IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL ACTION**
v.	:	
	:	**No. 01-648**
ANDREW LOPES	:	
	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 9th day of January, 2002, upon consideration of Defendant's Motion to Suppress Evidence (Document No. 19, filed December 5, 2001), Defendant's Memorandum of Law in Support of Motion to Suppress Evidence (Document No. 22, filed December 13, 2001), Government's Response to Defendant's Motion to Suppress Evidence and Incorporated Memorandum of Law (Document No. 24, filed December 18, 2001), and an evidentiary hearing held on January 3, 2002, **IT IS ORDERED** that, for the reasons set forth in the following Memorandum, Defendant's Motion to Suppress Evidence is **DENIED**.

MEMORANDUM

I. BACKGROUND

This case arises out of the arrest of defendant, Andrew Lopes, on March 20, 2001, for possession with the intent to distribute more than five grams of cocaine base ("crack cocaine") in violation of 21 U.S.C. § 841(a)(1). Defendant has moved to suppress evidence, arguing that a Philadelphia Police officer violated the Fourth Amendment in obtaining the crack cocaine. Specifically, defendant argues that the officer conducted a warrantless search unsupported by probable cause. The Court conducted an evidentiary hearing on January 3, 2002, and now denies defendant's motion.

The relevant facts for purposes of this motion are as follows:

At approximately 4:50 a.m. on March 20, 2001, Philadelphia Police Lt. Robin Hill drove his marked police vehicle onto the 5100 block of Viola Street in West Philadelphia. See January 3, 2002 Hearing Transcript ("Hr'g T.") at 5, 7. That particular block, Lt. Hill testified, is known to be a drop-off point for stolen vehicles. Id. at 6. After turning onto the block, Lt. Hill saw two men, defendant and another unidentified individual, standing on the north sidewalk directly next to a black 1994 Ford Mustang. Id. at 7. Lt. Hill stopped his vehicle in close proximity to the Mustang. Id. The two men appeared to look in Lt. Hill's direction; they then walked forward toward the front of Lt. Hill's vehicle and continued past the vehicle until they left the block. Id. at 8. After the men left the block, Lt. Hill remained in his vehicle for approximately ten minutes. Id. He did this because he knew of crimes taking place on the block and "wanted to see what would transpire." Id.

After observing the Mustang for about ten minutes, Lt. Hill lowered the window on the passenger side of his vehicle. Id. at 9. He could then hear that the Mustang, though unoccupied, was idling. Id. Lt. Hill subsequently entered the Mustang's tag into his mobile data terminal; the terminal returned information showing that the tag corresponded to a vehicle of a different make and model. Id. at 10-11. The tag report and the fact that the Mustang was still running suggested to Lt. Hill that the Mustang might be stolen. Id. at 11. Stolen vehicles are often left idling because, when operated without an ignition key – that is, when the vehicle has been "hot-wired" – it is difficult to shut off the ignition. Id. at 12.

Believing that the Mustang might be stolen, Lt. Hill exited his vehicle with his flashlight and walked to the passenger side of the Mustang, the area where defendant and the unidentified

male were previously standing. Id. at 11. He looked for specific signs of theft on the vehicle, including broken windows, broken door locks, or a damaged steering column,[1] and observed none. Id. at 11-12.

Lt. Hill then shined his light into the passenger-side window of the vehicle. Id. at 12. He saw a package or packages on the passenger's seat, but could not identify their contents because the window was tinted. Id. at 12-13. At that time, Lt. Hill did not try to open the passenger-side door, nor did he look through the window at the ignition. Id. at 28. Instead, he walked around to the driver side of the Mustang. Id. at 13. He did not shine his light on the windshield or in the driver-side window. Id. at 28, 31. He did, however, find that the driver-side door was unlocked; he opened it, seeking to determine whether there were keys or any ownership information in the Mustang. Id. When he opened the door, the interior dome light came on; at this point, Lt. Hill saw that the packages on the passenger's seat were three clear plastic bags containing what was later identified as crack cocaine. Id. The packages included fifty-nine small packets of crack cocaine, eight glass bottles of crack cocaine, and a twenty-eight-gram bulk package of crack cocaine. Id.

Immediately after Lt. Hill opened the door to the Mustang, defendant approached behind him and yelled: "Hey, that's my car." Id. Lt. Hill responded in question form: "This is your car?" Id. at 14. Defendant replied to Lt. Hill's question by stating: "Well, no, but I drove it here." Id. Lt. Hill then called for backup, and when backup arrived, he placed defendant under arrest and recovered the items from the passenger seat. Id. at 16.

