IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF OKLAHOMA SITTING IN AND FOR BEAVER COUNTY

THE STATE OF OKLAHOMA, **Plaintiff,**	)	BEAVER COUNTY OKLAHOMA FILED
vs.	)	**Case No. CM-2019-1**
	)	MAR 08 2019
PATRICK BRADEN ROTH **Defendant.**	)	TAMMIE PATZKOWSKY COURT CLERK BY JP DEPUTY

RESPONSE TO DEFENDANT'S DEMURRER

COMES NOW the State of Oklahoma by and through the District Attorney, James M. Boring, and in response to the Defendant's Motion to Dismiss filed herein, alleges and states as follows:

A. Title 22 O.S. § 504 provides that any demurrer must distinctly specify the grounds of the objection to the indictment or information, or it must be disregarded.

B. The proposition as to Okla. Stat. Tit. 21 § 504 (5) is offered without factual distinction or support in caselaw or statute.

C. The State denies each and every claimed proposition of error or insufficiency alleged in the Defendant's demurrer. Specifically, the State of Oklahoma sets forth

   a. The Court has proper jurisdiction over the Defendant and the subject matter of the above styled and numbered cause.

   b. The Court has proper venue over the person of the Defendant and the subject matter of the above styled and numbered cause.

   c. The Information states facts which constitute a public offense or crime under the laws of the state of Oklahoma and which constitute a public crime against this Defendant.

   d. The Information states facts which constitute a public offense as charged.

   e. The Information was endorsed, presented, returned and filed as prescribed by State law and substantially conforms to the requirements of criminal procedure.

   f. The Information alleges fact sufficient to apprize a criminal defendant of the charges against him. It states the nature and cause of action against Defendant so as to enable any person of common understanding to know what charge he must be prepared to defend.

   g. The Information charges separate and distinct crimes, in separate counts and is not duplicitous.

   h. The Information does not contain allegation, which if true, would constitute a legal justification or excuse or other bar to prosecution.

FURTHER ARGUMENT AND AUTHORITIES

The Defendant brings forth a "Demurrer to Information" pursuant to Okla. Stat. Tit. 22 § 504, citing with emphasis sections 4 and 5, which reads in relevant part as follows:

> "The Defendant may demur to the indictment or information when it appears upon the face thereof either:
>
> ...
>
> 4. That the facts stated do not constitute a public offense.
>
> 5. That the indictment or information contains any matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution."

The State's charging information alleges in relevant part as follows:

COUNT 1: OBSTRUCTING OFFICER – A MISDEMEANOR, on or about the 14th day of December, 2018, by obstructing one Beaver County Sheriff's Deputy, Christopher McMinn, in the performance of said officer's official duty by willfully and intentionally delaying or obstructing the attempted discharge of Deputy McMinn's official duties by intentionally and repeatedly refusing to identify himself during the course of Deputy McMinn's investigation into suspicious activity at the Northern Natural Gas Plant in Beaver County, Oklahoma.

The State's charging authority is found at Okla. Stat. Tit. 21 § 540, which states in relevant part: "Any person who willfully delays or obstructs any public officer in the discharge or attempt to discharge any duty of his or her office, is guilty of a misdemeanor."

PROPOSITION 1:

Firstly, as to Defendant's reliance on Okla. Stat. Tit. 22 § 504 Section 4, and the allegation that "the facts stated do not constitute a public offense", the State would submit to this Court that such a question is one for the jury.

This statute is purposefully broad as to cover actions that might not otherwise be unlawful, but which delay or obstruct law enforcement from carrying out their official duties. Whether or not the actions of the defendant knowingly or intentionally obstructed or delayed Deputy McMinn in the performance of his official duties is a question for the trier of fact.

It should first be noted that "the Supreme Court has left open the question whether it is unlawful to sanction a person who is the proper subject of an investigatory stop as a result of the latter's refusal to provide identification. See *Kolender v. Lawson*, 461 U.S. 352, 361 n.10, 103 S. Ct. 1855, 1860 n.10, 75 L. Ed. 2d 903 (1983); *Brown v. Texas*, 443 U.S. 47, 53 n.3, 99 S. Ct. 2637, 2641 n.3, 61 L. Ed. 2d 357 (1979). Likewise, the Seventh, Eighth and Tenth Circuits have noted that the question remains open. *Albright v. Rodriquez*, 51 F.3d 1531, 1537 (10th Cir. 1995); *Gainor v. Rogers*, 973 F.2d 1379, 1386-87 (8th Cir. 1992); *Tom v. Voida*, 963 F.2d 952, 959 & n.8 (7th Cir. 1992). *Gainor v. Douglas County*, 59 F. Supp. 2d 1259, 1284, 1998 U.S. Dist. LEXIS 22307, (N.D. Ga. September 30, 1998).

