

Jermaine Grant is additionally charged with possession of a firearm by an alien, in violation of 18 U.S.C. § 922(g)(5).

Presently before the Court are the defendants' motions to suppress physical evidence. Specifically, the defendants move to suppress all physical evidence obtained from the search of their black Infiniti G20 ("Infiniti G20") incident to a traffic stop on June 6, 2004. Defendants also move, pursuant to the "fruit of the poisonous tree" doctrine, to suppress any physical evidence seized during the subsequent search of the Infiniti G20 after it was impounded, as well as any physical evidence seized from Defendant Gordon's person after his arrest.

I. FINDINGS OF FACT

1. On June 6, 2004, at approximately 4:38 p.m., Easton Police Officer Brian Herncane, while on duty in a marked police vehicle, observed a black Infiniti G20 parked in the unit block of North Sixth Street in the city of Easton with Dean Gordon seated in the driver's seat. (H.T. 10/12/04, at 5-6.)

2. Officer Herncane's attention was drawn to the Infiniti G20 because he had stopped it approximately two weeks prior to June 6, 2004 for an expired inspection sticker. (H.T. 10/12/04, at 6.)

3. Officer Herncane also recognized Mr. Gordon from two nights prior to June 6, 2004 when Officer Herncane, while in a backup role capacity, encountered Mr. Gordon after a traffic stop. (H.T. 10/12/04, at 7.) Mr. Gordon was at the time accompanied by Lennox Taylor, a/k/a "Jada," who, according to Officer Herncane, is familiar to the Easton Police Department because of his reported involvement in narcotics trafficking and sales. (H.T. 10/12/04, at 7, 39.) Mr. Gordon was driving Lennox Taylor's vehicle. (H.T. 10/12/04, at 39.)

4. After first seeing the Infiniti G20, Officer Herncane drove past it, made a U-turn up the block on North Sixth Street and parked to continue observing the Infiniti G20. (H.T. 10/12/04, at 7.) While driving past the Infiniti G20, Officer Herncane noticed that the inspection sticker on the Infiniti G20 was still expired. (H.T. 10/12/04, at 6-7.)

5. As Officer Herncane continued to observe the Infiniti G20, Jermaine Grant exited from a Chinese food restaurant and entered the Infiniti G20 sitting in the front passenger seat. (H.T. 10/12/04, at 7-8.)

6. Officer Herncane then observed the Infiniti G20 pull away from the parking spot into a lane of traffic without signaling. (H.T. 10/12/04, at 8.)

7. Officer Herncane proceeded to conduct a traffic stop of the Infiniti G20 in the unit block of South Sixth Street.

(H.T. 10/12/04, at 9.) Officer Herncane approached the Infiniti G20 believing at first that Mr. Grant was Lennox "Jada" Taylor.

(H.T. 10/12/04, at 37.) Officer Herncane initially addressed Mr. Grant as Jada, but when he looked into the Infiniti G20, he realized that Mr. Grant was not Lennox Taylor. (H.T. 10/12/04, at 37.)

8. Officer Herncane then requested that Mr. Gordon produce his license, registration, and insurance paperwork for the Infiniti G20. (H.T. 10/12/04, at 9.) He also questioned Mr. Gordon about using his turn signal and about the expired inspection sticker. (H.T. 10/12/04, at 10.)

9. In response, Mr. Gordon produced his New York driver's license and the insurance paperwork for the Infiniti G20, but he was not able to produce the registration. (H.T. 10/12/04, at 9.)

10. While standing outside the driver's side door conversing with Mr. Gordon, Officer Herncane first noticed an odor of raw or unburnt marijuana which he characterized as a "moderate odor." (H.T. 10/12/04, at 10.)

11. Both the driver's side and passenger window were open at the time. (H.T. 10/12/04, at 40.)

12. Officer Herncane understood raw marijuana to be the cut dried out version and burnt marijuana to be the smoke of

marijuana that's being burned, ingested. (H.T. 10/12/04, at 25-26.)

