

IP 07-0027-CR 1 M/F USA v Grogg
Judge Larry J. McKinney

Signed on 8/21/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	NO. 1:07-cr-00027-LJM-KPF-1
)	
CLARENCE WILLIAM GROGG,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.) 1:07-cr-27-LJM-KPF-1
)
CLARENCE WILLIAM GROGG,)
Defendant.)

ORDER ON DEFENDANT’S MOTION TO SUPPRESS

Defendant, Clarence William Grogg (“Grogg”), is charged with unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Grogg has filed a Motion to Suppress all evidence seized and information obtained as a result of a search of his vehicle. For the reasons explained herein, Grogg’s motion is **DENIED**.

I. BACKGROUND

The following facts are from the testimony presented at the August 17, 2007, hearing on the motion to suppress and the probable cause affidavit submitted with the criminal complaint. On September 18, 2006, Special Agent Eric B. Jensen (“Special Agent Jensen”) of the Bureau of Alcohol, Tobacco and Firearms informed the Indianapolis office of the Bureau of Immigration and Customs Enforcement (“ICE”) that Grogg was a “suspicious suspect” who would be arriving in Indianapolis that day from France via a connecting flight from Detroit. Special Agent Jensen further advised that Grogg had parked his car in the short term parking area of the Indianapolis International Airport on August 28, 2006, and that he had changed his return date three times. According to the testimony of ICE Special Agent Joshua Livers (“Special Agent Livers”), officers had also learned from a concerned citizen that Grogg was suspected of having weapons or drugs and being involved

in some criminal activity such as child pornography or molestation. Finally, at some point Indiana State Police (“ISP”) had used a narcotics-detecting canine to perform a sweep of Grogg’s car in the parking lot and the canine had given a positive result.

Grogg finally arrived at the airport sometime late that night. ISP Trooper Jeffrey Segó (“Trooper Segó”), an officer assigned to work with ICE, and Special Agent Lievers were dressed in plainclothes and observed Grogg exit his plane through the jet-way. Grogg appeared confused and asked airline employees several questions. The two officers assumed that Grogg was asking for directions to the baggage claim area because after speaking with airline employees he proceeded to that area. It is the Court’s impression from the probable cause affidavit and the testimony of the officers that Grogg’s luggage had not yet arrived at the baggage claim area so he went outside to smoke a cigarette. Trooper Segó and Special Agent Lievers watched Grogg asked several people for a light for his cigarette and overheard him ask a woman who was waiting on her husband to pick her up for a ride away from the airport. When the woman’s husband arrived, Grogg asked to be taken to a hotel and he said “any hotel will do.” He then claimed a guitar case and a red suitcase from the baggage claim area and returned to the couple’s car to load his luggage.

At that point, the two officers approached Grogg and identified themselves. Trooper Segó took the lead in speaking with Grogg and advised that they were looking for people carrying contraband and that Grogg’s actions looked suspicious. He requested to see Grogg’s identification, and either he or Special Agent Lievers instructed the couple in the car to leave. Trooper Segó also questioned Grogg about his itinerary and why Grogg was in Indiana. During this questioning both officers noticed that Grogg’s breath smelled as if he had been drinking; however they indicated that Grogg was cooperative, appeared to be alert and coherent, and agreed to talk with them. The

officers testified that Grogg stated that he did not have anything to hide and that the officers could search anything that they wanted, including his luggage. The officers then checked Grogg's luggage and, finding nothing inside, handed the luggage back to Grogg.

Trooper Segó then asked Grogg whether Grogg had a vehicle at the airport. Grogg confirmed that he did have a vehicle parked on the fourth floor of the short term parking garage. Trooper Segó asked Grogg if the officers could search the vehicle and Grogg readily agreed, again indicating that he did not have anything to hide. Grogg then lead the officers to his car and unlocked the door. Trooper Segó saw a blue-green suitcase in the rear passenger seat. He told Grogg that the officers wanted to search the car and its trunk and anything inside of the vehicle, including the suitcase in the rear seat. After learning this, Grogg still agreed that the officers could search the vehicle. When Trooper Segó got to the suitcase, he once again asked for permission to search that object and Grogg once again agreed. In fact, the officers testified that Grogg did not place any limits on the scope of their search and that he was very cooperative and respectful.

