

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

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ELEVENTH JUDICIAL DISTRICT COURT
COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO

Plaintiff,

No. D-1116-CR-2017-00404

ANTHONY WAGON,

Defendant,

**DEFENDANT'S MOTION TO EXCLUDE AND SUPPRESS EVIDENCE
AND STATEMENTS**

Defendant Anthony Wagon, by and through counsel undersigned, moves this Court to enter an Order suppressing and excluding any statement he made in this matter, as well as any evidence that was collected as a result of such statement. Defendant brings this Motion pursuant to Article II, Sections 10 and 18 of the New Mexico Constitution, the 5th, 6th, and 14th amendments to the Constitution of the United States, NMRA 5-501 et seq., 5-503 et seq., 5-601 et seq., §11-601, et seq., and 11-701 et seq., and as grounds states:

1. Defendant Anthony Wagon is charged with a single count of murder in the first degree (willful and deliberate).
2. A preliminary hearing was held on May 3, 2017 and, by Order dated May

16, 2017, Mr. Wagon was bound over on a single count of murder in the first degree (willful and deliberate).

3. Undersigned Craig Acorn, Assistant Public Defender, entered his appearance on behalf of Mr. Wagon on November 29, 2018.

4. Upon investigation of Mr. Wagon's detention and arrest by the Farmington police defense counsel questioned whether it was performed lawfully.

5. Mr. Wagon is a registered member of the Navajo Nation.

6. At the time of his detention and arrest, Mr. Wagon resided with his parents in a home which is and was within "Indian Country", as defined in 18 U.S.C. 1151.

7. Officers with the Farmington Police Department (FPD) went to that residence in the late night hours of April 24, 2017. Mr. Wagon exited his home to check on his uncle, who was asleep in a pickup truck on the property. The FPD officers confronted Mr. Wagon and "asked" him to come with them. Mr. Wagon was barefoot at the time and asked if he could get his shoes, but the officers said they did not want to wake his parents.

8. The FPD has no memorandum of understanding with the Navajo Nation that grants them any authority to exercise police powers on Nation territory.

9. The FPD was not accompanied to Mr. Wagon's home by Navajo Nation Police, nor any United States federal law enforcement officers, nor any law enforcement officer authorized to take enforcement action on Nation territory.

10. The FPD officers had no arrest warrant, nor extradition document, nor any legal process document authorizing their actions that night.

11. By all accounts, the FPD was not engaged in "hot pursuit" of Mr. Wagon.

12. By all accounts, Mr. Wagon was intoxicated at the time of the encounter with FPD officers.

13. Mr. Wagon did not voluntarily accompany the FPD officers to Farmington. He was not free to go about his business. The FPD officers issued commands to Mr. Wagon and performed a "Terry Pat". The officers directed him not to get his shoes from inside the residence because they knew that Mr. Wagon's parents might awaken and would likely question their authority to be there and detain Mr. Wagon.

14. After removing Mr. Wagon from his residence on the Navajo Nation, FPD officers transferred Mr. Wagon to the custody of another FPD officer in or near the Farmington city limit.

15. The FPD requires its officers to record interactions with citizens like the

one they had with Mr. Wagon using their body camera and/or their dashboard cameras. See FPD Policy and Procedure 241-14 (attached hereto as Exhibit A). It seems that not a single officer recorded this incident. No such recording has been disclosed to defense.

16. After removing Mr. Wagon from his residence on the Navajo Nation, FPD officers transferred Mr. Wagon to the custody of another FPD officer in or near the Farmington city limit.

17. That officer took Mr. Wagon to the Farmington police station where he was interrogated by FPD detectives.

18. Mr. Wagon gave a statement to detectives that they used as part of their investigation and which the State intends to use against him, together with other evidence, including a vehicle, developed from the statement, at trial.

ARGUMENT

The detention and arrest of Mr. Wagon by officers of the FPD was unlawful and therefore any and all evidence which arose from such unlawful action must be suppressed.

