**** ORAL ARGUMENT REGULAR CALENDAR APRIL 24, 2025 ****

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Appeal No. 24-CF-0242
(Crim. No. 2022-CF2-002599)

SHAQUILLE TAYLOR

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

REPLY BRIEF FOR APPELLANT

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ARGUMENT

I. The Trial Court Erroneously Denied Mr. Taylor's Motion To Suppress Evidence Recovered By The Secret Service By Means Of a Warrantless Inventory Search Without Consent To Search, Or Opportunity To Order A Tow And Without Reference To Or Production Of Specific Police Procedures That Allow For A Warrantless Inventory Search.

For an inventory search to be permissible, "the police must first have had a lawful basis for acquiring custody of appellee's auto before they could employ safe-keeping methods such as an inventory of its contents." *United States v. Pannell*, 256 A.2d 925, 926 (D.C. 1969). "[A] condition precedent to a constitutionally permissible inventory search is lawful possession by the authorities of the vehicle." *Arrington v. U. S.*, 382 A.2d 14, 18 (D.C. 1978). "[I]f a standard impoundment procedure exists, a police officer's failure to adhere thereto is unreasonable and violates the Fourth Amendment." *United States v. Proctor*, 489 F.3d 1348, 1354 (D.C. Cir. 2007)

Appellee agrees (at 18-19) that in order for an inventory search to be lawful, the Altima would first have to be lawfully in police custody. Secret Service Agent Smead would have had to ""have probable cause to believe that the car contains contraband, or a person consents to such possession or is unable to make other arrangements for disposition of the automobile." *Madison*, 512 A.2d at 281."" However, none of the conditions appellee cites could be reasonably found on this

record. There was no probable cause according to Agent Smead's testimony to search the Altima, and he did not ask for consent or give opportunity to make other than police arrangements for disposition of the Altima. Agent Smead determined the car would need to be towed by summoning a private tow company police regularly used and he began his extensive inventory search of the Altima within 10 minutes of him being on the scene that resulted in recovery of the gun entered into evidence at trial.

As far as Agent Smead was concerned, this was an accident between two vehicles he came upon and he did not know who caused it (10/31/23 Tr. 92-93). As for the first potential lawful basis appellee cites, probable cause, Agent Smead made clear in his testimony at the suppression hearing that his search of the Altima was not based on a thought he had probable cause to search and therefore there was no lawful basis on that prong. Agent Smead insisted this was simply an inventory search he conducted prior to a tow and not a search based on probable cause to believe the car contained contraband after he placed Taylor under arrest for fleeing law enforcement. In support, Agent Smead testified the gun he ultimately found in the Altima was not in plain view, it was on the floorboard covered with things strewn all over it, he had to move the open glove compartment that was now on the floor of the car to see it, the dashboard had collapsed onto it from impact of the

crash (10/30/23 Tr. 121-26, 127-28). According to Agent Smead, he never saw Taylor make a furtive movement before he left in the car, he had no reason to believe there was contraband in the Altima, he was not looking for evidence of a crime when he searched the vehicle. He said his search was not based on probable cause to conduct a search and was merely to mitigate any claim something valuable was missing from the vehicle later (*id.* at 125-26).

Appellee does not rely on any argument there was probable cause to search the vehicle. As for the second potential lawful basis appellee cites, consent to search, appellee does not rely on consent to search either. Instead, appellee relies on an argument (at 21) that Taylor was unable to make other arrangements for a tow. Agent Smead did not testify at the suppression hearing he asked for or had consent to search the vehicle within that short 10 minutes he stated that he was on the scene and before he began his search (10/30/23 Tr. 120). Agent Smead did not testify he gave Taylor the opportunity within that 10 minutes before he began his search to make other arrangements for the necessary tow. He did not testify Taylor was unable to do so or was so incapacitated due to his injuries from the accident he could not make a call. Agent Smead testified that Taylor was conscious after the accident and followed his commands to get out of the vehicle, lay on his stomach and put his hands behind his back to be handcuffed before he was taken to the

hospital by ambulance for his injuries from the accident (*id.* at 118-19, 128, 134-136; 10/31/23 Tr. 43-46).

Taylor testified at trial. His testimony was consistent with Agent Smead's on the aftermath of the crash. Taylor did not indicate he was asked for consent or gave consent to search or was given an opportunity by police to make a call and make his own arrangements for a tow or call his girlfriend to do so. Taylor testified at trial that after the crash his car came to a standstill against a wall and he had to push out the front windshield to climb out of the vehicle and then fell to the ground. He recalled a Secret Service police officer held a gun to him, told him to stay on the ground, got on top of him and handcuffed him. He remembered being placed on a gurney and taken to Washington Hospital Center for treatment. Mr. Taylor stated he was ultimately diagnosed with a head injury and sustained a broken arm and broken leg in the crash that required several surgeries (11/2/23 Tr. 33-36). Appellee's speculative assertions (at 21) Taylor was conclusively incapacitated from making other arrangements is meritless. No witness testified to that and that speculation is otherwise refuted by the record of injuries only involving a head injury and a broken arm and leg, that is not conclusive evidence of any inability to make a phone call to a tow company or someone else to call a tow company.