After Lt. Hill had arrested defendant, he ran a second report on the Mustang's tag and

[1] A damaged steering column is evidence that a vehicle has been hot-wired. Id. at 12.

found that the tag did in fact correspond to the Mustang. Id. at 23. In running the initial report, Lt. Hill had entered one character incorrectly. Id. He testified, however, that, in running that first report, he entered what he believed to be the correct tag. Id. at 16.

II. DISCUSSION

A. THERE WAS PROBABLE CAUSE TO SEARCH THE VEHICLE.

"The Fourth Amendment generally requires police to secure a warrant before conducting a search." Maryland v. Dyson, 527 U.S. 465, 466 (1999) (citing California v. Carney, 471 U.S. 386, 390-391 (1985)). A long-established exception to this requirement is the "automobile exception." Id. (citing Carroll v. United States, 267 U.S. 132 (1925)). Under that exception, "where there [is] probable cause to search a vehicle 'a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained.'" Id. at 467 (citing United States v. Ross, 456 U.S. 798, 809 (1982)). The exception "allows warrantless searches of any part of a vehicle that may conceal evidence...where there is probable cause to believe that the vehicle contains evidence of a crime." Karnes v. Skrutski, 62 F.3d 485, 498 (3d Cir.1995) (quoting United States v. McGlory, 968 F.2d 309, 343 (3d Cir.1992)) (internal quotations omitted); see also United States v. DeSumma, 44 F. Supp. 2d 700, 707 (E.D. Pa. 1999) (DuBois, J.).

Extending this principle, courts have held that a warrantless search of a vehicle is justified if there is probable cause to believe that the vehicle is stolen. United States ex rel. Johnson v. Johnson, 340 F. Supp. 1368, 1374 n.10 (E.D. Pa. 1972) (Becker, J.) (citing Preston v. United States, 376 U.S. 364, 367-68 (1964)) ("It should be noted that probable cause to believe that an automobile is stolen apparently will justify an immediate warrantless search."). This is

because a stolen vehicle will obviously "contain[] evidence of a crime." Karnes, 62 F.3d at 498.

There is one other exception to the Fourth Amendment's warrant requirement applicable to this case – the "plain view" exception. Under that exception, a law enforcement officer may seize an item if (1) the officer was "lawfully on the premises," (2) discovery of the item was "inadvertent," and (3) "the incriminating nature of the item [was] immediately apparent." United States v. Scarfo, 685 F.2d 842, 845 (3d Cir. 1982). See also United States v. Burton, 193 F.R.D. 232, 240 (E.D. Pa. 2000) (DuBois, J.).

This case involves an interplay between the automobile and plain view exceptions. Defendant apparently does not challenge the seizure of the crack cocaine under either the second or third prongs of the plain view analysis. The parties agree – and the evidence is clear – that once Lt. Hill opened the door of the automobile, he inadvertently saw items that were quite obviously packets of crack cocaine. Accordingly, the central issue to disposition of defendant's motion is whether the Lt. Hill was "lawfully on the premises," Scarfo, 685 F.2d at 845, that is, whether he had probable cause to conduct a search of the automobile. More specifically, the Court must determine whether Lt. Hill had probable cause to believe that the automobile was stolen.

Probable cause to conduct a search exists "when, viewing the totality of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" United States v. Hodge, 246 F.3d 301, 305 (3d Cir. 2001) (citing Illinois v. Gates, 462 U.S. 213, 238 (1983)). As support for its argument that Lt. Hill had probable cause to enter the car, the government cites the Sixth Circuit's decision in Smith v. Thornburg, 136 F.3d 1070 (6th Cir. 1998), a case involving facts slightly similar to those presented here. In Smith, the

court identified nine factors supporting a finding of probable cause:

> (1) an unoccupied expensive car was haphazardly parked at 12:40 a.m. in a high crime area; (2) the engine was running; (3) the headlights were on; ([4]) the doors were unlocked; ([5]) the radio was turned on; ([6]) stolen vehicles are frequently abandoned with their engines running because the ignitions have been tampered with during the theft process; ([7]) [the location of the car] was known to the officers as a dumping ground for stolen vehicles and an area from which they had recovered many stolen vehicles; ([8]) the Dodge Stealth is a frequently stolen vehicle; and ([9]) the unlocked and running car was parked only a few feet from a drug bust and within easy reach of any member of the crowd which gathered.

Smith, 136 F.3d at 1075.

Similar to the Smith court, the Court concludes that, in this case, Lt. Hill had probable cause to believe the Mustang was stolen. The Mustang – a sports car – was parked in a location known to be a drop-off area for stolen vehicles. It was unoccupied and left idling, suggesting that it may have been operated without an ignition key. Moreover, Lt. Hill, upon running a tag inquiry, was informed that the tag appearing on the Mustang corresponded to a different vehicle. These three factors are sufficient to establish probable cause.

