

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO.: 10 CR 60006

2010 NOV 23 A 10 59

STATE OF NORTH CAROLINA)
)
 vs.)
)
 THOMAS HOLLOWAY,)
)
 Defendant.)

KL

MOTION TO DISMISS

NOW COMES the Defendant, by and through counsel, William J. Thomas, II and James H. Monroe, and moves the Court pursuant to N.C.G.S. §15A-971 et. seq., for an Order suppressing any evidence obtained as a result of the unlawful stop and seizure of the Defendant. In support of his motion the Defendant shows unto the Court as follows:

1. On or about October 11, 2010, the Defendant, Thomas Holloway, was stopped while operating a motor vehicle at the intersection of Main Street and Ninth Street in Durham, North Carolina by Officer Doreen Hogan of the Duke University Police Department. Following the stop, Officer Hogan arrested the defendant and charged him with Driving While Impaired and Driving after Consuming Alcohol Being Less than 21 years of age.

2. At the time of the stop, Officer Hogan was an employee of the Duke University Police Department which is operated, owned and controlled by Duke University. As such, Officer Hogan was an employee of Duke University at the time she stopped the Defendant.

3. Pursuant to N.C.G.S. § 74G-2 "the Attorney General is given the authority to certify a private, nonprofit institution of higher education, other than those described by G.S. 116-15(d), as a campus police agency and to commission an individual as a campus police officer." N.C. Gen. Stat. § 74G-2 (2010).

4. At the time of Defendant's stop and arrest the Duke University Police Department was a campus police agency certified by the North Carolina Attorney General's Office and

Officer Hogan was a campus police officer commissioned by the North Carolina Attorney General's Office as set forth and defined in N.C.G.S. § 74G-2 (2010).

5. As a commissioned campus police officer, Officer Hogan had the same police powers as municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions. See N.C. Gen. Stat. § 74G-6 (2010). In stopping and arresting the defendant, Officer Hogan was clearly exercising the police powers granted to her by the North Carolina Attorney General under the Campus Police Act codified in Chapter 74G of the North Carolina General Statutes.

6. The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. Amend. I. The First Amendment is applicable to the states under the Due Process Clause of the Fourteenth Amendment. See Gitlow v. New York, 268 U.S. 652 (1925).

7. The United States Supreme Court has articulated the following three-pronged test to determine whether a statute violates the Establishment Clause of the First Amendment: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive governmental entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations and quotation marks omitted).

8. In Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982), the Supreme Court considered the excessive entanglement implications of a statute vesting important discretionary governmental powers in a religious institution. Citing the third prong -- the entanglement prong -- of the Lemon test, the Supreme Court held in that case that the delegation of a State's alcohol licensing power to religious institutions was unconstitutional. The Supreme Court stated, "[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." Larkin, 459 U.S. at 127.

9. In Foley v. Connelie, 435 U.S. 291 (1978), the Supreme Court held that "the exercise of police authority calls for a very high degree of judgment and discretion." Id. at 298. The Supreme Court clearly and emphatically said that police "are clothed with authority to exercise an almost infinite variety of discretionary powers" and are vested with "plenary discretionary powers." Id. at 297-98. As such, the North Carolina Supreme Court has found the exercise of police power is an important discretionary governmental power within the meaning of the First Amendment that cannot be delegated to a religious institution. State v. Pendleton, 339 N.C. 379, 386, 451 S.E.2d 274, 278 (1994).

10. North Carolina Appellate Courts have previously held that the delegation of police power to private post-secondary educational institutions substantially similar to Duke University violates the Establishment Clause of the First Amendment.

11. For example, in Pendleton our Supreme Court held that § 74A (a predecessor of § 74G) unconstitutionally delegated state police power to a religious institution, Campbell University. 339 N.C. at 390, 451 S.E.2d at 281. Specifically, the Court noted that Campbell University's mission was to "[p]rovide students with the option of a Christian world view" and "[b]ring the word of God, mind of Christ, and power of the Spirit to bear in developing moral courage, social sensitivity, and ethical responsibility" as well as encourage creativity, provide a community of learning, and equip students with intellectual and professional skills. Id. at 388, 451 S.E.2d at 279-80. The Court also referenced Campbell University's requirement that all undergraduates take at least one Judeo-Christian religion course, and its statement that it "is a Baptist university" whose purpose arises out of three basic theological and Biblical presuppositions: learning is appointed and conserved by God as essential to the fulfillment of human destiny; in Christ, all things consist and find ultimate unity; and the Kingdom of God in this world is rooted and grounded in Christian community. Id. at 390, 451 S.E.2d at 281.

