

**MOTION TO ACCEPT
DISCRETIONARY INTERLOCUTORY APPEAL**

Comes now the Appellant/Defendant below, [name] (hereinafter, “[name]”), by counsel, and pursuant to Appellate Rule 14(B)(2), respectfully requests that the Court accept jurisdiction of a discretionary interlocutory appeal. In support of his request, [name] says:

1. He is the defendant in a criminal proceeding initiated by the filing of Information in Superior Court 6, No. June 30, 2011.
2. The Information was based on the discovery of certain items and information during warrantless search of [name]’s person following a routine traffic stop.
3. [name] filed a Motion to Suppress the proceeds of the search on June 4, 2012. A hearing was held on December 13, 2012. Briefing was completed on January 7, 2013. On May 28, 2013, the Court adopted the State’s Proposed Findings of Fact and Conclusions of Law without modification and denied [name]’s Motion to Suppress. It is from this Order that [name] seeks interlocutory review. [The Order is attached hereto as Exhibit A. The State’s Proposed Findings of Fact and Conclusions of Law, referenced in the Court’s Order, but not separately signed, are attached hereto as Exhibit B.]

4. On June 27, 2013, [name] filed a Motion to Certify the Order [denying his Motion to Suppress] for Interlocutory Appeal, pursuant to Appellate Rule 14(B)(1).

5. On July 1, 2013, the trial court certified its Order of May 28, 2013 for Interlocutory Appeal. [The Order Certifying the May 28, 2013 Order is attached hereto as Exhibit C.]

6. This Motion to Accept Discretionary Interlocutory Appeal is timely filed within thirty days of the trial court's certification, pursuant to Appellate Rule 14(B)(2)(a) as the Order was entered on the Chronological Case Summary on July 1, 2013.

7. The issues to be addressed in the interlocutory appeal include:

a. Whether the arresting officer violated [name]'s right to be free from unreasonable search and seizure under the Fourth Amendment by conducting a search for weapons and contraband during an otherwise routine traffic stop according to the officer's "standard practice", but without an objectively reasonable suspicion that [name] was armed and dangerous, thereby requiring suppression of the evidence seized during the unlawful search.

b. Whether the search of [name]'s person was unreasonable under the totality of the circumstances and in violation of Article I, Section 11 of

the Indiana Constitution, thereby requiring suppression of the evidence seized, where [name]'s behavior would not have caused a reasonable person to believe either that he was armed and dangerous or that a search of his person was necessary for officer safety.

8. This Court should accept this discretionary interlocutory review for the following reasons:

a. [name] is likely to prevail on the suppression issue.

[name] is charged with Dealing in Cocaine, Possession of Cocaine, Battery, and Resisting Law Enforcement. The charges arise following a routine traffic stop. [name], who was operating a properly registered vehicle with a valid Indiana driver's license, was pulled over for allegedly failing to signal a turn. Officer Loudermilk [hereinafter, "Officer"], who followed him for several hundred yards before making the traffic stop, did not observe any equipment irregularities, did not observe any erratic driving and admittedly had no reason to believe that [name] was impaired.

[name] was out of the car and walking toward a house as Officer ordered him to stop. Officer testified that he did not see any weapons or make any observations that led him to believe that [name] may have been armed or was engaged in criminal activity and that there was nothing suspicious about [name]'s appearance. After being ordered three times to

stop, [name] did so and complied with Officer's order to return to his car. Officer did not pat [name] down before he allowed him to re-enter his vehicle, nor did he look into [name]'s vehicle to ascertain whether there were weapons within his reach before he allowed him to re-enter the vehicle.

After [name] re-entered his vehicle, Officer stood next to the driver's window and the open door and engaged [name] in conversation. He found no irregularities in [name]'s documents, and saw no weapons or evidence of weapons. [name] did not threaten Officer, complied with all of his requests and, according to Officer, said nothing that made him fear for his safety. However, Officer observed that [name] appeared to be "very nervous" and that he removed his hands from the steering wheel after being told to keep them there – but that his actions were not otherwise suspicious.

Despite [name]'s compliance with his requests, Officer "suspected" that something was wrong and while he "had no idea what [was wrong]", he "thought it could be a weapon or drugs". Officer also thought that "it could have been a stolen vehicle, weapons, he could be on parole or an escapee...", although he could not articulate any facts to support his suspicion.

Because of his suspicion, Officer ordered [name] out of his car

and told him that he was going to be searched for weapons for Officer's safety and for [name]'s safety. [name] followed Officer's order and exited his vehicle. As Officer began to pat [name] down, he felt something in his right front pocket. Officer knew that it wasn't a weapon, but continued the search. As Officer searched [name], he displayed his tazer. When [name] asked what he had done wrong, Officer told him that he was going to be handcuffed and forced him to put his hands on the car. [name] resisted being handcuffed and was eventually put on the ground and tazed repeatedly.

