

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARC AND TYRONE STEPHENS,
Plaintiffs-Appellants,
v.

CITY OF ENGLEWOOD,
ENGLEWOOD POLICE DEPARTMENT,
DET. MARC MCDONALD,
DET. DESMOND SINGH,
DET. CLAUDIA CUBILLOS
DET. SANTIAGO INCLE JR.,
AND DET. NATHANIEL KINLAW,
Individually and in official capacity
NINA C. REMSON ATTORNEY AT LAW,
LLC, AND COMET LAW OFFICES, LLC
Defendants-Appellees

CASE No. 16-1868
D. N.J No. 2:14-cv-05362-WJM-MF

**PLAINTIFFS' MOTION FOR
SUSPENSION OF RULES
PURSUANT TO FRAP RULE 2 AND
FRCP RULE 61 MOTION TO
STRIKE COURT'S OPINION
STATING THERE ARE
INCONSISTENCIES IN
TESTIMONY REGARDING
TYRONE'S ALIBI**

INTRODUCTION

There are three instances where the Panel stated in their opinion that there were inconsistencies in Tyrone Stephens Alibi. The evidence on record prove these statement to be incorrect. Appellants are respectfully asking the court to withdraw/amend their opinion based on the facts on record as show below, or clarify where on the record are the inconsistencies in Tyrone Stephens Alibi regarding the attack on October 31, 2012, in the parking lot of 7-eleven at 10pm, or a little after 10pm.

STATEMENT OF MATERIAL FACTS

- 1. The Panel Opinion states, Page 2**, “Marc offered Tyrone an alibi that they had been at home together, and Tyrone adopted it. However, Tyrone later admitted to being in the vicinity of the 7-Eleven — specifically, at a McDonald’s down the street — with two different alibi witnesses.”.
- 2. The Panel Opinion states, Page 5**, “The facts here, viewed most favorably to the Stephenses, do not create a genuine dispute as to whether probable cause existed when Tyrone was arrested. The defendants had three compelling pieces of evidence implicating Tyrone in the attack: (1) the identification by Natalia Cortes; (2) the statement made by Justin Evans that Tyrone had participated in the attack; and (3) inconsistencies in testimony regarding Tyrone’s alibi. This evidence was more than sufficient to establish probable cause. See *Wilson v. Russo*, 212 F.3d 781, 790 (3d Cir. 2000)”.
- 3. The Panel Opinion states, Page 6**, “While the Stephenses contend that the evidence shows that Tyrone was actually half a mile away at a McDonald’s at the time that the assault occurred, the equivocal evidence that they present does not dispel the probable cause described above”.

I. OCTOBER 31, 2012 - ATTACK WAS AT 7-ELEVEN AT 10PM

a. Defendant McDonald testified that “The Victims Stated” the attack occurred on October 31, 2012, in the parking lot of 7-eleven On or about 10pm, **EXHIBIT 1 - ECF Doc 72-3, page 28, para 16, #19-25**, and that Tyrone stated he was at McDonalds at 10pm, **EXHIBIT 1 - ECF Doc 72-3, page 28, para 17, #1-3**.

Prosecutor: First of all what was the time that **the victims said** the attack occurred?

McDonald: **On or about 10pm.**

Prosecutor: And what day did they say the attack occurred?

McDonald: October 31, Halloween.

Prosecutor: Where did Tyrone say that he was at that time?

McDonald: He stated he was initially at **McDonald’s**.

b. Naiquan Thomas stated at **10:00pm** he was present at 7-eleven during the incident, **EXHIBIT 2 - ECF Document 72-3, page 8, #5-10**.

Cubillos: At approximately what time were you at 7-11?

Naquan: About like **10**.

Cubillos: **10**. And what happened at 7-11?

Naquan: I was first at 7-11 buying some M&Ms and I walked outside and I seen a couple guys I knew **and a fight** and I seen **Derek** that I knew from my team.

c. Naiquan Thomas, who identified all of the suspects that were fighting, stated to Defendants Cubillos, Singh, and Inle that he knows Tyrone and that he was **not at 7-eleven**, **EXHIBIT 2 - ECF Document 72-3, page 11, #19-22**.

