

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
ROGERS, DAMON,)	CAUSE NO. IP06-0109-CR-01-H/F
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) CAUSE NO. IP 06-109-CR-1 H/F
)
 DAMON ROGERS,)
)
 Defendant.)

ENTRY ON DEFENDANT'S MOTION TO SUPPRESS

Just after 9:00 p.m. on April 7, 2006, Damon Rogers was a passenger in an automobile that was stopped by an Indianapolis police officer, ostensibly for an expired license plate. A police officer's pat-down of Rogers' outer clothing discovered a revolver hidden in the crotch of his pants. A federal grand jury then indicted Rogers for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The government also contends that Rogers is subject to a mandatory minimum fifteen year sentence under 18 U.S.C. § 924(e) based on three or more prior convictions for violent felonies or serious drug offenses.

Rogers has moved to suppress the firearm as evidence. The court held an evidentiary hearing on October 26, 2006, but recessed because one government witness was unavailable to testify because of an emergency. On November 28, 2006, the court received an additional factual stipulation relating to that witness's

testimony. The court also heard further argument. The court now states its findings of fact and conclusions of law as required by Rule 12(d) of the Federal Rules of Criminal Procedure. Substance rather than the court's label should control whether a matter is treated as a finding of fact or a conclusion of law.

After weighing the credibility of the conflicting testimony, the court finds that the preponderance of evidence shows that the original traffic stop violated the Fourth Amendment to the United States Constitution. The stop was not supported by probable cause to believe there was a violation of the traffic laws. The court also finds no other legal basis justifying the traffic stop or the frisking of Rogers. Accordingly, the court grants the motion to suppress the firearm and any other evidence derived from the stop.

The Facts

On April 7, 2006, Officer Stephen Gorgievski was working the evening shift as a neighborhood resource officer for the Indianapolis Police Department. On that assignment, he was not required to respond to "runs," radio dispatches of police officers to respond to citizen complaints or notice of problems needing immediate attention. He was assigned to carry out a more pro-active community policing function by patrolling a neighborhood with which he was very familiar, on the north side of downtown Indianapolis. He knew that retail drug sales were common on the streets. He also knew that drug dealers often carry firearms.

Around 9:00 p.m, Officer Gorgievski stopped his patrol car on 36th Street just east of its intersection with North Illinois Street. He saw two men near a black Buick parked on the near (east) side of Illinois just south of the intersection. One man was defendant Damon Rogers. The other was the owner of both the car and the house on the southeast corner, Sam Bennett. Rogers was standing behind the open passenger door by the sidewalk. Officer Gorgievski did not recognize either man.

From a distance of approximately 30 to 50 feet, Officer Gorgievski made eye contact with Rogers. Rogers turned his back toward Officer Gorgievski, who then saw movements of Rogers' shoulders and arms that he interpreted as possibly tucking some object into the front of his pants. Officer Gorgievski then saw Rogers get into the front passenger seat of the car. Officer Gorgievski turned his bright spotlight on the car. He saw Rogers seem to lift his hips up from the seat and to make some sort of adjustment below his waist, and below the window level of the car. Bennett got into the car. He and Rogers then began to drive a few feet north toward 36th Street to make a right turn to the east, past Officer Gorgievski.

Officer Gorgievski moved his patrol car to block 36th Street and signaled to Bennett that he would need to go further north on Illinois. Bennett did so. Officer Gorgievski then turned from 36th Street north on Illinois, followed Bennett and Rogers, and turned on his emergency lights and siren to order Bennett to stop.

Bennett pulled over immediately and stopped in front of the second house north of the 36th Street intersection. See Def. Ex. 14 (map).

Officer Gorgievski parked his patrol car behind Bennett's Buick and approached the driver's window. Officer Gorgievski had a brief conversation with Bennett. He told Bennett that he had stopped him for an expired license plate. Bennett replied in substance that Officer Gorgievski was mistaken because he had renewed the vehicle registration recently. Bennett gave Officer Gorgievski his vehicle registration, which showed that the license plate was not expired. Def. Ex. 4. Bennett did not have a driver's license with him. Officer Gorgievski told Bennett that there might be a problem with the computer information. During this encounter, Officer Gorgievski observed that passenger Rogers seemed nervous. The officer then returned to his police car with the vehicle registration.

