

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**UNITED STATES OF AMERICA**

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**v.**

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**Magistrate No.**

**BM**

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**POST-HEARING MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS TANGIBLE AND DERIVATIVE EVIDENCE**

The Defendant, BM, by and through his attorneys, James Wyda, Acting Federal Public Defender for the District of Maryland, and Susan M. Bauer, Assistant Federal Public Defender, submits this post-hearing memorandum in support of the previously filed Motion to Suppress Tangible and Derivative Evidence. The Defendant states as follows:

**Procedural Background**

On June 13, 1998, BM was charged, by way of criminal citations, with possession of marijuana and open container of alcohol in a motor vehicle, in violation of 36 C.F.R. §2.35(b)(2) and §4.14(b), respectively. Pursuant to Federal Rule of Criminal Procedure 12(b)(3), prior to Mr. M's trial, the defense filed a Motion to Suppress Tangible and Derivative Evidence. A hearing was held on the motion on September 18, 1998. The hearing occurred at the United States District Court, at Ft. Detrick, Maryland, before the Honorable Jillyn K. Schulze. At the hearing, testimony was presented by the arresting officer, Ranger George DeLancey and defense investigator, Cristina Marciano. At the conclusion of the hearing, leave to file post-hearing memoranda was granted by the Court. A further trial date in this matter is set for November 20, 1998.

## The Facts

On June 13, 1998, National Park Service Ranger George DeLancey was assigned to the Chesapeake and Ohio Canal National Historical Park (hereinafter “the park”), in a section known as the McCoy’s Ferry Picnic Area. The park is located within the exclusive territorial jurisdiction of the United States, and is managed by the Department of the Interior. As such, members of the public who utilize the park are subject to regulations promulgated by the Secretary of the Department of the Interior, as set forth in Title 36 of the Code of Federal Regulations.

On this particular evening in June, Ranger DeLancey was “checking fishing licenses” in the park.<sup>1</sup> At approximately 9:40 p.m., Ranger DeLancey observed a blue sedan enter the park. He watched as the vehicle passed through the parking lot where he was stationed. The vehicle made a u-turn in the next lot and left the park. Ranger DeLancey testified that at no time did the vehicle stop. As the vehicle maneuvered out of the parking lot, Agent DeLancey did not observe the operator commit any motor vehicle violation, nor did the vehicle appear to “flee” from the officer.

Ranger DeLancey entered his police vehicle, which had been parked in the first parking lot near the entrance to the park, and pursued the blue sedan. He followed the sedan through the one-lane tunnel that is the boundary of the park, onto McCoy’s Ferry Road. Ranger DeLancey activated his cruiser’s emergency lights, directing the vehicle to stop. Upon approaching the vehicle, the ranger noticed the odor of an alcoholic beverage. According to his testimony, he requested the driver, Mr. M, to step from the vehicle. Ranger DeLancey then noticed a six-pack of Coors Light

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<sup>1</sup>Testimony and summaries of testimony provided at the suppression hearing which are set forth in this memorandum are based upon counsel’s notes and recollection. Due to the nature of this proceeding and the deadline established for filing post-hearing memoranda, counsel did not request a transcript. However, a transcript of the proceeding will be ordered upon request of the Court.

behind the driver's seat, with two of the bottles missing. According to Ranger DeLancey, Mr. M appeared nervous and had his hands in his pockets. He asked Mr. M how much he had to drink. At first, Mr. M replied "one" then said "two" beers. Due to Mr. M's nervousness and the fact he appeared to be manipulating something in his pockets, Ranger DeLancey conducted a pat-down search for weapons. In Mr. M's front pants pocket, the ranger felt what he believed was a marijuana pipe. He asked Mr. M "is this a pipe?" Mr. M acknowledged that it was. Mr. M and the other two occupants of the vehicle were arrested. A search of the vehicle revealed a small amount of marijuana. Ranger DeLancey testified that Mr. M was cited and released.

The defense presented testimony and documentary evidence through Federal Public Defender Investigator Cristina Marciano. Investigator Marciano detailed for the Court how she traveled to the park in her government vehicle. The first sign she encountered relating to the park directed visitors to turn onto McCoy's Ferry Road from Route 56. After approximately one mile, Ms. Marciano described passing through a one-lane tunnel. The tunnel is too narrow to accommodate more than one vehicle safely. Moreover, Ranger DeLancey testified that if a park visitor were to back through the tunnel, he would consider that a traffic violation. Ranger DeLancey informed the Court that the entrance to the tunnel is the jurisdictional boundary of the park.