Q: Do you know Tyrone Stevens?

A: Yes

Q: Was he there?

A: No, I did not see him

d. Naiquan Thomas stated to defendant Cubillos, after he walked out of 7-eleven the fight was already started, and he walked up to **Derrick Gatti** and after about “**2 minutes**” they both left, **EXHIBIT 2 - ECF Doc 72-3, page 12, #1-4**.

Lisa Alexander: What transpired when you walked up what did you tell Derek?
The -- like -- what was your purpose of walking up to this crowd?

Naiquan: So I was overall -- we left -- it had to be **about two minutes**. For me to get there, look at it, know that -- try to tell Derek, come on and all that and then leave.

Lisa Alexander: He’s going from when he walked out of **7-11 to the incident**, talking to Derek and then him and Derek walking away.

e. Jeisson Duque stated **after the attack** an old lady said she called the cops, and the victims waited **10 minutes** for the police, but police never arrived so they left, **EXHIBIT 3 - ECF Document 72-2, page 11, #12-21**.

Jeisson: There was an old lady that go out, **out from 7-11** that she was also crying and she was like oh, **I just call the police**, stay here. We stay for like **10 minutes**. I stay with my other friend by myself **waiting**.

for the police to help us to get home, right, so nobody goes there and everybody started staying like, yo, get out of here because that guys are coming back, right. So, we go home.

f. This confirms the time of **10:12pm** of the third 911 phone call in which office W. Regitz arrived at **10:15pm**, **EXHIBIT 4 - ECF Doc 72-2, pg 2**. 10:00pm(time of attack) + 2 minutes(Naiquan and Gatti left) + 10 minutes(Jeisson waited for Police) = **10:12pm=call time 22:12 below.**

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EX. 1(b)

ENGLEWOOD POLICE DEPARTMENT

75 SOUTH VAN BRUNT STREET ENGLEWOOD, NJ 07631
CHIEF ARTHUR O'KEEFE

Tel:(201) 568-2700

Incident Summary

Dept Incident #: I-2012-025544 Department: ENGLEWOOD POLICE DEPARTMENT
 * Location: 9 TENAFLY RD, ENGLEWOOD NJ 07631
 Bureau: Initial Call: DISFHT / DISTURBANCE- FIGHT
 Sector: Final Call: DISFHT / DISTURBANCE- FIGHT
 Call Entry Time: 10/31/2012 22:12 Incident Status: CLEARED
 First Unit Dispatched: 10/31/2012 22:13 Last Unit Cleared: 10/31/2012 22:16
 * Call Time: 10/31/2012 22:12 Call Disposition: CLR / CLEAR
 Call Taker : cook207 Call Origination: 911 / 911 CALL
 Primary Unit: 194 CC#:
 Initial Narrative: in front of 7-11
 Final Narrative:

Officer Dispatch:

Dispatch Location	Unit Code	Officer Name	Vehicle	Date	Dispatch	Enroute	Arrival	Clear	Total Time (min)
* 9 TENAFLY RD, ENGLEWOOD NJ 07631	194	REGITZ, W	PATROL 108	10/31/2012	22:13	22:13	22:15	22:16	3

g. Defendant McDonald later testified in the probable cause hearing that Tyrone Stephens was at **McDonalds at 10pm**, and maliciously moved the time of the incident to **10:15pm**, **EXHIBIT 5 - ECF Doc 72-3, page 49, para 58, #15-21**. Regitz was on the scene at 10:15pm.

Prosecutor: With regards to Tyrone Stephens statement that he gave, when he said he was at McDonalds at around 10pm on October 31, correct?

McDonald: Yes.

Prosecutor: And that the victims said that the assault had taken place after that, 10:15 or so, correct?

McDonald: Correct.