At some point in this brief period, Officer Gorgievski called for help from his fellow neighborhood resource officers in the area. To do so, he did not use the general police radio, which is recorded and managed by a central dispatcher. Instead, he used a separate CB radio that connected him only with the other neighborhood resource officers. That radio traffic was not recorded. Officer Collins arrived within a minute or two of the stop and parked behind Officer Gorgievski's car. Officer Gorgievski told Officer Collins that he thought the passenger (Rogers) might have some contraband – perhaps a weapon or drugs –

tucked into the crotch of his pants. There is no evidence that Officer Gorgievski undertook any further investigation of the license plate question at this point.

Officer Gorgievski asked Bennett if he could search the car. Bennett consented. Officer Collins asked Rogers to step out of the car and then told him that he was going to pat down his outer clothing for weapons. Rogers submitted to the frisk. Officer Collins felt a hard object that he recognized as a revolver tucked into the crotch of Rogers' pants. Officer Collins then handcuffed Rogers and retrieved a loaded Charco .357 caliber revolver.

Officer Gorgievski then contacted dispatch for the first time at 9:13:45 p.m. He reported that he and Officer Collins and Officer Lawalin (another neighborhood resource officer) were involved in a stop and arrest at 36th and Illinois Streets, and he requested a vehicle to transport Rogers to jail. The request for the transport vehicle was recorded just sixteen seconds after Officer Gorgievski reported the incident to dispatch for the first time.

Further inquiries by the officers that evening turned up the correct registration information showing proper registration for the Buick, but Officer Gorgievski did not submit this inquiry until 9:40:16 p.m., twenty-five minutes after he had called for a vehicle to transport Rogers to jail.

The principal issue presented by Rogers' motion to suppress is whether Officer Gorgievski had probable cause to stop Bennett's car for having an expired license plate. If Officer Gorgievski had such probable cause, he was entitled to ask Bennett for permission to search the car. With that consent, Officers Gorgievski and Collins were entitled to take reasonable steps to ensure their own safety. Such steps might have included, at least under these circumstances, having Rogers step out of the car and then patting down his outer clothing for weapons.

The court has before it three distinct and conflicting stories about whether Officer Gorgievski had probable cause to stop Bennett's car: (1) Bennett's version in his testimony before the court, (2) Officer Gorgievski's version as reported the night of the arrest, and (3) Officer Gorgievski's very different version in his testimony before this court. There are serious credibility problems with each of Officer Gorgievski's accounts, and the material contradictions between his two versions further undermine the credibility of both. The court generally credits Bennett's version of events and finds that Officer Gorgievski did not have probable cause for the traffic stop.

Bennett's Hearing Testimony: Bennett described his attempt to turn east on 36th Street and Officer's Gorgievski's blocking of that street. He pulled back onto Illinois Street and drove north in a center lane. (Illinois Street is one-way north at that location and has several lanes of traffic.) He saw Officer Gorgievski's

emergency lights in his mirror and pulled over. Bennett testified, consistent with police routine procedure, that Officer Gorgievski approached his window and told him that he had stopped him for an expired license plate. Bennett said something to the effect that he was wrong because he had just recently renewed the registration and plate. Officer Gorgievski asked him for his vehicle registration and driver's license. Bennett testified that he did not have his driver's license with him at the time. In fact, he had only an expired or suspended Georgia license, and no Indiana license. Bennett testified that on the night of the stop, his license plate had current stickers showing that the license plate was valid until February 2007. See Def. Ex. 12.¹

Officer Gorgievski's Initial Report: Officer Gorgievski's initial report provided a very simple account of the facts that led him to stop Bennett's car. He stopped Bennett for an expired license plate, and his stop was based on a routine computer check of the license plate that "came back expired." Officer Gorgievski's initial report said nothing about having seen the small colored stickers in the upper left and right corners of the license plate showing the month and year of expiration. He also wrote in the report that he had stopped the Bennett car because of the expired plate. His report said nothing about stopping the car because of suspicious conduct by Rogers.