12. Similarly, in State v. Jordan, 155 N.C. App. 146, 574 S.E.2d 166 (2002), the North Carolina Court of Appeals upheld the trial court's decision that § 74E unconstitutionally

delegated state police power to a religious institution, Pfeiffer University. *Id.* at 154, 574 S.E.2d at 171. In support of its decision, this Court noted the school's strong affiliation with the United Methodist Church, its requirement that at least six of its forty-four trustees be church members, the university's decision to close its administrative offices every Wednesday morning during chapel services and to allow course credit for student attendance, and Pfeiffer's mission to be "a 'model church related institution preparing servant leaders for life long learning[.]'" *Id.* at 153-54, 574 S.E.2d at 170-71.

13. Duke University is a religious institution within the meaning of Establishment Clause as demonstrated by the following:

A. Similar to Campbell University and Pfeiffer University, Duke University's bylaws set forth an undeniably religious purpose for the school. Specifically, Article I of the bylaws states the religious aims of the University:

"The aims of Duke University (the "University") are to assert a faith in the eternal union of knowledge and religion set forth in the teachings and character of Jesus Christ, the Son of God; to advance learning in all lines of truth; to defend scholarship against all false notions and ideals; to develop a Christian love of freedom and truth; to promote a sincere spirit of tolerance; to discourage all partisan and sectarian strife; and to render the largest permanent service to the individual, the state, the nation, and the church. Unto these ends shall the affairs of this University always be administered."

See Defendant's Exhibit 1 (emphasis added).

B. Similar to Pfeiffer University, Duke University sets religious requirements on the selection of the Board of Trustees who govern and run Duke University. Specifically, of the thirty-six (36) members of the Duke University Board of Trustees, twenty-four (24), or two-thirds of those members must be elected by the United Methodist Church: twelve from the Western North Carolina Conference of the United Methodist Church and twelve from the Eastern North Carolina Conference of the United Methodist Church. See Defendant's Exhibit 1.

C. The University's selection requirements for its Board of Trustees highlight the historic affiliation of Duke University with the United Methodist Church. The institution was

begun in 1838-39 when Methodist and Quaker families in northwest Randolph County united to transform Brown's Schoolhouse into Union Institute, thus providing permanent education for their children in a Christian setting. A formal agreement with the Methodist Church was entered into in 1859 when the name of the school was changed to Trinity College. The name of Trinity College continues as the undergraduate college of the University. See Defendant's Exhibit, available at: <http://library.duke.edu/uarchives/history/narrativehistory.html>.

D. Symbolically, the place of religion in the life of the University is shown by the Chapel tower dominating the central quadrangle of the West Campus. Duke's Methodist heritage is represented there by the carvings of Methodist leaders Thomas Coke, Francis Asbury, and George Whitefield, along with John Wesley, the founder of Methodism. See Defendant's Exhibit 3, available at: <http://library.duke.edu/uarchives/history/duke-umchh-basic.html>.

E. Duke University's motto is "Eruditio et Religio", meaning "Knowledge and Religion" and is based on a Charles Wesley hymn. Charles Wesley was an English leader of the Methodist movement. See Defendant's Exhibit 4, available at: <http://library.duke.edu/uarchives/history/histnotes/insignia.html>.

F. Duke University's religious affiliation is not just a relic of the past but continues to be embodied by the Divinity School of Duke University, a graduate theological seminary recognized and supported by the United Methodist Church. As stated by the Dean of the Divinity School, Richard Hays, "Duke Divinity School is one of the 13 theological schools **founded and supported** by the United Methodist Church, which continues to be **central to the school's mission**. Additionally, the school is a **major ecumenical center** by virtue of its Wesleyan tradition and its commitment to the catholicity of the church." (Emphasis added). See Defendant's Exhibit 5, available at: <http://divinity.duke.edu/about#message>.

G. The Duke Divinity School requires its students and faculty to abide by a Conduct Covenant. This Covenant provides in part that:

"As a Divinity School committed to forming and educating persons for the ministry of Jesus Christ, we covenant together to embody truth in every aspect of our lives, including our academic work. In joyful obedience to Christ, we gratefully involve our bodies, minds, and spirits in this community of discipline and love, recognizing that we are a people called to worship God by the Spirit of truth."

See Defendant's Exhibit 6, available at: <http://divinity.duke.edu/academics/conduct-covenant/read-covenant>.

H. The Duke Divinity School further requires its first-year students to take part in a Spiritual Formation Group. As noted on the Duke Divinity School website:

"Each first-year student has been prayerfully placed in a small, intentionally diverse group. These groups are led by local pastors, many of whom are Duke Divinity alumni. Each week the groups gather to share concerns, to reflect theologically on the nature of Christian discipleship, and, most important, to pray together."