The exclusionary rule requires that evidence obtained in an unconstitutional manner be suppressed. *State v. Tapia*, 2018-NMSC-017, ¶ 13. The Exclusionary

rule under the “Fourth Amendment, was purposed solely on deterring police misconduct” while Article II, Section 10 is “also directed at protecting the constitutional right to be free from unreasonable search and seizure, whether or not it resulted from police misconduct.” *State v. Garcia*, 2009-NMSC-046, ¶ 29, 147 NM 134, In its essence, “Article II, Section 10 expresses the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions[.]” *State v. Gutierrez*, 1993-NMSC-062, ¶ 46, 116 NM 431. The remedy of exclusion is not limited to physical evidence, it also requires the suppression of any evidence that is “fruit of the poisonous tree” *Utah v. Strieff*, 136 S.Ct. 2056, 2061 (2016) (internal quotations and citation omitted).

In fact, “the exclusionary sanction applies to any ‘fruits’ of a constitutional violation—whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention.” *United States v. Crews*, 445 U.S. 463, 470, (1980).

Furthermore, “the exclusionary rule applies not only to evidence unlawfully seized, but also to evidence derived from the original illegality.” *State v. Lujan*, 2008-NMCA-003, ¶ 9. In addition, the subsequent provision of *Miranda* warnings cannot, when viewed in the totality of the circumstances, overcome the taint of constitutionally infirm searches and seizures. *State v. Bedolla*, 1991-NMCA-002,

¶¶ 30-35. In other words, “the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence...” *Murray v. United States*, 487 U.S. 533, 536–37 (1988). Thus, all evidence that is the product of an unconstitutional seizure must be suppressed.

Here, FPD officers came onto the Navajo Nation and took Mr. Wagon into custody without lawful authority. They had no agreement with the Navajo Nation that permitted them to exercise police powers, nor were they accompanied and assisted by any law enforcement officers who had lawful authority to act. They had no valid arrest warrant, nor did they have an extradition warrant issued by the Nation. Therefore, all physical evidence, statements made by Mr. Wagon, and observations by officers after the unconstitutional detention are the product of the unconstitutional seizure. All of the evidence is tainted by the unlawful detention. Thus all of the evidence after the seizure must be suppressed.

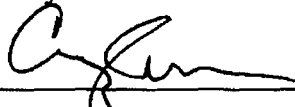
THEREFORE, Defendant hereby respectfully requests that this Court enter an Order granting the relief he requests and exclude and suppress all statements he made, together with any evidence collected as a result of his unlawful seizure by the FPD, along with whatever and further relief the Court deems appropriate.

This will certify that a copy of the foregoing was placed in the District Attorney's incoming basket and mailed to other counsel of record on the date of filing.






Counsel for Defendant

Respectfully Submitted:



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FARMINGTON POLICE DEPARTMENT		
POLICY AND PROCEDURE		
	POLICY NUMBER: 241-14	EFFECTIVE DATE: 10/23/2018
	SUBJECT: In-Car & Wearable Video Cameras	
	APPROVED BY:  STEVEN D. HEBBE, CHIEF OF POLICE	
		

PURPOSE:

The purpose of this policy is to establish guidelines for the use, management, storage, and retrieval of audio-visual recordings by in-car and wearable video systems.

POLICY:

It is the policy of the Farmington Police Department to utilize in-car video cameras in patrol vehicles, and wearable video cameras to collect audio-visual evidence of criminal activity, to evaluate officer performance, and as a training tool for police officers.

PROCEDURE:

The Farmington Police Department has adopted the use of in-car and wearable video cameras to accomplish the following:

1. To provide an accurate depiction of events for courtroom presentation;
2. To accurately capture statements and events during the course of an incident or investigation;
3. To enhance the officers' ability to document and review statements and actions for report writing purposes and courtroom preparation;
4. To provide an impartial measurement for self-critique and field evaluation; and
5. To assist in the ongoing training of police officers and police recruits.

EXHIBIT A

The following incidents shall be audio and video recorded when the reasonable possibility of recording such incidents exists:

1. All investigative contacts, both in person or by telephone, including follow-up investigations;
2. All emergency responses in which the patrol vehicle's emergency lights are activated;
3. All motor vehicle pursuits;
4. All prisoner transports;
5. All crimes in progress;
6. The reception of citizen complaints or feedback on police employee performance.
7. Any other situation or event that the officer deems appropriate to record.