Appellee alternatively asserts (at 21 n. 8) that even if Taylor had been offered the opportunity to make his own arrangements by calling a tow company himself and staying on the scene (or calling his girlfriend to do so since it was her car), the police were in lawful possession because it was leaking fluids. This argument also has no merit, there was no evidence whatsoever and appellee points to no evidence that the private tow company police summoned had any more ability to immediately arrive on the scene or availability of a tow truck to remove the vehicle than if Taylor or his girlfriend had been given the opportunity to choose and summon a different private tow company, or even the same tow company if that was suggested by police to Taylor as the one to call for quickest removal for safety purposes.

As demonstrated, the trial court's conclusion (10/30/23 Tr. 141) the gun was not subject to suppression because the first requirement for an inventory search of the Altima and exception to the warrant requirement was established by a preponderance of the evidence - - that the vehicle had to end up in possession of police and their possession of it was necessarily a community care taking function - - did not have foundation on this record and its ruling should be reversed.

Appellee defends (at 23) the trial court's second conclusion that Agent Smead's testimony alone and without documentation of any written policy that the

Secret Service searches every vehicle for inventory as a matter of procedure and how they are to do it, met "the [second] requirement that the inventory search be conducted pursuant to an establish[ed] law enforcement policy" (10/30/23 Tr. 141). Their arguments have little merit. First, appellee contends (at 23) Taylor's written court pleading did not mention the need for a written policy. But his argument at the suppression hearing (10/30/23 Tr. 138-39) clearly did complain there was no written policy produced to support Agent Smead's testimony he acted routinely and in accordance with written policy, and appellee does not dispute those facts as to what occurred at the suppression hearing and set forth in appellant's brief (at 22).

Second, appellee argues (at 23) that Taylor did not produce the written police policies and procedures for a warrantless inventory search at the suppression hearing, thereby implying that it was his responsibility to do so and not the government's. But it was not Taylor's burden to produce the written policy for purposes of cross-examination, it was the government's, it was in the government's possession and part of their burden in discovery and appellee's argument on appeal raises discovery issues in this arena. Appellee relies on (at 19, 20, 22, 23) *Madison v. United States*, 512 A.2d 279 (D.C. 1986) for its proposition no written policy was necessary in order for the trial court to draw its conclusions. But *Madison* is

not dispositive, because the fundamental issue would seem to be that a defendant has a right to confront police on their claims a policy exists for a warrantless search and the defense cannot do so without the policies. Even if the defense had been given the policies it was the government's burden to show they were followed.

Here, the reasonableness of the search depends on adherence to policies. The government withheld those policies even after the usual discovery requests were lodged by the defense prior to trial in violation of Rule 16 and potentially *Brady*. Materials were in the government's possession (MPD a part of prosecution team). *Kyles v. Whitley*, 514 U.S. 419 (1995). The material was necessary to the defense case and possibly impeaching. The government relied on those policies for Agent Smead's actions. The government seems to ignore its obligations to provide the requisite materials to confront the officer. The defense needs an opportunity to confront officers – essential to effective cross examination – particularly where policies involved are highly technical, and frequently misused. Effective confrontation here must involve the application of the MPD General Orders Series 602 Number 01 and Series 303 Number 03 (GO-SPT 602.01; GO-OPS 303.03). Each speak in depth to the legal authority, condition to allow for and scope of the performance of an inventory search. *Id*. It is Rule 16 (government is relying on the policy to conduct the search). It is also *Brady*, that

could impact the outcome of the hearing. MPD policy has specific, itemized rules for when towing is allowed/necessary and when an inventory search can be conducted beforehand and police need to be in strict compliance with those rules.

Finally, appellee asserts (at 24-26) that error, if any, was harmless because evidence of the gun did not "inflame the jury" (at 25). While appellant acknowledged in his brief (at 27) the jury found him not guilty of the gun charges, he nevertheless argued that "evidence underlying those charges was a substantial portion of the trial and witness testimony and there is no assurance the evidence or lack thereof was not prejudicial or used by the jury to compromise a verdict or in some other way influence a verdict on the remaining counts." *Id.* Appellee does not address this argument, that jurors could have compromised on a verdict, agreeing to acquit him of the gun charges if those who wanted him to be acquitted on the gun charges would agree to find guilt on the aggravated assault charges. In closing argument the prosecutor argued Mr. Taylor fled police and disregarded the life of others because he didn't want to get caught with loaded gun in the car (11/2/23 Tr. 76, 99-103). Maybe some jurors agreed with this argument, maybe some did not but we know the gun was important to the government as to all of the charges. "The law correctly recognizes that it must make room for jurors' negotiation and compromise during deliberation." *Steadman v. United States*, 358

A.2d 329, 332 (D.C. 1976). This is what could have happened here with the gun evidence that was allowed and should have been suppressed. As a result, the government has not shown that the error was harmless.