When he opened the suitcase, Trooper Segó found a black Weihrauch .357 magnum revolver inside. The handgun was loaded with six live .38 special rounds. When Trooper Segó showed it to Grogg, Grogg seemed surprised and remorseful. Grogg apologized and stated that he had forgotten that the handgun was in the suitcase. He said that the handgun had belonged to his father and was left to him when his father died. The entire encounter with the two officers from the time they approached until they completed the search of the car lasted about fifteen minutes.

Grogg was arrested and later interviewed by Special Agent Jensen. After receiving his *Miranda* warnings, Grogg admitted that he had put the handgun in the car and that it was loaded.

Grogg also admitted that he had two prior convictions for bank robbery and knew that he was not supposed to be around guns.

II. DISCUSSION

Grogg's Motion to Suppress presents three issues: (1) whether the officers' questioning of Grogg was proper under the Fourth Amendment; (2) whether Grogg's consent to search his car was valid in light of Grogg's alleged mental health; and (3) if Grogg's consent to search was valid, whether the scope of that consent extended to the suitcase inside of the car. The Court addresses each issue in turn.

A. PROPRIETY OF THE OFFICERS' QUESTIONING

The burden of proof with respect to an allegedly illegal seizure depends upon whether there was a warrant. Here, there is no indication that the police acted with a warrant; therefore, the Government bears the burden of establishing legality by a preponderance of the evidence. *See United States v. Longmire*, 761 F.2d 411, 417 (7th Cir. 1985) (citing LAFAYETTE, SEARCH AND SEIZURE § 11.2 at 499 (2d ed. 1981)). *See also United States v. Wilkie*, Cause No. TH 04-11-CR-M/L, 2005 WL 613583, *3 (S.D. Ind. March 7, 2005) (citing *Longmire*). Here, the Government contends that Grogg's encounter was a consensual encounter or, alternatively, a proper *Terry* stop.

Not all police questioning of citizens implicates the Fourth Amendment. Indeed, courts have repeatedly found that no seizure occurs for Fourth Amendment purposes when law enforcement officers approach an individual at an airport and, after identifying themselves, ask routine questions related to the individual's identification, itinerary, and ticket information. *See, e.g., United States*

v. Mendenhall, 446 U.S. 544, 555 (1980); *United States v. Thomas*, 87 F.3d 909, 911 (1996); *United States v. Odum*, 72 F.3d 1279, 1283 (7th Cir. 1995); *United States v. Rodriguez*, 69 F.3d 136, 141-42 (7th Cir. 1995). As long as the person to whom question are put remains free to disregard the questions and walk away, there has been no intrusion on that person's liberty or privacy under the Constitution. *See Mendenhall*, 446 U.S. at 554; *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (citing *Mendenhall*). The test for determining whether a consensual encounter occurred or whether the police seized an individual is an objective one that looks at the totality of the circumstances rather than the particular details in isolation and considers a reasonable person's interpretation of the conduct in question. *See Chesternut*, 486 U.S. at 573-74. Several factors assist in determining whether an encounter is consensual, including "whether the encounter took place in public, whether the suspect consented to speak to police, whether the officers told the suspect that he was not under arrest and free to leave, whether the suspect was moved to another area, the number of officers present and whether they displayed weapons or physical force." *United States v. Adamson*, 441 F.3d 513, 520 (7th Cir. 2006) (citing *United States v. Robinson*, 30 F.3d 774, 782 (7th Cir. 1994)).