Defendant argues that Lt. Hill's error in entering the tag negates a finding of probable cause. The Court disagrees. It has long been established that "[b]ecause many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." Brinegar v. United States, 338 U.S. 160, 176 (1949). See also Garcia v. United States, 913 F. Supp. 905, 917 n.12 (E.D. Pa. 1996) (Van Antwerpen, J.) (citing Brinegar, 338 U.S. at 176). There is no evidence

suggesting that Lt. Hill acted unreasonably in erroneously entering the tag number. Thus, it is appropriate for the Court to consider the evidence of the erroneous tag report in determining whether there was probable cause.

Defendant argues in response that Lt. Hill could have, and should have, done more to determine whether the Mustang was in fact stolen. Continuing, defendant states: (1) Lt. Hill could have run the tag report a second time before he investigated the Mustang, (2) he could have looked through the passenger window to see if there was a key in the ignition, and (3) he could have shined his light through the windshield to look at the vehicle identification number and shined his light through the driver-side window to look at the steering column. Defendant is arguing, in essence, that Lt. Hill should have been required to "double-check" his probable cause analysis. However, defendant cites no case law holding that police officers must do so, and the Court concludes the law does not impose such a requirement.[2]

B. DEFENDANT LACKS STANDING.

The Court denies defendant's motion for an alternative reason – that defendant had no standing to challenge the officer's entry into the vehicle.[3]

"Standing to challenge a search requires that the individual challenging the search have a

---

[2] The Court notes that defendant's citations at oral argument to three cases purportedly supporting a conclusion that Lt. Hill's factual mistakes negate probable cause were off the mark. All of the cases cited, United States v. King, 244 F.3d 736 (9th Cir. 2001); United States v. Lopez-Soto, 205 F.3d 1101 (9th Cir. 2000); and United States v. Lopez-Valdez, 178 F.3d 282 (5th Cir. 1999) involve a police officer's mistake of law, as opposed to mistake of fact. The holdings in these three cases excluding evidence based on such mistakes are thus clearly distinguishable from the case presented here.

[3] Ordinarily, standing would be the Court's primary consideration. The parties, however, have neither briefed nor argued the issue. For this reason, the Court treats the standing question as an alternative ground for its disposition.

reasonable expectation of privacy in the property searched...and that he manifest a subjective expectation of privacy in the property searched." United States v. Baker, 221 F.3d 438, 441 (3d Cir. 2000) (citations omitted). The defendant challenging a search or seizure has the burden of proving standing. United States v. Ryan, 128 F. Supp. 2d 232, 235 (E.D. Pa. 2000) (Brody, J.) (citing United States v. Salvucci, 448 U.S. 83, 86-95 (1980)).

Much of the case law on standing to suppress evidence, like the present case, involved searches of automobiles. As the Third Circuit has explained, "whether the driver of a car has the reasonable expectation of privacy necessary to show Fourth Amendment standing is a fact-bound question dependent on the strength of his interest in the car and the nature of his control over it." Baker, 221 F.3d at 442. It is not necessary that the defendant seeking to establish standing own the automobile at issue. Id. The defendant must, however, demonstrate that there is "clear evidence of continuing possession and control, as well as no evidence that the driver obtained the car illegitimately." Id. at 443;see also Ryan, 128 F. Supp. 2d at 235.

The record before the Court with respect to the motion to suppress presents precious little information concerning defendant's expectations of privacy in the Mustang. The only mention of who owned or possessed the vehicle came in Lt. Hill's testimony that defendant yelled to Lt. Hill "'Hey, that's my car,'" Hr'g T. at 13, and then subsequently said that although he did not own the car, he "drove it here." Id. at 14. Lt. Hill's police investigation report reflects this same conversation. No other document or testimony provides any information as to what rights, if any, defendant had in the car.

To have standing, defendant must show "clear evidence of continuing possession and control." Baker, 221 F.3d at 443. The evidence before the Court does not meet that threshold.

There is, in short, no clear evidence of continuing possession and control. Accordingly, the Court concludes that defendant has not established a reasonable expectation of privacy in the vehicle. Defendant, therefore, has no standing to challenge Lt. Hill's entry into the vehicle. Cf. Ryan, 128 F. Supp. 2d at 236 (finding no standing where"car and license tags were not registered in [defendant's] name, no keys to the car were recovered, and there is no evidence that defendant was riding in the car with the owner's permission"). But see Baker, 221 F.3d at 442-43 (finding standing where defendant had borrowed car from friend, had been driving it for four to six weeks, and had possession of keys to car).

III. CONCLUSION

For the foregoing reasons, defendant's motion to suppress evidence is denied.

BY THE COURT:

_____

JAN E. DUBOIS, J.