

NA 05-0012-CR 1 T/N USA v Allen
Judge John D. Tinder

Signed on 08/19/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
ALLEN, ANTHONY C.,)	CAUSE NO. NA05-0012-CR-01-T/N
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	NA 05-012-CR-01-T/N
)	
ANTHONY C. ALLEN,)	
)	
Defendant.)	

ENTRY ON MOTION TO SUPPRESS¹

The Defendant moves to suppress evidence obtained during a search of a vehicle he had been driving when he was pulled over for speeding. The Government opposes the motion. Oral argument was held and the court rules as follows:

I. FINDINGS OF FACT²

On June 11, 2004, at approximately 11:00 P.M., the Defendant, Anthony C. Allen, was driving a brown 1998 Buick automobile in the vicinity of 8th and Larkspur in Jeffersonville, Indiana. Near that intersection the vehicle he was driving was stopped by Lieutenant Kenny Kavanaugh of the Jeffersonville Police Department. Subsequent to that stop, the vehicle driven by Defendant Allen was sniffed by a drug detecting dog

¹ This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

² Any finding of fact more appropriately considered a conclusion of law is so deemed, and vice versa.

maintained by the Jeffersonville Police Department and shortly thereafter the vehicle was searched. The search led to the discovery of 8.6 grams of crack cocaine between the front seats and 184.96 grams of crack cocaine along with 95.5 grams of powder cocaine and a set of digital scales in a gym bag in the trunk of the vehicle. The Defendant moves to suppress the drug evidence discovered during that search.

Several significant events occurred prior to the search which have a bearing on whether the drug evidence should be suppressed.

In the early part of June 2004 law enforcement officers with the Southern Indiana Drug Task Force became interested in determining whether Anthony C. Allen was involved in crack cocaine distribution. On June 2, 2004, a member of that task force, Detective Robert McGhee of the Jeffersonville Police Department, was told by a confidential informant that he could purchase crack cocaine from Defendant Allen. Prior to providing that information, the informant had previously provided other information to Detective McGhee which had resulted in the arrests of others for drug distribution as well as the seizure of drugs. In Detective McGhee's opinion, the informant was reliable. The informant never had provided false information to Detective McGhee. The informant had provided McGhee information on more than ten occasions prior to the matters involving Defendant Allen. At some point during the relationship between the informant and Detective McGhee, the informant had been facing drug-related criminal charges involving trafficking in crack cocaine and he was cooperating, at least for part of the time, in hopes of having the drug charges dismissed. The informant also received

payment for his services including payment for providing information regarding Mr. Allen.

On June 2, the informant and Detective McGhee met. The informant placed a phone call to Defendant Allen to arrange for the purchase of crack cocaine. Preparations were then made for a meeting between the informant and Defendant Allen. During those preparations, Detective McGhee searched the informant and found no illegal contraband on that individual. The informant was then provided with law enforcement funds to purchase crack cocaine from Defendant Allen. The informant was also provided a digital recording device to capture any conversations between the informant and Mr. Allen during the scheduled transaction. At about 6:00 p.m. on the evening of June 2, the informant left the meeting with Detective McGhee and drove directly to 1053 Sunflower Court in Jeffersonville, Indiana without making any stops along the way. The travel of the informant was observed by members of law enforcement who conducted surveillance that evening.

The telephone call that had been placed to set up the meeting was made to a cellular telephone number that Detective McGhee knew to be Defendant Allen's number. The telephone call was most likely recorded because Detective McGhee recalls having listened to it immediately after the call was made. He recognized Mr. Allen's voice because he has known Mr. Allen since he was a small child.

Detective McGhee participated in the surveillance and observed Mr. Allen at the door of 1053 Sunflower Court address at one time. According to Detective McGhee

four male individuals, including the informant, were present at the apartment during the time that the informant was there. The informant had been given \$900 to purchase approximately one ounce of crack cocaine from Defendant Allen.

The informant was in the apartment for a short period of time and then left and drove directly to a predetermined location at which time he turned 10.4 grams of crack cocaine over to Detective McGhee that he indicated he had received from Mr. Allen. Subsequently, that evening, Detective McGhee attempted to listen to the recording of the conversation that the informant said occurred between him and Mr. Allen, but the recording was not very intelligible. The \$900 was never recovered by law enforcement. The informant was searched at the post-transaction meeting and no additional crack cocaine nor the money was found. The informant told Detective McGhee that he had provided Allen \$900 and Allen had given him the crack cocaine.

A second meeting was then scheduled between the informant and Defendant Allen. Similar searching procedures were conducted prior to this second meeting during which the informant was searched and no contraband or extra funds were found. The informant was not provided a recording device for this second meeting. The purpose of the second meeting was because the amount of crack cocaine obtained earlier was less than the full ounce that had been ordered and paid for. The informant was surveilled to the 1053 Sunflower Court address again and made no stops along the way. After being in the residence for a short period of time, the informant left and traveled directly, without stops, to a predetermined meeting location. At that time, the informant turned over one additional gram of crack cocaine. Mr. Allen was not observed by Detective

McGhee at any point during the second meeting with the informant. No further action was taken by law enforcement regarding Defendant Allen and his purported distribution of crack cocaine between June 2 and June 18, 2004.

