

TH 04-0011-CR 1 M/L U.S.A v Wilkie and Clark
Judge Larry J. McKinney

Signed on 3/7/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
WILKIE, EDWARD L,)	CAUSE NO. TH04-0011-CR-01-M/L
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

UNITED STATES OF AMERICA)	
Plaintiff,)	
)	
vs.)	TH 04-11-CR-M/L
)	
EDWARD L. WILKIE and)	-01
MICHAEL D. CLARK,)	-02
Defendants.)	

ORDER ON DEFENDANTS’ MOTION TO SUPPRESS

Defendants Edward L. Wilkie (“Wilkie”) and Michael D. Clark (“Clark”) (collectively “Defendants”) each are charged with possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, and possession with the intent to distribute 50 kilograms or more of marijuana, a Schedule I, Non-Narcotic Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B)(ii), and 841(b)(1)(C).

The matter comes before the Court on Defendants’ Motion to Suppress all evidence seized, and information obtained, directly or indirectly, as a result of the traffic stop and subsequent search. For the reasons given below, the Defendants’ Motion to Suppress is **DENIED**.

I. BACKGROUND

The following facts were established by the testimony of police witnesses.¹ On June 17,

¹ The facts are partially substantiated by two video recordings of the traffic stop admitted into evidence as Government’s Exhibits 4A, 4B, and 6. However, the video recording from Sgt. Sellers’ video camera, mounted on the interior of his marked police vehicle, is without audio.

2004, Greencastle Police Department Sergeant Sam Sellers (“Sgt. Sellers”) and Roachdale Town Marshal Heath Kerns (“Marshal Kerns”) were working a “special traffic enforcement detail” near the thirty-eight mile marker on Interstate 70 in Putnam County, Indiana. At approximately 2:07 a.m., Sgt. Sellers observed a black 2001 Ford Harley Davidson edition pickup truck, New York registration number 67499JA (the “truck”), traveling eastbound. Using his calibrated radar unit, Sgt. Sellers determined that the vehicle was traveling sixty-seven miles per hour in a sixty-five mile per hour zone. As the vehicle passed Sgt. Sellers’ marked police vehicle, Sgt. Sellers observed that the rear license plate of the truck was not illuminated and noted that the truck slowed to approximately fifty-five miles per hour. At approximately 2:09 a.m., Sgt. Sellers initiated a traffic stop of the truck at mile marker forty-one.

As Sgt. Sellers approached the vehicle, he observed approximately eight or nine air fresheners hanging inside the cab, and four suitcases in the open bed of the truck. The occupants of the vehicle were identified as Wilkie, the driver, and Clark, the passenger.² Sgt. Sellers immediately noticed that Clark’s breathing was labored and he observed Clark’s carotid artery pulsating.

Sgt. Sellers asked Wilkie to produce his driver’s license, vehicle registration, and proof of insurance. Sgt. Sellers informed Wilkie that he had been stopped because his vehicle’s license plate light was not illuminated. Wilkie’s Pennsylvania driver’s license was torn and, although it identified his name, it did not contain all of the information required to determine if it was valid. At 2:12 a.m.,

Additionally, from 2:23 a.m. to 2:49 a.m., during which time the search takes place, the video is completely obscured by condensation on the windshield. The second video recording, from an assisting officer’s vehicle-mounted video camera parked behind Sgt. Sellers’ vehicle, is of such poor quality that it provides the Court no additional vantage of the occurrences described herein.

² Both defendants are African-American.

Sgt. Sellers asked Wilkie to accompany him to his marked police vehicle, to collect information missing from his torn license. Sgt. Sellers testified that this request was made, at least in part, for officer safety, so he would not have to stand with his back to the oncoming traffic. Upon inquiry from Sgt. Sellers as to the nature of his travels, Wilkie advised that he was coming back from San Diego, California, en route to New York. Wilkie also stated that he and Clark had been in San Diego for three days, visiting Clark's brother.

