

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

STATE OF MARYLAND

vs.

Case Number:
115141033

EDWARD NERO,

DEFENDANT.

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Verdict)

Baltimore, Maryland

Monday, May 23, 2016

BEFORE:

HONORABLE BARRY G. WILLIAMS, Associate Judge

APPEARANCES:

For the State:

JANICE BLEDSOE, ESQUIRE
MICHAEL SCHATZOW, ESQUIRE
MATTHEW PILLION, ESQUIRE
JOHN BUTLER, ESQUIRE
SARAH AKHTAR, ESQUIRE

For the Defendant:

MARC ZAYON, ESQUIRE
ALLISON LEVINE, ESQUIRE

* Proceedings Digitally Recorded *

Transcribed by:
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T A B L E O F C O N T E N T S

	P a g e
Verdict (Not guilty)	3

P R O C E E D I N G S

(10:32 a.m.)

THE CLERK: The Circuit Court for Baltimore City, Part 31, is now in session. The Honorable Barry G. Williams presiding.

THE COURT: Good morning, everyone. Please be seated.

THE GALLERY: Good morning, Your Honor.

THE COURT: Call the case.

MR. SCHATZOW: Good morning, Your Honor. This is the case of State versus Officer Edward Nero, Number 115141033. Present on behalf of the State, I'm Michael Schatzow; Deputy State's Attorney Janice Bledsoe; and Assistant State's Attorneys Matt Pillion, John Butler, and Sarah Akhtar.

THE COURT: Good morning.

COUNSEL: Good morning, Your Honor.

MR. ZAYON: Your Honor, Good morning. For the record, Marc Zayon. As the Court knows, I represent Officer Edward Nero, to my left, with Allison Levine, as well.

THE COURT: Good morning. You may be seated.

All right. This Court has been asked to render a decision in this matter and will give the information as follows:

1 The State has charged the defendant with
2 assault, misconduct in office by corruptly performing an
3 unlawful act, reckless endangerment and misconduct in
4 office by corruptly failing to do an act that is required
5 by the duties of his office.

6 In order to convict the defendant of assault,
7 the State must prove that the defendant caused offensive
8 physical contact with Freddie Gray; that the contact was
9 the result of an intentional or reckless act of the
10 defendant and was not accidental; and that the contact
11 was not legally justified.

12 In order to convict the defendant of misconduct
13 in office, the State must prove that the defendant was a
14 public officer, that the defendant acted in his official
15 capacity, and that the defendant corruptly did an
16 unlawful act. For this count, the State alleges that the
17 defendant arrested Freddie Gray without probable cause.

18 In order to convict the defendant of reckless
19 endangerment, the State must prove that the defendant
20 engaged in conduct that created a substantial risk of
21 death or serious physical injury to another; that a
22 reasonable person would not have engaged in that conduct;
23 and that the defendant acted recklessly.

24 Finally, in order to convict the defendant of
25 the second count of misconduct in office, the State must

1 prove that the defendant was a public officer; that the
2 defendant acted in his official capacity; and that the
3 defendant corruptly failed to do an act required by the
4 duties of his office. For this count, the State alleges
5 that the defendant failed to ensure the safety of Freddie
6 Gray by failing to secure Mr. Gray with a seat belt
7 during the process of Mr. Gray being transported in a
8 police vehicle while he was in police custody.

9 The State has the burden of proving, beyond a
10 reasonable doubt, each and every element of the crimes
11 charged. If the State fails to meet that burden for any
12 element of a crime, this Court is required to find the
13 defendant not guilty of that crime.

14 I will discuss each allegation in order.

15 Again, the defendant is charged with the crime
16 of assault.

17 In order to convict the defendant of assault,
18 the State must prove that the defendant caused offensive
19 physical contact with Freddie Gray. The defendant
20 acknowledges that any unwanted or unwarranted contact can
21 be considered offensive, and the evidence is clear that
22 at no point did Mr. Gray want to be touched by any of the
23 officers.

24 Two, that the contact was the result of an
25 intentional or reckless act of the defendant and was not

1 accidental. Clearly, when the defendant touched Mr.
2 Gray, it was done intentionally. But for reasons that I
3 will soon discuss, I find that it was not reckless, but
4 acknowledge that is not the end of the analysis.