At about 9:30 P.M. on June 18, Detective McGhee received a phone call from the same confidential informant indicating that Defendant Allen and Jamie Sheckles were in an apartment in Jeffersonville, Indiana and that he had observed Defendant Allen and Sheckles with nine ounces of crack cocaine in a black bag. The apartment was described by the informant to be the residence of Lavar Harrison. (Detective McGhee understood that Lavar Harrison was either a friend of Defendant Allen or that Mr. Harrison's girlfriend is related to Mr. Allen.) Upon learning that information, Detective McGhee went to the vicinity of the apartment indicated by the informant and began surveillance. He also contacted FBI Special Agent Paul Meyer and Lieutenant Kevin Kavanaugh of the Jeffersonville Police Department in order to obtain their assistance in continuing the investigation. Detective McGhee arrived near the location of the apartment within five minutes of receiving the confidential informant's telephone call. After being on surveillance for approximately thirty minutes, Detective McGhee observed Jamie Sheckles exiting the apartment and getting into a vehicle and departing. Mr. Sheckles had nothing in his hands when he left that apartment. After Sheckles left, the informant made phone calls to Detective McGhee indicating that the cocaine was still in the apartment with Defendant Allen. At approximately 11:00 p.m., the informant called Detective McGhee to report that Allen was about to leave the apartment with the cocaine in a black bag and that Allen would be driving a 1988 brown

Oldsmobile. Shortly thereafter, Detective McGhee observed Allen leaving the apartment carrying a black bag. Allen walked directly to a brown Oldsmobile and opened the trunk with the black bag in his hand. While Allen was doing that, Detective McGhee received another phone call from the confidential informant indicating that Allen had just departed with the black bag, going to a brown Oldsmobile, confirming what Detective McGhee observed. Detective McGhee conveyed this information to other law enforcement agents, specifically to Agent Meyer and Lieutenant Kavanaugh. Detective McGhee observed Allen leaving the area of the apartment driving the Oldsmobile. He did not observe any passengers in the Oldsmobile with Allen.

Lieutenant Kenny Kavanaugh had a conversation with Detective McGhee on the evening of June 18, 2004, during which he was told by Detective McGhee that Defendant Allen would be traveling in a four-door brown 1988 Buick bearing Indiana license plate number 10A8581 and that a credible and reliable confidential informant observed Allen in possession of a significant quantity of crack cocaine, that is, over three grams. Lieutenant Kavanaugh was in an unmarked police vehicle shortly after talking with Detective McGhee and was positioned around the intersection of Allison Lane and Middle Road in Jeffersonville, Indiana. While at the location he observed Defendant Allen driving the vehicle that Detective McGhee had described. The first thing that Lieutenant Kavanaugh noticed was that the vehicle was speeding. The Buick was traveling from Allison Lane westbound on Middle Road. Lieutenant Kavanaugh could hear the engine accelerating and he began following the Buick. Middle Road is a two-lane road that runs east and west in the city of Jeffersonville. It interchanges with

Ninth Street. The posted speed limit in that area is 35 mph. Although Lieutenant Kavanaugh had hand-held radar equipment available to him in his vehicle, he did not use it that evening. However, he did “pace” the Buick by watching the speed of his own vehicle as he followed the Buick being drive by Defendant Allen. By Lieutenant Kavanaugh’s calculation, Defendant Allen was traveling at approximately 50 mph in a 35 mph speed limit zone. He continued to follow the Buick until it came to an area where there was ambient light and where Lieutenant Kavanaugh felt he was in a safe position to effect a traffic stop, which turned out to be at the intersection of 8th and Larkspur. The police vehicle driven by Lieutenant Kavanaugh had emergency lights and was, as he described it, a “semi-marked” vehicle. Lieutenant Kavanaugh illuminated his emergency lights to stop the Buick. Shortly after the emergency lights were turned on, the Buick stopped. The stop took place at approximately 11:20 P.M.

Prior to making that stop, Lieutenant Kavanaugh had experienced a previous encounter with Defendant Allen. This took place in approximately 2001. Lieutenant Kavanaugh had stopped Defendant Allen in a stolen vehicle and Mr. Allen ran from the vehicle upon the occasion of that stop. Consequently, Lieutenant Kavanaugh approached the Buick cautiously after it had stopped. Lieutenant Kavanaugh went to the driver’s side window of the Buick and asked Mr. Allen for his driver’s license. He then returned to his vehicle to run a standard driver’s license inquiry. Mr. Allen was unable to provide a registration for the vehicle. Lieutenant Kavanaugh also informed Mr. Allen that the reason for the stop was that he was speeding.

While Lieutenant Kavanaugh was conducting the license check, he continued to observe Defendant Allen's behavior. Allen was acting nervously and anxiously. On at least two occasions Allen turned around and looked back at Lieutenant Kavanaugh as the Lieutenant was seated in his vehicle. Lieutenant Kavanaugh interpreted that type of activity and behavior as being associated with a person who is looking for an opportunity to run from the scene. Lieutenant Kavanaugh is an eleven-year veteran of the Jeffersonville Police Department and had numerous experiences in making traffic and other stops.

The license check showed no adverse information about Mr. Allen's license and no outstanding warrants were indicated. Lieutenant Kavanaugh then began writing a speeding ticket for Defendant Allen. According to Lieutenant Kavanaugh, it takes approximately three to four minutes to write a ticket of that sort. After completing the ticket, Lieutenant Kavanaugh returned to the driver's side door of the Buick. He did not take the ticket with him due to the fact that Mr. Allen was turning around and acting nervously. Lieutenant Kavanaugh did not want to have the ticket, the license and a flashlight in his hand. He wanted his hands to remain free because of concern about the activities of Mr. Allen. When Lieutenant Kavanaugh arrived back at the driver's side window of the car of the Buick, he saw an open cell phone on Mr. Allen's lap. Prior to running the driver's license inquiry, Lieutenant Kavanaugh had required Mr. Allen to place the cell phone in the glove box of the Buick so he could not place a phone call. When he returned, the cell phone was opened up on the lap of Mr. Allen and it appeared to Lieutenant Kavanaugh that Mr. Allen was about to use the cell phone.

