No. 22PA14 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

THOMAS C. WETHERINGTON Petitioner/Appellee/ Cross-Appellant v. N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY; N.C. HIGHWAY PATROL Respondent/Appellant.	)	**From Wake County** **No. COA13-405**

AMICUS CURIAE BRIEF OF THE STATE OF NORTH CAROLINA AND NATIONAL FRATERNAL ORDER OF POLICE

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SUPREME COURT OF NORTH CAROLINA

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THOMAS C. WETHERINGTON	)	
	)	
Petitioner/Appellee/	)	
Cross-Appellant	)	
v.	)	
	)	**From Wake County**
N.C. DEPARTMENT OF CRIME	)	**File No. 11 CVS 3211**
CONTROL & PUBLIC SAFETY;	)	
N.C. HIGHWAY PATROL	)	
	)	
Respondent/Appellant	)	

I. INTEREST OF FOP AS AMICUS CURIAE

The National Fraternal Order of Police is the world's largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges across the United States. The North Carolina State Lodge of the Fraternal Order of Police (hereinafter collectively "FOP") is a voluntary non-profit association of over six thousand North Carolina law enforcement officers. The FOP has been active throughout North Carolina and nationwide in promoting enhanced public safety and protection of the law enforcement community.

Law enforcement officers occupy a unique niche within the realm of public employment. Although police officers undeniably occupy the most dangerous and stressful positions in the public domain, police officers are afforded the least protection with regard to their own employment. The members of the FOP have always recognized that it is their duty as public servants, first and foremost, to serve and protect our communities. In exchange for that commitment, law enforcement officers ask to be treated fairly by their governmental employers. As the voice of law enforcement officers, the FOP's perspective is unique and particularly relevant to the substantive issues presented herein.

The issues in this important case will directly affect FOP members and all law enforcement officers in North Carolina because officers frequently encounter danger, stressors, confusion, uncertainty, misperception and other factors that may result in a discrepancy in a post-incident statement. In such circumstances, the application of an agency "truthfulness" policy must be objectively analyzed and determined in order to commensurately punish real cases of intentional untruthfulness regarding significant and materials matters.

For 100 years, the Fraternal Order of Police has advocated for proper constitutionally-based personnel systems designed to objectively investigate

allegations against police officers, while at the same time protecting the constitutional, statutory and common law rights of officers under investigation.

II. STATEMENT OF FACTS

The FOP adopts Trooper Wetherington's statement of facts in his briefs filed with this Court. In summary, Trooper Wetherington inaccurately recalled a detail during the course of a high-risk traffic stop that was unrelated to the discharge of his duties as a law enforcement officer. That simple mistake cost him his career.

III. SUMMARY OF ARGUMENT

The United States Supreme Court has recognized that roadside encounters between police officers and motorists are fraught with danger. In fact, the Court has stated that traffic stops are "especially dangerous," in part because of the "possible presence of weapons in the area surrounding the suspect." *Michigan v. Long,* 463 U.S. 1032, 1049 (1983). That is exactly the "especially dangerous" situation that was encountered by Trooper Wetherington in the traffic stop that is the genesis of this case.

Because of the potential danger encountered by police officers during traffic stops and because of the *actual* danger encountered in the traffic stop by Trooper Wetherington (upon the discovery of intoxicated occupants with loaded firearms),

no discussion of the events that followed is complete without an examination of the effect that a high-stress incident can have on the memory of a police officer. Scientific research in the area has repeatedly confirmed that:

> . . . officers' memories function at different levels under stress. If an officer has a vivid or distinct memory of a person with a weapon but lacks a clear recollection of an unarmed individual *or some object in the environment*, this could reflect how memory functions under stress, *rather than planned, conscious deception by the officer.*

Criminal Interrogations of Police Officers After Use-of-Force Incidents, FBI Law Enforcement Bulletin, Sept. 3, 2013, http://leb.fbi.gov/2013/september (Emphasis added).

Because officer's memories after stressful events have repeatedly proven to be fragmented and not a totally accurate perception of reality, the application of a "truthfulness" policy must be objective to ensure that only *willful* untruthfulness about significant and material matters is sanctionable by termination. Otherwise, officers will be subject to termination for common, insignificant and even trivial discrepancies. In this case, the employer failed to apply an objective standard in evaluating Trooper Wetherington's statements. The employer applied a subjective analysis that included equating mistakes and inaccuracies with falsehood, lies and untruthfulness.

