

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 AND MOTION TO
STRIKE COURT'S OPINION
STATING NATALIA CORTES
IDENTIFICATED TYRONE
STEPHENS AS A PERPETRATOR**

INTRODUCTION

There are three instances where the Panel stated in their opinion that Natalia Cortes identified Tyrone Stephens as the “perpetrator”, and “participating in the attack”. **Nowhere on the record** does Cortes make those statements. 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 does Natalia states she identified Tyrone as a **perpetrator**, or as **participating in 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**, “Natalia Cortes, identified three of the attackers as Tyrone, Justin Evans, and Derrick Gaddy”.
2. **The Panel Opinion states, Page 3**, “First, Cortes, while acknowledging that she had earlier identified Tyrone as a perpetrator, testified that she was not actually sure if he was involved”. **Page 3**, “However, at this point, the prosecutor’s case against Tyrone began to unravel. First, Cortes, while acknowledging that she had earlier identified Tyrone as a perpetrator, testified that she was not actually sure if he was involved”.
3. **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)”.

I. NOVEMBER 2, 2012 - NATALIA SWORN STATEMENT

a. Natalia stated to McDonald and Singh that she **could not** identify anyone.

Q: “If you saw the actors again, would you be able to identify them?”

Natalia Cortez: “I’m not really sure because it was really dark and most of them had hoods on and like that one in the bike had the ski-mask on”, **EXHIBIT 1** - ECF Doc 72-2, pg 22, #23 & pg 23, #2-3.

b. McDonald told the Grand Jury that Natalia identified Tyrone because the Ski-mask fell off his face. **EXHIBIT 2** - ECF Doc 72-4, page 3, #5-25.

Juror #4: It sounds like Santiago’s cousin identified Mr. Stephens?

McDonald: Yes. Natalia.

Juror #4: So is there any thought that the mask came off at any point, if Natalia Cortez saw Stephens there or did the person who was wearing the mask take it off or anything like that....?

McDonald: It could have come off.

c. McDonald testified in the probable cause hearing that Natalia identified Tyrone, **EXHIBIT 3** - ECF Doc 72-3, page 113, pg 1-5.

Q: Do you recall who Natalia was able to pick out out of that -- photo book that you showed her?

McDonald: Yes. She picked out Tyrone Stevens, Justin Evans, and Derric Gatti.

d. During Justin Evans probable cause hearing, McDonald testified after speaking with the victims and witness Natalia Cortes on November 2, 2012, the Englewood Investigators “**only had Derric Gatti**”.

The Supplementary Investigative Report prepared by defendant McDonald and reviewed by defendant Cubullos states, “**On 11/02/12**, (see paragraph 1), **EXHIBIT 4** - ECF Doc 72-3, page 19, para #1. “After taking all of the statements from the victims and witnesses. Detective Singh and I drove to the Winton White football stadium to pick up **Derric Gaddy** for questioning”, (see paragraph 3, last sentence), **EXHIBIT 4** - ECF Doc 72-3, page 19, paragraph #3.

Q: After you attempted to interview Derric Gatti, what happened next?

McDonald: I mean well, that was pretty much it. All we really knew at that particular point **was Derric Gatti.** **EXHIBIT 3** - ECF Doc 72-3, page 113, #14-25.

e. McDonald **testified** during Justin Evans probable cause hearing that on, November 2, 2012, Natalia **did not** identify any attackers, **EXHIBIT 5** - ECF Doc 72-3, page 121:

Q. Okay. She also said, “I’m not sure I can identify the actors it was really dark”. I think, then, that you said “**If you saw them again could you identify them?**”

McDonald (A). Right. Yes.

Q. So then I think then you showed her the photo array, again?

McDonald (A). That was for --

Q. Oh, detective Cabillos

McDonald (A). Yes

II. NOVEMBER 13, 2012, CUBILLOS AND MCDONALD PHOTO ARRAY WITH NATALIA:

Cubillos: Okay anybody look familiar

Natalia: Not really. But—

Cubillos: There was one?

Natalia: There was one that maybe, but I mean I’ve seen him around a couple times.