Lieutenant Kavanaugh also noticed Mr. Allen moving his hands around his lap area in the vicinity of his waistline. Mr. Allen was wearing baggy clothing and Lieutenant Kavanaugh asked him whether he had something around his waistline. Allen indicated that he had another cell phone on his waist. Allen continued to look around the Buick and appeared anxious. Lieutenant Kavanaugh asked Mr. Allen whether he had been wearing his seatbelt and Mr. Allen indicated that he had not. At that point, Lieutenant Kavanaugh asked Mr. Allen to step out of his vehicle to pat him down out of concern for officer safety. Mr. Allen did step out of the vehicle was taken to the back of the vehicle near the trunk on the left side to have the pat down conducted.

Lieutenant Kavanaugh had substantial experience with drug investigations and knew from his training and experience that individuals involved with crack cocaine often carry firearms. That connection with firearms and drugs was also common in the Jeffersonville, Indiana area. Because of the Defendant's prior history and the way that he was acting that evening, Lieutenant Kavanaugh directed Allen to the trunk area of the vehicle and took hold of the bottom of the Defendant's shirt to escort him back to the trunk area for the pat down. The neighborhood in which the stop occurred was a populated area.

Without even being asked, as soon as Defendant Allen came out of the vehicle he made a statement to Lieutenant Kavanaugh to the effect that if Kavanaugh searched the Buick it would be an illegal search. Kavanaugh told Defendant Allen that he had not requested permission to search the vehicle. Defendant Allen repeated his comments about how any search that would be conducted by Kavanaugh would be an illegal

search. Lieutenant Kavanaugh was not asking questions of Defendant Allen at this time, but rather was allowing the Defendant to talk freely. The pat down did not produce any dangerous weapons or anything else of note. After the pat down was completed, Lieutenant Kavanaugh informed Mr. Allen that the pat down had been conducted for officer safety and that he wanted to verify that Mr. Allen did not have any type of weapon on his person or in his possession. He then stated to Mr. Allen that if there was illegal contraband such as weapons or narcotics inside the vehicle, he should indicate where they were located. In response to that, Mr. Allen reiterated that any search of the vehicle would be illegal. Lieutenant Kavanaugh then reminded Defendant Allen that he was not asking to search the vehicle at that time; he was only trying to find out whether the Defendant had anything in his possession. Shortly thereafter, Lieutenant Kavanaugh officially asked Mr. Allen for permission to search the vehicle to which Allen responded that a search would be illegal. Lieutenant Kavanaugh said something to the effect of "Do you give consent or not?" and the Defendant replied in the negative. Upon hearing that, Lieutenant Kavanaugh informed Mr. Allen that he had information that illegal drugs were in the Defendant's possession and he would be contacting a drug canine officer to do an exterior search of the vehicle. Lieutenant Kavanaugh testified that Mr. Allen was not free to leave at that point. Lieutenant Kavanaugh then contacted the canine handler, Officer Leverett, at approximately 11:32 P.M. The Defendant continued to talk about how a search would be illegal as Lieutenant Kavanaugh waited for Officer Leverett and the canine to arrive. It took Officer Leverett approximately twelve to fifteen minutes from the time of initial contact to arrive at the scene of the stop, according to Lieutenant Kavanaugh. Lieutenant Kavanaugh had not given Mr. Allen his

speeding ticket as of this time and Allen was not yet handcuffed; nonetheless, he was not free to leave the scene. The *Miranda* rights were not read to Mr. Allen prior to the canine search.

When Officer Leverett received the call from Lieutenant Kavanaugh, he was at a hotel with the police chief and the mayor of Jeffersonville. The Jeffersonville Police Department was hosting a national convention for the North American Police Work Dog Association being held at that hotel. This was essentially a convention for canine teams. The hotel was approximately three miles from Officer Leverett's home. This is relevant because the canine that was to be used to conduct the search, Dutch, was in the backyard of Officer Leverett's residence. Upon receiving the call, Officer Leverett immediately left the hotel and proceeded to his house where he picked up Dutch. Officer Leverett and Dutch then went immediately to the scene of the traffic stop.

Officer Denver Leverett is a four and a half year veteran of the Jeffersonville Police Department. He has worked as a canine officer for approximately four of those years, all of which have been spent with his companion, Dutch. As of the time of the search in question, Officer Leverett and Dutch had been working together approximately three years. Dutch is trained for dual purposes, that is to search for utility purposes such as locating individuals in buildings and other locations to aid in criminal apprehension as well as to do drug searches. He is trained to alert to the odors of cocaine, marijuana, heroin and methamphetamine. Officer Leverett and Dutch have been through an extensive certification process which requires annual recertification. With respect to the drug aspect of certification, the dog is tested on sixteen odor

detections consisting of eight in vehicles, four in a room, and four in either luggage or lockers. The certification process is conducted by a master trainer affiliated with the North American Police Work Dog Association. During each certification process, the dog has to correctly locate fifteen out of the sixteen odors. If more than one odor is missed, the dog is not certified. Prior to the search that is the subject of the motion before the court, Dutch was last certified on February 12, 2004. During that testing process, Dutch correctly identified and located all sixteen drug odors. Cocaine was one of the substances used during that test. Cocaine was one of the four odors used in the room, two of the eight odors in the vehicle, and one of the four odors in the locker. Dutch's method of alerting to the odor of drugs is what is called an aggressive alert. This means he will either scratch or bite at the location of the odor. During each of the four years that Leverett has spent with Dutch, Dutch has successfully passed certification.