The application of that analysis resulted in Trooper Wetherington's termination for simply misplacing his uniform hat.

The employer's decisionmaker acknowledged that *willfulness* is an element of proof in a truthfulness charge. (Glover T p 350) However, there are also additional elements of proof, especially *materiality*, so that a truthfulness policy cannot be subjectively interpreted at the whim of an arbitrary management official. Here, the Patrol's suggested approach (automatic termination for any "untruthfulness" at all) is flatly inconsistent with controlling precedent and reasonable police discipline procedures. It is also not necessitated by the application of the disclosure doctrine enunciated in the case of *Brady v. Maryland,* 373 U.S. 83 (1963), as urged by the employer. As demonstrated by other cases, proper just cause decisionmaking in truthfulness cases necessitates analysis of the complete panoply of just cause factors enunciated by this Court in *Bulloch v. N.C. Department of Crime Control,* 732 S.E.2d 373 (N.C. App. 2012). See also, *Jacob Scott v. N.C. Department of Crime Control,* 2013 WL 4519315 (N.C.O.A.H. 2103)(May, ALJ); *Hager v. NCDOC,* 2004 WL 3252142 (2004)(Lassiter, ALJ).

Further, there can be no dispute that the public benefits when police officers are provided with clear guidance regarding the conduct that is expected of them.

Implementing understandable and evenly-applied policies promotes legitimacy and a sense of procedural justice that communities expect from their police departments. The fact remains that failure to adopt coherent policies and apply them in a uniform manner results in difficult public battles that that undermine public trust in the police officers and departments that serve the communities across this state.

IV. ARGUMENT

A). HIGH-STRESS ENCOUNTERS BETWEEN POLICE OFFICERS AND THE PUBLIC CAN EFFECT THE ACCURACY OF THE OFFICER'S MEMORY OF THE EVENT

No discussion of the facts of this case is complete without an examination of the effect a high-stress encounter has on the memory of a police officer regarding that event. Here, Trooper Wetherington was involved in a high-risk traffic stop, at night, involving intoxicated occupants of a motor vehicle with loaded weapons within arm's reach. Trooper Wetherington was alone at the time of the encounter, dealing with two occupants of the detained auto. Without question, this traffic stop presents a situation for which officers are trained to be on high alert. As noted by one researcher:

> Traffic stops are inherently dangerous and risky and pose a significant threat to the physical safety of law enforcement officers. It is not uncommon for routine

> traffic stops to escalate into a violent situation. In fact, thousands of officers have been assaulted, and at least 300 officers have been feloniously killed by drivers or other occupants of vehicles involved in traffic stops or pursuits.

Excerpt from Iowa Code 805.1(4).

Because law enforcement officers are trained regarding the danger posed by even routine traffic stops, it is undisputed that such stops result in high stress to the officer. This is especially true where, as here, an officer encounters exactly the type of risk factor – intoxicated occupants with loaded weapons – that he is trained to recognize as potentially deadly. It is no wonder that an officer's memory of such an encounter may not be totally accurate, especially when that memory relates to details of the traffic stop that are not germane to securing the scene and suspects, such as what happened to the officer's hat during the engagement.

Research has demonstrated that "[i]f an officer has a vivid or distinct memory of a person with a weapon but lacks a clear recollection of an unarmed individual *or some object in the environment*, this could reflect how memory functions under stress, *rather than planned, conscious deception by the officer.*" *Criminal Interrogations of Police Officers After Use-of-Force Incidents,* supra (Emphasis added). In addition, research in the area has demonstrated that ". . . many officers do not fully realize the

extent of their own memory and perceptual gaps and distortions until confronted with evidence to the contrary." Artwohl, Alexis PhD., *Perceptual and Memory Distortion During Officer-Involved Shootings,* FBI Law Enforcement Bulletin, Oct. 2002, pg. 18, http://leb.fbi.gov/2002-pdfs/leb-october-2002. Researchers have repeatedly noted that officers involved in critical incidents are not even aware that their memory of the event may be incomplete or inaccurate. Thus, as in this case, it is not unusual for an officer to give a description of an event which may change over time or which may change after the officer is confronted with evidence to the contrary. This does not demonstrate intentional deception on the part of the officer, only an inaccurate memory. As stated by one researcher:

> Even for officers who were the only officer present, their later perusal of investigation reports, including physical evidence and eyewitness statements, can educate them as to the lack of completeness and total accuracy of their memories of the event.