Here, the Court concludes that Grogg's encounter with police was not a consensual encounter and that he was effectively seized for Fourth Amendment purposes. The two officers approached Grogg as he was preparing to load his luggage and depart the airport with the couple who agreed to give him a ride. It was late at night and Grogg had just arrived in Indianapolis following what was no doubt a lengthy day of transcontinental flight. Moreover, according to Special Agent Lievers's testimony, the officers instructed the couple to leave shortly after they had identified themselves and before they had engaged in very much substantive conversation with

Grogg. Based on these circumstances, the Court finds that a reasonable person would not have felt free to leave.¹

Although the Court concludes that the encounter was not a consensual encounter but rather a seizure, this does not necessarily mean that it was improper. Pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny, police officers may stop a person when the officers have reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity. The Court concludes that the circumstances of this case justified the brief intrusion into Grogg's liberty interests because the officers had, at a minimum, reasonable and articulable suspicion that Grogg was engaged in a crime. Here, the officers knew that a narcotics-detecting canine had alerted to the presence of contraband in Grogg's vehicle. The Court concludes that this fact by itself is significant and, assuming that the canine sweep was proper, justifies the stop in this case. *See, e.g., Florida v. Royer*, 460 US 491, 506 (1983) (commenting that positive reaction from a canine during a *Terry* stop would have resulted in justifiable arrest based on probable cause); *United States v. Brown*, 24 F3d 1223, 1226 (10th cir. 1994) (indicating that alert from a canine provides probable cause to impound vehicle and obtain warrant for a search); *United States v. Daniels*, No. 97-1345, 1997 WL 415239, *4 (7th Cir. July 21, 1997) (unpublished decision) (stating that positive result from canine during traffic stop provided probable cause to search); *United States v. Yokana*, Cause No. 86 CR 144, 1986 WL 7947 (N.D. Ill. June 25, 1986) (stating that positive result from canine during traffic stop provided probable cause to arrest and probable cause to seize vehicle).

¹ Even if the encounter could be characterized as a consensual encounter, the Court finds that it ripened into an investigative stop when the officers informed Grogg that he was suspected of carrying contraband and that they would like to search his luggage. *See United States v. Borys*, 766 F.2d 304, 311 (7th Cir. 1985) (concluding that a reasonable person would not have felt at liberty to leave when he knew that he was identified as a suspect).

As a final matter then, the Court *sua sponte* addresses whether the canine sweep itself was proper. The Court concludes that it was. In this case, the car was parked in a public place, and by its nature a canine sweep is minimally intrusive. See *United States v. Place*, 462 U.S. 696, 707 (1983). Although the Court is unaware of any decisions on point in this Circuit, both the Eighth and Tenth Circuits have specifically upheld canine sweeps of parked cars in public places. See *United States v. Fred*, 50 F.3d 548, 551 (8th Cir. 1995), *vacated on other grounds*, 517 U.S. 1152 (1996) (concluding that canine sniff of car parked on the street is so limited in its intrusion on protected privacy interests that it does not amount to a search for Fourth Amendment purposes); *United States v. Ludwig*, 10 F.3d 1523, 1526-27 (10th Cir. 1993) (upholding canine sniff of car in parking lot of motel where it was conducted without particular suspicion). The Court has no reason to suspect that the Seventh Circuit would reach a different conclusion than those courts. In fact, the Seventh Circuit has cited *Ludwig* with approval and specifically indicated that it “[has] always rejected the notion that a hotel occupant enjoys the same expectation of privacy in his car in a parking lot of the hotel.” *United States v. Washburn*, 383 F.3d 638, 642 (7th Cir. 2004). The same reasoning -- the lowered expectation of privacy -- readily applies to a public parking facility at an international airport. Accordingly, the Court finds that the canine sweep in this case, which was conducted in a public place and was minimally intrusive on Grogg’s privacy interests, did not infringe on Grogg’s Fourth Amendment rights.

B. GROGG’S MENTAL CONDITION AND VALIDITY OF CONSENT TO SEARCH

Grogg’s second argument is that his mental condition rendered invalid his consent to search his vehicle. He asserts that his behavior was erratic and, though he has submitted no evidence,

argues that he told the officers that he had not taken his medication and that he was mentally disabled and/or insane.² Thus, Grogg impliedly argues that he his mental condition should have been obvious to the officers. The Court disagrees.