Dutch does alert on numerous occasions in the field in which no controlled substances are found. Officer Leverett attributes this to residual odors, giving an example that if a person touches drugs and then later touched his gas tank a well trained dog will alert to the gas tank. The Jeffersonville Police Department keeps a record of whether drugs are found each time Dutch is used. This record would contain information about situations in which Dutch alerted and no drugs were found. During the search that is the subject of motion before the court, Dutch alerted in four locations in the vehicle. Drugs were found in only two of those locations. According to Officer Leverett, Dutch will not react to cat or dog food or even human food. The search dogs

are trained with various distractions to make sure that they only alert on the materials for which they are trained to search. Dutch is rewarded when he makes an accurate alert by being given a tennis ball. He is trained so that he will not alert to a tennis ball but he receives it as a reward for an accurate alert.

Officer Leverett projected that it took him approximately five to seven minutes to get from the hotel to his house and then approximately two or three more minutes to get to the scene of the stop. The stop was conducted within one half mile of Officer Leverett's residence. His total estimate of the time from his receipt of the call from Lieutenant Kavanaugh to his arrival at the scene is twelve to fifteen minutes.

Upon arriving at the scene of the stop, Officer Leverett was briefed by Lieutenant Kavanaugh. Officer Leverett then retrieved Dutch from the police unit and performed what is called a parade search. That consisted of a walk of Dutch around the vehicle. This took approximately thirty seconds. The parade search began on the right side and then went to the left side of the vehicle. During the parade search Dutch gave an aggressive alert by scratching at the rear driver's side trunk area at the area in the immediate vicinity of the left tail light. Officer Leverett noticed a distinct behavior change in Dutch in that area. His tail began wagging, his ears went up, he shut his muzzle and began breathing in and out very heavily. When he gets to the greatest odor of drugs, that is when he begins scratching or biting and, in this instance he began scratching at the trunk area of the automobile. He was then given a reward of a tennis ball and shortly thereafter Leverett began a search with Dutch of the interior of the vehicle. When Dutch was placed in the vehicle, the doors were closed and Dutch was

allowed to conduct the search on his own. He alerted to three separate places inside the vehicle, one of which produced additional amounts of crack cocaine. Dutch alerted in the interior of the car to the area between the front passenger seat and the center console and in the crack of the seat where cocaine was located. He also alerted at the rear driver's side door panel and the rear driver's side seat where there was a crack that leads to the trunk area. These latter two alerts did not lead to a discovery of drugs.

Then the trunk of the vehicle was opened and Dutch was allowed into the trunk and continued his search. In doing so, Dutch located the black duffle bag and began scratching and biting the bag and picked it up. He was told to drop the bag, which he did, and then he was rewarded. The bag was later removed from the trunk. When the bag was opened, Officer Leverett saw a large quantity of powder and crack cocaine inside the bag. At no time prior to, during, or after the search by Dutch did any of the officers associated with the investigation seek a search warrant.

Lieutenant Kavanaugh also noticed Dutch's scratching and pawing at the left rear trunk area and in and around the bumper as well. Lieutenant Kavanaugh informed Mr. Allen, who was standing right beside him, that Dutch was alerting to the vehicle and then, according to Lt. Kavanaugh, Mr. Allen blurted out, "It's there inside the vehicle." Mr. Allen repeated that on more than one occasion, and he made reference to something being in between the seats. After hearing Allen make that second statement, Detective McGhee advised Mr. Allen of his *Miranda* rights. Lieutenant Kavanaugh testified that he had notified Detective McGhee by radio of the dog alert, that the statements by Mr. Allen had occurred, and that Detective McGhee arrived on the scene

on foot very shortly after the radio notice.³ After the advice of rights was given, Officer Leverett placed Dutch inside the vehicle and located the drugs between the seat. Then Mr. Allen made a statement to the effect that the dog should be taken inside the car, expressing a desire in getting the situation ended so that he would be transported to the jail and the matter would be concluded. However, the search was not ended because Lieutenant Kavanaugh sensed that Mr. Allen was too anxious to have the search end. The trunk was then opened and the dog was allowed to get in the trunk and alerted to the black bag. The bag was then taken from the trunk after the dog had lifted it. After the black bag was found, even before it was opened, Mr. Allen made statements to the effect that "He was done, just throw me under the jail, that's it." When the black bag was opened by officers on the scene it was found to contain over 100 grams of cocaine.