Artwohl, Alexis PhD., *Perceptual and Memory Distortion During Officer-Involved Shootings,* supra, at 22.

There is no reasonable dispute in this case that Trooper Wetherington was primarily focused, during this high-risk traffic stop, on the intoxicated occupants of the car and the loaded weapons within their reach. It is not surprising that Trooper

Wetherington formed an initial impression regarding how his hat was lost and that his memory may not have been totally accurate. It is also not surprising that, when confronted with evidence in conflict with his recollection, Trooper Wetherington slightly amended his recitation of the events, in recognition of his flawed memory on the subject.

These facts undoubtedly demonstrate one thing – that a police officer under significant stress and subjected to danger may not accurately recall details that are not germane to the encounter at issue. These facts also conclusively refute any implication that Trooper Wetherington was intentionally deceptive.

B). THE DISCLOSURE REQUIREMENTS OF *BRADY V. MARYLAND* DO NOT NECESSITATE OR JUSTIFY THE TERMINATION OF TROOPER WETHERINGTON'S EMPLOYMENT

In the seminal case of *Brady v. Maryland,* 373 U.S. 83 (1963), the United States Supreme Court held that, in the course of a criminal prosecution, due process requires the disclosure of "evidence favorable to an accused . . . where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. Subsequent to *Brady,* the Supreme Court held that evidence which may be used to impeach the testimony of government witnesses falls within the ambit of *Brady* when the credibility of the witness may have an effect on

the jury's determination of guilt. *Giglio v. United States,* 405 U.S. 150, 154 (1972); *United States v. Agurs,* 427 U.S. 97 (1976). However, subsequent decisions have clarified that not every misstep of a government witness (ie. police officer) must be disclosed in the course of a criminal prosecution, only *material* facts "that, if suppressed, would deprive the defendant of a fair trial." *United States v. Bagley,* 473 U.S. 667, 675 (1985).

The *Brady* decision, and its use as a justification for discipline and termination of police officers, has become a hot topic in law enforcement. Today, many law enforcement agencies have taken the position that any inaccuracy or misstatement by a police officer results in that officer being unable to act as a witness in criminal prosecutions and, thus, results in that officer being "unemployable." That is exactly the position that has been taken by the Respondent/Appellant in this case. The decisionmaker has stated that it had "no choice" but to terminate Trooper Wetherington's employment based upon an internal finding of "untruthfulness" which will allegedly disqualify him from acting as a witness in any criminal prosecution because of the mandates of *Brady.* (T p 323, 326). This Court should not further grease this very slippery slope.

Contrary to the position taken by the employer here, it is not mandated by *Brady* that every single inaccuracy or error, no matter how immaterial, renders a police officer unable to act as a witness in a criminal prosecution and, thus, terminable. In fact, it has been recognized that "[t]he mere fact that a recurring government witness has been added to [a] *Brady* list is not necessarily a comment. . . on that individual's future viability as a witness, on his or her reputation, or on the person's ability to serve in his or her current capacity." Reimund, Mary Ellen, *Are* Brady *Lists the Scarlet Letter for Law Enforcement Officers?* International Journal of Humanities and Social Science, Vol. 3 No. 17, pg. 3 (Sept. 2013). Many law enforcement professionals recognize that policies which mandate automatic termination for any "truthfulness violation" under *Brady*, such as the policy at issue here, are "complex and difficult to manage." Noble, Jeff, *Police Officer Truthfulness and the* Brady *Decision,* Police Chief Magazine, October, 2003. As stated by a California Police Commander:

> Today many police executives have recognized the importance of officer credibility and have established a "No Lies" proclamation. As simple as No Lies sounds, it is far more complex and difficult to manage. . . . Lies are not a fixed target . . . [No Lies policies should only apply to] intentional, malicious, deceptive conduct. . . . The No Lies rule causes managers to deem that *Brady* has taken their

> discretion away . . . But removing management discretion is not the *Brady* rule. *Brady* stands for the proposition that evidence that may be exculpatory in nature must be given to the defense. In a case where an officer will be testifying as a witness to an event, the officer's credibility is a material issue and his lack of credibility is clearly potentially exculpatory evidence . . . . It seems the analysis often stops at this point, suggesting that if there is evidence regarding an officer's credibility, the officer can no longer be placed in a position where he may become a percipient witness in an investigation. . . But what if the misconduct is [not intentional deception]? . . . The answer is that police chiefs have discretion available to them and that not every act of . . . deception may be worthy of termination.