At approximately 2:15 a.m., Sgt. Sellers returned to the truck to speak to Clark. Sgt. Sellers asked Clark to produce his driver's license for identification purposes, and asked if he had located proof of insurance for the truck. Clark produced his driver's license, but was unable to produce proof of insurance as requested. Upon inquiry from Sgt. Sellers as to the nature of their travels, Clark advised that the two were returning from San Diego en route to New York. Clark further stated that they had been in San Diego for five days, and that they had stayed in a hotel. At approximately 2:20 a.m., Clark exited the vehicle, searching the glove compartment for the insurance papers. During this time, Sgt. Sellers continued to observe Clark's nervous behavior. Sgt. Sellers then asked Clark to accompany him to Sgt. Sellers' police car.

Based on the aggregate of his observations, Sgt. Sellers retrieved his narcotics canine, Jasper ("K-9 Jasper"), from his marked police vehicle. Sgt. Sellers commanded Jasper to conduct a free air sniff around the exterior of the truck. Near the rear of the truck bed, K-9 Jasper positively indicated the presence of one of the controlled substances that he is trained to detect. Subsequent to this positive indication, Sgt. Sellers and assisting law enforcement officers searched the truck.

During the search, Sgt. Sellers removed the four suitcases from the open bed of the truck. Upon removal of a fifth suitcase from the cab, Sgt. Sellers detected a strong odor of raw marijuana.

The suitcases were then spaced out along the side of the road. Sgt. Sellers ran K-9 Jasper around the suitcases individually, and K-9 Jasper positively indicated on each. Each suitcase contained no less than one block shaped package of marijuana wrapped in clear plastic with a preliminary cumulative weight of 149 pounds. Sgt. Sellers placed Wilkie and Clark under arrest.

Following the arrest of Wilkie and Clark, the truck was towed to a contract wrecker lot. During an inventory, Sgt. Sellers noticed that the spare tire located in the open truck bed did not match the tires on the truck. Upon moving the spare tire, Sgt. Sellers came to believe that a foreign object had been placed inside it. Sgt. Sellers obtained a search warrant, issued by the Honorable Diana LaViolette, Putnam County Circuit Judge, on June 17, 2004. Upon receipt of the signed warrant, Sgt. Sellers had the tire deflated and removed from the rim. Sgt. Sellers located three block shaped packages from inside the tire. The packages contained a white compressed substance, later tested positive for the presence of cocaine with an approximate weight of three kilograms. The Defendants seek the suppression of all evidence seized and information gained, directly and indirectly, as the result of the search of their motor vehicle.

III. DISCUSSION

The Defendants base the instant motion on the following arguments: (1) initial seizure of the truck was lawful; (2) impermissible manner and scope of the detention; (3) lack of reasonable suspicion to employ a canine sniff; and (4) illegal search of the truck. In determining whether suppression is warranted of the marijuana and cocaine seized from inside the vehicle, the Court must ascertain whether the initial traffic stop was lawful and whether the warrantless search of the truck was supported by probable cause.

A. BURDEN

Who bears the burden of proof with respect to an allegedly illegal search or seizure depends upon whether the search was effected pursuant to a warrant: if the police acted with a warrant, the defendant bears the burden of proving its illegality; if the police acted without a warrant, as in this case, the search is presumptively illegal and the prosecution 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 LAFAVE, SEARCH AND SEIZURE § 11.2 at 499 (2d ed. 1981)).

B. THE SEIZURE

The Defendants contend that the traffic stop was unlawful because it was motivated by the Defendants' race rather than legitimate law enforcement objectives. However, "[u]lterior motives do not invalidate a police stop for a traffic violation, no matter how minor, if a motor vehicle law infraction is detected." *United States v. Murray*, 89 F.3d 459, 461 (7th Cir. 1996). The Court heard credible testimony from Sgt. Sellers, a seasoned law enforcement officer, who testified that he used his calibrated radar device to detect the speeding violation, and that the rear license plate was not illuminated, as required by Indiana Code.³ Sgt. Sellers' personal observation of two separate traffic

³ Indiana Code 9-19-6-4(e) requires that

either a tail lamp or a separate lamp must be placed and constructed so as to illuminate the rear registration plate with a white light and make the plate clearly legible from a distance of fifty (50) feet to the rear. A tail lamp or tail lamps, together with a separate lamp for illuminating the rear registration plate, must be wired so as to be lighted whenever the head lamps or auxiliary driving lamps are

violations provides the “specific and articulable facts” necessary to satisfy the requirements of effecting an investigatory stop of the truck. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968). Therefore, Defendants’ arguments, that the initial traffic stop was pretextual, are unavailing.⁴

C. THE VEHICLE SEARCH

Given the lawfulness of the traffic stop, Defendants next argue there was no justification for calling in K-9 Jasper and thereby broadening the scope of the investigation beyond the simple issuance of a traffic citation and exceeding the time necessary to accomplish any legitimate interests related to the traffic stop.