13. Traveling with Officer Herncane on the evening of June 6, 2004, was Officer Herncane's K-9 partner, Boris. (H.T. 10/12/04, at 29.) Boris is trained to detect the presence of both raw and burnt marijuana. (H.T. 10/12/04, at 30.)

14. At the time of the incident, there was no written protocol guiding Easton police officers with respect to when to use a K-9. (H.T. 10/12/04, at 46.) The procedures guiding the Easton Police today derive solely from state and case law. (H.T. 10/12/04, at 46-47.) According to Officer Herncane, to utilize a K-9 patrol dog, there must be reasonable suspicion. (H.T. 10/12/04, at 47.) Officer Herncane believes that detecting the smell of marijuana provides reasonable suspicion. (H.T. 10/12/04, at 47.)

15. Officer Herncane did not use Boris at anytime prior to searching the Infiniti G20. (H.T. 10/12/04, at 29-30.) Officer Herncane claims there was no need to do so since he already smelled marijuana coming from the Infiniti G20. (H.T. 10/12/04, at 30.)

16. Officer Herncane is a graduate of Mansfield University with a degree in criminal justice. (H.T. 10/12/04, at 4.) He is also a graduate of the Allentown Police Academy. (H.T. 10/12/04, at 4.) He has been a police officer for more than six years in the City of Easton. (H.T. 10/12/04, at 4.)

The City of Easton is four square miles and has approximately 25,000 to 30,000 residents. (H.T. 10/12/04, at 5.) The City of Easton has a 62-man police department. (H.T. 10/12/04, at 5.)

17. Officer Herncane is assigned to the patrol division where he is a K-9 officer working for the dual purpose of "patrol and narcotics." (H.T. 10/12/04, at 4.) Officer Herncane was trained in the detection of narcotics at what he termed "NARC schools." (H.T. 10/12/04, at 4.) Also, he had been trained to detect the odor of burnt marijuana at the Allentown Police Academy. (H.T. 10/12/04, at 25.)

18. Easton Police Officers in general receive training for recognition of the smell of raw marijuana through various schools and seminars. (H.T. 10/12/04, at 60.)

19. Prior to the arrests of Mr. Gordon and Mr. Grant on June 6, 2004, Officer Herncane had made approximately 30-40 marijuana-related arrests. (H.T. 10/12/04, at 45.) Of those arrests, approximately 2-5 involved situations where Officer Herncane was able to detect the presence of raw marijuana by himself, without the assistance of a K-9 dog. (H.T. 10/12/04, at 45.)

20. Based on training and experience, Officer Herncane is able to detect the smell of raw marijuana. See generally H.T. 10/12/04, at 4, 25, 45, 60.

21. After detecting the smell of raw marijuana emanating from the Infiniti G20, Officer Herncane returned to his patrol car. (H.T. 10/12/04, at 11.) Upon his return, Officer Mead, a backup officer, arrived on the scene. (H.T. 10/12/04, at 11.)

22. Officer Herncane then ran a license check on Mr. Gordon and a warrant check on both Mr. Gordon and Mr. Grant. (H.T. 10/12/04, at 11.) The response verified that Mr. Gordon's New York license was valid and there were no outstanding warrants for either man. (H.T. 10/12/04, at 26.)

23. Officer Mead then exchanged documentation with Mr. Grant while Mr. Grant was seated in the Infiniti G20. (H.T. 10/12/04, at 57.) Officer Mead then proceeded to deliver the paperwork handed to him by Mr. Grant to Officer Herncane. (H.T. 10/12/04, at 57.) Officer Mead did not smell marijuana at any time during the encounter with Mr. Grant. (H.T. 10/12/04, at 58.)

24. Officer Mead has been a patrolman for 16 years and in that time he has come into contact with raw and burnt marijuana and can detect the smell of raw marijuana. (H.T. 10/12/04, at 59-60.)

25. Officer Herncane reapproached the Infiniti G20 and asked Mr. Gordon to step out. (H.T. 10/12/04, at 12.) When Mr. Gordon did so, Officer Herncane patted him down for weapons.