The trial court erred in failing to grant the motion to suppress and appellant is entitled to a new trial.

II. The Trial Court's Response To A Jury Note Allowing Them To Substitute Any Human For The Complainant To Satisfy The Second Element Of Aggravated Assault While Armed Was Erroneous.

Appellee mentions (34-35) that Taylor did not make certain exact argument in the trial court he now makes on appeal but appellee does not argue he is subject to plain error analysis, and so he does not defend on and make a plain error argument in response.

Appellee centers its argument (at 26-36) on the notion that the jury instruction in response to the jury note on the second element of aggravated assault while armed (motor vehicle) asking if they could substitute any human for the Mr. Gage tracked the generic language in the statute and therefore could not be misleading, confusing or prejudicial. While tracking the generic language of a statute may be sufficient, appellant maintains that under the circumstances of this case and Taylor's testimony and defense at trial, the court cannot say with fair

assurance that the judgment was not substantially swayed by reinstruction. *Gray v. United States*, 155 A.3d 377 (D.C. 2017).

Closing arguments followed jury instructions. In closing argument the prosecutor specifically repeated the second element of the crime verbatim and exactly as the jury was initially instructed and made a point of saying, this "second element, this is heart of this charge"(11/2/23 Tr. 77). In response to the heart of the case, defense counsel argued this was an accident, and even according to the government's own witnesses, Taylor specifically tried to avoid hitting Mr. Gage's car (*id*. at 85-94). Taylor testified he tried to avoid Mr. Gage's car (11/2/23 Tr. 31-32, 35, 39, 42). The government's crash investigator testified breaking on the Altima was intentionally activated by Taylor one second prior to impact (11/1/23 Tr. 63-65, 70-75, 100). The government's expert witness in accident reconstruction was able to conclude with certainty Taylor took his foot completely off the accelerator pedal having observed a hazard and applied the car break before and through impact with the Jaguar belonging to Mr. Gage and used the steering mechanism to swerve (*id*. at 114-15).

Something caused the jury to ask if any human could be substituted for Mr. Gage in the second element of the instruction, the heart of the instruction. The defense asked that the jury simply be told to follow the Redbook instructions as

given, obviously the safest and most consistent response because anything else would change the instruction. The jurors did not state they were confused, they asked if they could substitute for reasons unknown. While no one can know for sure, it is reasonable to think that perhaps some if not all the jurors felt the testimony of Taylor, backed up by the expert testimony of the government's witnesses showed that with respect to Mr. Gage, Taylor took measures to avoid colliding with him which might negate as to him and under the initial instruction an extreme indifference to human life.

The government argues (at 34) that the reinstruction was so clarifying for the jury, as opposed to confusing or misleading, that within 48 minutes later they came back with verdicts on all the charges. Appellant argues no clarification was necessary because they jury did not state it was confused. However, it obviously could have changed the course of deliberations when so soon afterwards they rendered a verdict. Whatever one of more jurors was stuck on (likely having something to do with Taylor's defense), once that question was answered the jury rendered a verdict soon thereafter.

As a practical matter in the context of this particular case and Taylor's stated defense, this court cannot say that the reinstruction could have unintentionally but realistically and unfairly blotted out Taylor's defense, by allowing the jurors to

dismiss Taylor's defense as to Mr. Gage and his efforts to avoid him and government expert testimony in support thereof. The reinstruction did change the initial instruction in that it allowed the jury to ponder what could have happened to any human and find guilt, versus what actually happened and Taylor's conduct toward Mr. Gage.

For all the reasons stated in appellant's opening brief and here, the court should reverse appellant's convictions on this basis and afford him a new and fair trial.

CONCLUSION

For all the foregoing reasons and any other reasons this Court deems appropriate, this case should be reversed, the convictions vacated and a new trial ordered; if no other relief is granted the parties agree the conviction for assault with a deadly weapon merges with the conviction for aggravated assault while armed and must be vacated. [1]

[1] Appellant maintains all arguments made in his opening brief. Any failure here not to address a point or argument in appellee's brief is not meant to be taken as and should not be treated as a concession by the appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means through the Court's electronic E-Filing system upon counsel for appellee Chrisellen R. Kolb and by email on Assistant U.S. Attorney Chimnomnso Kalu at Chimnomnso.Kalu@usdoj.gov, this 14th day of April, 2025.

/s/: *Mindy Daniels*
Mindy Daniels