A routine traffic stop is analogous to a “Terry stop.” *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). During a routine traffic stop, a policeman who lacks probable cause but whose “observations lead him reasonably to suspect’ that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to ‘investigate the circumstances that provoke suspicion.’” *Berkemer*, 468 U.S. 420, 439 (1984) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975)). “[T]he stop and inquiry must be ‘reasonably related in scope to the justification for their initiation.’” *Berkemer*, 468 U.S. at 439 (quoting *Terry*, 392 U.S. at 29)). Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information

lighted.

⁴ In their supplemental memorandum, Defendants also argue that the “special traffic enforcement detail” methods employed in this case -- conducting traffic stops for unilluminated license plates -- constitutes the functional equivalent of an unconstitutional random drug checkpoint. *See City of Indianapolis v. Edmond*, 521 U.S. 32 (2000). However, Sgt. Sellers’ traffic stop of Wilkie and Clark was not at all random. As the Court has discussed, the Defendants were pulled over for two specific motor vehicle infractions.

confirming or dispelling the officer's suspicions. *Berkemer*, 468 U.S. at 439.

In assessing whether a detention is too long in duration to be justified as an investigative stop, the Court must examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendants. *See United States v. Sharpe*, 470 U.S. 675, 686 (1985). The Court, in making this assessment, should take care to consider whether the police are acting in a swiftly developing situation, and in such cases, should not indulge in unrealistic second guessing. *See id.* A *post hoc* evaluation of police conduct can almost always yield some alternative means by which the objectives of the police might have been accomplished. *See id.* The Court will not do so here.

Given the circumstances facing Sgt. Sellers, he pursued his investigation in a reasonable and diligent manner. Upon initial approach and contact with the occupants of the truck, several intervening circumstances gave rise to reasonable and articulable suspicion of criminal activity, including: slowing below the posted speed limit, the presence of eight or nine air fresheners inside the cab of the truck, the extremely nervous behavior of Clark, the four suitcases in the open bed of the truck that seemed in excess of what two male individuals would need for a three- to five-day trip, and Wilkie's torn driver's license. These intervening circumstances made it well within reason for Sgt. Sellers to initiate three to four minute conversations regarding the duration and nature of Wilkie and Clark's trip, while simultaneously requesting necessary identifying information from Wilkie, the driver, and proof of insurance from Clark, the owner. The inconsistencies offered by Wilkie and Clark regarding their trip added to the reasonable suspicion developed.⁵ During this phase of the

⁵ Defendants argue that the inconsistency in their stories is attributable to the manner in which Sgt. Sellers framed his questions. Specifically, that Sgt. Sellers had asked Wilkie how long they stayed in San Diego, but asked Clark how long they had been gone, thus accounting

detention, Sgt. Sellers was attempting to gather information related to the vehicle and its occupants. The facts reveal that this case does not involve any delay unnecessary to a legitimate investigation.⁶

Based on the aggregate of his observations, Sgt. Sellers then commanded K-9 Jasper to conduct a free air sniff around the exterior of the truck so the dog could sniff for odors of controlled substances that it was trained to detect. For purposes of analyzing Fourth Amendment protections, Sgt. Sellers' walk around the exterior of the truck with K-9 Jasper did not constitute a search. *See City of Indianapolis v. Edmond* 531 U.S. 32, 40 (2000) (holding that walking a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search); *United States v. Place*, 462 U.S. 696, 707 (1983) (explaining that "the canine sniff is *sui generis*," an investigative procedure limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure).

