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June 18, 2009

VIA E-MAIL

J. Thomas Manger
Chief,
Montgomery County Department of Police
2350 Research Boulevard
Rockville, Maryland 20850

Dear Chief Manger:

Thank you for your e-mail yesterday notifying me that an “investigation was initiated into the facts and circumstances surrounding the actions of the Officer involved” in the issuance of a ticket to me on April 19, 2009, for “prohibited use of flashing lights”. When Officer Herman exercised his authority and required me to pull my vehicle over and effectively detained me, I had committed no cognizable offense. I was neither speeding nor driving recklessly. All the occupants in my vehicle were properly belted. There was no legitimate basis for his action.

Therefore, I welcome an open and full review of what transpired, particularly and most importantly with respect to determining the practice or policy of the Montgomery County Department of Police in issuing this type of ticket then and in the future.

I want to state at the outset that I bear no ill will towards Officer Herman in his personal capacity. Moreover, he acted only polite and professional in his interactions with me. Indeed, if the reports were accurate that he missed our court appearance due to leave associated with an upcoming military commitment, I salute and applaud his service. Furthermore, I hold nothing but respect for members of our Law Enforcement community. My law practice specifically revolves around the representation of military, intelligence and law enforcement personnel, predominantly on the federal level and, in fact, I have also represented individuals who have served in your Department.

Thus, I am sure you can then understand the offense I took to being informed that I could have been ticketed with “interfering with a police investigation” by simply having flashed my lights at other motorists. Beyond the fact that Officer Herman had no idea, nor did he inquire, as to the intent of my action, the assertion much less even the insinuation that warning another

motorist of the existence of a speed trap is not only beyond the pale but it is patently contrary to Maryland law. Dipino et al. v. Davis, 354 Md. 18 (1999).

Indeed, there is a lengthy legal history upholding the rights of motorists to warn other motorists of police activity. In the earliest days of the automobile it did not take long for drivers to exceed posted speed limits and law enforcement to set up speed traps. In the first years of the Twentieth Century the United Kingdom directly confronted this issue. For example, in Betts v. Stevens, [1910] 1 K.B. 1, which involved warnings given to motorists approaching a speed trap, the Chief Justice noted that “[n]othing that I now say must be construed to mean that the mere giving of a warning to a passing car that the driver must look out as there is a police trap ahead will amount to an obstruction of the police in the execution of their duty in the absence of evidence that the car was going at an illegal speed at the time the warning was given....” The State of Ohio addressed the same issue in Warrensville Hgts. v. Wason, 50 Ohio App. 2d 21, 361 N.E.2d 546 (Ohio App. 1976) and found in favor of the driver. On the subject of warnings and identification of the presence of law enforcement in general, it should be noted that while such action “may have made detection of violations more difficult, it is equally possible that it may have inhibited the commission of crimes in the first place. Surely that is one goal of law enforcement.” State v. Jelliffe, 5 Ohio Misc. 2d 20, 449 N.E.2d 810, 811 (Ohio. Mun. 1982). See also State v. CLR, 40 Wash. App. 839, 700 P.2d 1195 (Wash. App. 1985)(obstruction statutes do not apply where no obvious, contemporaneous, illegal activity when warning given). The list could go on.

Our community expects that our officers will enforce the law, not create it. If the Department believes a law is needed to prohibit the type of conduct that I was accused of engaging in then the County should take the matter to the Maryland State Legislature, not allow individual officers, or the Department as a whole, to improperly flex their authority and harass law abiding citizens with the perceived intent of intimidation.

There can be no confusion over what constitutes the proper application of § 22-227(c) which prohibits “flashing lights” except as authorized by law. It is the punitive provision for enforcement of § 22-218. I spent six years as a volunteer firefighter and emergency medical technician while I lived in New York State. If I placed the blue light that I had used when authorized in New York on my current Maryland vehicle and turned it on, I would be violating § 22-227(c). Flashing my “headlamps”, which is how the Maryland Code in § 22-203 defines the front two primary lights on our vehicles, two or three times in a two second interval is not even arguably in violation of this statutory provision.

