IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID TREJO — APPELLANT

V. — NO. 2008-KA-2133-COA

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF THE APPELLANT

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REPLY ARGUMENT

I. THE TRIAL COURT ERRED IN OVERRULING TREJO'S MOTION TO SUPPRESS.

A. Trejo had "standing" to object to the seizure of his person and vehicle.

The State contends that Trejo lacked "standing" to object to the search of the passenger, Ms. Nutt, because the cocaine was found on Ms. Nutt's person and outside of Trejo's vehicle. (Brief of Appellee at 9-11). This argument is misplaced, as was the trial court's finding(s)/ruling(s) to the extent that it intimated or held that Trejo lacked "standing."

In his principal brief, Trejo challenges the initial traffic stop, which constituted an unreasonable seizure of his person. As explained below, the search of Ms. Nutt and the discovery of the cocaine were "fruits" of the initial illegality of the traffic stop, and the exclusionary rule prohibits the admission of the cocaine as derivative evidence of the unreasonable seizure. Therefore, for purposes of "standing," the sole relevant inquiry is whether Trejo had "standing" to challenge the unreasonable seizure of his own person incident to the initial illegal traffic stop.

The State's argument fails to acknowledge that the exclusionary rule extends not only to evidence obtained as a direct result of the primary illegal government activity (the initial traffic stop), but also to secondary or derivative evidence ("the fruit of the poisonous tree") obtained as a result of or through exploitation of the initial illegality. *Jackson v. State*, 418 So. 2d 827, 829-30 (Miss. 1982) (citations omitted). The State overlooks the fact that the cocaine recovered from the search of Ms. Nutt was derivative evidence obtained as a result of the initial illegality, i.e., the initial traffic stop, which constituted an unreasonable seizure of Trejo's person. This Court's holding in *Couldery v. State*, 890 So. 2d 959 (Miss. Ct. App. 2004) was grounded, in part, on this very premise. *See Couldery*, 890 So. 2d at 967 (¶15) ("Because the stop was improper, all evidence obtained from the

stop should have been suppressed.").

The Fourth Amendment plainly guarantees the "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).[1] Thus, is well-settled that, for Fourth Amendment purposes, "a traffic stop entails a seizure of the driver." *Brendlin v. California*, 551 U.S. 249, 255, 127 S. Ct. 2400, 2406 (2007) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391 (1979)); *Howard v. State*, 987 So. 2d 506, 509-10 (¶12) (Miss. Ct. App. 2008). Accordingly, Officer Picou's execution of the initial traffic constituted a seizure of Trejo's person.

As the State points out in its brief, to have "standing, a defendant must show that his own Fourth Amendment rights were subject to an unlawful search or seizure. (Brief of the Appellee at 10) (quoting U.S. v. Meyer, 656 F.2d 979, 980 (5th Cir. 1981). The initial traffic stop constituted a seizure of Trejo's own person; hence, he clearly has "standing" to raise a Fourth Amendment challenge to the illegal seizure. By virtue of the exclusionary rule, Trejo's challenge to the initial stop properly extends to the cocaine that was obtained as a result of or through exploitation of the illegal seizure.

In sum, Trejo clearly had "standing" to challenge the unreasonable seizure of his own person. The exploitation of this seizure resulted in the search of Ms. Nutt and, thereby, the discovery of the cocaine. Therefore, the cocaine was a "fruit" of the initial illegal seizure of Trejo's person, and the cocaine was properly subject to suppression under the exclusionary rule. Accordingly, the State's assertion that Trejo somehow lacks standing to challenge the admissibility of the cocaine is

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[1] Similarly, Article 3, Section 23 of the Mississippi Constitution guarantees that "the people shall be secure in their ***persons***, houses, and possessions, from unreasonable ***seizure*** or search. . . ." MS Const. Art. 3, § 23. (emphasis added).

sorely misplaced, and this Court should disregard it.

B. The trial court erred in overruling Trejo's motion to suppress, as the initial traffic stop was unreasonable.

Reminiscent of *Coudery*, the State is once again "attempt[ing] to play a legal game of pin-the-tail on the charges." *Couldery*, 890 So. 2d at 962 (¶6). The game began at the trial level when the State, through Officer Picou, scrambled desperately to provide legal justification to support Trejo's initial traffic stop, despite Officer Picou's admission that he did not believe that Trejo was breaking any law at the time he pulled Trejo over. Based on the arguments in Trejo's principal brief and the arguments below, Trejo urges this honorable Court to put an end to this game and reverse the result reached in the trial court.