¹Defendant's Exhibit 12 is a photograph of the license plate taken approximately one month after the stop. Bennett testified that the license plate looked the same the night of the stop. For reasons explained in the text, the court credits his testimony on this point.

The problem with this initial account is that it simply is not true. The records of Officer Gorgievski's computerized inquiry show that he typed an inquiry into his mobile computer for Indiana license plate 95-A-1532, issued in 2005, at 9:08:58 p.m. The stipulated evidence shows that Officer Gorgievski received a response one second later providing no data at all in response to that inquiry. See Stipulation ¶ 9(a) & Ex. 2A. The stipulated evidence also shows that there are many reasons why an officer might receive such a response. Most important, the evidence shows that an officer could not conclude from the absence of data that the license and registration had expired. See Stipulation ¶ 10. Officer Gorgievski could not conclude from that response that the car had an expired license plate.

Officer Gorgievski's Hearing Testimony: At the hearing on the motion to suppress, Officer Gorgievski testified to a different version. Contrary to his written report, he did not testify that he had received a response that the license plate was expired. He testified that he had typed in a routine inquiry and had gotten no response. That was clearly correct, as shown by the computer records that had become available to him before the hearing began. He testified instead that he had in fact seen and read the stickers on the license plate. He thought the month sticker showed February or March and that the year sticker was a yellow sticker showing "06," he testified, thus indicating on April 7, 2006 that the plate was expired.

According to the hearing testimony, Officer Gorgievski followed the Bennett car north on Illinois Street and saw the license plate and its stickers. Officer Gorgievski claims he then typed in the routine inquiry and received no response, as indicated by the computer records. He then activated his lights and siren to stop Bennett, who pulled over from the center lane of traffic to park at the curb. Officer Gorgievski testified that he approached Bennett's window and told him he had stopped him because of the expired plate. Bennett told him he had already renewed the registration. Officer Gorgievski did not recall whether he asked Bennett for his registration, but he testified that he told Bennett that the computer could be in error and that he would check again.

Officer Gorgievski also testified at the hearing that he stopped the Bennett car based on both the expired license plate stickers and Rogers' suspicious activity. He testified that he called for the vehicle to transport Rogers before he checked Bennett's registration, the ostensible purpose of the stop.

The problems with Officer Gorgievski's hearing testimony are that it (1) conflicts with his first account that he prepared the night of the events, (2) conflicts with Bennett's testimony, and (3) is not consistent with the times and distances involved. Officer Gorgievski's hearing testimony has the earmarks of a belated and improvised effort to correct the problem with his original report after he learned that the computer records contradicted his earlier claim that he received a report that the license plate was expired.

In terms of time and distance, Officer Gorgievski's hearing testimony version would have required him to turn north on Illinois Street to follow Bennett, to recognize the expired stickers on the license plate, to type in the computer inquiry about the license plate (something he said he does "very carefully" while driving), to receive and understand the "no data" response, to activate his emergency lights and siren, and then to have Bennett pull over in front of the second house from the corner. The maximum distance Bennett might have driven before stopping was about 120 feet. See Def. Ex. 14. Assuming a conservative average of 15 miles per hour, Bennett's car would have covered that distance in less than six seconds. (The court assumes that Bennett was prudent enough not to accelerate quickly away from the police officer who had just told him to take a different route.) Assuming an even more conservative average speed of 10 miles per hour, Bennett's car still would have covered that distance in less than nine seconds. It would have taken Bennett at least several seconds to see the lights, to react to them, and to pull his car to a safe stop by the curb. Based on all the evidence presented at the hearing, Officer Gorgievski simply did not have time to do everything he claimed to have done in his testimony in time to have Bennett stop where he stopped.