Cubillos: Was he there the night um—

Natalia: I’m not sure cause everybody had hoodies—

Cubillos: Uh huh

Natalia: Hats. The guy with the ski-mask

Cubillos: Um, so the one that you think was there. I mean—

Natalia: I mean he kinda looks like, like his

Cubillos: Uh huh

Natalia: But I’m not really sure of his face

Cubillos: You’re not sure of his face, so he doesn’t even look familiar? Okay. Um, that’s it. Time is 3:33pm. **EXHIBIT 6**

a. According to Cubillos, Tyrone’s (a juvenile) picture was **not** in the photo array, and this photo array was **the same** used by McDonald on November 2, “On 11/13/12, I met with Natalia Cortes at the Englewood Police Department to show her the same photo array that Det. McDonald had provided”...McDonald advised me that the individual that was placed in the photo array was a possible suspect Victory Sarhano..”No photo of any other juvenile suspect was used in this photo array”, **EXHIBIT 7** - defendants SA177.

b. Photo array eyewitness identification worksheet for Natalia states the following: “**Did the witness identify any photo as depicting the perpetrator?**” The answer checked is “**No**”, **EXHIBIT 8** - SA186, #20 also same ECF Doc. 42, page 9. #20

c. McDonald **testified** that the pictures in the photo array were only of adults. Tyrone’s was a minor so his picture was not in the photo array:

Q. Okay. Do you recall Natalia being asked, “Is there anyone from” – Is there anyone familiar?” She states, “Not really. I’m not sure.” Do –

McDonald: According to Detective Cabillos, Yes.

Q. Okay

McDonald: That's what she said

Q. So, looking through the photo array, at headquarters, on November 13th, the bottom line is Natalia **could not identify anyone** in the photo book as being there that night, right?

McDonald: **Right.** But again, those were different suspects at the time.

Q. Okay. Do you know, with certainty, whether or not Justin's picture was in that November 13th photo book with Detective Cabillos?

McDonald: No. They were all adults

Q. Okay.

McDonald: All the suspects were adults. EXHIBIT 9, #4-21

III. FEBRUARY 26, 2013 - PROBABLE CAUSE HEARING - WITNESS NATALIA CORTES:

a. Natalia testified that she did not identify anyone as the attacker, **EXHIBIT 10 - Natalia Cortes Testimony - ECF Doc 72-3, page 90-97, #5-22:**

Jordan Comet (Q). I need to know at any time, to any detective or police officer, anywhere whether you were in the hospital, whether you were at home, in the police department, at any time when asked whether you could identify any of the actors any of the people who they are claiming did--

Natalia Cortes (A). uh huh

Jordan Comet (Q). --some fighting or some bad things on by 7-eleven that night, at any time, were you able to identify and point out any of those individuals?

Natalia Cortes (A). I said I pointed out some, but **I said I wasn't really sure.** I said they might have been there, but since it was really dark and most of the people had hoodies on. **That's all I said,** **EXHIBIT 10 - ECF Doc 72-3, pg 91, para #7, #8-11.**

Jordan Comet (Q). Okay. So you're saying a little more now than you said before so, I'm asking you—I'm going to ask you—I'm going to clarify. You said you pointed out some individuals. What do you mean by that?

Natalia Cortes (A). That might have looked like they might have been there like, from, like, my memories. **But not really anyone that stood out, like, oh, I saw him right there – standing right there.** **EXHIBIT 10 - ECF Doc 72-3, page 91, #7, #12-19.**

b. Natalia only identified when **Comet suggested Tyrone to Natalia in the hallway as the suspect,** and the Court told her to say Yes...or no, **EXHIBIT 11 - SA 234, Doc. 003112432109 Page: 80, #8-9:**

Jordan Comet (Q). Okay. And did there ever come a point where you – first of all, have you ever seen my client before?

Natalia Cortes (A). Yeah. We went to high school.

Jordan Comet (Q). You went to high school together. Okay. So, do you know who my client is?

Natalia Cortes (A). Yeah.

Jordan Comet (Q). And **just now in the hallway**, when you first saw him

Natalia Cortes (A). Uh-huh.

Jordan Comet (Q). – what – what was – what was your reaction?

Jordan Comet (Q). What did you just say?

Natalia Cortes (A). I said I'm not – I'm not really so sure that he wasn't there – that he was there.

