IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 07-1964

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LONNIE RAY DAVIS,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APPELLANT'S FINAL BRIEF

FEDERAL DEFENDER OFFICE
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Request For Oral Argument

In accordance with the rules and procedures of the United States Court of Appeals for the Sixth Circuit, Appellant requests oral argument in this matter. Appellant submits that oral argument is necessary to ensure a full and fair hearing on the issue presented in this appeal.

Statement Of Subject Matter And Appellate Jurisdiction

This is an appeal as of right from the Judgment entered by the United States District Court for the Eastern District of Michigan following a guilty plea and sentencing. The Judgment in this case was entered on August 15, 2007. The Notice of Appeal was filed on August 6, 2007. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

Issue For Review

WHETHER THE TRAFFIC STOP OF APPELLANT'S VEHICLE VIOLATED THE FOURTH AMENDMENT BECAUSE THERE WAS NOT PROBABLE CAUSE TO BELIEVE THERE WAS AN ONGOING TRAFFIC VIOLATION OR REASONABLE SUSPICION TO BELIEVE THAT APPELLANT WAS, OR WAS ABOUT TO BE, ENGAGED IN A CRIMINAL ACT

Statement Of The Case

On February 22, 2006, an Indictment was filed charging the Appellant, Mr. Lonnie Davis, in Count One, with Felon in Possession of a Firearm, 18 U.S.C. § 922(g)(1), and in Count Two, with Possession with Intent to Distribute Cocaine Base, 21 U.S.C. § 841(a)(1). (R. 1: Indictment, Apx. 6). Appellant filed a Motion to Suppress Evidence (R. 13: Motion to Suppress Evidence, Apx. 9) and the Government filed a Response (R. 14: Response to Motion to Suppress Evidence, Apx. 16).

The District Court took evidence and heard arguments from the parties on June 28, 2006 and denied the motion from the bench on that day. (Tr. 6/28/06, Apx. 61-62). On April 20, 2007, Mr. Davis, pursuant to a Rule 11 Plea Agreement, pled guilty to the charges contained in the Indictment. (R. 24: Plea Agreement, Apx. 24). The Appellant reserved his right to appeal the District Court's ruling on his Motion to Suppress Evidence. *Id.*

On July 27, 2007, the Appellant appeared for and was sentenced to the custody of the Bureau of Prisons for a period of 188 months to be followed by four years of Supervised Release. The sentence was imposed concurrent with the State of Michigan sentence the Appellant is serving. (R. 28: Judgment, Apx. 42). Notice of Appeal was filed on August 5, 2007. (R. 26: Notice of Appeal, Apx. 41).

Statement Of The Facts

The facts of the instant case were accurately and succinctly set forth in the "Government's Response To Defendant's Motion to Suppress Evidence":

On January 13, 2006, at approximately 2:10 a.m., Westland Police Officer Pat Griffin was on routine patrol near Van Born and Middlebelt Road. During his patrol, the officer observed Defendant as he drove southbound on Middlebelt in a red, 1996 Ford. Officer Griffin was positioned behind the Ford and noticed an object dangling from Defendant's rear view mirror. Officer Griffin activated his overhead lights for a traffic stop. The officer intended to investigate Defendant for violating a state ordinance which prohibits obstructed vision. Officer Griffin made contact with the driver and only occupant, Defendant Lonnie Davis. Defendant readily admitted that he had no driver's license. Officer Griffin placed Defendant under arrest for no operator's license on person. As Defendant stepped out of the vehicle, the officer noticed a cup containing suspected liquor. Defendant admitted that the cup contained alcohol. During a search incident to arrest, Officer Griffin found four bundles of money in Defendant's sweatshirt pocket. A stun gun was found on Defendant's belt and two baggies of suspected crack cocaine were found inside his sock. At that point, Defendant said he wanted to be honest. He told the officer that there was a pistol underneath the driver's seat. Officer Griffin looked under the driver's seat and recovered a loaded, .380 handgun. An open pint of Hennessy Cognac was also found between the driver's seat and center console. (R. 14: Government's Response To Defendant's Motion To Suppress

Evidence at pp. 1-2; Apx. 16).

The object dangling from Defendant's rear view mirror was a small "Tweety Bird" which was admitted into evidence at the hearing conducted by the district court, (Tr. 6/28/06 at pp. 5-6; Apx. 51-52) and which is part of the record on appeal.

Summary Of Argument

The police officer who stopped Appellant's vehicle did not have probable cause to believe that Appellant had committed a traffic violation which would justify the stop. No reasonable police officer would have concluded that the "Tweety Bird" hanging from the rear view mirror of Appellant's vehicle obstructed the Appellant's vision. In addition, the record contains no facts which would have provided the officer with reasonable suspicion to believe that Appellant had committed or was about to commit a criminal offense.

Standard Of Review

When reviewing the denial of a motion to suppress this Court reviews the district court's findings of fact for clear error and its conclusions of law *de novo*. *United States v. Foster,* 376 F.3d 577, 583 (6th Cir. 2004). In the present case, the district court was not required to make any factual rulings so the standard of review is *de novo* because there are no facts before the Court for review. The sole question of law is whether there was a violation of the Fourth Amendment. *United States v. Jones,* No. 07-1155, slip op. at 4 (6th Cir. Jan. 7, 2008).