From the outset, it is important to note that determinations of reasonable suspicion and/or probable cause are questions of law which are reviewed de novo. *See e.g., Dies v. State*, 926 So. 2d 910, 917 (¶20) (Miss. 2006) (citing *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663 (1996)); *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 113 (¶11) (Miss. 1999). Therefore, this Court affords no deference to the trial court's decision as to probable cause/reasonable suspicion. It should also be borne in mind "that the provisions for search and seizure are strictly construed *against the state and in favor of the citizen.*" *Barker v. State*, 241 So. 2d 355, 358 (Miss. 1970) (emphasis added).

As the State correctly notes, "a law enforcement officer has the authority to stop a motorist if the officer has probable cause to believe that the person is committing a traffic offense." (See Brief of Appellee at 4) (citing *Burnett v. State*, 876 So. 2d 409, 411 (¶6) (Miss. Ct. App. 2003) (citation omitted)). As this Court has stated "the detaining officers [must have] a 'particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Floyd v. State*, 749

So. 2d at 144-15 (¶17) (quoting *U.S. v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 694-95 (1981)). Finally, the officer may not rely on "an inchoate and unparticularized suspicion or hunch;" he or she "must be able to point to specific and articulable facts that justify the intrusion." *Rainer v. State*, 944 So. 2d 115, 118 (¶6) (Miss. Ct. App. 2006) (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968)). As the record vividly illustrates, Officer Picou's decision to stop Trejo fell far short of reasonable.

First and foremost, Officer Picou himself repeatedly testified that, at the time he pulled Trejo over, he did not believe Trejo had violated any law. (Tr. 69, 71, 75-76, 126, 135-36). Trejo submits that the inquiry may and should properly end here. The standard for determining whether a traffic stop is reasonable requires that the facts and circumstances provide the detaining officer with "probable cause to believe that the person is committing a traffic offense" and/or a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *Burnett*, 876 So. 2d at 411 (¶6); *Floyd*, 749 So. 2d at 144-15 (¶17). Where the detaining officer himself admits that he did not believe that the detainee was breaking any laws at the time of the stop, the stop is patently unjustified. Officer Picou's admission should also easily refute the State's claim that the good faith exception applies.

As the State points out, Officer Picou claimed that he made the initial traffic stop because he was concerned that Trejo was sleepy or impaired because Trejo did not move over when he flashed his bright headlights in Trejo's rear-view mirror. (Appellee's Brief at 7). This was clearly "an inchoate and unparticularized suspicion or hunch." *Rainer*, 944 So. 2d at 118 (¶6) (citing *Terry*, 392 U.S. at 21)). There was absolutely no evidence, from Officer Picou or otherwise, that Trejo's vehicle was swerving or otherwise being operated erratically, and it is defies logic to suggest that a driver not switching lanes in response to the bright lights flashed by a tailgating vehicle indicates that

the driver (at least the lead one) is impaired or sleepy.

In fact, due to Officer Picou's tailgating at merely one to one-and-a-half car-lengths at sixty (60) miles per hour, it would have been unsafe for Trejo to switch lanes. Furthermore, under Mississippi law, Trejo was only required to give way to the right to an overtaking vehicle "on audible signal." See Mississippi Code Anotated § 63-3-609. This statute makes perfect sense, as bright lights in a rear view mirror tend to have a significant blinding effect on the driver. Also, Mississippi Code Annotated Section 63-3-619(1) provides that "the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." Miss. Code Ann. § 63-3-619(1).

The State also contends that the stop was justified because Trejo was driving at less than the maximum speed limit in the left hand lane. (Brief of Appellee at 8). As stated in Trejo's principal brief, this Court addressed a virtually indistinguishable situation in *Couldery*, and held that the defendant did not commit a traffic violation and the officer's decision to stop him was unjustified. *Couldery v. State*, 890 So. 2d 959 (Miss. Ct. App. 2004).

The State attempts to distinguish the instant case from *Couldery* claiming that "the record [in the instant case] shows evidence of a traffic violation." (Brief of Appellee at 7). More specifically, the State claims that Trejo violated a Mississippi Code requiring as follows:

> Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic . . . except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

Brief of Appellant at 7) (citing Mississippi Code Annotated § 63-3-603(d) (1972)).[2]

Significantly, the State fails to acknowledge that Section 63-3-603 also mandates that "a vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Miss. Code Ann. § 63-3-601(a).