A Jeffersonville Police Department Officer Parker was also on the scene. In the report that Lieutenant Kavanaugh prepared regarding the events of that evening, Mr. Allen was first placed in handcuffs after the dog alerted to the vehicle and prior to when Detective McGhee read the *Miranda* rights to him. The report that Lieutenant Kavanaugh prepared indicates that Officer Parker read the *Miranda* rights to Defendant Allen. Lieutenant Kavanaugh testified that this inconsistency was in fact an error, perhaps of the typographical nature. He insisted that Detective McGhee read those

³ However, Det. McGhee testified that he heard Lt. Kavanaugh ask Allen about narcotics activity or narcotics being in the car, and that Allen's remark about it (referring to drugs) being inside the vehicle was in response to that inquiry. This would suggest that Det. McGhee was on the scene earlier than the time indicated by Lt. Kavanaugh. This conflict is resolved below by the finding that the sequence related by Det. McGhee seems more accurate.

rights to the Defendant. Detective McGhee corroborated that testimony.⁴ Even though advice of rights forms which would allow the written waiver of the *Miranda* rights were available to the officers on the night of this arrest, no such form was used.

When Detective McGhee arrived at the scene of the traffic stop, he saw Lieutenant Kavanaugh standing with the Defendant. FBI Agent Meyer was also on the scene. Detective McGhee overheard Mr. Allen make the statement “It’s in there, it’s there, it’s inside the vehicle.” On direct examination, Detective McGhee testified that this statement was spontaneous. However, on cross-examination, he clarified that this statement was elicited by Lieutenant Kavanaugh’s questioning of Allen about narcotics activities or whether Allen’s vehicle contained narcotics. This clarification is consistent with Lieutenant Kavanaugh’s testimony that he asked Mr. Allen whether there were any weapons or narcotics inside the vehicle. Other law enforcement personnel were also on the scene, but not standing as near Mr. Allen as Lieutenant Kavanaugh was. Detective McGhee testified that after hearing that statement, he advised Mr. Allen of his *Miranda* rights. He did that by reading off of a card to him. In response to that advice of rights, Mr. Allen said that he understood his rights and repeated basically the same thing, that “It’s in there, it’s inside the vehicle.” Detective McGhee also observed the arrival of canine Officer Denver Leverett and the dog-assisted search conducted by him. Detective McGhee observed the discovery of approximately ten grams of crack cocaine from the interior of the vehicle and approximately 184 grams of crack cocaine from the

⁴ The court concludes that the report is in error and that Detective McGhee, rather than Officer Parker, gave the *Miranda* warnings.

black bag in the trunk along with 95 grams of powder cocaine and digital scales. The bag containing the cocaine and the scales in the trunk of the Buick appeared to Detective McGhee to be the same bag he saw Mr. Allen with at the prior location. Prior to hearing Mr. Allen indicate that drugs were in the vehicle, Detective McGhee heard Lieutenant Kavanaugh inquire about whether drugs were contained in the car. The questioning of Defendant Allen which took place prior to the advice of *Miranda* rights went on for just a few minutes after the canine arrived. Detective McGhee confirms that Mr. Allen was not free to leave from the time he was stopped for speeding until he was read his *Miranda* rights.

The book-in form used at the Clark County Jail regarding the arrest of Mr. Allen indicates that the time of the arrest was 0014 on June 19, 2004. Detective McGhee indicated that the jail is approximately two miles from the scene of the traffic stop and arrest of Mr. Allen and it takes a couple of minutes to get there. According to Detective McGhee, the jail staff signed the commitment form at 12:55 A.M. on June 19, 2004.

II. CONCLUSIONS OF LAW

A. THE SEARCH WAS LEGAL

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. Generally, a search is considered unreasonable unless supported by a warrant issued upon probable cause. However, this general rule has

exceptions, and the Government bears the burden of proving that an exception applies. *United States v. Basinski*, 226 F.3d 829, 833 (7th Cir. 2000).

Defendant moves to suppress all evidence and statements made by him during and subsequent to his encounter with the police. He argues that his extended detention and arrest were without probable cause and that the search of his vehicle was without probable cause, consent, or a warrant, all in violation of his constitutional rights. Defendant contends that the officers lacked reasonable suspicion and probable cause to continue detaining him past the time necessary to issue a traffic citation and that the increased deprivation of liberty was not justified. The Government responds that the traffic stop and search of Defendant's vehicle were lawful, and, alternatively, the evidence inevitably would have been discovered by lawful means.

Defendant first seems to argue that the initial stop of his vehicle by the police was unlawful.⁵ However, it is indisputable that the initial stop of Mr. Allen's vehicle for speeding was consistent with the Fourth Amendment's requirement that seizures be reasonable under the circumstances. A police officer's "decision to stop an automobile is reasonable where the officer has probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810 (1996) (holding traffic stop did not violate Fourth Amendment where officers had probable cause to believe that a traffic violation has occurred); *United States v. Rogers*, 387 F.3d 925, 934 & n.9 (7th Cir.

⁵ On page three of his motion, Defendant contends that his initial stop was illegal, but on page four he indicates that the stop was justified. The court assumes that Defendant intends to argue that the initial stop was unlawful.

2004) (officer's observation of erratic driving gave him probable cause to believe driver had committed traffic violation and authorized stop of vehicle); *United States v. Hernandez-Rivas*, 348 F.3d 595, 599 (7th Cir. 2003) (traffic violation of speeding gave police probable cause to stop vehicle). The court's findings establish that Lt. Kavanaugh had probable cause to stop Defendant's vehicle when the officer observed Defendant driving the 1988 Buick at a speed in excess of the posted speed limit. Therefore, Lt. Kavanaugh's decision to stop the vehicle was reasonable under the Fourth Amendment.