ARGUMENT

THE POLICE STOP OF APPELLANT'S VEHICLE VIOLATED THE FOURTH AMENDMENT BECAUSE THERE WAS NOT PROBABLE CAUSE TO BELIEVE APPELLANT COMMITTED A TRAFFIC VIOLATION AND THERE WAS NOT REASONABLE SUSPICION THAT APPELLANT WAS ENGAGED IN CRIMINAL ACTIVITY.

The Fourth Amendment guarantees '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In *Whren v. United States,* 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), the Supreme Court said: "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." 116 S.Ct. At 810 (citations omitted). And in *United States v. Ferguson,* 8 F.3d 385 (6th Cir. 1993), the Sixth Circuit held "that so long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment." 8 F.3d at 391 (citation omitted). *See, United States v. Hill,* 195 F.3d 258, 265 (6th Cir. 1999).

In the present case, the policeman ostensibly stopped Appellant because of the "Tweety Bird" ornament hanging from the rear view mirror. The Michigan statute in play provides:

> Sec. 709. (1) A person shall not drive a motor vehicle with any of the following:
>
> . . .

> (c) A dangling ornament or other suspended object that ***obstructs*** the vision of the driver of the vehicle, except as authorized by law.

M.C.L.A. § 257.709(1)(c) (Emphasis added).

Thus, it is not enough nor sufficient that there is a "Tweety Bird" ornament dangling from the rear view mirror. Tweety Bird must also obstruct the vision of the Appellant in order for there to be probable cause that a traffic violation has occurred. A simple examination of Appellant's Exhibit will reveal that such is not the case and that no policeman could have so believed.

In *People v. White & Fishbain,* 107 Cal.App.4th 636, 132 Cal.Rptr.2d 371 (2003), an officer on patrol stopped a vehicle with a tree-shaped air freshener hanging from the rearview mirror[1] and later discovered five pounds of marijuana and thousands of dollars in cash in the trunk. The California Court of Appeals reversed the trial court's denial of the defendants' motion to suppress stating:

> We must determine whether it was objectively reasonable for Mertz [the policeman] to believe that the air freshener obstructed or reduced Fishbain's clear view through the windshield so as to constitute a possible violation of the Vehicle Code. On this record, we do not believe it was.
>
> . . . It is worthy of note that the officer never testified that he believed the air freshener obstructed the driver's view. . . . Finally, the officer never testified to other specific and articulable facts, like hesitant or erratic driving, that might suggest the driver's clear view was impeded.

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[1]The California statute, Vehicle Code 26708, subdivision(a)(2) prohibits driving a vehicle with an object displayed that obstructs or reduces the driver's clear view through the windshield or side windows. 132 Cal.Rptr.2d at 642.

> The defense, on the other hand, presented evidence from civil engineer James Munn, who testified that the air freshener covered less than .05 percent of the total surface of the car's windshield. Munn concluded that based on the relative sizes of the air freshener and windshield, an air freshener hanging from the rearview mirror would not obstruct the vision of a six-foot-tall driver. Munn also testified to an experiment he conducted that verified this conclusion. . . .
>
> Based on the evidence presented at the hearing, we conclude it was not reasonable for the officer to believe that the object he observed may have obstructed or reduced the driver's clear view. Thus, the vehicle stop cannot be justified on this basis.

People v. White & Fishbain, 132 Cal.Rptr.2d at 642.

In the present case, it was also unreasonable for the police officer to believe that the "Tweety Bird" he observed obstructed the vision of Appellant as he was driving the car. Thus, the vehicle stop cannot be justified on this basis.

In *People v. Arias,* 159 P.3d 134 (Colo. 2007), the defendant was driving a Dodge Ram truck with a tree-shaped air freshener hanging from the rearview mirror. An officer stopped the defendant for violating a Colorado statute that prohibits obstructions of a driver's vision through the windshield. 159 P.3d at 136. A subsequent search of the defendant and the vehicle revealed marijuana and cocaine. The Supreme Court of Colorado upheld the suppression of this evidence stating:

> We accept the trial court's findings. Observing an air freshener or like item hanging from a rearview mirror is not automatically a basis for a traffic stop. Instead, the officer must reasonably believe the air freshener actually obstructs the driver's vision through the windshield. We defer to the trial court's findings that the evidence here was insufficient to show that Officer Gray

reasonably believed the driver's vision through the windshield was obstructed at the time he pulled Arias over.

159 P.3d at 139.

In the present case, there is no evidence that the "Tweety Bird" actually obstructed the Appellant's vision through the windshield. Nor is there any testimony that the officer reasonable believed that Appellant's vision was obstructed at the time he made the stop.

