

STATE OF NORTH CAROLINA **FILED** IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

COUNTY OF FORSYTH 2013 FEB 15 A 11:00 11 CR 50874

STATE OF NORTH CAROLINA)
FORSYTH COUNTY, C.S.C.)

VS.

BY Jose Hdez)
)
)

MOTION FOR APPROPRIATE
RELIEF

DONNA WATERS

NOW COMES the defendant, Donna Waters, by and through undersigned counsel, and respectfully submits this Motion for Appropriate Relief pursuant to NCGS 15A-1414(b)(3). As grounds for said Motion the defendant, through counsel respectfully shows unto the Court the following:

1. On January 28, 2011 T. S. Hanks of the Winston-Salem Police Dept. detained and arrested the above named defendant for suspicion of Driving While Impaired.
2. On February 5, 2013 in the State of North Carolina and in the County of Forsyth the matter of **State v. Waters** was heard in the District Court division. The Honorable George Bedsworth presiding. The State was represented by DWI prosecutor Jonathan Shrader and the defendant was represented by attorney John J. Barrow of the Forsyth County bar.
3. The defendant filed numerous pretrial objections and motions. The matter was called for hearing at approximately 2:30 in the afternoon of the fifth. The State's sole witness during the motion hearing was Winston-Salem police officer T.S. Hanks.
4. Following the hearing on the defendant's pre-trial motions Ms. Waters was arraigned and a trial on the merits ensued. Once again Officer Hanks was the State's sole witness.

5. The matter was vigorously contested and testimony was interrupted while counsel presented arguments regarding evidentiary issues. (During these arguments Officer Hanks remained on the witness stand.) Based on information and belief, there were spectators in the courtroom who sat a vantage point that allowed them to see the witness stand as well as Officer Hanks. At some point during the proceedings Judge Bedsworth called the lawyers out of the courtroom and asked Mr. Shrader if Officer Hanks was texting him [Shrader] from the witness stand? Mr. Shrader responded in the affirmative and indicated that Officer Hanks had texted him but he [Shrader] did not respond to the text. Defense counsel was led to believe that there was one text sent by Officer Hanks to Mr. Shrader. Based on information and belief, there were in fact more than one text message sent from Officer Hanks during the trial of Ms. Waters. This material fact was not made known to defense counsel. Based on the representation of "one text" that was not responded to counsel decided not to move for a mistrial.

6. Based on information and belief Judge Bedsworth expressed concern over Hanks conduct. The trial moved forward and Ms. Waters was convicted of driving while impaired.

ARGUMENT

NCGS Sec. 15A-1414(b)(3) provides that a Motion by the defendant for appropriate relief may be made within ten days after entry of judgment "*for any other cause the defendant did not receive a fair and impartial trial.*" The defendant, through counsel contends that she did not receive a fair trial due to the conduct of Officer Hanks. The judicial process and the trial of Ms. Waters was adulterated as soon as Officer Hanks attempted to secretly communicate with the prosecutor while he (Hanks) was on the witness stand.

Officer Hanks is a nine year veteran of the police department who, by his own reckoning has testified hundreds of times in a court of law. Therefore it is axiomatic that Mr. Hanks was well aware of the prohibition against **secretly communicating with the participating prosecutor during his (Hanks) testimony.** To suggest otherwise would be an act of naïve denial. Thus by his conduct Mr. Hanks demonstrated a disdain for the trial process, the litigants and the presiding judge. It is immaterial whether Mr. Shrader ever saw or responded to the texts. It is the conduct of the witness and his state of mind that led him to engage in such behavior that casts a pall over the entire trial.

Based on information and belief, a courtroom observer ultimately brought Mr. Hanks' conduct to the attention of the presiding judge. How long Mr. Hanks had been engaged in his illicit conduct undetected is a matter of speculation. Nevertheless, defense counsel was not immediately made aware of Mr. Hanks attempt to communicate with the prosecutor nor was he ever made aware of what Mr. Hanks was texting. Clearly the defense was at an unfair disadvantage due to the clandestine nature of Mr. Hanks conduct and the extra judicial statements of the witness.

