the Court why he believed the defendant took a prolonged time to stop, passing by other, safer areas to select a narrower location to stop. Tr. at 63:8-67:6. The Trooper's estimate of approximately 1/10th of a mile (Tr. at 38:7) was entirely consistent with the video evidence which showed the time elapse to have been approximately 4-5 seconds, with traffic traveling at highway speeds. A car travelling at 65 miles per hour for 4-5 seconds will travel .07-.09 miles, which is approximately 1/10th of a mile. Thus the Trooper's testimony was consistent with the video. The defense also asked the Trooper about the part in the video where it shows Trooper Fleisher's car moving to the side of the road as the defendant's car continued traveling on the road. Trooper Fleisher testified that he moved his car over

because “I was anticipating most people normally pull -- stop a lot faster. I was anticipating getting my vehicle in a safe location as well.” Tr. at 66:8-10. That movement, showed by the video, is absolutely consistent with the Trooper’s testimony that, in that tenth of a mile, the defendant passed by what the Trooper believed was a safe area to pull over before he actually did pull over. While it is certainly fair to disagree with the Trooper’s professional opinion that the time the defendant took to pull over was suspicious or unusual, there was no misrepresentation, mischaracterization or embellishment on this point by the Trooper.

3) There was no conflict between the Trooper’s testimony and the dash-cam videotape regarding the Trooper’s assessment of the import of the driver’s license fraud information he received when he ran the license plate in his system.

The defense questioned Trooper Fleisher about a recorded conversation he had well after the search and arrest, with another officer, Corporal Engling, who Trooper Fleisher described as working in “the vehicle fraud unit” in his Troop. Tr. at 75:17-77:14. Trooper Fleisher at no time expressed the view that he did not know whether it was lawful to conduct an investigatory stop based on the registered owner being a license fraud suspect. His conversation with the Corporal on the audio (Defense Exhibit 1) is (talking over one another): “I’m assuming that doesn’t come up unless . . . he’s not a victim. . .” The other officer then talks to the Trooper about what likely happened with the license fraud. Trooper Fleisher then says, “He’s a registered owner of the car, so I think . . .,” at which point the Corporal, who is the person in the unit responsible for this type of fraud, affirms it.

The defense attorney questioned Trooper Fleisher about this conversation:

Q: You’re just hoping that you got the license plate thing right because that’s your reason for stopping the car, right?

A. I wasn’t hoping, I was fairly confident.

Tr. at 77:11-14. That testimony was also consistent with the portion of the dash-cam video in which Trooper Fleisher is talking to his partner who arrives on the scene after the stop. He clearly articulates the same basis for his stop to his partner.

In spite of this testimony, the Memorandum states that, while driving to catch up to the defendant's car, the Trooper was "mulling over whether 'suspected license fraud' was enough to justify the stop." Mem. at 15–16. The Court was suspicious because the Trooper "testified confidently about his basis for the traffic stop, and in particular, that seeing 'suspected driver's license fraud' on the CLEAN/NCIC report immediately triggered his suspicion that Payano was guilty of a crime." Mem. at 15. The government submits that the fact that the Trooper confirmed his beliefs with a more experienced officer does not warrant a finding that the Trooper did not immediately suspect that the car, and the driver of the car, was involved in criminal activity. The government would argue that, to the contrary, a law enforcement officer who confirms his beliefs—more precisely, his suspicions—with a more senior or higher-ranking officer is acting diligently. Such a conclusion is entirely consistent with the Court's finding that there was in fact a reasonable basis for the initial stop.

B. There Was No Evidence That "The Ethnicity of Payano and Acosta Very Likely Figured Into Trooper Fleisher's Motivation for the Traffic Stop."

In its Memorandum, this Court found that "[w]hen Trooper Fleisher ran the CLEAN/NCIC check, the report indicated that the owner of the Ford Focus was a 'license fraud suspect.' This provided him a reasonable suspicion to justify conducting a traffic stop to investigate the driver's license fraud." Mem. at 11. The Memorandum also includes the following statement: "...we cannot ignore the fact that the ethnicity of Payano and Acosta very likely figured into Trooper Fleisher's motivation for the traffic stop." *Id.*

Racial profiling is a very serious issue for prosecutors, and everyone else concerned about the even-handed application of the law. However, finding such motivation in this case and as to this Trooper is not supported by the evidence and is unwarranted. There was no evidence, for example, of any comments, either on the audio or in the Trooper's testimony, that demonstrated or even alluded to any racial animus or racial motivation for his official actions that day. Nor was there any evidence that the Trooper has a practice of disproportionately stopping motorists of any particular race or ethnicity.