That question is closely related, but legally different than the one at hand. The one at hand is more readily decided. In this case, the Defendant was not arrested only on grounds of failure to provide identification during the course of a valid investigatory stop, but specifically upon violation of the Oklahoma Criminal Code at Okla. Stat. Tit. 21 § 540. Although the Oklahoma Court of Criminal Appeals has not taken up the issue specifically, it has been well litigated in states with almost identical statutory language, and the resounding opinions are clear: whether the actions of the Defendant violate the statutory provision is a question for the jury.

Although outside the Tenth Circuit, the case *Gainor v. Douglas County*, 59 F. Supp. 2d 1259, is most closely related in factual similarity, motive of the Defendant, and supported by state statutory authority almost identical to the case at hand.

> "The Georgia courts have ruled that a refusal to provide identification can constitute violation of O.C.G.A. § 16-10-24, which prohibits a person from willfully obstructing or hindering a law enforcement officer in the lawful discharge of the latter's official duties. In *Bailey v. State*, 190 Ga. App. 683, 379 S.E.2d 816 (1989), the Georgia Court of Appeals held that failure to produce identification to an officer, who is in the lawful discharge of his duties, constitutes obstruction of an officer pursuant to O.C.G.A. § 16-10-24. There, a non-uniformed officer had observed the defendant driving recklessly. Following the latter to his home, the officer announced herself as an officer and tried to speak to the defendant and to examine the latter's identification. The defendant refused to provide any identification. The Georgia Court of Appeals held that defendant's refusal to identify himself was not merely discourteous, but also actually hindered and obstructed the officer in her investigation. *Bailey*, 190 Ga. App. at 684. *Gainor v. Douglas Cty., 59 F. Supp. 2d 1259, 1281 (N.D. Ga. 1998).*

Likewise, in *Hudson v. State*, 135 Ga. App. 739, 218 S.E.2d 905 (1975), the Court of Appeals upheld a conviction for obstruction where an individual who police believed might be the person wanted on a bench warrant refused to provide the police with identification. The Court of Appeals noted that the obstruction statute had been purposely drafted broadly to cover actions that might not be otherwise unlawful, but which obstructed or hindered law enforcement officers in carrying out their duties. *Hudson*, 135 Ga. App. at 742.

Therefore, consistent with other jurisdictions with similar statutory language, whether this Defendant's persistent and repeated refusal to identify himself to Deputy McMinn during the course of an investigatory stop into suspicious activity at a local critical infrastructure facility delayed or obstructed the officer's performance of his duties is a question for the jury. On their face, such deliberate acts, as in the cases cited, are sufficient. As such, the demurrer should be denied as to Okla. Stat. Tit. 22 § 504 Section 4.

PROPOSITION 2:

Secondly, as to Defendant's reliance on Okla. Stat. Tit. 22 § 504 Section 5, and the allegation that "the indictment or information contains any matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution", the State proposes to this court that there is not factual support or legal authority for of legal justification or excuse for the offense charged. As such, the demurrer should be denied as to Okla. Stat. Tit. 22 § 504 Section 5.

PROPOSITION 3:

Outside the scope of an Okla. Stat. Tit. 22 § 504 Demurrer, the Defendant has made claims under the Fourth and Fifth Amendments to which the State will issue a brief response, though they are misplaced in a Demurrer.

Fourth Amendment Application:

"For purposes of analyzing Fourth Amendment seizures, the Tenth Circuit has divided interactions between police and citizens into three categories: (i) consensual encounters; (ii) investigative stops; and (iii) arrests." See *Oliver v. Woods*, 209 F.3d 1179, 1186 (10th Cir. 2000). *Reid v. Pautler*, 36 F. Supp. 3d 1067, 1167 (D.N.M. 2014).

"An encounter that is not consensual may nevertheless be justified as an investigative detention. An investigative detention occurs when an officer stops and briefly detains a person "in order to determine his identity or to maintain the status quo momentarily while obtaining more information." *Oliver v. Woods*, 209 F.3d at 1186 (quoting Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)).

"For reasonable suspicion to exist, an officer 'need not rule out the possibility of innocent conduct;' he or she simply must possess 'some minimal level of objective justification' for making the stop." *United States v. Winder*, 557 F.3d 1129, 1134 (10th Cir. 2009). This standard is met by information "falling 'considerably short' of a preponderance standard." *United States v. Winder*, 557 F.3d at 1134. See Illinois v. Wardlow, 528 U.S. 119, 123, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)(noting that "'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence..."). *Reid v. Pautler*, 36 F. Supp. 3d 1067, 1167 (D.N.M. 2014).

In the case at hand, Deputy McMinn responded to a call of suspicious activity at the Northern Natural Gas Plant, which is a critical infrastructure facility as defined by Oklahoma law, Okla. Stat. Tit. 21 § 1792. As officers arrived to the location there was a white vehicle parked on a county road, which backed up out of sight on the county road as officers passed. Some approximate quarter mile away from the vehicle was a man dressed in a brown coat with a hoodie covering his head who was holding something in his hands walking west from the natural gas plant. As an officer made contact with the man, the white vehicle that had been spotted earlier began to maneuver along the county road then slowly pass by the natural gas plant at a slow speed as if surveilling the area. The white vehicle was bearing paper tags. The man, who had been called in by plant officials as having been at the plant exhibiting "suspicious behavior" was approached by Deputy McMinn, who was the investigating officer called to the scene. Deputy McMinn requested the man identify himself on multiple occasions. The man repeatedly refused to identify himself and was ultimately placed under arrest for obstructing an officer.

