

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

UNITED STATES OF AMERICA,

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§

v.

6:18-cr-00149-RP

MATTHEW JOSHUA PUMPHREY

DEFENDANT’S BRIEF IN SUPPORT OF THE MOTION TO SUPPRESS

**TO THE HONORABLE ALAN D. ALBRIGHT, UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF TEXAS:**

Defendant Matthew Pumphrey files this brief in support of his Motion to Suppress.

**I.
FACTUAL BASIS**

The factual basis is derived from the incident report, the search warrant affidavit, and the video of the stop. In no way should this be considered a complete inventory of everything that occurred leading up to the time of the stop to the eventual arrest of defendant Matthew Pumphrey.

A. Summary of the stop

In summary, a Department of Public Safety officer noticed Michelle Escamilla standing by her car at a Love’s Gas Station pump at 2:15 a.m in Fairfield, Texas. The officer observed Ms. Escamilla’s car lacked a front license plate and an expired registration sticker. The officer saw Ms. Escamilla enter the gas station store as he pulled into a gas pump. After fueling his patrol car, the officer waited for Ms. Escamilla to leave the gas station with her expired registration. After 30 to 45 minutes of waiting, the officer decided to approach Ms. Escamilla. This time he

noticed Ms. Escamilla and Mr. Pumphrey standing by the same car. The officer performed an investigatory stop on both individuals. After questioning both individuals, the officer requested identification from Mr. Pumphrey and found an outstanding warrant. The officer arrested Mr. Pumphrey. The officer performed an inventory search of Mr. Pumphrey's vehicle and located contraband, for which he is currently charged in this Court.

B. Unexplained differences between the search warrant affidavit and the incident report should produce an inference in favor of Mr. Pumphrey.

A comparison between the search warrant affidavit and the incident report makes it difficult to harmonize both and reveals several differences for the articulable basis for the stop of Mr. Pumphrey. Once the defendant establishes that the investigative stop is warrantless, it is the government's burden to prove the articulable basis for the stop, and therefore, it should be their burden to explain these differences.¹

The incident report states that the officer performed an investigative stop on Ms. Escamilla for the following reason: "Based on the fact that the Freestone County area had multiple robberies, multiple skimming attempts, as well as other thefts and the fact that I had just waited 30-45 minutes for them to leave the parking lot, I decided to conduct a reasonable suspicion stop on Escamilla."²

The incident report then states that the officer performed an investigative stop on Matthew Pumphrey for the following reason: "I pulled in behind Escamilla and noticed that she was

¹ *United States v. Gomez*, 623 F.3d 265, 269 (5th Cir. 2010)

² This is echoed by what the officer also told Ms. Escamilla – "I approached Escamilla and informed her that she had been stopped because of her expired registration as well as the fact that they had been in the parking lot for an unreasonable amount of time."

standing with a white male identified as Matthew Pumphrey by Texas DL#27787406.” Other than this statement, the incident report is devoid of any other reason as to why the officer stopped Mr. Pumphrey.

Per the incident report, when the officer entered the gas station parking lot he did not notice Mr. Pumphrey around the gas pump area, nor did the officer notice Mr. Pumphrey next to Escamilla’s unregistered car with a missing license plate. He only noticed Mr. Pumphrey in the general vicinity *after* he pulled back around to question Ms. Escamilla.

The search warrant affidavit tells a different story. The articulable basis for the stop of Mr. Pumphrey follows:

“At approximately 2:15 A.M. I conducted a suspicious activity check on **2 individuals** due to the fact that **they** were parked at a gas station pump for approximately 30-45 minutes and had not refueled their vehicle. I believed this to be out of the ordinary and suspicious because **they** were not from the local area and the majority of the time citizens traveling a long distance will stop to refuel but are back on the road quickly because they are trying to complete their road trip. I further believed it was suspicious because citizens that do stay a length of time will park in a parking spot instead of taking up a gas pump station. I have had some training in credit card fraud, and have also received intelligence reports on credit card scheming due to the increased amount of credit card scheming activity. There have been credit card skimming cases in the Streetman, Texas area as well as recent store robberies in the Fairfield, Texas area. I believed that based on these facts, it was possible that **the individuals** were engaged in some sort of criminal activity.”

Simply stated, the officer’s articulable basis for the investigative stop of Mr. Pumphrey in the incident report is different from the officer’s articulable basis in the search warrant affidavit. The incident report says that the officer stopped Mr. Pumphrey and asked for identification because he was standing around Ms. Escamilla when he approached. The search warrant affidavit says that the officer stopped Mr. Pumphrey because the officer observed Mr. Pumphrey

and Ms. Escamilla parked at the gas station together for a prolonged period of time and because they were located in a high crime area. Reconciling these competing truths is a threshold issue and impacts the rest of the analysis.