Jordan Comet (Q). So, you're –

Natalia Cortes (A). Like, I've seen him, but I was, like, **I'm not really so sure that he was there.**

Jordan Comet (Q). Was he one of the pictures that the officers showed you? **EXHIBIT 11 - SA 234, Doc. 003112432109 Page: 80, #8.**

Natalia Cortes (A). Yeah.

Natalia Cortes (A). **I think.**

Jordan Comet (Q). Did - I'm sorry?

Natalia Cortes (A). I think so. **I think** he was in one of the pictures.

Jordan Comet (Q). Okay. And was he one of the pictures that you pointed out saying it's possible he was there?

THE COURT: You have to say yes or no.

Natalia Cortes (A). Yes.

Jordan Comet (Q). Are you saying yes or no?

Natalia Cortes (A). Yes.

Jordan Comet (Q). So, you're saying you did point out and say my –

Natalia Cortes (A). I said he might have been there, but I'm not sure.

Jordan Comet (Q). Okay. And –

Natalia Cortes (A). That's what I said.

Jordan Comet (Q). **Did you witness Mr. Stephens fighting that night?**

Natalia Cortes (A). **I didn't quite see anybody's faces who were actually fighting.** see defendants **EXHIBIT 11 - SA234, ECF 003112432109, Page: 80, para #9, #7-10**

Jordan Comet (Q). Okay

Natalia Cortes (A). **The only people that I saw were just standing like—just there.**

Jordan Comet (Q). Okay. And do you specifically recall whether my client was specifically there at 10:13pm that night?

Natalia Cortes (A). **No.**

Jordan Comet (Q). And when the officers asked you – they—was

there—was there a point on November 2nd or November 13th that they videotape – not video—audiotaped your conversation with them?

Natalia Cortes (A). Yeah.

Jordan Comet (Q). Do you recall that?

Natalia Cortes (A). I remember they – they recorded it.

Jordan Comet (Q). The recorder. And when the recorder was in front of you, did they show you pictures?

Natalia Cortes (A). Yes.

Jordan Comet (Q). **And, at that point, was there ever a point where you said, I identify a specific person?**

Natalia Cortes (A). Well, I identified, like, one or two that kind of stood out, **but not him. EXHIBIT 12 - para #10, #3-6.**

c. The prosecutor and Court steps in and objects to Comet stating that he spoke to Natalia via phone, and in the hallway. **EXHIBIT 10 - ECF Doc 72-3, page 93, #14-15.**

Prosecutor: I'm going to object to any conversation that you've had with this witness.

Jordan Comet: I understand.

The court: that makes you

Jordan Comet: I understand.

Prosecutor: you're

The Court: a potential witness

Prosecutor: That makes you a fact witness and I would move to disqualify you if you refer to any conversation that weren't witnessed by another person.

The Court: **I'm going to disregard what counsel just said just now.**

d. The initial questioning was removed from the record, and Comet had to start the questioning over. Natalie Cortez testified at Tyrone Stephens's probable cause hearing that she **did not identify Tyrone Stephens** by name, picture, or as a possible suspect on November 2, 2012, **EXHIBIT 10 - ECF Doc 72-3, page 93-97.**

Jordan Comet: But there are three parts to this. There's an identification by knowing the person by name. There's an identification of a picture. And then there's the –I'm not sure, I really don't know maybe possibly. Those are the three parts that were looking at here.

Jordan Comet: **First question is, did you pick out anyone from a picture, looking at them and saying, oh, I know that person, his name is whatever, either on 11/2 or 11/13 2012?**

Natalia Cortez: No. I didn't know anybody's name. I just saw by face.

Jordan Comet: When you looked at their faces, did you say I saw that face at 7-eleven on October 31, 2012?

Natalia Cortez: No.

Jordan Comet: And finally, third, did there come a point where you wavered and said, I'm not sure, this person might have been there, I really don't know?

Natalia Cortez: Yeah.

Jordan Comet: And how many faces did you say that about?

Natalia Cortez: I think one or two.

Jordan Comet: And the crucial question is, do you know whether one of those faces that you said might have been there was my client?