Id. (Emphasis added).

In addition, the Supreme Courts in states that have addressed the issue of termination as a result of a finding of untruthfulness have held that *Brady* does not compel termination as claimed here. In *Kitsap County Deputy Sheriff's Guild v. Kitsap County,* 176 Wash. 2d 428, 219 P.3d 675 (2009), the Supreme Court of Washington held that neither public policy nor the *Brady* decision necessitates the termination of a police officer found to have been untruthful in an internal investigation. The court stated, ". . . there is no explicit (or even implicit) statement [in *Brady*] regarding the continued employment of an officer found to be untruthful." *Kitsap County,* 219 P.3d at 680. The court went on to state:

> Further even if *Brady* caselaw constituted a public policy against reinstatement of an officer found to be dishonest, it provides no guidance regarding what level of dishonesty would prohibit reinstatement.

> The *Brady* rule provides neither an explicit nor a well defined public policy against reinstating an officer found to be untruthful.

Id.

In *Appeal of the Town of Pelham,* 154 N.H. 125 (N.H. 2006), the New Hampshire Supreme Court upheld an arbitration award reinstating a police dispatcher who had been terminated for alleged untruthfulness in an internal investigation. Similar to the *Kitsap County* case, the New Hampshire Supreme Court found that no public policy directed that police personnel accused of dishonesty must be terminated. Id. at 128-29

As further discussed below, the inaccuracies at issue in this case in regard to Trooper Wetherington's loss of his hat are not the type of "intentional, malicious or deceptive conduct" targeted by *Brady* and its progeny. The claim that the decisionmaker had "no choice" but to terminate Trooper Wetherington in this case comports with neither the letter nor the spirit of the *Brady* doctrine.

C). THE PATROL FAILED TO PROVE JUST CAUSE FOR TERMINATION BECAUSE THE DISCREPANCY IN HAT LOCATIONS IS NOT MATERIAL OR SIGNIFICANT

In order to prove just cause for the termination of Trooper Wetherington, Respondent/Appellant had the burden of demonstrating: 1.) violation of a clearly

defined and *reasonable* employment policy, and; 2.) that such violation of policy was sufficiently severe to rise to the level required to establish just cause for termination after application of all just cause factors and consideration of all mitigating and aggravating factors. See, N.C.G.S. 126-35. A just cause inquiry "cannot always be satisfied by the mechanical application of rules and regulations." *NCDENR v. Carroll,* 358 N.C. 649, 669 (2004).

Not every infraction gives rise to employee discipline. Instead, consideration must be given to "notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case." Id.

Understanding that high-stress encounters can result in law enforcement officer's memories of the event being imprecise, it is clear that Trooper Wetherington engaged in no intentional deception regarding the circumstances surrounding the loss of his hat. (T p 461) The information included in his statement was information that Trooper Wetherington believed to be true and accurate. (T p 461)

Trooper Wetherington explained that he believed the hat to still be on his head when traveling from the first to the second traffic stop. He later recalled placing the hat on his light bar. (T p 474) When Trooper Wetherington initially told Sergeant

Oglesby that his hat was on his head when it blew off, he honestly believed that it had been on his head. (T p 474)

Trooper Wetherington did not have any motivation to misrepresent any facts in relation to the location of his hat. (T p 478) He explained that after he realized that his hat was on his light bar, he felt ***there was no material significance*** to the exact location of the hat at the time it was lost. (T p 479)

In fact, Sergeant Ogelsby acknowledged in his testimony the existence of studies which recognize that law enforcement officers may have confusion as a result of the elevated danger from many police operations. (T p 100). This element of confusion resulting from danger is the key to a proper and rational just cause determination.

Law enforcement agency truthfulness policies must be objectively interpreted and reasonably enforced to ensure that all elements of a truthfulness offense are supported with substantial evidence before a disciplinary sanction as serve as termination is imposed.