Defendant next argues that the duration and scope of the detention beyond that necessary to issue him a citation for speeding was unreasonable and excessive. While a "seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to" issue a ticket, *Illinois v. Caballes*, 125 S. Ct. 834, 837 (2005); see *United States v. Jacobsen*, 466 U.S. 109, 124 (1984), that is not what occurred here. Beyond Lt. Kavanaugh's probable cause to stop Defendant's vehicle for speeding, the officers on the scene also had probable cause to detain and arrest Mr. Allen based on their reasonable belief that he had engaged in several illegal drug transactions. The officers also had probable cause to search the Buick for crack cocaine.⁶

⁶ If the officers had lacked probable cause to arrest and detain Mr. Allen, the continued detention beyond the time needed to issue a traffic citation for the purpose of awaiting the canine unit's arrival might have required closer scrutiny to determine whether the length of the detention unreasonable. However, the continued detention and arrest in this case were supported by probable cause, so no further analysis of that time frame is required.

“Probable cause to arrest exists when a reasonably cautious and prudent person would be justified in believing that the individual to be arrested had committed, was committing or was about to commit a crime.” *United States v. Askew*, 403 F.3d 496, 507 (7th Cir. 2005). An officer’s corroboration of the information provided by an informant’s tip can establish probable cause. *United States v. Banks*, 405 F.3d 559, 570 (7th Cir. 2005) (informant’s tip that drug deal would take place at a particular address at a particular time, corroborated by police surveillance established probable cause); *United States v. Navarro*, 90 F.3d 1245, 1254 (7th Cir. 1996) (“[B]ecause the surveillance preceding the stop corroborated the information from the informant, the law enforcement officers had probable cause for both the arrest and search”). The tips from the CI along with the corroboration by police surveillance establish probable cause for the arrest and search of Mr. Allen and search of his Buick. The informant, who on numerous prior occasions had provided reliable information to Detective McGhee resulting in drug arrests and seizures of drugs and who never had provided false information, advised McGhee that he could purchase crack cocaine from Mr. Allen. On two occasions, it was arranged for the informant to meet with Mr. Allen for the purpose of purchasing or obtaining crack cocaine from him. Surveillance was conducted by law enforcement, including Detective McGhee. The informant was searched by law enforcement before each meeting and no illegal contraband was found; after meeting with Mr. Allen and directly returning to law enforcement, the informant was found to have crack cocaine. He reported to Detective McGhee that Mr. Allen had given him the crack cocaine in exchange for money. Then, on June 18, the informant contacted Detective McGhee to report that he had observed Mr. Allen and Jamie Sheckles in an

apartment with nine ounces of crack cocaine in a black bag. Detective McGhee began surveillance of the apartment and observed Mr. Sheckles leave without anything in his hands. The informant called Detective McGhee and indicated that Mr. Allen was about to leave with the cocaine in a black bag and would be driving a 1988 brown Oldsmobile. A short while later, the detective observed Mr. Allen leaving the apartment carrying a black bag. Allen walked to a brown Oldsmobile and opened the trunk with the bag in his hand. About the same time, the informant called once again and confirmed what the detective had just witnessed. Detective McGhee conveyed this information to FBI Agent Meyer and Lieutenant Kavanaugh. He then observed Mr. Allen drive away in the Oldsmobile. All of this information known to law enforcement officers McGhee, Meyer and Kavanaugh gave them reason to believe that Mr. Allen had in his possession nine grams of crack cocaine. Therefore, the officers had probable cause to arrest Mr. Allen, not only for that possession, but also for the prior distribution transactions with the CI.

Defendant is correct in asserting that he effectively was under arrest after the time lapsed which was necessary to issue him a citation for speeding. After conducting a pat down search of Mr. Allen, Lieutenant Kavanaugh advised him that he believed illegal drugs were in Mr. Allen's possession and he was going to contact a drug canine officer to perform an exterior search of the vehicle. No reasonable person in Mr. Allen's shoes would have felt free to leave at that point, knowing what the officers believed and knowing that the canine would be (and was) summoned. Indeed, Lieutenant Kavanaugh testified that Mr. Allen was not free to leave at that time and Detective McGhee testified that Mr. Allen was not free to leave from the time he was first stopped

for speeding. Thus, the detention of Mr. Allen progressed beyond a mere traffic stop and had ripened into a custodial arrest. Thus, Mr. Allen's claims regarding the duration and scope of his detention do not implicate constitutional concerns.

When an officer has reasonable suspicion that an occupant of the vehicle is engaged in illegal activity in addition to that which justified a traffic stop, the officer may prolong the stop to investigate that activity. See *United States v. Walden*, 146 F.3d 487, 490 (7th Cir. 1998) (information returned in license check indicating that defendant had prior arrests for weapons offenses and armed robbery and there was an "officer safety alert" provided officer with reasonable suspicion to investigate beyond seatbelt violation). Further, an officer's reasonable suspicion that the occupant of a vehicle is engaged in drug activity justifies calling the drug-detection unit and detaining the occupant while awaiting the unit's arrival. See *United States v. Rogers*, 387 F.3d 925, 934 n.9 (7th Cir. 2004) (following lawful traffic stop, given driver's nervous behavior, odd odor emanating from vehicle and driver's prior drug history, the officer had reasonable suspicion to believe vehicle occupants were engaged in drug activity and was thus justified in calling canine unit and may have had probable cause to arrest driver and search vehicle incident to arrest); *United States v. Finke*, 85 F.3d 1275, 1281 (7th Cir. 1996) (officer had reasonable suspicion that vehicle was transporting drugs which made it reasonable to call for canine unit and continue questioning occupant). Lieutenant Kavanaugh had reasonable suspicion to believe that a citation was the least of Mr. Allen's worries: Kavanaugh had reason to believe that Mr. Allen was engaged in illegal drug activities based on the information conveyed from Detective McGhee as well as