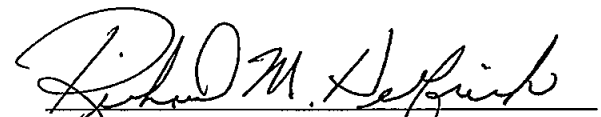
Conclusion

The stop of Appellant's vehicle was not supported by probable cause to believe that he had committed a traffic violation or by reasonable suspicion that he was involved in criminal activity. Accordingly, all evidence seized from Appellant and the vehicle should have been suppressed.

Respectfully submitted,

Legal Aid & Defender Association, Inc.

FEDERAL DEFENDER OFFICE



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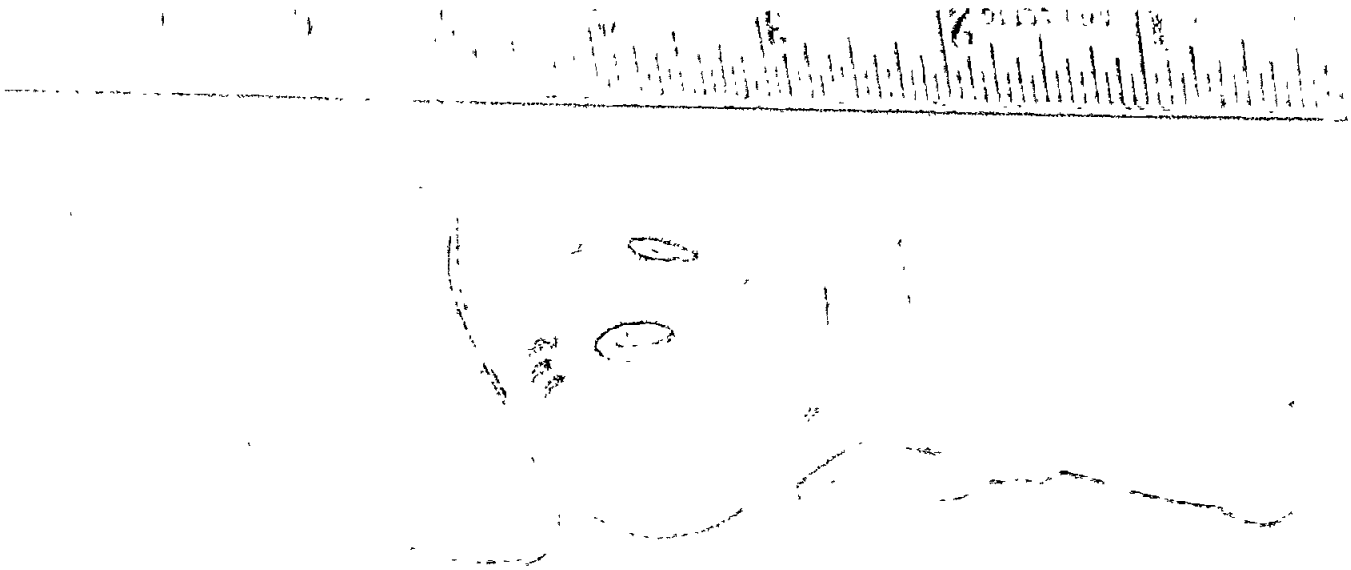


UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 07-1964
Case Caption: *USA v. Davis*

APPELLANT'S DESIGNATION
OF APPENDIX CONTENTS

Appellant, pursuant to Sixth Circuit Rule 30(b) hereby designates the following filings in the district court's record as items to be included in the Joint Appendix:

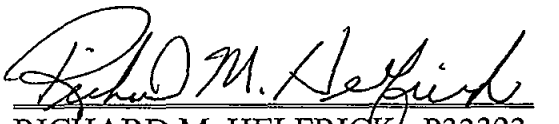
DESCRIPTION OF ENTRY	**DATE**	**RECORD ENTRY NO.**
Indictment	2/22/06	1
Motion to Suppress Evidence	5/17/06	13
Response to Motion to Suppress Evidence	5/22/06	14
Plea Agreement	4/20/07	24
Notice of Appeal	8/6/07	26
Judgment	8/15/07	28

DESCRIPTION OF PROCEEDING	DATE	PAGE NOS.
Transcript of Motion Hearing	6/28/06	All

Respectfully submitted,

Legal Aid & Defender Association, Inc.

FEDERAL DEFENDER OFFICE



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Date: March 28, 2008

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

LAURICIA MURRAY, being duly sworn, deposes and says that on the 28th day of March, 2008, she mailed the original of Appellant's Final Brief and six (6) copies to Mr. Leonard Green, Clerk, U.S. Court of Appeals, Potter Stewart U.S. Courthouse, 100 E. Fifth Street, Ste. 532, Cincinnati, Ohio 45202; and one (1) copy to Jeanine Jones, Assistant United States Attorney, 211 W. Fort Street, Suite 2001, Detroit, Michigan 48226 by enclosing same in an envelope addressed to them at the aforementioned addresses and depositing said envelopes in the United States Mail receptacle with postage fully prepaid, 1st class.

Lauricia Murray
LAURICIA MURRAY

Subscribed and sworn to before me
this 28th day of March, 2008

Terri L. King
TERRI L. KING
Oakland County Acting in
Wayne County, Michigan
My Commission Expires: 03/29/2012