

**STATE OF NEW YORK  
ERIE COUNTY SUPREME COURT**

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**THE PEOPLE OF THE STATE OF NEW YORK**

**v.**

**[REDACTED]**

**Defendant.**

---

**[REDACTED]**

**MEMORANDUM OF LAW**

**[REDACTED]**

**Hon. [REDACTED]  
25 Delaware Ave.  
Buffalo, NY 14202**

**[REDACTED]  
Erie County District Attorney  
25 Delaware Ave.  
Buffalo, NY 14202**

██████████ is charged in this indictment with criminal possession of a weapon in the second degree (Penal Law § 265.03[3]). A suppression hearing was held on ██████████. This memorandum of law is submitted in support of the defendant's motion to suppress the firearm on the ground that it was recovered in violation of his right to be "secure in [his] persons, houses, papers, and effects, against unreasonable searches and seizures" (US Const, Amends 4, 14; NY Const, Art I, § 12).

At 6:00 p.m. on ██████████ Buffalo Police Officer ██████████ ██████████ He observed a couple of people on the porch and a couple of young men sitting in a legally parked car out in front. There was no sign of any trouble and no call of any disturbance in the area. According to PO ██████████ the car was running, but there is no proof of this, as he did not activate his body cam for the initial part of the encounter. When testifying about whether the vehicle was running or not, PO ██████████ acknowledged that by the time he activated his body camera, "it appears that it shut off." (34); (numbers in parentheses refer to pages of the suppression hearing transcript from July 21, 2022). He recognized the man in the driver's seat as Mr. ██████████ whom he recalled did not have a valid license when he encountered him two months earlier.

PO Giarrano pulled behind the vehicle, approached, and stopped Mr. ██████████ who had stepped out of the vehicle (12). At this time, Mr. ██████████ was placed in the backseat of the patrol car, without incident or threats, and PO ██████████ began to ask him questions about his license and informed Mr. ██████████ that there was a warrant out for him. PO ██████████ later testified that Mr. ██████████ did not in fact have a warrant (35).

After unsuccessfully attempting to unlock the vehicle, PO ██████████ made the unilateral decision to smash the window, causing great damage to a legally parked, locked vehicle.

*The approach of the vehicle was unlawful.*

In a suppression hearing, the prosecution has the “initial burden of going forward to show the legality of the police conduct” (*People v. Gray*, 126 AD3d 1541 [4th Dept. 2015]).

In order to approach either a civilian or a parked car, the police must have an objective, credible basis for the interference (*People v. DeBour*, 40 NY2d 210, 223 [1976]; *People v. Ocasio*, 85 NY2d 982, 984 [1995]). The approach must be based on more than “a hunch, whim, caprice or idle curiosity” (*id.* at 985).

Here, PO ██████████ stated reason for the approach was that Mr. ██████████ was in the driver’s seat, the engine was running, and Mr. ██████████ driving privileges were suspended the last time he pulled him over (about two months earlier). He acknowledged that his body cam was not on at the time he observed the car running, and by the time the body cam was activated, that “it appears that it shut off” (34).

This raises a credibility issue, and PO ██████████ acknowledged that a judge previously found his testimony at a suppression hearing to be incredible ( 50).

In this instance, PO ██████████ most certainly acted on “a hunch, whim, caprice or idle curiosity.” He testified that at no time did he see Mr. ██████████ driving the vehicle and at no time did he ask Mr. ██████████ how long he was there, legally parked. He also testified that there was “an uptick in crime at the particular address” (11). In determining the legality of an encounter under *DeBour*, it has been crucial whether a nexus to conduct existed, that is, whether the police were aware of or observed conduct which provided a particularized reason to request information. PO ██████████ sole reason for approaching Mr. ██████████ was on whim. The fact that an encounter occurred in a high crime area, without more, has not passed *DeBour* scrutiny. *People v. Holmes*, 81 N.Y.2d 1056, 1058).

If the engine was not running, then Mr. [REDACTED] was not operating the vehicle, so there was no reason for PO [REDACTED] to approach. Additionally, both of the alleged suspects were out of the vehicle and were of no threat to the officers. The third person in the vehicle was not in any distress nor was he threatening any of the police officers. He was sitting peacefully, in a locked vehicle that was legally parked.