Mr. Allen's suspicious and anxious behavior during the stop. This behavior included Mr. Allen's turning around during the license check, looking around nervously, removal of the cell phone from the glove box, and his volunteering that any search of the Buick would be an illegal search despite not yet having been asked to permit such a search. All of this gave Lieutenant Kavanaugh at least reasonable suspicion that Mr. Allen was engaged in drug activity which justified calling the canine officer and awaiting his arrival. Officer Leverett arrived on the scene within fifteen minutes of receiving the call from Lieutenant Kavanaugh. This short delay for a person already under arrest was not unreasonable and was necessary to allow Leverett and Dutch to respond to the call. In fact, Lieutenant Kavanaugh had probable cause to believe that Mr. Allen was engaged in illegal drug activities, which justified his arrest and the search of the passenger compartment of his vehicle incident to his arrest. *New York v. Belton*, 453 U.S. 454, 460 (1981) (holding that when an officer makes a lawful custodial arrest of an occupant of a vehicle, he may incident to that arrest, search the passenger compartment of the vehicle).⁷

Dutch's positive alert to the odor of drugs (recall that he is trained to alert to the odors of cocaine, marijuana, heroin and methamphetamine) in the Oldsmobile, including the trunk, confirmed the officers' belief that it was reasonable to search the entire vehicle for drugs. See *United States v. Carpenter*, 406 F.3d 915, 916 (7th Cir. 2005); *United States v. Rogers*, 387 F.3d 925, 934 n.9 (7th Cir. 2004). While it is true that

⁷ The search of the passenger compartment led to the discovery of crack which made the subsequent search of the trunk reasonable under the circumstances.

Dutch has alerted on numerous occasions when no controlled substances were found, and did so here (drugs were found in two of the four locations in the Buick to which Dutch alerted), he is a well-trained drug detection dog, having successfully passed certification the last four years; he performed perfectly on his last certification. And, Officer Leverett's explanation that Dutch alerts to residual odors is unchallenged. Certainly, the two unproductive alerts inside the vehicle in this instance are credibly explained by residual scents. Given that the vehicle was being used to transport sizeable quantities of cocaine in two separate locations in the car on that occasion, it is certainly plausible that cocaine was near those two unproductive sites either that same night or during some similar event. Dutch's positive alert added to the officers' probable cause to arrest Allen and search his vehicle for drugs which probable cause already existed even before the dog sniff took place. In other words, Dutch's alert was the icing on the cake.

Moreover, it is well-established that law enforcement officers may conduct a warrantless search of a vehicle when they have probable cause to believe that the vehicle contains contraband or evidence of a crime. *California v. Acevedo*, 500 U.S. 705, 717 (1984); *Carroll v. United States*, 267 U.S. 132, 153-56 (1925); *United States v. Huebner*, 356 F.3d 807, 813 (7th Cir. 2004); *Ochana v. Flores*, 347 F.3d 266, 271 (7th Cir. 2003). The search lawfully may extend to any part of the vehicle in which evidence or contraband might be concealed, including, the trunk, closed compartments and containers. *United States v. Ross*, 456 U.S. 798, 818-21 (1982) (automobile exception applies to closed containers inside the car and "every part of the vehicle that might

contain the object of the search”); *United States v. Ledford*, 218 F.3d 684, 688 (7th Cir. 2000). The search is lawful even if the driver is outside of and away from and unable to access the vehicle at the time of the search. *United States v. Washburn*, 383 F.3d 638, 642 (7th Cir. 2004) (defendant had been placed in back of patrol car before search). Given Detective McGhee knowledge based on the informant’s tips and his surveillance, as well as his communications to Lieutenant Kavanaugh and Agent Meyer about the informant’s statements and the police surveillance and corroboration of the informant, McGhee, Kavanaugh and Meyer all had probable cause to believe that the Oldsmobile contained crack cocaine. Thus, the officers could have conducted a search of the vehicle, including all parts such as the trunk and any containers within including the black bag, without a warrant, and even without actually arresting Allen.

B. SOME STATEMENTS ARE SUPPRESSED

During the hearing on the motion to suppress, some concerns were raised regarding the admissibility of certain incriminating statements made by Mr. Allen at the scene. As a general rule, a defendant must be advised of his *Miranda* rights before he is subjected to custodial interrogation by law enforcement; otherwise the defendant’s statements will be inadmissible. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). In *Miranda* the Supreme Court defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* The Supreme Court expanded on this definition in *Rhode Island v. Innis*, 446 U.S. 291 (1980): “[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either

express questioning or its functional equivalent,” *id.* at 300-01, the latter which means “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Id.* at 301; *see also United States v. Abdulla*, 294 F.3d 830, 834 (7th Cir. 2002). However, statements that are not the result of police interrogation but which are volunteered are not subject to *Miranda*. *Miranda*, 384 U.S. at 478; *Abdulla*, 294 F.3d at 835; *United States v. Westbrook*, 125 F.3d 996, 1002 (7th Cir. 1997).

Mr. Allen’s repeated comments to Lieutenant Kavanaugh that any search of the vehicle would be an illegal search are not subject to suppression. Mr. Allen made these statements as soon as he exited the vehicle. They were not made in response to express police questioning or its functional equivalent. Lieutenant Kavanaugh had no reason to know that asking Mr. Allen to exit the vehicle for a pat down search was reasonably likely to elicit such statements from Mr. Allen. Mr. Allen initiated these statements on his own and he made them voluntarily. Thus, admission of these statements would not violate *Miranda*.