5 And finally, that the contact was not legally
6 justified. In order to assess whether the contact was
7 not legally justified, it is helpful to discuss some of
8 the facts presented at trial. All times mentioned are on
9 the morning April 12, 2015.

10 At 8:40:03, video time stamp one minute and
11 fifteen seconds of Exhibit 41, shows the defendant coming
12 down an alley. And at 8:40:10, video time stamp one
13 minute and thirty-five seconds, it shows Officer Garrett
14 Miller on foot, and the defendant on bike riding over to
15 the area where Mr. Gray is ultimately detained. At
16 8:40:13, there is a call over KGA, which is Exhibit 40,
17 where either Miller or the defendant calls out, "We got
18 one."

19 Miller testified that he apprehended Mr. Gray,
20 and that Mr. Gray gave up without a fight and did not
21 resist. He testified that the defendant did not touch
22 Gray at any time prior to the time Miller approached and
23 detained Gray. By the time Miller cuffed Gray, the
24 defendant was standing to their left at the ramp. While
25 Miller believed that the defendant was ready to assist

1 because they work together, he reiterated that the
2 defendant did not have anything to do with the cuffing
3 and initial detention. While Miller detained Mr. Gray at
4 the handicap ramp, he told the defendant to go retrieve
5 Miller's bike, which Miller had left in the court when he
6 got off his bike to chase Mr. Gray.

7 Exhibit 56 and 41 both show the defendant getting
8 on his bike at 8:40:21, video time stamp fourteen seconds
9 and four minutes and thirty-seven seconds, respectively.
10 And approximately twenty seconds, later Exhibit 41 shows
11 the defendant walking with two bikes toward the area
12 where he ultimately met with Miller and Mr. Gray. I note
13 that the video does not show Miller and Mr. Gray at the
14 corner at that time.

15 Finally, Exhibit 41 shows Miller walking towards
16 the corner with Mr. Gray at 8:40:52, video time stamp
17 five minutes and sixteen seconds.

18 The State concedes, that pursuant to Wardlaw and
19 Terry, that Miller had a right to stop Mr. Gray but,
20 based on the KGA tape, part of the defendant's statement,
21 and part of Miller's statement referenced at trial, wants
22 this Court to find that the defendant was an integral
23 part of the initial detention and subsequent arrest of
24 Mr. Gray.

25 Officer Miller, who testified under a grant of

1 immunity from the State, stated unequivocally, while on
2 the stand and under oath, that he was the one who
3 detained and handcuffed Mr. Gray, that he was the one who
4 walked Mr. Gray from the handicapped entrance to the wall
5 where the defendant met him after retrieving officer
6 Miller's bike.

7 Mr. Brandon Ross clearly stated that it was not
8 the defendant who was with Mr. Gray initially but another
9 bike officer. Mr. Ross saw the defendant with two bikes
10 walking towards Mr. Gray and the other officer, and this
11 was after the bike officer cuffed Mr. Gray.

12 There is no value for Brandon Ross to say this
13 because he is not a friend of the defendant. He saw what
14 he saw, and it corroborates the testimony of Miller
15 stating that he and he alone was involved in detaining,
16 cuffing, and taking Mr. Gray to the wall to await
17 transport, and it is consistent with the statement of the
18 defendant where he stated that he went to get the bikes
19 and met Miller and Mr. Gray at the opening of the court.
20 This is corroborated by State's Exhibit Number 41, which
21 shows the defendant walking with two bikes.

22 The testimony that was presented from Miller and
23 the interview with the defendant, where both indicated
24 that "we handcuffed," is more in line with the habit of
25 Baltimore City Police Officers who testify to speak in

1 terms of what was done by the collective and not
2 necessarily what is done by the individual. Therefore,
3 the Court does not find that the use of the term "we"
4 implicates the defendant in either participating in the
5 initial detention of Mr. Gray or the subsequent decision
6 to arrest Mr. Gray.

7 The Court finds that the only contact that the
8 defendant had with Mr. Gray at the first stop at Presbury
9 Street occurred when he interacted with Gray after Miller
10 walked him to the area to await the van. By that time,
11 the Wardlaw/Terry stop had been effected by Miller and
12 only Miller. It was Miller who detained Mr. Gray. It
13 was Miller who cuffed Mr. Gray. And it was Miller who
14 walked Mr. Gray over to the area where the defendant met
15 them.