Natalia Cortez: No... **I'm saying, no, it wasn't him, EXHIBIT 10 - ECF Doc. 72-3, page 94, para #17, #1-3.**

Prosecutor: You said that you were interviewed at the hospital correct?

Natalia Cortez: Yes.

Prosecutor: And you think that the date, November 2, 2012 sounds correct?

Natalia Cortez: Yeah. Something like that.

Prosecutor: And you said that you were showed a photo identification book? A collection of pictures?

Natalia Cortez: Yes

Prosecutor: Did you point to any of the pictures when asked if they were there?

Natalia Cortez: I pointed, like, one or two pictures.

Prosecutor: Did you say how sure you were at that point?

Natalia Cortez: **All my answers were pretty much, I'm not so sure.** It might have been, but I'm not really sure since it was really dark. And like I said, everybody had either hoodies or like, some type of hat on.

Prosecutor: **Did you know Tyrone Stephens before you looked at the photo book on November 2?**

Natalia Cortez: **I remember him by face** because we went to high school together. I mean, like, we really didn't talk or, like, anything. But I remember seeing him in high school. And that he played sports and everything.

Prosecutor: **Did you recognize any of the pictures that you pointed out as being Tyrone Stephens?**

Natalia Cortez: No, **EXHIBIT 10 - ECF Doc 72-3, pg 95, para 19, #16-18**

Prosecutor: Do you remember the identification in the hospital.

Natalia Cortez: I remember they showed me.

Prosecutor: Do you remember what you said that day very well?

Natalia Cortez: **I remember them showing me the books and what I said.** It was—**Not Really.** **EXHIBIT 10 - ECF Doc 72-3, page 96, para #21, #8-11.**

Prosecutor: I don't have any further questions.

Comet: Did the officer say to you a reason why they came to you more than one time and didn't just question you once?

Natalia: Because they said -- the second time they said that they had, like, a small group that they had gotten from that day. And that was, like, only, like, four or five pictures.

Comet: **And in those four or five pictures, was my client one of those pictures?**

Natalia: Not that I can recall. **No.** **EXHIBIT 10 - ECF Doc 72-3, pg 97, #22, 1-10**

ARGUMENT

The record proves all Englewood Investigators knew that there was no identification by Natalia of the suspect, or of Tyrone as the suspect on November 2, and November 13. Yet, the Police Reports and McDonald testimony states that Natalia identified Tyrone as the suspect. The identification by Natalia stating or testifying Tyrone was a “perpetrator”, or as “participating in the attack” on October 31, 2012, in the parking lot of 7-eleven at 10pm, or a little after 10pm, is **not on 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.** In fact, as proven above, defendant McDonald testified that after speaking with Natalia on November 2, 2012, the investigating officers **only had Derric Gatti as a possible suspect.** In addition, Cubillos photo array was of **adults** and did not contain Tyrone’s picture. The defendants clearly fabricated police reports, sworn statements and gave false testimony. A jury would not be foreclosed from reviewing the police records and sworn statements **before** Natalia’s testimony. In addition, a genuine dispute is established because the officers knew the incident took place at **7-eleven at 10pm**, and defendant McDonald confirmed on record that Tyrone was at McDonalds restaurant and that **investigating officer Kinlaw** said he saw Tyrone at **McDonalds at 10pm**. Natalia testimony is irrelevant.

Appellants put the evidence in front of the District Court in the “Statement of Facts in their opposition briefs”, **Doc 71-2, page 12, #116-118**, and First Motion for Reconsideration, **ECF 85, 1-18**, and the 3rd Circuit Panel in their 3rd circuit Reply Brief, **Doc: 003112517474, Page: 6-7, #13-18; and page 9-10, #35-40**. The Panel and district court erred as a matter of fact and law by ignoring or overlooking the vast documentary evidence and undisputed testimony on record, see **Roe v. Operation Rescue, 54 F. 3d 133 - Court of Appeals, 3rd Circuit 1995** (holding that the district court abused its discretion by “ignoring” undisputed evidence).

CONCLUSION

Appellant respectfully request the court to grant the motions to prevent manifest injustice pursuant to Rule 2 and Rule 61.

Respectfully Submitted,



Tyrone Stephens
Plaintiff, pro se



Marc Stephens
Plaintiff, pro se