(H.T. 10/12/04, at 12.) No weapons were found during the search. (H.T. 10/12/04, at 12.) Officer Herncane then directed Mr. Gordon to sit on the curb. (H.T. 10/12/04, at 12.) Mr. Grant was then directed to exit the Infiniti G20 and Officer Herncane patted Mr. Grant down for weapons. (H.T. 10/12/04, at 12-13.) No weapons were found on Mr. Grant's person and Mr. Grant was directed to sit on the curb also next to Mr. Gordon. (H.T. 10/12/04, at 13.)

26. Officer Herncane then began searching the Infiniti G20. When he entered the vehicle there was a "strong odor" of raw marijuana. (H.T. 10/12/04, at 13.)

27. Officer Herncane first searched underneath the passenger side seat but found nothing. (H.T. 10/12/04, at 13.) Next Officer Herncane searched under the driver's side seat but found no marijuana present. (H.T. 10/12/04, at 13.)

28. Officer Herncane then opened the center console of the Infiniti G20 and discovered marijuana individually packaged in ten sealed glassine zip-lock bags within a larger black plastic bag. (H.T. 10/12/04, at 13, 32.)

29. It took approximately thirty seconds to a minute from the time Officer Herncane first poked his head into the Infiniti G20 until the time he found the marijuana. (H.T. 10/12/04, at 13.)

30. The total amount of marijuana that was found in the center console of the Infiniti G20 was approximately 14.1 grams. (H.T. 10/12/04, at 32.)

31. Also located inside the Infiniti G20 at the time the marijuana was discovered was Chinese food and an air freshener hanging from the rear view mirror. (H.T. 10/12/04, at 40-41.)

32. Officer Herncane left the marijuana in the center console, walked over to Mr. Gordon and Mr. Grant, and placed them under arrest for possession with intent to distribute marijuana and possession of marijuana. (H.T. 10/12/04, at 14.)

33. Sergeant Lobb then arrived on the scene and remained with the Infiniti G20 while the defendants were transported to the Easton Police station. (H.T. 10/12/04, at 14.) The Infiniti G20 was impounded and a search warrant sought. (H.T. 10/12/04, at 14.)

34. At the police station, upon a strip search of Mr. Gordon, 16 tablets of ecstasy were found in a clear glassine bag inside Mr. Gordon's left sock after the sock was removed. (H.T. 10/12/04, at 15.) The strip search continued and Mr. Gordon later removed a clear glassine bag containing crack cocaine from his buttocks. (H.T. 10/12/04, at 15-16.)

35. After a search warrant on the Infiniti G20 was issued, Officer Herncane initially used his K-9 partner to

conduct a search of the exterior and interior of the Infiniti G20. (H.T. 10/12/04, at 16.) Officer Herncane's K-9 partner gave indications of contraband on the outside and the inside of the Infiniti G20. (H.T. 10/12/04, at 16.) On the inside of the Infiniti G20, Officer Herncane's K-9 partner gave indications on the center console and on the glove compartment. (H.T. 10/12/04, at 16.)

36. Uncovered in the glove compartment area of the Infiniti G20 were two clear glassine baggies containing large quantities of crack cocaine within a larger white plastic bag. (H.T. 10/12/04, at 16.) Also found in the trunk of the Infiniti G20 was a black plastic bag containing a fully loaded Smith and Wesson model number 663 revolver that contained six .38 caliber rounds. (H.T. 10/12/04, at 16.) Also in the trunk was a brand new digital postal scale. (H.T. 10/12/04, at 17.)

37. In the subsequent search of the Infiniti G20, Officer Herncane also discovered the registration information which along with the insurance card indicated that the Infiniti G20 is registered to and owned by both Mr. Gordon and Mr. Grant. (H.T. 10/12/04, at 17.)