Whether a person's consent is voluntary, and therefore valid, depends upon the totality of the circumstances. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). Among the factors to consider in determining whether consent was freely given are the age, education, intelligence, and mental health and capability of the person giving consent; whether the person giving consent did so immediately or only after repeated requests by the police; whether physical coercion was used to obtain consent; and whether the person giving the consent was in custody. *See United States v. Strache*, 202 F.3d 980, 985 (7th Cir. 2000) (internal citations omitted). When a person challenges the validity of his consent on the basis of his mental capacity, the Seventh Circuit has approached the issue similar to how it approaches apparent authority. *See United States v. Grap*, 403 F.3d 439, 445 (7th Cir. 2005). Thus, to summarize from *Grap*, the relevant question is whether a law enforcement officer reasonably believes that a person has the capacity to consent. *See id.*

Here, the Court concludes that the officers had no reason to suspect that Grogg lacked the mental capacity to consent to the search of his vehicle. Indeed, Special Agent Lievers explicitly denied that he was aware of any alleged mental health treatment when questioned at the suppression hearing. The officers testified that Grogg was cooperative and respectful and that nothing in his demeanor seemed out of the ordinary. In fact, Special Agent Lievers stated that Grogg's speech was

² Pursuant to defense counsel's motion, the Court ordered a psychological evaluation to determine whether Grogg was competent to stand trial. That evaluation, which the Government entered as an exhibit at the suppression hearing, concluded that Grogg was competent to stand trial and to assist his counsel. It also indicated diagnoses for malingering and "Borderline Personality Disorder with antisocial features."

responsive to the officers' questions and understandable. In addition, the officers observed no difficulty with conversing or maneuvering through the terminal or garage. Finally, Grogg repeatedly and readily agreed to permit the officers to search his luggage and his car, and he even led the officers to his vehicle. Based on all of these circumstances, the Court concludes that the officers had no objective reason for believing that Grogg was incapable of consenting to a search. Therefore, the Court finds that Grogg's consent to search was valid.

C. SCOPE OF CONSENT AND SEARCH OF THE SUITCASE IN GROGG'S CAR

The final issue raised by Grogg is whether his consent to search his car extended to the suitcase inside of the vehicle. Grogg argues that a reasonable person would not have believed that Grogg's consent extended to the suitcase and that the officers should have asked for separate permission to search the suitcase. Based on the testimony presented by the officers at the suppression hearing, the Court cannot agree with Grogg's argument.

The scope of a search is generally defined by its expressed object. *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (citing *United States v. Ross*, 456 U.S. 798 (1982)). The standard for measuring the scope of a suspect's consent is an objective one, *i.e.*, what a reasonable person would understand by the exchange between an officer and the suspect. *See id.* Accordingly, a suspect may delimit the scope of the search to which he consents, but officers need not stop to ask permission to search every container found within a space if the suspect's consent would reasonably be understood to extend to that container. *See id.*; *United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000) (consent to search hotel room implicitly included search of purse located within hotel

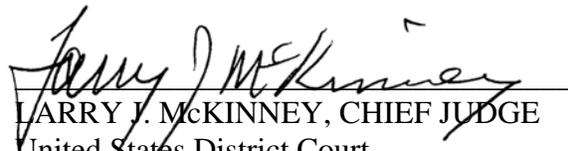
room); *United States v. Morgan*, 725 F.3d 56, 58 (7th Cir. 1984) (consent to search luggage validates the search of both the luggage and containers within the luggage).

In this case, the Court concludes that, contrary to Grogg's assertions, the officers had every reason to believe that they were permitted to search the suitcase in the case. The officers repeatedly asked for permission to search the car and its contents and Grogg readily agreed. Moreover, once he reached the suitcase, Trooper Sego specifically asked Grogg for permission to search that item and Grogg agreed. Therefore, under the circumstances, the Court finds that Grogg did give consent to search the suitcase in his car.

III. CONCLUSION

Based on the foregoing reasons, the Court finds no basis for the suppression of the evidence obtained as a result of the vehicle search in question. Therefore, Defendant Clarence William Grogg's Motion to Suppress is **DENIED**.

IT IS SO ORDERED this 21st day of August, 2007.


LARRY J. MCKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

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