Colonel Glover acknowledged that proof of *willfulness* is required in order to prove untruthfulness (T p 350) Here, the evidence fails to meet this element. The

alleged untruthfulness must be *material* and *significant*. E.g., *Jacob Scott,* supra; *Hager*, supra.

In *Scott,* Judge May issued an insightful decision, examining and explaining the correct methodology in a truthfulness case. Other state courts have arrived at similar conclusions. See, *Harder v. Village of Forest Park,* 2008 U.S. Dist. LEXIS 36892 (N.D. Ill. 2008)(applying Illinois law)(A police officer's dishonesty related to "internal police administration" and not related to "an officer's public duties" not sufficient to warrant termination.); *Gibson v. Department of Police,* 30 So.3d 1032, 1038 (La. Ct. App. 2010)(Reversing a 60-day suspension for alleged untruthfulness based upon the fact that the officer may have been confused about details of an encounter unrelated to his law enforcement duties.); *Hunt v. Shettle,* 452 N.E.2d 1045, 1052 (In. Ct. App. 1983)(Materially inconsistent statements by a police officer in the course of an internal investigation are insufficient to support demotion where no evidence existed of *scienter* or intent to deceive.)

Just cause for termination requires substantial proof of substantial misconduct. Hat location is trivial. It did not matter where the hat was at the time it was lost. The hat location is not significant, material or relevant to the investigation. As such, the

employer has failed to satisfy its legal burden of demonstrating just cause for termination under well-settled law.

D). COLONEL GLOVER'S TESTIMONY UNDISPUTABLY DEMONSTRATES ARBITRARINESS, WHICH PRECLUDES TERMINATION

Arbitrary or capricious public personnel decisions are forbidden by North Carolina law. E.g., *Toomer v. Garrett,* 155 N.C. App. 462 (2002); *Carroll,* supra. Colonel Glover was the new Patrol Commander and this was his first case of dismissing a Trooper. (T p 326) Glover made clear *three times* in his testimony that he felt like *he had* to terminate Wetherington, erroneously believing that he had no choice. (T pp 326, 337-338) Glover explained that Trooper Wetherington was alleged to have violated the Patrol's truthfulness policy. (T p 320)

Colonel Glover repeatedly emphasized: "I had no choice." (T p 326) When asked what made him feel like he had no choice, he answered by saying that there was a violation of the truthfulness policy. (T p 326) As discussed above, neither the case law on the topic of truthfulness nor best practices mandates dismissal for a alleged violation of a truthfulness policy. Colonel Glover's personnel decisionmaking was mechanical and technical. He erroneously believed that he could not consider the big

picture or the totality of circumstances. Scores of cases condemn this kind of arbitrary public personnel decisionmaking. E.g., *Bulloch,* supra*; Carroll,* supra.

Colonel Glover reaffirmed his point that if a truthfulness violation is determined, that "I have no choice because that's the way I view it." (T p 337) He further testified that if he finds a substantiated or adjudicated violation of the truthfulness policy that he does not have any discretion as Colonel to do anything less than termination. (T pp 337-338) This is plainly erroneous and is textbook arbitrariness as found by Judge Manning. Colonel Glover had the legal duty to consider all of the analytical just cause factors and to consider a broad range of possible punishments, not just termination.

Colonel Glover reaffirmed that the truthfulness policy contained an element that the untruthful statement *must be willfully untruthful.* (T p 350) Trooper Wetherington was not willfully untruthful. Rather, he merely recalled a trivial matter (the location of his hat when it blew away) differently following a dangerous traffic stop and a subsequent mental reconstruction of the incident.

V. CONCLUSION

If law enforcement officers are subject to termination for every discrepancy resulting from poor recollection or confusion, few officers will be left employed. An

examination of the totality of the circumstances which lead to Trooper Wetherington's termination, which is legally required, demonstrates that his alleged "untruthfulness" was nothing more than a faulty recollection caused by exposure to a potentially life-threatening situation. Termination of his employment under these circumstances is neither just, nor equitable, nor fair.

This Court should affirm the decision of Judge Manning on both alternative grounds of lack of just cause and arbitrariness.

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N.C. R. App. P. 33(b)
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VII. CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing has been served by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in first-class postage-prepaid envelope properly addressed as follows:

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This 16th day of April, 2015.

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