This Court, in *Couldery*, addressed Section 63-3-603 and easily determined that the defendant did not violate the statute. *See Couldery*, at 964 (¶¶14-16). As in *Couldery*, the defendant, Trejo, was the only car on the particular area of the highway other than the police officer. In *Couldery*, this Court found significant that "the State adduced no evidence that Couldery changed from the right lane to the left lane without first ascertaining that he could change lanes with safety." *Id.* at 964 (¶16). In the instant case, Officer Picou's tailgating at an unsafe distance (one car length at sixty mph), created an unreasonably dangerously condition for Trejo to switch lanes;[3] and if Trejo had switched lanes in such an unsafe circumstance, he would have arguably violated Section 63-3-603(a) because it was unsafe to do so. Thus, Trejo actually prudently complied with the statute.

Additionally, Trejo did not violate Section 63-3-603(d) because he was not "proceeding at less than the *normal speed* of traffic *at the time and place and under the conditions then existing*

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Apparently, the State made a clerical error. It cites Mississippi Code Annotated Section 63-3-601, while the language quoted is found in Section 63-3-603(d). (Brief of Appellee at 7). To the extent, if any, that the State intends to rely on Section 63-3-601, it should be noted that the exact same argument was presented to and rejected by this Court in *Couldery*. See *Couldery*, 890 So. 2d at 962-3 (¶10-13). Accordingly, any argument that Trejo violated Section 63-3-601 (as well as Section 63-3-611) lacks merit, as this Court has previously ruled on the issue.

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It should pass without citations that the commonly understood rule of thumb is that drivers should maintain at least one car length between vehicles for every ten miles per hour the vehicle is traveling.

shall be driven in the right-hand lane then available for traffic. . . ." Miss. Code Ann. § 63-3-603(d) (emphasis added). By necessary implication, the "normal speed of traffic" is relative to the number of cars traveling in a given area and the rate of speed the cars are traveling. Trejo was the only vehicle on the road other than the pursuing officer. He was traveling north on I-55 at about 1:00 a.m. (Tr. 58, 64, 105-08). The maximum speed limit was 70mph, and the minimum speed limit was 40 or 45. (Tr. 58, 64, 105-06; see also Brief of Appellant at 3 fn.2). Therefore, the speed Trejo was traveling (60mph) was necessarily the "normal rate."[4] He was not traveling in the midst of other cars moving at different rates of speed from which to comparatively determine where his speed fell relative to the "normal rate of traffic." Section 63-3-603(d) is simply not workable/applicable at the time and place and under the conditions existing in this case. If it were, then one driving on the interstate within the speed limits with no other cars on the road would commit a traffic violation for using the left hand lane. This is clearly absurd. It is also worthy of mention that Section 63-3-603(d) does not provide that drivers proceeding at less than the *maximum speed limit* shall use the right-lane; it says drivers traveling below the "normal speed of traffic." *Id.*

Finally, as alluded to above, Section 63-3-603(a) mandates that a driver not change lanes "until the driver has first ascertained that such movement can be made with safety." Miss. Code Ann. § 63-3-601(a). Officer Picou's decision to follow Trejo at one car length at sixty miles an hour created an unsafe situation for either car to change lanes. Officer Picou's dangerous driving also directly violated Mississippi Code Annotated Section 63-3-619(1), which provides that "the driver

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Additionally, in common experience it is certainly very normal to find a substantial number of drivers traveling 60mph on an interstate with a maximum speed limit of 70mph and a minimum of 40 or 45mph; some drive faster; some drive slower. Sixty miles-per-hour (60mph) is a very safe very reasonable speed to travel on an interstate highway.

of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." Miss. Code Ann. § 63-3-619(1). Prior Mississippi case law has determined that Officer Picou's actions were excessively unreasonable. See *Dailey v. Acme Fin. Corp.*, 234 So. 2d 902 (Miss. 1970) (following 36 feet behind while traveling 45 miles per hour violated Section 63-3-619). Thus, Trejo was in compliance with Section 63-3-603; he would have violated the statute had he changed lanes with Officer Picou following dangerously close behind.

CONCLUSION

Based upon the foregoing, as well as the issues and arguments raised in his initial brief, the Appellant, David Trejo, contends that he is entitled to have his conviction sentence and fines reversed and a judgment of acquittal rendered in his favor. The Appellant would stand on his original brief in support of issues not responded to in this reply brief.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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CERTIFICATE OF SERVICE

I, Hunter N. Aikens, Counsel for David Trejo, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **REPLY BRIEF OF THE APPELLANT** to the following:

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