Upon emerging from the other side of the tunnel and proceeding around a curve in the road, two signs were visible. One of the signs notified visitors that the "park closed at dark." Both witnesses testified that no prior signs are posted regarding the operating hours of the park. Ms. Marciano stated that after the tunnel she came upon two parking lots. The first, smaller lot contained narrow parking spaces and a limited turning area. Ms. Marciano, an experienced driver, believed there was insufficient space to safely turn around in that area. She proceeded to the next

lot and was able to turn around without actually entering a parking space. In response to government cross-examination, Ms. Marciano indicated that she could have maneuvered a three-point turn in the smaller parking lot, but it would have required several stops and turns. It should also be noted that on the night of Mr. M's arrest, Ranger DeLancey's cruiser was parked in the first parking lot.

### **Argument**

However brief, investigative detention by a police officer must be based on "reasonable and articulable suspicion that the person seized is engaged in criminal activity." Reid v. Georgia, 448 U.S. 438, 440 (1980). Even a limited intrusion requires something more than a "hunch." Terry v. Ohio, 392 U.S. 1, 27 (1968). For an encounter, such as the one that occurred between Ranger DeLancey and Mr. M, to be constitutionally permissible, the ranger must have observed sufficiently "unusual conduct" to justify a reasonable belief that "criminal activity may be afoot." Id. at 30. The evidence in the record before the Court evidences only compliance with the law. Compliance with the law cannot be the basis of investigative detention.

The officer's stated reason for the stop of Mr. M was to determine "whether" he was illegally in the park after dark. The Superintendent of the National Park Service is granted the authority to establish a "reasonable schedule of visiting hours" for federal parks. 36 C.F.R. §1.5(a)(1). Moreover, violation of a park closure is prohibited under subsection (f) of that regulation. However, in order to enforce such regulations, public notice is required. 36 C.F.R. §1.7. The public must be made aware limitations on the use of parkland by one or more of the following methods:

- (1) Signs posted at *conspicuous* locations, such as normal points of entry and reasonable intervals along the boundary of the affected park locale.
- (2) Maps available in the office of the superintendent and other places

convenient to the public

(3) Publication in a newspaper of general circulation in the affected area.

(4) Other appropriate methods, such as the removal of closure signs, use of electronic media, park brochures, maps and handouts.

36 C.F.R. §1.7(a)(1)(emphasis added).

The McCoy's Ferry area of the C & O Canal Park complies with §1.7, in that a closure sign is posted. However, no sign is posted prior to actually entering the park. In order to conform one's conduct to the closure regulation, one must enter the park to read the sign. If it is after dark, visitors must leave the park. The testimony in this case was that Mr. M complied with that regulation. He came into the park through the tunnel, passed the sign area, made a u-turn in the second parking lot and left. Ranger DeLancey stated that Mr. M did not "loiter." This conduct, as viewed by a reasonable police officer, cannot amount to reasonable suspicion of criminal conduct.

Visitors to the park, like Mr. M, cannot be expected to comply with the park closure regulation until they are provided with notice through the posted sign. Ranger DeLancey acknowledged that different areas of the park are available for various public uses. Some recreational uses of the park are permitted after dark. This is especially apparent in the McCoy's Ferry area. That particular section of the park contains a campground. Ranger DeLancey told the Court that campers are permitted access to the park after dark. No physical boundary is erected to close off the camping area, nor is there any restriction on campers entering and leaving the park after dark. In fact, Ranger DeLancey indicated he expected to see people in the park after dark, and was in the picnic area ensuring that those who were fishing had proper licenses. It would also be appropriate to assume that anyone who ventured upon the park after dark would similarly see traffic

going into and out of the park. Accordingly, a valid stop cannot be based upon motorists who unwittingly venture into the park and then are stopped for violating a closure violation, which they could not have known about but for a sign posted well within the park boundaries.