If Officer Gorgievski had taken the time to check Bennett's registration, he would have seen that the registration on the Buick had been renewed just over a month earlier, on March 4, 2006. With that information literally in hand, Officer Gorgievski had no more legitimate reason for prolonging the stop. (Officer

Gorgievski and the government have never made an issue of the fact that Bennett did not have a driver's license with him at the time of the stop; that unknown fact could not have justified the stop.) Officer Gorgievski testified at the hearing, however, that he did not remember whether he asked for or saw the registration, which would have shown him that he had no valid basis for the stop. Tr. 28-29. That lack of memory is not credible, under these circumstances.

Conclusions of Law

Based on the facts found by the court, Officer Gorgievski's stop of the Bennett car was without probable cause and unconstitutional. The Fourth Amendment of the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." When police officers stop an automobile and detain the occupants even briefly, the stop amounts to a seizure within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996).

In *Whren*, the Supreme Court held that the police could lawfully carry out a traffic stop as part of an investigation of some other suspected wrongdoing as long as the police had probable cause to believe there was an actual violation of a traffic law. The Court rejected the argument that an otherwise valid traffic stop would be invalid if a reasonable police officer would not have stopped the car for the suspected violation alone, so that the traffic stop was merely a pretext for

investigating some other suspected wrongdoing. 517 U.S. at 813. Thus, if Officer Giorgievski had probable cause to believe the car in which Rogers was riding actually had an expired license plate, his stop would have been valid even if the officer's real reason for making the stop was to investigate some other suspected criminal activity.

When a police officer makes a justified stop of a vehicle, the officer has the power to order occupants to step out of that vehicle. See *Maryland v. Wilson*, 519 U.S. 408, 410 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). During an otherwise reasonable traffic stop, an officer is permitted to frisk a person's outer clothing to search for a weapon if the officer has a reasonable suspicion that the person is armed and dangerous. See *Pennsylvania v. Mimms*, 434 U.S. at 111-112.

The court assumes, without deciding, that after making the stop, Officer Giorgievski had reasonable, articulable grounds for asking Officer Collins to conduct a pat-down to ensure his and other officers' safety. It was dark. Officer Giorgievski was in a high-crime area. He had observed Rogers making some odd movements before entering the car, and he had observed Rogers acting in a nervous and suspicious manner after he had pulled the car over.

The constitutional problem here is that there was no probable cause for the stop in the first place. If Officer Giorgievski had made an honest mistake of fact

about whether Bennett's license plate had expired, the stop would still have been valid. See *United States v. Miguel*, 368 F.3d 1150, 1153-54 (9th Cir. 2004) (traffic stop based on inaccurate information from computer database showing that license plate was expired was reasonable and lawful, even though plate was not actually expired); *United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000) (traffic stop based on cracked windshield was reasonable because officer reasonably believed crack was excessive and unlawful, regardless of whether it was actually unlawful). Under Indiana law, it is a class C infraction to operate a motor vehicle with an expired license plate. Ind. Code § 9-18-2-40.

The court finds no such honest mistake in this case. The contradictions between Officer Gorgievski's different versions and the other factors discussed above lead the court to conclude that Officer Gorgievski did not honestly believe the license plate was expired when he stopped Bennett's car. He did not receive an erroneous computer message indicating that the license plate was expired. His account of seeing expired stickers on what was a properly renewed license plate, then conducting a computer check, and then pulling Bennett over, all before he reached the second house north of the intersection, is not credible. The fact that Officer Gorgievski claimed not to remember whether he made – and in fact failed to make – even the most basic effort to check on the license plate after the stop further undermines his credibility and emphasizes the pretextual character of the stop. Under *Whren*, of course, a traffic stop supported by actual probable cause

may be permissible, but that was lacking here. The government is not entitled to take advantage of *Whren* to support the stop.