In the case at hand, much like the previously cited case *Gainor*, the Defendant here had deliberately and intentionally worked to make his activity suspicious such that he would have the benefit of an encounter with law enforcement on that given day. He was successful in raising suspicion to a level that justified an investigative stop.

"The reasonable suspicion standard is thus not particularly stringent as all that is required is some minimal objective justification." *Gainor at* 1274. "Conduct that is entirely innocent may in the proper circumstances "justify the suspicion that criminal activity was afoot." *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581.

Certainly in the case at hand a reasonable officer would have felt obligation to take some steps toward investigating the conduct at hand. The report of a suspicious acting man was called in by the Northern Natural Gasplant, a plant identified as a critical infrastructure facility after having been staffed with company managers in Texas and having made reports to the Department of Homeland Security, who recommended the plant staff make a report to law enforcement. This is a day and age where awareness of and suspicion for terrorist activity is heightened. There was not a vehicle parked alongside the road from which a tourist would have simply stopped by to take a photograph. The vehicle that was observed in the area was making suspicious maneuvers as some type of surveillance vehicle. The vehicle was bearing paper tags. The person had been asked for information and refused to give the same to plant staff.

So, perhaps, as the *Gainor* court expressed, the question is best asked in the reverse. "Turning the inquiry around, one must ask whether Deputy Bearden would have acted reasonably had he not attempted to stop and question plaintiff." *Gainor* at, 1276.

"Again, one must ask what a reasonable officer should have done at this juncture? When an officer asks to speak to a suspicious individual under these circumstances and the latter repeatedly walks away, after having spoken to the officer in an inappropriate and hostile fashion, it would seem that the officer has an obligation to continue to try to speak to the subject to gauge out the level of risk threatened, requiring the officer to allow such a subject to walk away, when the latter's disobedience has only heightened the officer's consensus, does not seem reasonable or wise. Certainly, an investigative stop must be limited in duration and nature and an officer cannot endlessly interrogate the subject of such a stop, but the officer's efforts here to complete his inquiry of a subject who was repeatedly disobeying the officer's directive were reasonable under the circumstances and suspicions known to the officer." *Id* at, 1276-77.

There was an articulable reasonable suspicion for the officer to engage in an investigative stop of this Defendant on the date in question. There is no legal distinction between an investigative stop and a *Terry* stop. The investigative stop was certainly justified by some minimal objective justification, which is all that is required. Beyond that, a request for identification was certainly reasonable and to be expected.

"An identity request has an immediate relation to the *Terry* stop's purpose, rationale, and practical demands, and the threat of criminal sanction helps ensure that the request does not become a legal nullity." *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 180, 124 S. Ct. 2451, 2455 (2004).

To cite the Defendant's own authority seems appropriate: "The principles of Terry permit a State to require a suspect to disclose his name in the course of a Terry stop. The reasonableness of a seizure under the Fourth Amendment is determined by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests. Nev. Rev. Stat. § 171.123 (2003) satisfies that standard. The request for identity has an immediate relation to the purpose, rationale, and practical demands of a Terry stop. The threat of criminal sanction helps ensure that the request for identity does not become a legal nullity." *Hiibel at* 180.

Fifth Amendment Application:

The Fifth Amendment to the U.S. Constitution is not implicated by a request for identity. The Fifth Amendment prohibits only compelled testimony that is incriminating. Where the answer of the Defendant will not directly show his infamy, but only tend to disgrace him, he is bound to answer. This contention is misplaced and inapplicable.

In the context of the Fifth Amendment, to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Stating one's name may qualify as an assertion of fact relating to identity. Production of identity documents might meet the definition as well. Acts of production may yield testimony establishing the existence, authenticity, and custody of items the police seek. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 180, 124 S. Ct. 2451, 2455 (2004).

CONCLUSION

Therefore, the only question properly before this Court on the Demurrer of this Defendant is whether pursuant to Okla. Stat. Tit. 22 O.S. § 504(4) if the facts, as stated, constitute a public offense. The caselaw presented to this court, and statutory construction demand that such a question is answered by a jury. The question as to whether Defendant Roth's continued refusal to identify himself obstructed or delayed Deputy McMinn's performance of his official duties is a question for the trier of fact.

WHEREFORE, premises considered, the State of Oklahoma respectfully requests that Defendant's Demurrer be denied.

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BY: _____

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Certificate of Service

I hereby certify that on the 8th day of March, 2019, a true and correct copy of the above and foregoing document was mailed via U.S. First Class Mail to the following:

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