The Seventh Circuit has sustained the use of drug detection canines on facts similar to this case. In *United States v. Patterson*, 65 F.3d 68, 71 (7th Cir. 1995), the defendant was stopped for a traffic infraction and the officer became suspicious that he was a drug courier because of his

for the two day discrepancy. Setting aside for a moment, the fact that Defendants imply that they traveled from New York to San Diego in a single day and had traveled from San Diego to Indiana in a single day, Sgt. Sellers credible testimony was that he asked both Wilkie and Clark how long they had stayed in San Diego. No evidence to the contrary has been produced.

⁶ Contrary to Defendants' argument, the Government's failure to tender proof that Sgt. Sellers requested a return on Wilkie's identifying information immediately upon receipt does not render the nature or duration of his inquiries unreasonable or unrelated to the purpose of the traffic stop. Moreover, the fact that motorists are not required to show proof of financial responsibility under Indiana Code 9-25-8-2, does not render unreasonable Sgt. Sellers' request for proof of insurance on the vehicle -- which Clark attempted to locate for several minutes, first from the passenger seat, and also while standing outside the truck.

nervous behavior, messy vehicle, and overwhelming odor of air freshener.⁷ Similarly, in *United States v. Ferguson*, 935 F.2d 1518, 1525 (7th Cir. 1991), the defendant's luggage was briefly detained for a "sniff" by narcotics-trained canines because the defendant gave conflicting answers to the detective's questions and appeared furtive, nervous, and avoided eye contact both when carrying his baggage and during a short period of general questioning. Similarly, in both of these cases, the Court of Appeals found that reasonable suspicion existed to support a brief detention for the "sniff" by narcotics-trained canines. The Court, too, finds that the brief detention in this case for the open-air sniff was reasonable, both as to cause and duration.

During the open-air sniff, which was described in the testimony of Sgt. Sellers, K-9 Jasper alerted positively to the presence of at least one of the controlled substances he is trained to detect, effectively establishing probable cause to conduct a search. *See Patterson*, 65 F.3d at 71-72 (citations omitted). Under the automobile exception to the search warrant requirement, all parts of a vehicle may be searched without a warrant if there is probable cause to believe the car contains contraband or evidence. *See Patterson*, 65 F.3d at 71 (citation omitted). It is lawful to search the entire truck and open any packages, luggage, or closed containers that might reasonably contain the items for which the police have probable cause to search. *See United States v. Ross*, 456 U.S. 798, 821 (1982).

After K-9 Jasper alerted on the truck, Sgt. Sellers removed the suitcases from the open bed.

⁷ Defendants also argue that it is the overwhelming odor of air fresheners, not the presence of eight or nine air fresheners that can create suspicion of criminal activity. However, "there is no 'litmus test' for evaluating reasonable suspicion; rather each instance of police conduct must be judged for reasonableness 'in light of the particular circumstance.'" *States v. Ferguson*, 935 F.2d 1518, 1524 (7th Cir. 1991) (quoting *Terry*, 392 U.S. at 21). Defendants' assertion that an abnormal number of air fresheners cannot create reasonable suspicion is without support.

He then removed a fifth suitcase from the cab, and he detected a strong odor of raw marijuana. Once all of the suitcases were spaced out along the side of the road by law enforcement officers, Sgt. Sellers ran K-9 Jasper around the suitcases and K-9 Jasper alerted on each individual suitcase. Here, the warrantless search of the truck and the five suitcases contained therein, was constitutionally permissible because it was supported by probable cause and fell within the automobile exception to the warrant requirement.

D. THE ADMISSIBILITY OF EVIDENCE GAINED AFTER THE TRUCK WAS IMPOUNDED

The sole basis for the Defendants' Motion to Suppress the cocaine discovered in the spare tire upon issuance of a valid warrant is that it resulted from an illegal search (i.e., "fruit of the poisonous tree"). The Court has found the search of the truck constitutionally permissible.

IV. CONCLUSION

For the reasons stated herein, the Court finds no basis for the suppression of the evidence obtained as a result of the vehicle search in question. Defendants Edward L. Wilkie and Michael D. Clark's Motion to Suppress is therefore **DENIED**.

IT IS SO ORDERED this 7th day of March, 2005.

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

Distribution attached.

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