In-Car and Body-worn Video Systems Activation Protocols:

Officers on routine patrol who upon observation of traffic violations, municipal code violations, criminal activity or other observed emergency situations which require action shall immediately activate the body-worn camera system prior to taking action, to include following a vehicle, approaching an individual person, or engaging the vehicle emergency equipment. Officers shall activate their body-worn or in-car camera system prior to making an investigative telephone call, and when an incoming call is received, the body-worn or in-car camera shall be activated as soon as practicable and when safely able to.

Regarding dispatched calls for service, officers should consider activating their body-worn camera well before arriving on scene in order to prevent the officer from becoming distracted and forgetting to activate the camera should a dynamic situation be occurring upon arrival. If, upon review, it is determined an officer had an adequate opportunity to activate their body-worn camera prior to arrival on scene, but they failed to do so, it may be considered a violation of this policy.

The Department recognizes that officers may be placed in situations which are stressful, rapidly evolving and unpredictable. Therefore the Department recognizes there may be circumstances in which an officer may not be able to immediately activate their body-worn camera. In such cases the officer shall as soon as practicable and when safely able to, activate their body-worn camera.

As a matter of routine, all officers and employees who are issued a body-worn camera shall use the body-worn camera to record any of the aforementioned events or incidents. In as much as the additional, simultaneous use of the in-car camera system offers multiple advantages to accomplishing the stated purposes of this policy, officers shall use both the body-worn and in-car recording systems simultaneously. Officers shall make every reasonable attempt to utilize the in-car camera system whenever citizen contacts originate or occur near or via the police vehicle.

Not all citizen and investigative contacts can be video or audio recorded based upon circumstances outside of an officer's control. For example: unanticipated events requiring police intervention when neither the officer nor the department vehicle are equipped with recording equipment and such incidents are outside of the officer's routine duties and job assignment. It is not the intention of this policy to deny police services based upon the unavailability of recording equipment with which to record such services.

When the in-car and wearable video cameras are activated, officers shall ensure that the audio portion is also activated to ensure that all events are properly documented. Officers are encouraged to use the audio portion of the recording to narrate events as they occur to provide the best evidence for courtroom presentation.

Officers are encouraged, when possible, to review their camera recordings when preparing written documentation of events in order to ensure the accuracy and consistency of events.

Officers shall ensure the volumes from other electronic devices within the police vehicle (radios, CD players, etc.) are turned off when the back seat of their police vehicle is occupied. This does not apply to police radios.

In-Car Video Systems:

All in-car video equipment shall be installed in a manner which ensures the system can be activated automatically when the vehicle's emergency lights are activated, manually by the officer via a wireless transmitter, and manually by the officer from within the police vehicle.

Officer safety shall be the primary consideration for placement of the system components within the vehicle and the use of the equipment. Officers will be provided with adequate training in the use and operation of the in-car video equipment prior to use.

Prior to the start of each shift, all officers assigned an in-car video camera shall perform a pre-operational inspection of their equipment to ensure the video camera and wireless microphone are operational and functioning properly.

Any malfunctions of the in-car camera equipment shall be reported to the immediate supervisor prior to the patrol unit being placed in service. The supervisor shall then make the determination whether the patrol unit will be placed into service with an inoperable camera system. If it is determined the vehicle will go into service with an inoperable camera system, then dispatch will be notified. Furthermore, the supervisor will make a notation of the vehicle unit number and camera status through Department email to the Administrative Lieutenant and member of the IT Division to have the system fixed or replaced.

Wearable Video Systems:

All wearable video cameras shall be worn on or near the center of the chest. On patrol uniforms, this can be accomplished by clipping the cameras to the loop located between the buttons on the

center of the chest. If there is no loop on the uniform shirt, the camera should be attached as closely to the center of the chest as possible.

Officers will be provided with adequate training in the use and operation of the wearable video equipment prior to use.

Prior to the start of each shift, all officers assigned a wearable video camera shall ensure the camera has been downloaded and is fully charged as per their training. Each camera system comes with a wall and car charger. Depending on the make and model of the issued camera, the cameras can be downloaded at any of the department's networked computers, a downloading station, or via the wireless downloading system.