16 When the detention morphed into an arrest, the
17 defendant was not present. As such, the Court rejects
18 the state's theory that the defendant was involved in the
19 arrest because, absent "I and we," there are no credible
20 facts to show that he was involved in the touching of Mr.
21 Gray before Miller brought him to the corner.

22 Furthermore, the Court does not find, with the
23 facts presented, that there was a duty on the part of the
24 defendant to ask any questions of Miller before he
25 assisted with the continued detention and ultimate arrest

1 of Mr. Gray.

2 The defendant was aware of the KGA call from
3 Rice; knew that Miller had detained Mr. Gray and moved
4 him from one area to another; and that a van had been
5 summoned.

6 For the same reasons, minus the van call, the
7 defendant did not have a duty to make an inquiry of Mr.
8 Gray.

9 Since the defendant's contact with Mr. Gray came
10 after Mr. Gray was detained by Miller, this Court finds
11 that the contact by the defendant was legally justified
12 and not reckless. Therefore, as alleged by the State,
13 there is no assault by the defendant.

14 Next, the State alleges that the defendant
15 corruptly arrested Mr. Gray without probable cause, and
16 that the arrest rises to the level of misconduct in
17 office. Misconduct in office is corrupt behavior by a
18 public official in the exercise of his duties of office
19 or while acting under color of law.

20 In order to convict the defendant, the State must
21 prove, one, that the defendant was a public officer; two,
22 that he acted in his official capacity; and, three, that
23 he corruptly did an unlawful act.

24 There is no question that elements one and two
25 of the misconduct charge are met since the defendant was

1 a public officer acting in his official capacity on the
2 day of Mr. Gray's arrest.

3 But, as noted, the Court does not find that the
4 defendant detained Mr. Gray at the ramp, nor does the
5 court find that any actions by the defendant turned the
6 detention into an arrest.

7 The Court does find, based on a review of
8 Exhibit 41, the testimony of the defendant, Mr. Ross, and
9 Mr. Miller, that the initial contact concerning detention
10 and arrest occurred when Miller, acting alone, interacted
11 with Mr. Gray.

12 As such, this Court does not find that the
13 defendant detained or arrested Mr. Gray without probable
14 cause. The propriety and basis for Miller's actions are
15 not before this Court and, therefore, have not been
16 assessed by this Court.

17 The State has indicated its belief that the
18 facts as presented lend themselves to the application of
19 accomplice liability for all the charges, and the
20 defendant should be held criminally liable for the
21 actions of Miller and others as an accomplice.

22 In order to convict the defendant of any of the
23 charges under the theory of accomplice liability, the
24 State would have to prove that a crime occurred; and that
25 the defendant, with the intent to make the crime happen,

1 knowingly aided, counseled, commanded, or encouraged the
2 commission of the crime, or communicated to the primary
3 actor in the crime that he was ready, willing, and able
4 to lend support, if needed.

5 The State's theory from the beginning has been
6 one of negligence, recklessness, and disregard for duty
7 and orders by this defendant. There has been no
8 information presented at this trial that the defendant
9 intended for any crime to happen. Nor has there been any
10 evidence presented that the defendant communicated any
11 information to a primary actor that he was ready,
12 willing, and able to lend support, if needed, to any
13 crime.

14 Since the assault and misconduct are based on a
15 detention and arrest that this Court has already
16 determined was effected by Miller acting alone and on the
17 information provided over KGA, and especially where there
18 is no conspiracy charged, this Court does not find that
19 accomplice liability on the charge of assault and
20 misconduct is an appropriate application of the law.

21 I will now discuss the charges of reckless
22 endangerment and misconduct in office. The State alleges
23 that the next two criminal acts occurred at what is
24 referred to as the second stop. After Mr. Gray was
25 placed in the van at the first stop, he was driven a

1 block or so away to the Mount Street location where the
2 van was met by the defendant, Miller, Rice, and other
3 officers.