II. CONCLUSIONS OF LAW AND DISCUSSION

A. Standing

"Standing to challenge a search requires that the individual challenging the search have a 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) (citing California v. Greenwood, 486 U.S. 35, 39 (1988) and Rakas v. Illinois, 439 U.S. 128, 143 (1978)); see also Gov't of V.I. v. Williams, 739 F.2d 936, 938 (3d Cir. 1984) ("An essential element to a successful challenge of a search and seizure of a car on Fourth Amendment grounds is the existence of a legitimate expectation of privacy.") (citing United States v. Salvucci, 448 U.S. 83, 93 (1980) and Rakas, 439 U.S. at 140-50). Therefore, the defendants must establish a reasonable and subjective expectation of privacy in the Infiniti G20 searched on June 6, 2004. Whether such an expectation has been established is a factual determination to be made by the Court after a "conscientious effort to apply the Fourth Amendment." Salvucci, 448 U.S. at 92-93.

Here, the defendants argue, and the Government has not disputed, that both defendants have such an expectation of privacy because they co-own the vehicle. This is significant because "property ownership is clearly a factor to be considered

in determining whether an individual's Fourth Amendment rights have been violated." Id. at 91 (citing Rakas, 439 U.S. at 144 n.12). Further suggesting that there is a reasonable and legitimate expectation of privacy is the fact that both defendants occupied and were using the vehicle at the time of the traffic stop as well as the fact that neither defendant consented to a search. In view of this evidence, the Court finds that the defendants had a legitimate expectation of privacy and therefore have standing to pursue their motions to suppress.

B. The Traffic Stop

The defendants argue that the Easton Police unlawfully stopped the defendants' vehicle before it was searched. Challenges to automobile stops are appropriately analyzed under Fourth Amendment principles because the temporary detention of individuals during an automobile stop "constitutes a 'seizure' of 'persons' within the meaning of" the Fourth Amendment. Whren v. United States, 517 U.S. 806, 809-10 (1996). Therefore, an automobile stop must be "reasonable." See id. at 810. Reasonableness is to be measured objectively by looking at the totality of the circumstances. Ohio v. Robinette, 519 U.S. 33, 39 (1996). An automobile stop is reasonable, as a general matter, "where the police have probable cause to believe that a traffic violation has occurred." Whren, 517 U.S. at 810. This

is true irrespective of the subjective motivations of the officer conducting the stop. Id. at 813; Robinette, 519 U.S. at 38 (1996); see also United States v. Akram, 165 F.3d 452, 455 (6th Cir. 1999) (holding, in a case involving a traffic stop of a U-Haul rental truck for speeding, that although "the officers were uninterested in the traffic violation and were really looking for drugs, the point of Whren . . . is that the motives of police are irrelevant").

Here, Officer Herncane observed that the inspection sticker on the defendants' vehicle was expired. Operation of a motor vehicle without a valid inspection sticker is a violation of the Pennsylvania Vehicle Code, 75 Pa.C.S.A. § 4703. Officer Herncane also observed the defendants' vehicle pull away from the parking spot into a lane of traffic failing to use its turn signal. Turning or moving a vehicle from a parked position into the traffic stream without giving an appropriate signal is also a violation of the Pennsylvania Vehicle Code, 75 Pa.C.S.A. § 3334(a). Therefore, the Court finds that there was probable cause to stop the defendants' vehicle. See Carr v. City of Erie, 110 Fed. Appx. 236, 237 (3d Cir. 2004) (not precedential) (holding that failure to use a turn signal provides a lawful basis for making a traffic stop in Pennsylvania).

C. The Warrantless Search

The defendants challenge the lawfulness of the search of their vehicle on June 6, 2004 arguing that the police lacked probable cause to believe that evidence of a crime and/or contraband would be located within the vehicle. To begin, the defendants correctly assert that federal Fourth Amendment analysis is what guides this Court in examining the lawfulness of the search of the defendants' vehicle. See United States v. Rickus, 737 F.2d 360, 363-64 (3d Cir. 1984) (holding that district courts are to decide admissibility of evidence questions in federal criminal cases on the basis of federal, and not state, law). The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. "Generally, for a seizure to be reasonable under the Fourth Amendment, it must be effectuated with a warrant based on probable cause." United States v. Robertson, 305 F.3d 164, 167 (3d Cir. 2002) (citing Katz v. United States, 389 U.S. 347, 356-57 (1967)).