See Defendant's Exhibit 7, available at: <http://divinity.duke.edu/academics/spiritual-formation>.

I. It is also clear that the mission of the Divinity School is consistent with and remains central to the overall mission of Duke University. As recently as November 2010, President Richard H. Brodhead reaffirmed the religious purpose of the school stating publically that "[t]he Divinity School is the **embodiment of the intention of the university to fulfill its calling in the preparation of a learned ministry.** It is also the symbol of the long and abiding relationship between church and academy. **Today we affirm anew that relationship, symbolized in our motto, Eruditio et Religio,** as we install a dean of the Divinity School." (Emphasis added). See Defendant's Exhibit 8, available at: <http://divinity.duke.edu/news-media/news/2010-09-02-hays-installed-dean>

J. In 2005, Duke University spent approximately \$22 million to expand the Divinity School with the construction of the Westbrook Building and Goodson Chapel showing a continued University commitment to the Divinity School and its purpose of educating a learned Christian ministry. See Defendant's Exhibit 9, available at: <http://divinity.duke.edu/about#setting>.

K. The Duke Endowment, the University's largest independent donor, continues to financially support rural Methodist churches in North Carolina. See Defendant's Exhibit 10, *available at* <http://www.dukeendowment.org/issues/strengthening-rural-churches/>.

L. Any further evidence that may be presented at a hearing on this Motion to Dismiss.

14. Because of its stated aims and purposes, its bylaws, its Christian motto and affiliation, and its commitment to the training of Christian ministers through the Duke Divinity School, Duke University is a religious institution. As such, the delegation of the police power by the State of North Carolina to Duke University represents an excessive entanglement with religion as set forth in Lemon, Larkin, Pendleton and Jordan and is thus unconstitutional under the Establishment Clause of the First Amendment to the United States Constitution.

15. In addition to violating the United States Constitution, the delegation of the police power by the State of North Carolina to Duke University violates the statutory requirement set forth in N.C. Gen. Stat. § 74G-2 which restricts the State from certifying as a campus police agency any institution described in N.C. Gen. Stat. § 116-15 (d). The institutions excluded under G.S. 116-15 (d) include institutions with "post-secondary degree activity based upon a program of study, equivalent experience, or achievement testing the institutionally planned objective of which is the attainment of a degree in theology, divinity, or religious education or in any other program of study, equivalent experience, or achievement testing that is designed by the institution primarily for career preparation in a religious vocation."

16. "Duke Divinity School's mission is to engage in spiritually disciplined and academically rigorous education in service and witness to the Triune God in the midst of the church, the academy, and the world. We strive to cultivate a vibrant community through theological education on Scripture, engagement with the living Christian tradition, and attention to and reflection on contemporary contexts **in order to form leaders for faithful Christian**

ministries." See Defendant's Exhibit 11, available at: <http://divinity.duke.edu/about/mission> (emphasis added).

17. As clearly set forth in its mission statement, Duke Divinity School, and thus Duke University, as the owner and operator of the Divinity School, offers a program of study "designed by the institution primarily for career preparation in a religious vocation" as defined in G.S. 116-15(d). As such, Duke University should not be certified as a campus police agency under N.C. Gen. Stat. § 74G-2 thus making the stop and arrest of the Defendant not only unconstitutional but also unlawful.

18. Based on the foregoing, the stop and arrest of Defendant in the above captioned matter were unconstitutional and made without valid police authority.

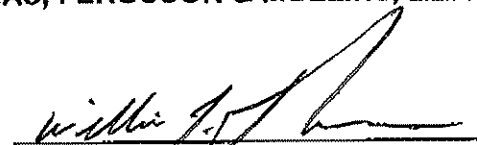
WHEREFORE the Defendant prays the Court as follows:

1. That the Court enter an Order dismissing the charges against Defendant;
2. That in the alternative the Court enter an Order suppressing all evidence obtained as a result of the stop and arrest of Defendant; and
3. For such other and further relief as the Court may deem just and proper.

This the 23 day of November, 2010.

THOMAS, FERGUSON & MULLINS, L.L.P.

By:



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STATE OF NORTH CAROLINA
COUNTY OF DURHAM

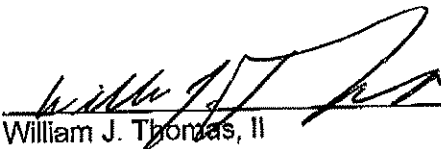
CERTIFICATE OF SERVICE

This is to certify that the foregoing document was this day served upon the District Attorney's Office for the Fourteenth Judicial District, by hand delivering a copy of the same to an Assistant District Attorney.

This the 23rd day of November, 2010.

THOMAS, FERGUSON & MULLINS, L.L.P.

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