II. NOVEMBER 8, 2012 - TYRONE'S SWORN STATEMENT

a. Marc Stephens submitted Tyrone's sworn statement to Judge Jerejian and the prosecutor Ryan McGee during Marc's firearm hearing, which clearly has Det. McDonald stating that Kinlaw saw Tyrone at McDonalds at 10pm, **EXHIBIT 6 - ECF doc 77-6 page 55-56.**

Tyrone Stephens: Kinlaw said he seen me! Kinlaw just said he seen me!

Det. McDonald: "Kinlaw said he saw you and other people...when Kinlaw saw you on the Ave at this particular time you weren't at home.."

Marc Stephens: Were you there?

Tyrone Stephens: No I was not there at all! I was not there! I didn't see any fight, anything! Kinlaw seen me at McDonald's. I pulled up at McDonalds.

Marc Stephens: **Kinlaw** said he saw him on the Ave, at, look like **10 o'clock**. Where was this altercation at? The 7-Eleven on the ave.?

Det. McDonald: up the street.

Tyrone Stephens: That's it right there! I was in front of **McDonalds**. I just hopped out of a car. I walked in **McDonalds** and said what's up **Kinlaw**.

Tyrone Stephens: If **Kinlaw** just said that he seen me, you just said it on here, you heard Kinlaw say that he seen me. He seen me at **McDonalds**, and he was talking to a little kid Willie. I think he was with **Ron**, right there at **McDonalds**. If you say that's the time, than how could I be at two places at once?

Det. McDonald: That was at **10:00** he said, **EXHIBIT 7 - ECF Doc 72-2, page 91. para 9-14.**

IV. DECEMBER 20, 2012 - PROBABLE CAUSE HEARING - JUDGE WILCOX OPINION

Judge Gary Wilcox ruled that Defense Witness Tyrone Roy was credible, and that based on the timeline Tyrone Stephens should have been at **McDonalds**, or home, during the time of the incident at 7-eleven, **EXHIBIT 8 - ECF Doc 72-3, page 65, para 91, #12-25.**

Judge Gary Wilcox: "I heard the brief testimony of Tyrone Roy. **I found Tyrone to be credible as a witness.** And clearly the reason Tyrone Roy was called is to establish time line, indicating that, again, he and another friend, Anthony Mancini, picked up Tyrone at his house at approximately 9:40, 9:45. **At approximately 10pm** they went to **McDonalds**. **They ate food there for about ten or 15 minutes.** And then Anthony drove Tyrone Stephens home. So, I think the Juveniles argument here is that, again, the time line, and again, the act was alleged to have occurred at 10:13pm-- that Tyrone at that time, would have been at **McDonald's**".

ARGUMENT

I. THE PANEL OPINION IS CLEARLY ERRORNEOUS BECAUSE THERE ARE NO INCONSISTENCIES IN TYRONE STEPHENS ALIBI.

If the victims were attacked at 7-eleven at 10pm, and the investigating officers confirmed Kinlaw saw Tyrone at McDonalds at 10pm, it is impossible for Tyrone to be at 7-eleven at 10pm. Defendant McDonald knew Tyrone was not at the incident, **“Kinlaw said he saw you and other people...That was at 10:00 he said that”, and testified the victims were attacked at 7-eleven On or about 10pm.** Judge Gary Wilcox opinion that the defense witness timeline was credible and from 10:00 -10:15pm Tyrone Stephens should have been at McDonalds. Officer Regitz arrived at 7-eleven at 10:15pm, and the victims and suspects were already gone.

The court is in Error by stating that there are inconsistencies in Tyrone Stephens alibi which is **not supported in the record**. “A finding of fact is clearly erroneous if it is without factual support in the record, United States v. Artus, 591 F. 2d 526 - Court of Appeals, 9th Circuit 1979 at 528. US v. Mageno, 762 F. 3d 933 - Court of Appeals, 9th Circuit 2014 at 943-944.

CONCLUSION

Appellant respectfully request the court correct the clear error of facts, and grant the motions to prevent manifest injustice.

Respectfully Submitted,



Tyrone Stephens
Plaintiff, pro se



Marc Stephens
Plaintiff, pro se