There are, however, "a few specifically established and well-delineated exceptions" to the warrant requirement. See United States v. Salmon, 944 F.2d 1106, 1120 (3d Cir. 1991). This Court elaborated on one such exception in United States v. William, No. CRIM.A.03-315, 2004 WL 220862, at *4 (E.D. Pa. Jan. 12, 2004) (Robreno, J.):

A long-established exception to the warrant requirement for searches is the "automobile

exception." Carroll v. United States, 267 U.S. 132 (1925). Under this 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.'" Maryland v. Dyson, 527 U.S. 465, 467 (1999) (citing United States v. Ross, 456 U.S. 798 (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). 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)).

Id. at *4.

In this case, there was probable cause to search the defendants' vehicle because, based upon his training and experience, Officer Herncane detected the smell of raw marijuana in the vehicle. See United States v. Winters, 221 F.3d 1039, 1040, 1042 (8th Cir. 2000) (finding that the "smell of raw marijuana created probable cause to search the defendant's car and its containers").

The defendants in the instant matter, citing Knowles v. Iowa, 525 U.S. 113 (1998), argue that the Easton police lacked probable cause to conduct a full search of their vehicle incident to the stop for the invalid inspection sticker and failure to

signal traffic violations. In Knowles, the Supreme Court declined to extend the "bright-line rule" of allowing a search incident to arrest to the situation where a citation is issued following a routine traffic stop. See id. at 118-19; see also United States v. Johnson, 63 F.3d 242, 247 (3d Cir. 1995) ("Clearly, a lawful traffic stop is not 'carte blanche' for an officer to engage in other unjustified action.").

This case, however, is distinguishable from Knowles, because in addition to the alleged traffic violations, Officer Herncane detected an odor of raw marijuana emanating from the defendants' vehicle. At least two circuit courts have found that the odor of raw marijuana alone can satisfy the probable cause requirement, see Winters, 221 F.3d at 1040; United States v. Downs, 151 F.3d 1301, 1303 (10th Cir. 1998), and at least one district court in the Third Circuit reached a similar conclusion, see United States v. Padron, 657 F. Supp. 840, 848-49 (D. Del. 1987), aff'd, United States v. Rubio, 857 F.2d 1466 (3d Cir. 1988). See also United States v. Crotinger, 928 F.2d 203, 205 (6th Cir. 1991) (finding that the smell of raw marijuana, coupled with other suspicious circumstances, created probable cause).

Ultimately, the credibility of Officer Herncane's testimony at the suppression hearing stating that he detected an odor of raw marijuana emanating from the defendants' vehicle is

at issue. The Third Circuit has created a framework for addressing such credibility issues:

In reviewing on-the-scene judgments of police officers we must, of course, remember that police officers may well "draw inferences and make deductions ... that might well elude an untrained person." United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). Nevertheless, an officer's inferences and deductions can only justify a warrantless arrest if the government satisfies its burden of establishing the probable cause necessary to support the arrest. Notwithstanding the deference afforded the on-the-scene conclusion of police officers, probable cause must ultimately be decided by the courts, not the police.

United States v. Myers, 308 F.3d 251, 255 (3d Cir. 2002).

With these precepts in mind, the Court finds Officer Herncane's testimony that he smelled a "moderate odor" of unburnt (raw) marijuana to be credible. First, Officer Herncane is trained in the detection of narcotics (H.T. 10/12/04, at 4), specifically in the detection of the smell of raw marijuana. (H.T. 10/12/04, at 60). Further, he testified that he is able to distinguish the odor of raw marijuana from burnt marijuana. (H.T. 10/12/04, at 25-26.) Second, Officer Herncane has been involved in 2-5 arrests where he has been able to detect the presence of raw marijuana without the assistance of his K-9 dog. (H.T. 10/12/04, at 45.) Third, Officer Herncane found raw marijuana in the center console of the defendants' vehicle only seconds after he initiated the search. (H.T. 10/12/04, at 13.)