Thus I was pleased to see in the initial television coverage on June 16, 2009, that Montgomery County Police spokesman Lt. Paul Starks agreed with me and conceded that there is no Maryland law that prohibits the flashing of a vehicle’s headlamps to warn other motorists of speed traps. <http://www.wusa9.com/news/local /story.aspx?storyid=87397&catid=189>.

In the Legal Times Blog of June 16, 2009, Lt. Stark correctly maintained this view:

The law cited on the ticket is a general prohibition on “flashing lights,” Starks says. The department, he says, has determined it’s not a violation to flash lights to warn motorists about a speed zone.

“It's similar to the speed cameras. Some people have posted signs ‘speed cameras up ahead,’” Starks says. “We explain that this was never a gotcha program. We are not advocating people put up signs or flash lights. But we know that it’s not against the law, either.”

Starks says the department is looking into how many tickets have been written for flashing lights. There was no immediate decision to stop writing tickets for flashing lights, Starks says, but the policy is expected to be examined.

There’s a separate law on the books in Maryland that prohibits motorists from equipping vehicles with flashing red and blue lights, Starks says.

<http://legaltimes.typepad.com/blt/2009/06/dc-lawyer-fightsand-winsticket-for-flashing-lights-at-speed-zone.html>.

But following the dismissal of my case, your Department appeared to withdraw from the unequivocal position it had earlier espoused. Now the law was “fuzzy” and “vague”. On WJLA, channel 7 yesterday Montgomery County police Corporal Stephen Galloza stated that “[a] judge is the one who makes a ruling on whether it’s appropriate or inappropriate.” And the station additionally reported that Montgomery County police say enforcing the ban on flashing is up to the individual officer’s discretion. <http://www.wjla.com/news/stories/0609/632694.html>. Officer Melanie Brennan also appeared to back away from Lt. Stark’s posture in her Fox News, channel 5, interview that also aired yesterday. http://www.myfoxdc.com/dpp/news/local/061709_lawyer_ticketed_for_flashing_headlights.

I am also aware, having been inundated by messages from supporters around the country, that the practice of your Department issuing citations pursuant to § 22-227(c) for warning other motorists dates back to at least 1990. One woman actually sent me her court records for the very same offense from almost twenty years ago. Obviously there is an issue here that needs to be resolved once and for all.

Therefore, respectfully, in light of the facts that exist and the current state of the law, I am asking for a written apology from Officer Herman and the Department for having exceeded proper authority and issuing an inappropriate ticket, not to mention significantly wasting my time (especially since Officer Herman and your Department *knew* in advance he would not be appearing in court on the scheduled date). Most importantly, I would also like a personal assurance from you, as Chief, that remedial training will be administered to your officers to educate them as to the scope and application of the laws in question, and that Montgomery County will no longer issue tickets to motorists who warn others through the use of flashing headlamps of police presence.

If you undertake any due diligence into my background, you will discover I will not hesitate to challenge government conduct and abuse, no matter the level. I am committed to pursuing this matter further, to include civil litigation if necessary, unless I am satisfied with the Department’s forthcoming response. Otherwise, given the fact that the tickets issued by Officer Herman and no doubt others were dismissed based on his failure to appear, no lesson will have been learned and the policy will remain ambiguous for others to fall victim to. I state this as someone who fully intends to engage in the conduct of flashing my headlamps, should I choose to do so in certain

circumstances, in the future. Therefore, as I run the risk of receiving additional tickets I will possess legal standing to pursue various claims to challenge prospective enforcement of the practice, in addition to pursuing damages for the conduct that has already occurred.

That said, contrary to the way one media outlet slightly sensationalized that I was “out for revenge”, I assure you that the case will not be about money. Any damages that I receive as a result of any litigation will be donated to your favorite law enforcement charity.

I trust I shall hear from you within a reasonable time, and look forward to our future dialogue. I would be happy to discuss this matter with you in person or on the phone. I can be best reached via e-mail or on my cell at 202-498-0011.

Sincerely,

/s/

Mark S. Zaid

cc: Attorney General Douglas Gansler
Senator Brian Frosh
Delegate Bill Bronrott
Delegate Susan Lee
Delegate Bill Frick
Delegate Brian Feldman
Delegate Roger Manno
Councilmember George Leventhal
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Media outlets