

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

UNITED STATES	:	
	:	
v.	:	02-CR-644
	:	
EDWARD BELLINGER,	:	
	:	
Defendant	:	

EXPLANATION AND ORDER

Anita B. Brody, J.

November

2004

Currently before me is defendant Bellinger’s motion to suppress physical evidence. For the following reasons, this motion is denied.

BACKGROUND

Defendant Bellinger is charged with one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). Bellinger moves to suppress evidence of the firearm, a black Beretta .40-caliber handgun. At the hearing on this motion to suppress,¹ I found that on the night of April 2, 2002, Philadelphia Police Officer Ronald Green and his partner David Beckett observed a burgundy Oldsmobile with tinted windows. (Tr. 8/23/04 at 102-03.) Green had heard radio flash descriptions of a red, medium-sized vehicle with tinted windows that was allegedly involved in a rash of prior robberies and aggravated assaults, some of which involved gunshots at police officers. (*Id.* at 103.) These flash descriptions began in December 2001 and

¹A copy of my factual findings is attached to this order.

continued through March 2002. (Id.) There was no evidence introduced as to whether any of these incidents occurred immediately prior to April 2, 2002 nor a description of the alleged assailants. (Id.)

Upon seeing the burgundy Oldsmobile, Green pulled over the vehicle. (Tr. 8/23/04 at 103.) Green testified that he knew tinted windows were illegal in Pennsylvania. (Id.) However, I found that he pulled over the vehicle because he believed it fit the flash description, not because tinted windows are illegal in Pennsylvania. (Id. at 104.)

Green and Beckett approached the car and asked the occupants for their identification. (Id.) When the rear seat passenger could not produce his identification, Beckett asked him to step out of the car. (Id. at 105.) As the rear passenger exited the car, a gun fell from his pant leg. (Id.) Green then ordered the driver and Bellinger, who was sitting in the front passenger seat, to exit the car at gun point. Green patted them down, placed them in handcuffs and had them lie on the ground. (Id.) At this time, Green, standing outside of the car, looked into the car through the front passenger's open door and saw the butt of a gun protruding from the front passenger's seat. (Id.) This is the gun that Bellinger is charged with possessing.

At the hearing I requested additional briefs from the parties addressing the following three issues:

One, the initial pulling over of the burgundy car, what was legally required to do this, was this legal standard met, how was it met or not met? Two, assuming the pull over was legal, was ordering the rear passenger out of the car legal? . . . Three, after the gun was discovered in the rear passenger's person, was taking custody of the driver and the defendant legal?

(Tr. 8/23/04 at 106.)

DISCUSSION

Initial Stop of the Car

As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. Whren v. United States, 517 U.S. 806, 810 (1996). In Whren, the Court held that the constitutionality of a traffic stop does not depend on the subjective intent of the officer involved. The Court stated that “the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.” Id. at 813 (internal citations omitted). Hence, as long as there existed probable cause to believe that a traffic violation occurred, an officer can legally stop a car, even if the officer’s actual purpose for stopping the car does not involve the traffic violation.

In the instant case, there was a visible traffic violation in that the Oldsmobile’s windshield was tinted in violation of section 4524 of the Pennsylvania Vehicle Code. 75 Pa.C.S.A. § 4524.² Under Whren, as long as there objectively was probable cause to believe that a traffic violation occurred, it does not matter that Green’s actual reason for stopping the car was its similarity to the flash description. Therefore, I find that the initial stop of the car did not violate the Fourth Amendment.

²Any tinting which does not “permit a person to see or view the inside of the vehicle through the windshield, side wing or side window of the vehicle” is prohibited. 75 Pa.C.S.A. § 4524. Green testified, and Bellinger did not contest, that the tinting in the burgundy Oldsmobile did not permit one to see the inside of the car through the windshield. (Tr. 8/23/04 at 8.)

Ordering the Rear Passenger Out of the Car

In Pennsylvania v. Mimms, 434 U.S. 106 (1977), the Court held that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment, even in the absence of any unusual or suspicious behavior on the part of the driver. Id. at 109, 111 n.6. The Court expanded this holding to include passengers in Maryland v. Wilson, 519 U.S. 408, 414-15 (1997) (“We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”). Under Mimms and Wilson, Green and Beckett were free to order the rear passenger of the burgundy Oldsmobile to exit the car without violating the Fourth Amendment.

Taking Custody of Bellinger and the Driver

Bellinger argues that Green effectively placed Bellinger under arrest, and therefore needed probable cause, when Green ordered Bellinger out of the car by gunpoint, handcuffed him, and made him lie on the ground. The government, on the other hand, seems to argue that these actions were among the reasonable steps that an officer may make to secure his safety during an investigatory stop under Terry v. Ohio, 392 U.S. 1 (1968).

I do not need to decide whether these actions constituted a full-fledged arrest of Bellinger or merely an investigatory stop under Terry. Under Mimms and Wilson, Green could order Bellinger and the driver to get out of the car without violating the Fourth Amendment. Once

Bellinger was out of the car, the butt of the gun was in plain view³ through the open door from outside of the car. Therefore, the gun was not seized in violation of the Fourth Amendment.

CONCLUSION

For the reasons set forth above, defendant Bellinger's motion to suppress physical evidence is denied.

³The plain view doctrine authorizes the seizure of "illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity." Illinois v. Andreas, 463 U.S. 765, 771 (1983).

ORDER

AND NOW, this _____ day of Novemeber 2004, it is **ORDERED** that Defendant's Motion to Suppress Physical Evidence (Docket # 19) is **DENIED**.

ANITA B. BRODY, J.

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