II. ARGUMENT

The Fourth Amendment protects individuals against unreasonable searches and seizures. Evidence derived from an unreasonable search or seizure generally must be suppressed under the “fruit-of-the-poisonous-tree doctrine.”³ “Warrantless seizures are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.”⁴

The framework articulated in *Terry*⁵ is used to analyze the legality of an investigatory stop. Under the two-part *Terry* reasonable suspicion inquiry, a court asks whether the officer’s action was: (1) justified at its inception; and (2) reasonably related in scope to the circumstances which justified the interference in the first place.⁶ Although “[a] defendant normally bears the burden of proving by preponderance of the evidence that the challenged search or seizure was unconstitutional [,] ... where a police officer acts without a warrant, the government bears the burden of proving that the search was valid.”⁷ Accordingly, “the Government bears the burden of establishing by a preponderance of the evidence the two elements under *Terry*.”⁸

³ *United States v. Alvarado-Zarza*, 782 F.3d 246, 249 (5th Cir. 2015).

⁴ *Id.*

⁵ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁶ *Id.* at 19-20.

⁷ *United States v. Waldrop*, 404 F.3d 365, 368 (5th Cir. 2005).

⁸ *Gomez*, 623 F.3d 265, 269.

The officer performed an investigatory, warrantless stop on Mr. Pumphrey. This point should be undisputed. The search warrant affidavit and incident report characterize the officer's stop of Mr. Pumphrey and Ms. Escamilla as a reasonable suspicion stop.⁹ The officer activated his car's lights and informed both individuals that they were being stopped.¹⁰ It is important to note that no questioning occurred before the officer's investigatory stop, and therefore, the analysis of the officer's stop must be contained to what the officer observed prior to the stop.¹¹

The officer's stop of Mr. Pumphrey was not justified. "An officer may temporarily detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot."¹² That particular inquiry is determined by looking at the "totality of the circumstances and [considering] the collective knowledge and experience of the officers involved."¹³ The suspicion does not need to rise to the level of probable cause but must be based on more than an unparticularized suspicion or hunch.¹⁴

First, assuming the incident report was the true and correct account of what the officer observed, the stop was not justified because the basis for the stop was Mr. Pumphrey's presence around the officer's true target Ms. Escamilla. His mere presence around a suspicious individual does not suggest that Mr. Pumphrey is engaging in criminal activity. If that were held to be

⁹ Incident Report: ("Based on the fact that the Freestone County area has had multiple robberies, multiple skimming attempts, as well as other thefts, and the fact that I had just waited 30-45 minutes for them to leave the parking lot, I decided to conduct a reasonable suspicion stop on Escamilla.") and Search Warrant Affidavit: ("I pulled in front of their vehicle at Love's truck stop pump #2. I activated my overhead lights, and camera. I confronted the individuals and informed them of their reason for being stopped.")

¹⁰ *Id.*

¹¹ *United States v. Hill*, 752 F.3d 1029, 1033 (5th Cir. 2014) ("As an initial matter, because a 'seizure' under the Fourth Amendment must be 'justified at its inception'...")

¹² *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989).

¹³ *United States v. Jones*, 234 F.3d 234, 241 (5th Cir. 2000).

¹⁴ *Id.*

sufficient, then anyone parked at a nearby gas pump would be subject to a *Terry* stop. That is the embodiment of “an unparticularized suspicion or hunch.”¹⁵

Second, assuming *in arguendo* that the search warrant affidavit credibly supplements the officer’s account, the officer still was not justified in stopping Mr. Pumphrey. To explain why, it is worth pausing and highlighting one case: *United States v. Hill*.¹⁶ The facts in that case parallel the facts in this case.

In *Hill*, at 11 p.m., officers approached a parked car backed into a space at an apartment complex. The officers considered the apartment complex a “hotspot” for crime, and the officers, from experience, believed that people backed into spaces to hide their license plates and by extension, their identity.¹⁷

As the officers approached the vehicle, they saw two individuals seated inside it.¹⁸ Those two individuals were Regon Hollis Hill and his girlfriend.¹⁹ The officers observed the girlfriend hastily exit the car and head towards the apartment.²⁰ One officer stopped the girlfriend and the other officer told Hill to exit the car.²¹ The officer frisked Hill and found a weapon in Hill’s pocket.²²

Ultimately, the Fifth Circuit determined that the government did not satisfy its burden under *Terry* to point to specific articulable facts warranting reasonable suspicion of criminal

¹⁵ *Id.*

¹⁶ *United States v. Hill*, 752 F.3d 1029.