However, Mr. Allen’s repeated statements that “It’s there, it’s there, it’s inside the vehicle”, which were made in response to Lieutenant Kavanaugh’s questioning of Allen about narcotics activities, the vehicle’s contents, and whether there were any drugs in the vehicle should be suppressed. Both Lieutenant Kavanaugh and Detective McGhee testified that the Defendant was not free to leave at the time; and no reasonable person would have felt free to leave having been told, as Mr. Allen had, that he was suspected

of possessing illegal drugs and that the canine unit was being summoned to search the vehicle. Thus, Mr. Allen was in custody at the time of this questioning by Lieutenant Kavanaugh. Moreover, Mr. Allen had not been advised of his *Miranda* rights before the questioning which elicited the initial statements that “It’s there, it’s there, it’s inside the vehicle.” Thus, under *Miranda* these statements are inadmissible and will be suppressed.

This *Miranda* violation raises the question of whether Mr. Allen’s subsequent statements are admissible. In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Supreme Court declined to extend the “fruit of the poisonous tree” doctrine to non-coercive *Miranda* violations. *Id.* at 308-18; see also *United States v. Stewart*, 388 F.3d 1079, 1087-88 (7th Cir. 2004). The Court said:

It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. . . . [T]he admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Elstad, 470 U.S. at 309. The Court continued, “absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion” as to subsequent statements. *Id.* at 314. Thus, “a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.” *Id.* at 318.

The court finds that Mr. Allen's initial statements regarding his view that a search would be illegal were voluntary and not coerced. Lieutenant Kavanaugh merely asked Mr. Allen questions about narcotics activity and the contents of the vehicle. This occurred fairly early on during the stop of Mr. Allen and there is no indication that the police used any improper tactics calculated to undermine the suspect's ability to exercise his free will, in obtaining any of Mr. Allen's statements that "It's there, it's there, it's inside the vehicle."

Therefore, the court must decide whether Mr. Allen's post *Miranda* comments were knowingly and voluntarily made despite the *Miranda* violation with respect to his initial statements to Lt. Kavanaugh about the presence of drugs inside the vehicle. In doing so, the court "examine[s] the surrounding circumstances and the entire course of police conduct." *Elstad*, 470 U.S. at 318. According to Kavanaugh, when Dutch alerted to the odor of drugs at the vehicle, Lt. Kavanaugh informed Mr. Allen of this fact, and Mr. Allen blurted out, "It's there inside the vehicle." Kavanaugh also asserts that he repeated this statement more than once and referred to something (presumably the drugs to which Dutch had alerted) being in between the seats. If Kavanaugh is accurate, Mr. Allen spontaneously made these statements. He did not make them in response to police questioning or interrogation or any other police action that should have been known to be reasonably likely to elicit an incriminating response from Allen. Detective McGhee heard it differently, though, as noted above. If McGhee is accurate, Allen's first reference to the thing between the seats was responsive to a question from Lt. Kavanaugh. That version seems more accurate to the court. Nonetheless, even if

the *Miranda* warnings should have been given before asking such a question, the method of obtaining the information does not seem to overbear Mr. Allen's free will.

After Allen referred to something being in between the seats, he was given his *Miranda* warnings. Mr. Allen said that he understood his rights, and McGhee asserts that Allen repeated basically the same thing, that "It's in there, it's inside the vehicle." While this may seem to be a spontaneous statement at first glance, more careful scrutiny shows it to be related to and derivative of Lt. Kavanaugh's *pre-Miranda* questioning. But Allen's statement after Dutch rooted around the trunk several minutes later is another matter. After the black bag was located but before it was opened, Mr. Allen spontaneously made statements to the effect that "He was done, just throw me under the jail, that's it." This was blurted out after Mr. Allen had been given his *Miranda* warnings and indicated that he understood them. It was not said in response to police questioning. It was separated in time from Lt. Kavanaugh's questioning of Allen, and it was separated by a significant inculpatory event, that is, Dutch's discovery of the drug-filled gym bag.

Based on the facts and circumstances, the court finds that Mr. Allen's statement made after the bag was located in the trunk but subsequent to the *Miranda* violation was knowingly and voluntarily made. Therefore, that statement regarding being done and throwing him under the jail need not be suppressed as a result of the initial *Miranda* violation. The same is true regarding Allen's statement about his eagerness to end the search and be taken to jail. This was blurted out spontaneously after Dutch located the

drugs inside the passenger compartment. However, his earlier statements regarding drugs being inside the car are suppressed.

III. CONCLUSION

Accordingly, Defendant's Motion to Suppress is **GRANTED** with respect to Defendant's statement that "It's there, it's there, it's inside the vehicle." The same applies to any repetition of that statement, even if repeated after he was given the *Miranda* warnings. These statements, and only these statements, will be suppressed. However, the Motion to Suppress is **DENIED** in all other respects.⁸

ALL OF WHICH IS ENTERED this 19th day of August 2005.

John Daniel Tinder, Judge
United States District Court

⁸ Though it was not specifically addressed at argument or in the briefs, there should be no mention in the presence of the jury of the request for consent to search the vehicle addressed to Allen and his declination. He has a Constitutional right to decline consent and it would be prejudicial to him to refer to his exercise of that right.

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