The Fifth Circuit case of United States v. Strakoff, 719 F.2d 1307 (5th Cir. 1983), deals with a notice and posting regulation similar to that required by the National Park Service. In Strakoff, the defendant entered a federal court building, and surrendered his gun at the metal detector. Strakoff, at 1308. He was subsequently charged with and convicted of a violation of 41 C.F.R. §101.20.313, which prohibits carrying or possessing a firearm on federal property. The defendant appealed his conviction, arguing that the signs advising of the firearms prohibition were not posted in a “conspicuous place.” Id. The General Services Administration is subject to the following notice and posting requirement:

The Administrator of General Services or officials of the General Services Administration duly authorized by him are authorized to make all needful rules and regulations for the government of the Federal property under their charge and control ... [p]rovided, that such rules and regulations shall be posted and kept posted in a *conspicuous* place on such Federal property.

40 U.S.C.A. §318a (emphasis added).

Signs were posted throughout the federal court building providing notice of the firearm restrictions, including near the elevators and in the lobby area. Strakoff, at 1309. However, no notice was posted on the outside of the public entrances, or near the metal detectors. Id. Finding that notice was not posted in a “conspicuous place,”<sup>2</sup> the conviction was reversed. Id. at 1310. Under similar analysis, conduct by Mr. M in briefly entering a park area where closure is not

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<sup>2</sup>The term “conspicuous place” was given its ordinary meaning by the Court, which is “one which is reasonably calculated to impart the information in question.” Strakoff, at 1309.

properly posted could not be deemed criminal activity.

Even if Ranger DeLancey stopped Mr. M on a mistaken belief that he violated park regulations, the stop was invalid. A recent opinion from this district declined to uphold a traffic stop where a police officer detained a motorist for erroneously concluding he committed a traffic violation. In United States v. Beckman, 3 F.Supp. 2d 654 (D. Md. 1998), District Judge Andre Davis, found that a military police officer exceeded his authority by stopping a vehicle that made a u-turn across a double yellow line. The facts of the case were that the defendant was traveling on Maryland Route 24, approaching Aberdeen Proving Ground, a military base. Id. at 654. After crossing the boundary of the base, but prior to passing the entrance gate, he made a u-turn, and proceeded away from the base. Id. The officer believed the driver made an illegal u-turn. Id. Pursuant to Maryland traffic law, a u-turn is not permitted on the crest of a grade out of sight of another vehicle approaching within 500 feet. Md. Code Ann. Trans. §21-602(b). On this basis, the defendant was stopped and eventually cited for driving under the influence of alcohol. Id.

In reversing the decision of the magistrate judge who upheld the stop, Judge Davis stated:

In the context of the watered down probable cause/reasonable suspicion standard applicable to routine motor vehicle traffic stops for traffic violations, however, patent legal errors by law enforcement officers should not be lightly disregarded through a forgiving slavishness to objective standards based on hypothetical scenarios, informed by combing through a transportation code to discover some arguable basis for calling a stop “reasonable.” (citations omitted).

Id. at 656.

The basis for the holding in Beckman is that a “reasonably well-trained” police officer who observed the defendant’s conduct could not have concluded that a violation occurred. Id. at 655. In the instant case, Mr. M’s behavior in immediately turning around and leaving the park, after

coming upon the only sign, negates any reasonable inference by the ranger that he committed a violation.

### **Conclusion**

A reasonable police officer observing Mr. M's conduct could only conclude that his conduct was in compliance with park regulations. A valid investigatory stop can never be based upon conduct that is lawful. Mr. M's conduct was entirely lawful. Immediately upon being confronted with notice of a park closure, he left the area. "Park closed after dark," cannot be so narrowly interpreted as to permit stops based upon technically crossing the threshold of a park area, without any prior notice of the hours of operation. This is particularly the case, where the park is open for some uses. Accordingly, Ranger DeLancey lacked the authority to stop Mr. M. All fruits of the illegal stop must be suppressed from the trial of this matter. Wong Sun v. United States, 371 U.S. 471 (1963).

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**CERTIFICATE OF SERVICE**

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I HEREBY CERTIFY that on this 2nd day of October, 1998, a copy of the foregoing was mailed to the Office of the United States Attorney, Assistant United States Attorney Michael Cunningham, 800 United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201.

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SUSAN M. BAUER  
Assistant Federal Public Defender