The defendants argue that Officer Herncane could not possibly smell raw marijuana under the circumstances in this case--where there was Chinese food and an air freshener in the vehicle (H.T. 10/12/04, at 40-41), two open windows (H.T. 10/12/04, at 40), and where the marijuana was packaged in sealed glassine zip-lock bags within a larger black plastic bag (H.T. 10/12/04, at 13, 32). However, there was no evidence presented, from an expert or otherwise, that Officer Herncane was not able, as he claims, to smell raw marijuana emanating from the defendants' vehicle in the manner and under the circumstances of this case. See, e.g., Padron, 657 F. Supp. at 848-49 (finding that "the inference that a person could not smell raw marijuana in plastic bags [had] not been proven beyond defendants' bald assertion").

The defendants question Officer Herncane's motivation for stopping the defendants' vehicle suggesting that Officer Herncane had a predisposed mind to arrest the defendants based on a prior incident. Although Officer Herncane's motivation is not relevant to whether there was probable cause to stop the defendants' vehicle in the first instance, see Whren, 517 U.S. at 813, it may be relevant in evaluating the credibility of Officer Herncane's testimony that he smelled raw marijuana, see Scott v. United States, 436 U.S. 128, 139 n.13 (1978) ("[A]s a practical matter the judge's assessment of the motives of the officers may

occasionally influence his judgment regarding the credibility of the officers' claims with respect to what information was or was not available to them at the time of the incident in question."). The Court, however, recognizes Officer Herncane's training and experience in the detection of raw marijuana and the speed with which he found the marijuana after the search begun. Further, the Court notes the absence of evidence showing that it is not possible to detect the smell of raw marijuana under the circumstances as they existed at the time of the search. Viewed in this light, the possible animus against the defendants, while a factor, does not alter the Court's conclusion that Officer Herncane's testimony that he smelled raw marijuana is credible.¹

Finally, the defendants seek to have the Court infer from the fact that Officer Herncane did not utilize his K-9 partner Boris before searching the defendants' vehicle (H.T. 10/12/04, at 29-30) that Officer Herncane did not actually smell marijuana. Although Officer Herncane would have been justified in utilizing Boris after he smelled raw marijuana (H.T. 10/12/04, at 47), he was not required to do so before searching the

¹The defendants also argue that the amount of marijuana seized was so small that Officer Herncane could not have smelled it. The issue is one of fact based on the totality of the circumstances. Although the amount of marijuana is a factor to be considered in the calculus of whether Officer Herncane's claim that he smelled marijuana is credible, there is no evidence, from an expert or otherwise, that supports the argument that the amount of raw marijuana in this case could not be detected by Officer Herncane.

defendants' vehicle. Before executing a warrantless search, "the law does not require the police to conduct a 'thorough' investigation, leaving no stone unturned." See Snell ex rel. Snell v. Duffy, No. CIV.A.02-3660, 2004 WL 62711, at *6 (E.D. Pa. Jan. 6, 2004) (Robreno, J.). Rather, "once a law enforcement officer has sufficient evidence within his knowledge to establish probable cause, no further investigation is required." Dintino v. Echols, 243 F. Supp. 2d 255, 264 (E.D. Pa. 2003) (Robreno, J.), aff'd, 91 Fed. Appx. 783 (3d Cir. 2004); see also Merkle v. Upper Dublin Sch. Dist., 211 F.3d 782, 790 n.8 (3d Cir. 2000) (holding that a police officer is "not required to undertake an exhaustive investigation in order to validate the probable cause that, in his mind, already existed").

Under the totality of the circumstances, the Court finds that there was probable cause in this case to justify the warrantless search of the defendants' vehicle. Hence, the Court will deny the defendants' motions to suppress.

An appropriate Order follows.