In a final effort to salvage the evidence in this case, the government has argued that the entire stop amounted to an investigative stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). Such a stop requires not probable cause but reasonable suspicion that criminal activity has occurred or is imminent. *Id.* at 22-24; *United States v. Vega*, 72 F.3d 507, 515 (7th Cir. 1995). To justify the particular intrusion of a *Terry* stop, “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” 392 U.S. at 21. Inarticulable hunches and generalized suspicions are not sufficient. *Id.*

When Officer Gorgievski turned on his lights and siren to stop the Bennett car, he did not have enough information to support a *Terry* stop. *Terry*, 392 U.S. at 20 (a stop must be justified at its inception and reasonably related in scope to the circumstances that justified the interference in the first place). Officer Gorgievski knew he was in a relatively high crime area, but he had no specific information related to Rogers or that location and time. A person’s presence in a high crime area, in and of itself, is not enough to support a reasonable, particularized suspicion of wrongdoing. *Illinois v. Wardlaw*, 528 U.S. at 124-25. Little more existed here. When Officer Gorgievski made eye contact with Rogers, Rogers turned his back to him and made movements that suggested he might

have been tucking an object into his pants. He then saw Rogers seem to lift his hips from the car seat, perhaps to make some adjustment below his waist, out of the officer's sight. That's it. Officer Gorgievski did not have any tip or other current information suggesting that Rogers was engaged in drug trafficking or was committing any other crime. Cf. *United States v. Askeu*, 403 F.3d 496, 507-08 (7th Cir. 2005) (finding reasonable suspicion for *Terry* stop based on informant's tip that suspect would meet in specified parking lot at specified time to buy drugs, and based on suspect's slow circling of parking lot upon arrival in manner consistent with information from simultaneous monitoring of phone call between suspect and dealer he was seeking to meet). Officer Gorgievski did not observe unprovoked flight, which might have supported reasonable suspicion, along with the other circumstances. See *Wardlow*, 528 U.S. at 124. A person who encounters a police officer "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *United States v. Davis*, 94 F.3d 1465, 1468-69 (10th Cir. 1996) (breaking eye contact with officers and walking away did not furnish basis for *Terry* stop), quoting *Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (plurality opinion). Based on what he testified seeing, Officer Gorgievski had no more than a hunch about what Rogers was actually doing before he entered the car.

With the benefit of hindsight, of course, we know that Officer Gorgievski's hunch or instinct turned out to be correct. It is well established, however, that even "inspired hunches" do not invest the police with the authority to 'stop people

at will.” *United States v. Ienco*, 182 F.3d 517, 524 (7th Cir. 1999), quoting *United States v. Sholola*, 124 F.3d 803, 812 (7th Cir. 1997). The Seventh Circuit has explained:

The requirement that the officers’ suspicion be articulable prevents the police from stopping a person on the basis of pure, even if inspired, hunch. *Terry v. Ohio*, supra, 392 U.S. at 27. The police must be able to give a rational explanation for why they suspected the person they stopped. This is an important requirement because without it the police could stop people at will, a *carte blanche* that has been thought inconsistent with the limitations that the Fourth Amendment places on the power to search and seize, and even un-American. A stop is not an arrest, but it is a sufficiently intrusive and even humiliating interference with freedom and privacy that it has been deemed to be within the amendment’s scope.

United States v. Feliciano, 45 F.3d 1070, 1072 (7th Cir. 1995). It is also well established that a search or seizure cannot be justified after the fact by relying on the evidence that was discovered during that search. *Id.* at 1073.

Also weighing against the *Terry* theory for defeating the motion to suppress is the fact that the theory was a make-weight after it was learned that the computer records contradicted Officer Gorgievski’s initial account about checking the license plate on the computer and supposedly being informed it had expired. Officer Gorgievski’s initial report relied solely on the phantom expired license plate report to justify the stop. Only later, in his hearing testimony, did he add that he stopped the car in part because of Rogers’ supposed suspicious activity.

For the foregoing reasons, the court grants defendant Damon Rogers' motion to suppress evidence obtained as a result of the traffic stop of the vehicle in which he was riding on April 7, 2006.

So ordered.

Date: December 20, 2006

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Joe Vaughn
United States Attorney's Office
10 West Market Street, Suite 2100
Indianapolis, IN 46204-3048

Juval Scott
Indiana Federal Community Defenders
111 Monument Circle, Suite 752
Indianapolis, IN 46204