

IN THE COUNTY COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY
CASE NO: 08-CM-021617

STATE OF FLORIDA

vs.

CHARGE: WEARING HOOD ON STREET/ NO
VALID LICENSE MOTORCYCLE

WALSH IAN NICHOLS

MOTION TO SUPPRESS

COMES NOW the Defendant, WALSH IAN NICHOLS, by and through his undersigned attorney and pursuant to Fla. R. Crim. P. 3.190(b) moves this Honorable Court to issue an order suppressing his stop, and all evidence subsequently obtained, as in contravention to his rights under the Fourth Amendment of the Federal Constitution as well as Article I § 9 and 12 of the Florida Constitution. In good faith the Defendant would state as follows:

1. On October 10, 2008 Officer Cordero of Tampa PD stopped Mr. Nichols at East 9th Avenue and North 16th Street in Tampa.
2. Cordero had responded at the request of Sergeant Murray, also of Tampa PD, who alleged he had seen Mr. Nichols wearing a mask and driving a scooter in the area of East 7th Avenue and North 15th Street.
3. Sgt. Murray requested Cordero stop Mr. Nichols for wearing the mask while operating the scooter on a public street.
4. At the time of Mr. Nichols' stop, he was sitting on the curb eating sushi.
5. Mr. Nichols was placed under arrest for wearing a mask on a public street and pursuant to the stop was further cited for failing to have a motorcycle endorsement.

6. Mr. Nichols dressing as Batman is not a violation of the law as contemplated by § 876.12, Florida Statutes because he did not do so:

(1) With the intent to deprive any person or class of person of the equal protection of the laws... (2) With the intent, by force or threat of force, to injure, intimidate, or interfere with any person because of the person's exercise of any right secured by federal, state, or local law... (3) With the intent to intimidate, threaten, abuse or harass any other person; or (4) While she or he was engaged in conduct that could reasonably lead to the institution of a civil or criminal proceeding against her or him, with the intent to avoid identification in such a proceeding. Fla. Stat. § 876.155 (2008); See also *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1980).

7. Law enforcement may not detain a citizen unless there is reasonable suspicion that a crime is being committed or probable cause to believe a traffic violation has occurred.

Whren v. United States, 517 U.S. 806, 810 (1996); *Popple v. State*, 626 So.2d 485, 486 (Fla. 1993).

8. A memorandum incorporating the law referenced herein will be filed simultaneously with this motion.

WHEREFORE the Defendant, WALSH IAN NICHOLS, prays this Honorable Court to issue an order suppressing his unlawful stop, as well as any evidence discovered as a result of that unlawful stop, as executed in violation of his foregoing rights.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been furnished by U.S. Mail to the Clerk of the County Court, and a copy to the Office of Mark Ober, State Attorney, 419 Pierce Street, Tampa, Florida 33602 this _____ day of January 09.

THE LAW OFFICES OF CARLSON & MEISSNER

J. KEVIN HAYSLETT, ESQUIRE
250 North Belcher Road, Suite 102
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Florida Bar #0748579
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**MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO SUPPRESS**

Law enforcement may not detain a citizen unless there is reasonable suspicion that a crime is being committed or probable cause to believe a traffic violation has occurred. *Whren v. United States*, 517 U.S. 806, 810 (1996); *Popple v. State*, 626 So.2d 185, 186 (Fla. 1993). The remedy for an unlawful stop is the suppression of that stop, along with all evidence obtained as a result. *Whren*, 517 U.S. at 813. Because Mr. Nichols was detained without any evidence that he was violating any laws or ordinances, his stop was unlawful and accordingly, that stop and the subsequent discovery that he lacked a motorcycle endorsement must be suppressed.

Florida Statutes Section 876.12 purportedly makes it a crime for anyone over the age of sixteen to wear, on a public way, a "mask, hood, or device whereby any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer." However, in *State v. Robinson*, the Florida Supreme Court held that § 876.12 statute was "overbroad" because it is "susceptible of application to entirely innocent activities... [and] of being applied so as to create prohibitions that lack any rational basis." 393 So. 2d 1076, 1077 (Fla. 1980). Thereafter, the Florida Legislature enacted § 876.155, limiting the application of § 876.12 as follows:

The provisions of § 876.12-876.15 apply only if the person was wearing the mask, hood or other device:

(1) With the intent to deprive any person of class of person of the equal protection of the laws... (2) With the intent, by force or threat of force, to injure intimidate, or interfere with any person because of the person's exercise of any right secured by federal, state, or local law... (3) With the intent to intimidate, threaten, abuse or harass any other person; or (4) While she or he was engaged in conduct that could reasonably lead to the institution of a civil or criminal proceeding against her or him, with the intent to avoid identification in such a proceeding.

There is absolutely no evidence to suggest that Mr. Nichols was dressing in costume for the purpose of intimidation, harassment, or to conceal his identity to avoid prosecution for some criminal act.

Therefore, pursuant to § 876.155, Mr. Nichols's apparel did not violate any laws.