4 When the van driver opened the door, Mr. Gray
5 was seated. Rice and Miller took Mr. Gray out of the
6 van. Miller retrieved his cuffs, replaced them with flex
7 cuffs, and placed shackles on Mr. Gray. At this point,
8 allegedly, Mr. Gray had gone limp. So, to get him back
9 into the van, Rice got into the van and pulled Mr. Gray
10 by the shoulders while the defendant had Mr. Gray's legs.

11 At three seconds of Exhibit 35, which is the
12 video by Mr. Ross, the video shows the defendant kneeling
13 down and placing his hands on Mr. Gray's lower body. By
14 eleven seconds, his hands are off. And at thirteen
15 seconds, Rice jumps out of the van.

16 The State alleges that the failure of the
17 defendant to seat belt Mr. Gray once he was placed back
18 in the van rises to the level of reckless endangerment
19 and misconduct in office.

20 In order to convict the defendant of reckless
21 endangerment, the state must prove that the defendant
22 engaged in conduct that created a substantial risk of
23 death or serious physical injury to another; that a
24 reasonable person would not have engaged in that act; and
25 that the conduct and that the defendant acted recklessly.

1 Reckless endangerment focuses on the actions of
2 the defendant and whether or not his conduct created a
3 substantial risk of death or injury to another. The
4 crime occurs when the actions are found to be
5 unreasonable under the circumstances presented. It does
6 not focus on the end result, which can be, if charged, a
7 separate crime.

8 Two questions are at issue here. Question 1:
9 Could an officer, similarly situated as the defendant,
10 reasonably rely on the fact that an officer in the van
11 with the detainee could and would, if required, seat belt
12 the detainee, especially when that person is a superior
13 officer? Question 2: Could an officer, similarly
14 situated as the defendant, reasonably assume and rely on
15 the fact that the transport officer, who presumably has
16 custody, would and could make sure that the detainee now
17 inside of his van is properly secured before driving off?
18 The answer to both of those questions, based on the facts
19 presented, is yes.

20 As to the reasonableness of not taking steps to
21 seat belt Mr. Gray, this Court finds that a reasonable
22 officer in the defendant's position and, in particular,
23 the defendant, could reasonably assume that an officer,
24 superior or not, in the back of the van would make a
25 determination as to whether seat belting was appropriate

1 under all the facts that that officer was aware of at the
2 moment.

3 This Court does not find that a reasonable
4 officer similarly situated to the defendant, at the point
5 where there are people coming out on the street to
6 observe and comment, would approach the lieutenant, who
7 just got out of the van, to tell him to seat belt Mr.
8 Gray or make an inquiry concerning the issue of whether
9 or not Mr. Gray has been seat belted. There is no
10 evidence that was part of his training and no evidence
11 that a reasonable officer would do the same.

12 While the State did not present clear evidence
13 of any protocol in the approximately 1500 pages of
14 General Orders or directives concerning transfer of
15 custody from an arresting officer to a transporting
16 officer, a review of policy 1114, Exhibit 2, published on
17 April 3, 2015, which may not have gone into effect until
18 after the incident in question, does shed some light on
19 the issue.

20 Policy 1114 requires that when a person is
21 taken into custody, members shall ensure the safety of a
22 detainee. Section 1.5 of the policy notes that whenever
23 a detainee is transported in a police vehicle, one must
24 make sure that the detainee is searched and handcuffed by
25 the arresting member before being placed in a police

1 transport vehicle, and the transporting officer must also
2 search each detainee prior to placing him in the
3 transport vehicle. The policy goes on to state that all
4 passengers shall be restrained by seat belts.

5 This Court has to assume that "member" and
6 "one" is in reference to police officers who are required
7 to follow the General Orders.

8 The policy seemingly uses "police vehicle,"
9 "police transport vehicle," and "transport vehicle"
10 interchangeably. The Court notes that there certainly
11 could be differences that are relevant, but no
12 definitional terms were presented during the trial by the
13 State.

14 It is certainly reasonable to believe that
15 before a vehicle pulls off, the officer who is charged
16 with transporting a detainee may have the duty to make
17 sure that the person being transported is properly
18 secured and, if not, seek help from other officers if
19 there is a need to do so.

20 However, this Court acknowledges that there may
21 be circumstances where that duty may shift or be
22 nonexistent in relation to a particular officer. But,
23 again, this Court is making its decision only on what has
24 been presented for this trial for this defendant.