Although not resulting in the recovery of evidence, it should be noted that PO [REDACTED] illegally arrested the passenger in the vehicle for refusing to open the doors and allow him to search.

*The search of the vehicle was unlawful.*

PO [REDACTED] stated reason for searching Mr. [REDACTED] car – and smashing the window to facilitate the search – was that the car was going to be impounded, thus authorizing him to conduct an inventory search. PO [REDACTED] testified that the purpose of the impound and inventory is “to safeguard the vehicle and its contents from damage or theft” (39), making this an ironic justification for a case in which he intentionally damaged the vehicle. PO [REDACTED] testified that the vehicle was locked and he could not enter the vehicle, proving the vehicle was safeguarded.

“The People bear the burden of demonstrating the validity of an inventory search. Where an inventory search of an automobile is challenged under the State and Federal Constitutions, New York case law requires the People to establish ... (1) that the vehicle was lawfully impounded, (2) that the search was conducted pursuant to a standardized local police procedure that limits the discretion of the officers in the field, and (3) that the inventory was not conducted as a pretext to search for evidence” (*People v. Mortel*, 197 AD3d 196, 215 [2nd Dept. 2021]).

The BPD policy does not permit a tow of a legally parked vehicle whenever the driver is suspended (People's Exhibit (5). Rather, it permits a tow pursuant to Vehicle and Traffic Law § 511-b (*id.*). § 511-b requires officers to impound a vehicle "upon making an arrest or upon issuing a summons or an appearance ticket for the crime of aggravated unlicensed operation of a motor vehicle in the first or second degree committed in his presence." The prosecution presented no evidence that Mr. [REDACTED] was charged with aggravated unlicensed operation in the first or second degree, and the tickets issued by PO [REDACTED] indicate that he was charged with aggravated unlicensed operation in the third degree.

PO [REDACTED] testified that it is the policy of the Buffalo Police Department to have a vehicle towed whenever it comes under the control of the Department and it is necessary to safeguard the vehicle and its contents from damage or theft. (28). He testified that "once we break the window, yes, it's totally in our control." (28). PO [REDACTED] is the person who damaged the vehicle by smashing the window. The vehicle was legally parked, locked and prior to the window being smashed, was not a hazard or inconvenience. If this PO [REDACTED] position, the Buffalo Police Department would have authority to smash anybody's vehicle and then claim it is under their control.

Based on the reading of People's Exhibit 5, PO [REDACTED] did not have the authority to impound the vehicle nor do an inventory search. PO [REDACTED]'s failure to abide by the Buffalo Police Department's vehicle towing and storage policy demonstrates his lack of credibility. Additionally, PO [REDACTED] testified that he was "roughly familiar" with the impound and inventory policy. As a police officer, it is PO [REDACTED]'s obligation to be fully familiar with the impound and inventory policy, not just familiar with it. Because PO [REDACTED] was not familiar with it, and he acted outside the scope of the policy, his actions in searching the vehicle cannot be justified.

Even if an impound and inventory search had been authorized by the BPD policy, the search was pretextual – and therefore unlawful.

If the pretextual nature of the search was not already obvious, PO [REDACTED] gave his motives away when he responded to a citizen who was on the porch nearby.

When a citizen complained about the window being smashed, PO [REDACTED] replied, “[y]ou know what, why don’t we stop convicting – carrying guns and fucking selling drugs all the time, and maybe we won’t fucking be here” (People’s 1 04:47 – 04:56).

Besides showing PO [REDACTED] utter contempt for the citizens and neighborhoods that he serves, this taunt highlights the fact that the inventory was a pretext to search for evidence and therefore an illegal search of the vehicle.

#### Conclusion

For the foregoing reasons, it is respectfully requested that the Court grant Defendant’s motion to suppress the evidence illegally seized from the legally parked vehicle Mr. [REDACTED] was sitting in on S [REDACTED]

WHEREFORE, the Defense requests that the Court suppress the evidence illegally seized from the vehicle on September 25, 2021.

[REDACTED]