Under *Whren* and *Poppo*, an officer may not stop a citizen without a valid basis. *Id.* at 813. *Id.* at 126. Specifically, the officer must have reasonable suspicion that the citizen is committing a crime or probable cause to believe the citizen is committing a traffic infraction. *Id.*; *Id.* It is undisputed that at the time of Mr. Nichols' stop, there was no reason to believe he was committing a traffic violation. Rather, the only indicated basis for the stop was Mr. Nichols' alleged crime of wearing a mask on a public street. (See Cordero's Report) However, based on the Legislature's re-evaluation of § 876.12 and its application, as discussed above, Mr. Nichols was not in fact in violation of that law. Accordingly, neither Sergeant Murray nor Officer Cordero had reasonable suspicion that Mr. Nichols was committing a crime and had no valid grounds upon which to detain him. Therefore, based on *Whren* and *Poppo*, the ultimate discovery that Mr. Nichols lacked a necessary motorcycle endorsement for his scooter occurred pursuant to an illegal stop, it is fruit of the poisonous tree, and must be suppressed. *Id.*; *Id.*

CONCLUSION

Mr. Nichols' stop must be suppressed, along with any evidence obtained as a result of that stop, because law enforcement lacked a valid basis to detain him. Because Officer Cordero lacked reasonable suspicion to believe Mr. Nichols was committing a crime, and also had no probable

cause to believe he was violating any traffic laws, she had no grounds to stop him. Since there was no basis for a stop, the fact that Mr. Nichols lacked a motorcycle endorsement must also be suppressed along with the stop.

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AMENDED MOTION TO DISMISS

COMES NOW, the Defendant, WALSH IAN NICHOLS, by and through his undersigned attorney, and pursuant to Fla. R. Crim. P. 3.190(e)(4) moves this Honorable Court to enter an order dismissing his above-referenced charge of wearing a hood on a public street, and as grounds therefore would state as follows:

1. On October 10, 2008 Walsh Nichols, otherwise attired as Batman, was stopped in the area of East 9th Avenue and North 15th Street in Ybor City.
2. Sergeant Murray of Tampa PD had seen a Batman figure drive by on a motorcycle in the area of East 7th Avenue and North 15th Street.
3. As he had apparently advised Nichols to unmask himself three weeks earlier, Sgt. Murray requested Officer Lisa Cordero respond to the location and conduct a stop.
4. Law enforcement approached and detained Nichols who was sitting on the curb eating sushi and wearing traditional Batman apparel, complete with cape and partial mask.
5. It was a dark day for the Dark Knight, as he was subsequently placed under arrest for wearing a hood on a public street.
6. Nichols was also arrested for not having the endorsement necessary to operate a motorcycle.

7. Nichols was arrested for allegedly violating § 876.12, Florida Statutes, which on its unmasked face makes it a crime for anyone over the age of sixteen to wear, on a public way, a "mask, hood, or device whereby any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer."
8. This particular crime is found in the section of Florida Statutes relating to criminal anarchy, treason, and other subversive crimes against public order.
9. The statute criminalizing wearing a hood on a public way, § 876.12, was created in 1951, and is notably followed by laws prohibiting the burning of flaming crosses. (See Fla. Stat. § 876.17-18).
10. The time period, placement, and tone of the law clearly reflect legislative intent to combat such groups of the Ku Klux Klan. *Nichol v. State*, 939 So. 2d 231, 234 FN2 (Fla. 5th DCA 2006).
11. Moreover, the Florida Supreme Court has ruled that the statute is "overbroad" because it is "susceptible of application to entirely innocent activities... [and] of being applied so as to create prohibitions that lack any rational basis." *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1980).
12. Accordingly, the legislature responded by enacting § 876.155, which limits the application of that series of statutes as follows:

The provisions of § 876.12-876.15 apply only if the person was wearing the mask, hood or other device:

- (1) With the intent to deprive any person of class of person of the equal protection of the laws... (2) With the intent, by force or threat of force, to injure intimidate, or interfere with any person because of the person's exercise of any right secured by federal, state, or local law... (3) With the intent to intimidate, threaten, abuse or harass any other person; or (4) While she or he was engaged in conduct that could reasonably lead to the

¹ The Defendant would note that the Batman character has always fought against such nefarious deeds.

institution of a civil or criminal proceeding against her or him, with the intent to avoid identification in such a proceeding.

13. In this manner, the legislature codified its intent to punish crime committers, not crime

fighters. *Nichol v. State*, 939 So. 2d 231, 234 FN2 (Fla. 5th DCA 2006).

14. There are no material disputed facts and the undisputed facts do not establish a prima facie

case of guilt against the defendant. Fla. R. Crim. P. 3.190(c)(4).

I, WALSH IAN NICHOLS, do hereby swear that the above facts are true and correct to the best of my knowledge.

WALSH IAN NICHOLS

WHEREFORE, the Defendant respectfully requests this Honorable Court to enter an Order dismissing the charge against him.

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