1 Having found that a reasonable person would act
2 similarly to the defendant, the Court does not find that
3 his actions were reckless and, therefore, finds that
4 there is no criminal liability under the theory that the
5 defendant's failure to act recklessly endangered Mr.
6 Gray.

7 Finally, there is the misconduct charge
8 stemming from the stop on Mount Street. The State
9 alleges that the defendant failed to ensure the safety of
10 Mr. Gray when he failed to seat belt him after Mr. Gray
11 was placed back in the van. As stated previously,
12 misconduct in office is corrupt behavior by a public
13 official in the exercise of his duties of office or while
14 acting under color of law.

15 In order to convict the defendant, the State
16 must prove that the defendant was a public officer; that
17 he acted in his official capacity; that he corruptly
18 failed to do an act required by the duties of his office.

19 Again, there is no question that elements one
20 and two of the misconduct charge are met since the
21 defendant was a public officer acting in his capacity as
22 a law enforcement officer on the day of Mr. Gray's
23 arrest.

24 Here, unlike in the other misconduct charge,
25 the State asserts the defendant failed to do an act

1 required by his office; and that failure to act is
2 corrupt behavior; and, therefore, the defendant should be
3 convicted of misconduct.

4 Along with the analysis this Court used to
5 determine whether the defendant was guilty of reckless
6 endangerment, I also must determine whether, under this
7 statute, he corruptly failed to do an act required by the
8 duties of his office. While this Court has already
9 determined that the defendant is not guilty of reckless
10 endangerment, based on the facts presented, I believe I
11 still must determine whether he corruptly failed to do an
12 act that is required of his office.

13 The comments to the Maryland Pattern Jury
14 Instructions note that the committee chose not to define
15 or explain "corrupt" or "corruptly," believing that the
16 words communicate their meaning better than a definition
17 would.

18 A review of relevant case law shows that a
19 police officer corruptly fails to do an act required by
20 the duties of his office if he willfully fails or
21 willfully neglects to perform the duty. A willful
22 failure or willful neglect is one that is intentional,
23 knowing, and deliberate. And mere error in judgment is
24 not enough to constitute corruption, but corruption does

1 not require that the public official acted for any
2 personal gain or benefit.

3 In order to fail to perform a duty, the
4 defendant had to know about this duty. Out of the more
5 1500 pages of the General Orders, at best, there seems to
6 be ambiguity on the issue of when custody is transferred
7 concerning someone who has been arrested and is about to
8 be transported by the non-arresting officer.

9 Again, the Court does not find that the
10 defendant was the one who placed Mr. Gray under arrest,
11 but clearly the defendant was involved in placing Mr.
12 Gray back into the van after Miller recovered his
13 handcuffs and placed shackles on Mr. Gray.

14 The State presented Exhibit 7, which is a
15 document that showed on June 26, 2012, the defendant,
16 when he was appointed as police trainee, acknowledged
17 receipt of nine listed items, including the General
18 Orders. It does not say in what format they were
19 provided, but there was testimony that generally it was
20 presented on a flashdrive. I do note that this form
21 crossed out "Police Commissioner's Memorandums" [sic].
22 It appears to be a given that any member of an
23 organization is required to follow the rules of that
24 organization once one is aware of the rules.

1 Defense Exhibit 10 is General Order A-2, which
2 is titled "Departmental Written Directives." Under the
3 General Information section, it states, in part, that
4 "Employees shall be responsible for complete familiarity
5 with and adherence to written directives, general orders,
6 and Police Commissioner Memoranda. As directed, written
7 directives shall be maintained by employees in their
8 General Manuals."

9 It goes on to say that, "Digital versions of
10 General Orders and Police Commissioner's Memoranda shall
11 be distributed in a pdf file, via email. Simultaneously,
12 hard copies of directives shall be printed and
13 distributed to each member. New directives shall require
14 all supervisors to communicate the content of the new
15 directive to their subordinates at roll call."

16 There was no evidence presented to this Court
17 that at any time between 2012 and the date of this
18 incident that the defendant's General Orders were ever
19 updated pursuant to the policy presented in General Order
20 A-2. There is no evidence that he was ever given any
21 information at roll call. This is not to say that the
22 Baltimore City Police Department does not follow General
23 Order A-2 concerning the dissemination of new orders and
24 updates, just that it was not presented to this Court
25 during this trial.