Most compelling is the fact that defense counsel did not point to anything in the record to support such an inflammatory charge. Indeed, the only mention of such motivation was summarily made "on information and belief" in defense counsel's pre-hearing brief. Def.'s Mem. at 8. The allegation itself was not pursued at the hearing. Counsel never even asked Trooper Fleisher a single question about this topic (and as a result, Trooper Fleisher did not have an opportunity to refute such an accusation). Defense counsel did not present any evidence in support of it. She did not even argue the point to this Court at the conclusion of the hearing.

During his testimony, Trooper Fleisher explained in detail his bases for both initiating the original stop and asking follow-up questions of the defendant. He testified how each articulable basis was grounded in his training and years of experience performing drug interdiction work in this area. Because the audio/video continued to run after the stop, Trooper Fleisher is heard talking to both his partner and Corporal Engling about his reason for the stop. These conversations reflect no mention of the defendant's race or ethnicity, either directly or by implication. Trooper Fleisher also testified that, following the arrest of the defendant, he continued his investigation into the driver's license fraud, and obtained the case file to review the evidence. Tr. at 49:12-21. Such actions are consistent with a legitimate concern about the

information that prompted this car stop, and are not at all consistent with the Trooper using that information as a pretext for a race-based motivation.

III. ARGUMENT

The government accepts this Court's findings regarding the legal insufficiency of the Trooper's observations as justification for the continued investigation of the defendant. Respectfully, however, the government asks this Court to reconsider the Memorandum's conclusions regarding Trooper Fleisher's credibility and the existence of a racial motivation for the car stop. The evidence presented at the hearing does not support either conclusion. Both his testimony and the dash-cam video demonstrate that this veteran law enforcement officer acted with no improper motivation.

This Court's adverse credibility findings are potentially devastating. A Court opinion that finds a law enforcement officer's testimony lacking in credibility is subject to disclosure to all defendants against whom that officer would be called to testify. *See Giglio v. United States*, 405 U.S. 150 (1972) (government must disclose material that might affect the jury's assessment of witness' credibility). With this impeachment material in hand, attorneys in any case in which Trooper Fleisher would testify will exploit the negative credibility findings to brand this veteran State Trooper a liar who is not worthy of belief and whose motivations are presumed to be based on race.

Given this reality, prosecutors on the state and federal level may be compelled to refrain from using this experienced Trooper as a witness, regardless of whether they are confident that he is trustworthy. Trooper Fleisher thus may no longer be able to perform an essential function of his position, as prosecutors will be reluctant to rely on the testimony of a law enforcement witness who has been deemed incredible by a federal district court judge. Further, a judicial

finding that this law enforcement officer used racial profiling as pretext for the investigatory traffic stop may expose him not only to public censure and criticism, but also to risk of liability in any civil rights actions, without having had an opportunity to refute or disclaim this finding. The record in this case does not justify such an outcome.

The government respectfully requests that this Court consider our arguments, in light of the record in this case, and revise its Memorandum granting the order of suppression. The government recognizes that this is an unusual request, but believes that it is appropriate and necessary under all of the facts and circumstances.¹

¹ The government has not identified any published cases that involve similar facts, but it is infrequent that law enforcement witnesses are explicitly deemed not credible in published opinions. The government has sought and successfully obtained reconsideration to remove damaging credibility language following a suppression hearing on another occasion in *United States v. Mailloux*, Cr. A. No. 13-270 (E.D. Pa.). The government cites this case only to show that we have sought and obtained reconsideration of adverse findings concerning alleged law enforcement misconduct in the rare case, while recognizing that the *Mailloux* case involved different facts and circumstances.

IV. CONCLUSION

For these reasons, the government urges this Court to review the references regarding racial profiling and credibility in its Memorandum of September 26, 2017, and consider issuing a superseding Memorandum that does not find that the Trooper was untruthful, or motivated by the defendant's ethnicity. The result of the defendant's motion to suppress would remain the same.

Respectfully submitted,

/s/ Louis D. Lappen

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CERTIFICATE OF SERVICE

I hereby certify that the attached government's Motion for Reconsideration of Adverse Racial Profiling and Credibility Comments in Court's Memorandum of September 26, 2017 was filed upon the counsel of record below by electronic filing and/or electronic mail:

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DATED: October 10, 2017