In addition, officers assigned a body camera shall conduct a minimum of one functionality test weekly. This function test shall be comprised of a brief recording, a download of the recording and a review of the video to confirm the body camera is operating properly. Where possible and appropriate officers should make every reasonable attempt to conduct this functionality test at the beginning of their respective work week and prior to going in service for work.

Before going into service, any malfunction of the wearable camera system shall be reported to the on-duty supervisor. If a malfunction occurs while on-duty, it shall be reported to dispatch and the on-duty supervisor immediately, whenever reasonably feasible to do so. If the system cannot be placed into service through basic trouble shooting procedures, the supervisor shall provide a pool camera and contact the IT Division to have the system fixed or replaced.

In-Car Digital Video Evidence:

Officers shall not attempt to erase, alter, modify, or tamper with any digital recording or digital recording equipment.

The current in-car digital camera system utilized by the Farmington Police Department records and temporarily stores events onto a compact flash memory card. The memory card is locked within the mobile video recorder. Officers shall not attempt to access or remove this memory card. All recorded material is transferred wirelessly from the vehicle to the system server. The only personnel with key access authorized to remove this memory card is the video system administrator, assistant administrator, or authorized repair personnel. Officers should not attempt to download or obtain video recordings from the mobile video recorder or compact flash card.

All wireless transfers of recorded material from the mobile video recorder / flash memory card will be conducted at the Farmington Police Department wireless access locations. The only exceptions will be routine maintenance, repair, or troubleshooting efforts conducted City of Farmington Police IT staff and/or in-camera system administrators and designees.

All non-wireless transfers of recorded incidents, (i.e., removal of flash memory card for maintenance and/or malfunction) will be conducted only by authorized personnel. Only the following personnel are authorized to remove the flash memory card for manual computer transfer of recorded material: In-camera system administrator, assistant or Chief's designee.

If the flash memory card is removed for manual transfer of recorded material for any reason, the In-Car Camera Maintenance and/or Media Manual Removal Form will be completed by the In-Car Camera system administrator, assistant or Chief's designee. The Officer whose media is manually removed is responsible for ensuring the form is submitted to the Professional Standards Lieutenant. At the time of removal, dispatch shall be notified and will update the Officer's dispatch call log and ensure the on-duty supervisor is notified. There are no exceptions to this paragraph.

Wearable Digital Video Evidence:

Officers shall not attempt to erase, alter, modify, or tamper with any digital recording or digital recording equipment.

The wearable camera system utilized by the Farmington Police Department is an all in one system. The memory card for this system cannot be removed and must be manually downloaded through a department networked computers, downloading station, or via the wireless downloading system as required by the type of issued camera. These downloads must be completed by the officer on a daily basis. Any problems with downloading the device will be reported to the supervisor and, if necessary, the IT department will be summoned to fix any problems with the system.

Digital Video Evidence Storage and Release

Material downloaded onto the camera system server will remain in the server's memory for 45 days. The digital archiving of the digital material to a back-up DVD is automatic and continuous, occurring in most cases with the first few days of submission into the system. The DVDs produced for archival purposes are stored in locked cabinets and are controlled by the system administrator. The only individuals who may access the stored copies are the following personnel: Chief of Police, the Professional Standards Lieutenant, the Camera system administrator or his/her assistant.

All recorded material that resides on the server or is archived on DVDs will only be viewed by accessing the manufacturer's proprietary viewing software program. This program is available to all authorized personnel on any of the Farmington Police Department's networked computers. If the recorded material is not viewable or available on the server (i.e., past the 45-day server storage period, server maintenance, and/or upgrades in progress), the software will automatically send a request to the system administrator instructing him/her to reload the material onto the server for requested viewing. Once reloaded on the system, the material will then be available to be viewed for an additional 45 days and then will be automatically purged, as an archived copy already exists.

All requests for recorded material will be submitted to the City Clerk's office per the New

Mexico Public Records Act. Once approved by the City Clerk, the request is forwarded to the Professional Standards Lieutenant for department approval and release.