Fairness and the maintenance of a just judicial process warrant the granting of the defendant's Motion for Appropriate Relief. To let the conviction of Ms. Waters stand in light of Officer Hanks' conduct would be a miscarriage of justice.

UNITED STATES CONSTITUTION; AMENDMENT VI provides in part that "*In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him;*" The Confrontation Clause of the United States Constitution attempts to ensure that a defendant receive a fair trial. The Sixth Amendment is in place to afford counsel for the accused the right to cross examine witnesses against her in areas relevant to the case. Mr. Hanks willfully and wantonly attempted to undermine and did undermine this well known clause of the Bill of Rights.

Rule 612(a) of the North Carolina Rules of Evidence provides that "*If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.*" Based on information and belief Officer Hanks was using his cellular phone or some electronic device while on the witness stand. Defense counsel was not made aware of this fact in a timely fashion nor was he provided with the opportunity to review the electronic devise.

The Due Process Clause of the United States Constitution and the North Carolina Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law;" The conduct of Officer Hanks violated Ms. Waters rights under the aforementioned clause.

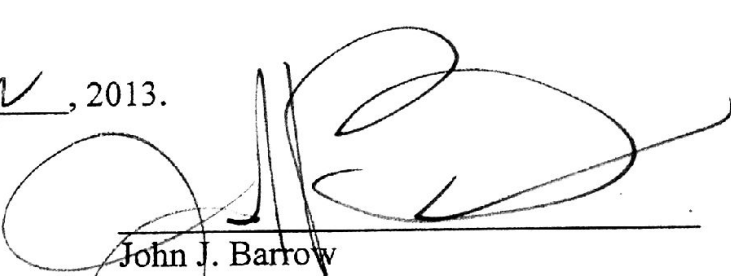
Mr. Hanks' efforts to secretly communicate with the prosecutor and the content of the texts were facts that defense counsel needed to be made aware of immediately so as to be able to confront and cross examine the witness. Once the violation of Ms. Waters' rights occurred the integrity of the trial was permanently compromised. Mr. Barrow, a seasoned attorney of twenty years made several judgments and decisions during the course of Ms. Waters' trial and at least some of these important strategic decisions were made while defense counsel was unaware of the contemptuous behavior of the witness.

PRAYER FOR RELIEF

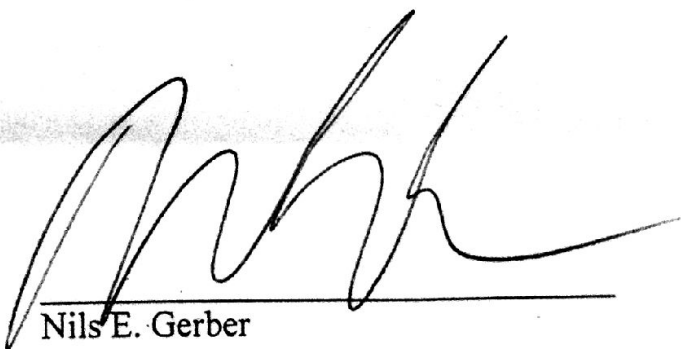
Wherefore the defendant, through counsel respectively prays this Court enter an **Order** vacating the conviction of the defendant and enter a **Judgment of Acquittal** in the above captioned matter.

Respectfully submitted,

This, the 15th day of February, 2013.



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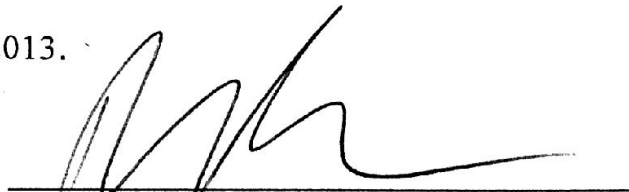
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion was served upon the Office of the District Attorney, 21st Judicial District, Forsyth County, by hand delivery of said copy directly to:

Seventh Floor, Hall of Justice
District Attorney's Office

on this the 15th day of February, 2013.



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