1 The audits in Exhibits 20 and 21 concerning
2 seat belting individuals in prisoner transport vehicles
3 was presented to this Court, but clearly they were
4 directed towards transport drivers and what they do by
5 the time they get to Central Booking. The exhibits had
6 nothing to do with what is done on the streets in an
7 active situation.

8 The State points to Exhibit 22, which shows
9 that at 6:01 p.m., on April 9, 2015, the defendant's
10 police email account received, among other documents,
11 amended policy 1114. Policy 1114 amended K14,
12 purportedly to take away discretion when seat belting a
13 detainee.

14 Andrew Jaffe who is the director of IT for the
15 police department stated that the emails containing new
16 policies was sent out as a blind copy to all officers
17 under "All BPD," which is a distribution group that
18 includes over 3000 people. He had no way of knowing if
19 it was opened or read by the defendant, and it was not
20 listed as high priority.

21 The State entered three emails authored by the
22 defendant on April 9, 2015, as evidence that he was using
23 his email account on that day. I note that Exhibit 23
24 was sent at 1:28 p.m.; Exhibit 24 was sent at 1:39 p.m.;
25 and Exhibit 25 was sent at 2:16 p.m. The State did not

1 present any evidence to show defendant used his email at
2 any time between 2:16 p.m. and 6:01 p.m., and certainly
3 did not present any evidence to show that he used it
4 after 6:01 p.m. on the 9th of April 2015.

5 Concerning the training that the defendant
6 received in the area of transport, Exhibit 27 is the
7 defendant's arrest and control performance evaluation
8 from his time at the Academy. The State presented
9 Officer Adam Long, who instructed the defendant on the
10 issue of placing a person into a vehicle and how to seat
11 belt them. In the eighty-hour course, Long noted that
12 there were a number of modules taught, and that the
13 defendant passed the section for placing a suspect into a
14 vehicle. He did not state that there was separate
15 training for placing someone into a transport wagon or
16 van. He said there was no specific training for wagon
17 drivers but noted, after the incident with Mr. Gray,
18 there is now.

19 Sergeant Charles Sullivan from the Western
20 District was assigned as the defendant's field training
21 officer in 2012. Field training is 10 weeks, but he had
22 the defendant for a few weeks less but did not know why.
23 When asked about wagon training, he stated that he did
24 not train the defendant on transport wagon or
25 transporting prisoners, even though it was part of the

1 required training. If he had, he would have used a van
2 and shown him how to transport a prisoner. This was
3 never done.

4 A review of Exhibit 9, which is the defendant's
5 police trainee manual shows that Sergeant Sullivan
6 initialed most of the areas where there is proof that the
7 defendant completed a required task. Sullivan stated
8 that if there was no check next to the area, the
9 defendant did not complete the task. Sergeant Sullivan
10 would have referred the defendant to General Orders if it
11 was something that he trained him on. If he did not
12 train him, he would not have referred him to the General
13 Orders.

14 Brenda Vicenti, who was the field training
15 coordinator, admitted that she was not a trainer, and the
16 area where it is noted for "Arrest Procedures/Processing
17 Prisoners" in Exhibit 9, the very subject matter where
18 the defendant would have received training for the issue
19 at hand, she indicated she did not train him. She and
20 the defendant initialed "Review," but that was done
21 because she was told to do so by someone at the Academy
22 and believes that the defendant did the same.

23 The Court is not satisfied that the State has
24 shown that the defendant had a duty to seat belt Mr. Gray
25 and, if there was a duty, that the defendant was aware of

1 the duty. This Court finds that the State has failed to
2 meet its burden to show that the defendant corruptly
3 failed to do an act required.

4 The Court also finds that, under the facts
5 presented, accomplice liability does not apply for the
6 charges of reckless endangerment and misconduct.

7 Based on the evidence presented, this Court
8 finds that the State has not met its burden to prove,
9 beyond a reasonable doubt, all required elements of the
10 crimes charged. Therefore, the verdict for each count is
11 not guilty.

12 This Court is in recess.

13 THE CLERK: All rise.

14 (Whereupon, the matter concluded at 10:57 a.m.)
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