¹⁷ *Id.* at 1030-31.

¹⁸ *Id.* at 1031.

¹⁹ *Id.*

²⁰ *Id.* at 1032.

²¹ *Id.*

²² *Id.* at 1030.

activity.²³ First, the court noted that many people back into parking spaces because it is easier to get out.²⁴ Therefore, that particular observation was of “little persuasive value in evaluating reasonable suspicion.”²⁵ Second, that Hill was in a high-crime area at night was a “relevant,”²⁶ consideration, but it was “not in of itself enough to support an officer’s decision to stop or frisk.”²⁷ This was because Hill was “not doing anything unusual for the 11:00 p.m. hour...”²⁸ Third, the Fifth Circuit explicitly rejected imputing the girlfriend’s hasty movements as justification to stop Hill.²⁹

Finally, the court in *Hill* noted what the government did not show: there was no tip of suspicious activity that preceded the seizure, the officers were not responding to any report of criminal activity, and finally, the officers, during their observation of the couple, did not see any suspicious activity.³⁰

Turning to the case at hand, the facts stitched together from the officer report and the search warrant affidavit offers the following mosaic: At or around 2:15 A.M., Mr. Pumphrey and Ms. Escamilla were parked at a gas pump for 30 to 45 minutes, the officer did not observe either individual refuel, the officer perceived them to not be from the local area, and the officer was aware of credit skimming activities occurring in Streetman, Texas and store robberies occurring in Fairfield, Texas.

²³ *Id.* at 1037.

²⁴ *Id.* at 1036.

²⁵ *Id.*

²⁶ *Id.* at 1035.

²⁷ *Id.* at 1036.

²⁸ *Id.*

²⁹ *Id.* at 1037; See *United States v. Navedo*, 694 F.3d 463, 468 (3d Cir. 2012) (“The Supreme Court has never viewed Terry as a general license to detain everyone within arm's reach of the individual whose conduct gives rise to reasonable suspicion.”).

³⁰ *Id.* at 1035.

These facts, in totality, do not objectively suggest that “criminal activity may be afoot.”³¹ First, the officer noted that credit skimming was occurring in a different town 15 miles away and that stores, not gas stations, were being robbed in Fairfield, Texas. The Fifth Circuit rejected this justification for stopping an individual in *Hill*, stating: “An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.”³² Furthermore, the officers in *Hill* considered a definitive and precise apartment complex a “hotspot” for crime.³³ In *this* case, it is not even clear that the officer considered the Love’s gas station in Fairfield, Texas a “hotspot” for crime. Additionally, Mr. Pumphrey was not engaging in any unusual activity the area to justify the stop.

Second, the officer noted that it was unusual that Mr. Pumphrey and Ms. Escamilla were parked and not refueling at a gas station for 30-45 minutes at 2:15 A.M. As a parallel, the *Hill* court viewed the officer’s suspicion of a backwards parked car of “little persuasive value in evaluating reasonable suspicion” because people back into parking spaces for entirely innocent reasons.³⁴ Similarly, it is not uncommon for individuals to innocently rest and regain their energy at a gas station before resuming their commute. In fact, in response to traffic safety concerns, AAA recommends drivers schedule a break every two hours, and take rest stops of 20 - 30 minutes.³⁵ However, while rest breaks are required under Federal law for drivers of commercial vehicles, there is no such law governing drivers of non-commercial vehicles at this time.

³¹ *Terry*, 392 U.S. 30.

³² *Hill*, 752 F.3d 1035.

³³ *Id.* at 1031.

³⁴ *Id.* at 1036.

³⁵ Tamra R. Johnson, Driving Drowsy, Don’t Be Asleep at the Wheel, AAA Newsroom, (Feb. 8, 2018).

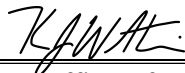
The third and final similarity to *Hill*: what the facts taken *together* do not show. Like *Hill*, the officer in this case did not have any reason to think that crime was happening at the moment of arrival. The officer was not tipped off, he was not responding to a report of criminal activity at the gas station, and Mr. Pumphrey did not match a description of anyone sought by the police. Even during a prolonged surveillance period, the officer did not note any suspicious or unusual activity.

**IV.
CONCLUSION**

For the reasons stated, Mr. Pumphrey was illegally searched and seized, and the evidence seized as a result should be suppressed. Defendant Prays the court grant this motion and suppress the evidence, and for whatever relief he may be entitled.

Respectfully submitted,

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