After [name] was subdued and handcuffed, he was searched again. He had no weapons on his person, but a packet of narcotics was found in his right front pocket. He was subsequently charged with possession of the narcotics.

By stopping [name]'s vehicle and detaining him, [name] was seized for Fourth Amendment purposes, even though the purpose of the stop was limited. *Delaware v. Prouse*, 440 U.S. 648, 653-655 (1979). These actions also constitute a seizure under Article I, Sec. 11 of the Indiana Constitution. *Taylor v. State*, 639 N.E.2d 1052, 1054 (Ind.Ct.App.1994).

Because a routine traffic stop, such as this one, is a relatively brief encounter, generally the officer issuing a traffic citation faces a safety threat that is a good deal less than that present in the case of a custodial arrest.

Knowles v. Iowa, 525 U.S. 113, 117 (1998). While the concern for officer safety in this context may justify the "minimal" additional intrusion of ordering a driver out of a vehicle, it does not by itself justify a full field-type search. *Id.* "In other words, while the Fourth Amendment to the United States Constitution permits a search incident to a custodial arrest, it does not permit a search incident to a traffic citation." *Cannon v. State*, 722 N.E.2d 881, 884 (Ind.Ct.App.2000).

A traffic violation, by itself, does not give rise to reasonable suspicion that the driver is armed and dangerous. *Porter v. State*, 512 N.E.2d 454, 456 (Ind. Ct. App. 1987). Therefore, an individual stopped for a traffic infraction may not be frisked or patted down for weapons unless the officer "holds a reasonable belief that the particular individual is armed and dangerous". *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979). Here, Officer articulated no basis for an objectively reasonable suspicion that [name] was armed and dangerous.

In *Jett v. State*, 716 N.E.2d 69, 70-71 (Ind.Ct.App.1999), this Court held that any fear for the officer's safety [that he initially experienced due to Jett's leaving his vehicle] was allayed when he complied with the officer's order, reentered his vehicle and remained inside until the officer ordered him out to perform the pat down search. Like Jett, [name] re-entered his vehicle

without incident and Officer could cite to no objective circumstances that would lead a reasonable person to conclude either that he was in danger or that [name] was armed and dangerous. In fact, Officer affirmatively stated that [name] was not threatening, was compliant with his requests, and that he saw no evidence of weapons.

In a warrantless search, the burden is on the State to show that, under the totality of the circumstances, the intrusion was reasonable. *Osborne v. State*, 805 N.E.2d 435, 439 (Ind. Ct. App. 2004). Here, the officer could cite only to the fact that [name] appeared “very nervous”. Indiana courts have been hesitant to assign significant weight to a person's display of nervousness. In *Finger v. State*, the reviewing court determined that nervousness alone was entitled to little weight. 799 N.E.2d 528, 534-35 (Ind. 2003) (making this particular point on Fourth Amendment grounds but declaring, “the factors leading to reasonable suspicion . . . also satisfy the requirements of the Indiana Constitution”). In *Rutledge v. State*, 426 N.E.2d 638, 641 (Ind. 1981) the Court noted that “The show of authority is unsettling and creates substantial anxiety.” This may be especially true in situations such as this one, where [name] is an African-American male stopped for a minor traffic violation at 1230 a.m. by a uniformed white police officer.

Officer's decision to conduct a pat down of [name] was not based on reasonable suspicion that he was armed and dangerous and was objectively unreasonable under the totality of the circumstances, thereby violating both the Fourth Amendment and [name]'s rights under Art. 1, Sec. 11 of the Indiana Constitution. Therefore, [name] is entitled to suppression of the evidence seized during the unlawful search.

- b. Resolution of the issue by way of interlocutory appeal is in the interests of judicial economy.

Resolution of the issue set forth above will be dispositive of the outcome of the case insofar as all evidence against [name] was obtained by the State following, and as a result of, the search.

The interests of judicial economy are best served by resolving the sole legal issue herein prior to trial. None of the parties, including [name], would be better served by a jury trial followed by an appeal on an issue that could have been resolved pre-trial. If the trial court's Order of May 28, 2013 is erroneous and the determination of the error is withheld until after trial and judgment, both [name] and the State will suffer the substantial expense of a jury trial and [name] will be incarcerated during the pendency of a post-sentencing appeal.

- c. Resolution of the issue by way of interlocutory appeal is in [name]'s best interest.

In the event [name] is not permitted an interlocutory appeal, he will proceed to trial to preserve the issue raised herein for appeal. By doing so, he will lose the opportunity to resolve his case by plea. Conversely, if he is permitted an interlocutory appeal and if the issue raised herein is decided adversely to [name], he will have an opportunity to engage in plea negotiations if he chooses to do so. If the issue is resolved favorably to [name], the case will not proceed to trial.

WHEREFORE, [name] respectfully requests that this Court certify the issue referenced herein for interlocutory appeal, granting him such further relief as may be just and proper in the premises.

Respectfully Submitted,
