

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 v. :
 :
 MAMADOU BILLO BARRY : NO. 17-180

MEMORANDUM

Bartle, J.

June 7, 2017

Defendant Mamadou Billo Barry is charged with one count of conspiracy under 18 U.S.C. § 371, one count of possession of 15 or more counterfeit and unauthorized access devices in violation of 18 U.S.C. § 1029(a)(2)(3), and one count of aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1) and(c)(4). He now moves to suppress evidence of credit cards and other items obtained by police officers from his person and his vehicle on the ground that they were seized in violation of the Fourth Amendment to the United States Constitution and are the fruit of the poisonous tree.

I.

The court makes the following findings after an evidentiary hearing.

On the evening of June 29, 2016 around 10 p.m., off-duty Delaware County Detective Michael Jay was in the check-out line at a Royal Farms Mini Market in Glenolden, Pennsylvania. He observed a woman, later identified as Adaisia McCray, in line in front of him. She was attempting to purchase

two cartons of cigarettes with a credit card. The store cashier asked McCray to provide the zip code associated with the credit card in order to validate the purchase, but she was unable to do so. McCray then exited the store through the front door.

Detective Jay commented to the store cashier that the preceding events were strange. After making his purchase, Detective Jay left the Mini Market through the back door and walked to his unmarked police car in the parking lot in front of the building. At this time he saw McCray enter the back seat of a dark Dodge Charger. Detective Jay noticed the Charger's New Jersey license plate number and using his cellphone called the Delaware County 911 Communication Center, known as DELCOM. DELCOM responded that there was no record found. Detective Jay requested that DELCOM check again for records related to the license plate. At this time, he watched a male, later identified as Ibrahim Diallo, exit the Mini Market and enter the driver's seat of the Charger. He also saw a male, later identified as defendant Mamadou Billo Barry, sitting in the front passenger seat. As the Charger left the Mini Market parking lot, Detective Jay decided to follow it.

The Charger drove off and thereafter pulled into a Wawa parking lot on Oak Lane in Folcroft, about a quarter of a mile from the Royal Farms Mini Market. Detective Jay was again on the phone with DELCOM. He walked over to the Charger to

check the license plate again to ensure he had the correct information to relay to DELCOM. While he was out of his car, he observed McCray exiting the Wawa without any apparent purchase. At the same time, DELCOM again informed him that no records had been found for the license plate. Detective Jay then sighted Diallo leaving the Wawa. Unlike McCray, Diallo had a Wawa bag in his hand. All the while Barry was sitting in the front passenger seat of the Charger.

Detective Jay called the Wawa on his cellphone and spoke with the manager. Detective Jay identified himself, described the woman and man he had observed at Royal Farms and at the Wawa, and asked if they had purchased anything. The manager replied that the man had successfully purchased cartons of cigarettes and the woman had attempted to purchase two cartons of cigarettes but the purchase was rejected.

By happenstance while Detective Jay was in the Wawa parking lot he met Folcroft Borough Police Officer Michael Stymiest, who was on duty and with whom Detective Jay was familiar. Detective Jay told Officer Stymiest that he was looking into some suspicious activity and requested that Officer Stymiest remain nearby in case he was needed to stop a car.

Detective Jay then exited the Wawa parking lot in his unmarked car and pulled into a parking lot across Oak Lane. He dimmed his car lights and watched the Charger drive out of the

Wawa parking lot and make a left turn onto Oak Lane. Suspicious of the woman's two unsuccessful attempts to use a credit card and concerned that criminal activity was afoot, Detective Jay then began to follow the Charger and radioed Officer Stymiest to stop the car. Officer Stymiest did so on Primos Avenue in Folcroft. Detective Jay parked his car in front of the Charger to prevent its escape.

Officer Stymiest's partner, Folcroft Borough Police Officer Leslie McLean, who was also on duty at this time, arrived at the scene after hearing Detective Jay's radio call. Officer Stymiest reported to her that there was an incident of possible credit card fraud witnessed by Detective Jay.

Officer Stymiest approached the driver, Diallo, and asked for his driver's license, vehicle registration, and insurance. Neither Diallo nor Barry was able to locate the vehicle registration. Diallo stated that he did not have his driver's license with him. Office Stymiest attempted to identify Diallo by asking for his name, date of birth, and the last four digits of his social security number. While Diallo gave a birthdate, he seemed unsure about it. Upon inquiry a second and third time, Diallo gave different birthdates than he had given the first time he responded. Officer Stymiest then asked Diallo to step out of the car and informed him that he would be patting him down. Officer Stymiest then asked Diallo

if he, Officer Stymiest, could retrieve the Diallo's wallet from his pocket. Diallo agreed and Officer Stymiest did so. The identification in Diallo's wallet did not match Diallo's appearance. At this point, Officer Stymiest handcuffed and detained Diallo.

While Officer Stymiest was interacting with Diallo, Officer McLean approached the passenger side of the car where Barry was seated. At this time Barry, who was in the front passenger seat, and McCray, who was in the back seat, were exiting the vehicle pursuant to the direction of another officer. The passenger side car doors remained open and Officer McLean patted down each of them. She asked Barry for identification, and he gave her a New Jersey driver's license. She described the license as "ratted and soft" and stated that it did not look the way it should. She then ran the license through her police system and stated that she received no information back. With Barry's permission she then looked through his wallet in order to obtain further identification. She found multiple credit cards in his wallet. She also stated that there were multiple credit cards in his pocket. At some point she saw all these credit cards from his wallet and pocket comingled on the hood of the Charger. She was unsure of which credit cards had come from Barry's wallet and which ones had

come from his pocket. Officer McLean also found a license with the name William Davis III on Barry's person.

While Officer McLean and Barry were standing beside the open front passenger door, Officer McLean asked Barry who owned the car. Barry replied that he did, but proof of ownership was never produced. At this time, Officer McLean decided that she needed to take the occupants into the police station for a suspect identification through fingerprinting. Officers McLean and Stymiest stated that this was necessary because they previously had been unable to determine the precise identity of the individuals. The three occupants of the Charger were handcuffed and placed in the back of patrol cars.

With the individuals detained in the back of the patrol cars, the officers agreed that the Charger needed to be towed because it was parked partially in a traffic lane on Primos Avenue and was a traffic hazard. Primos Avenue has two traffic lanes, one single lane in each direction and has inadequate shoulders for a vehicle to be parked there safely. Officers McLean and Stymiest each radioed to the police communication center to request a tow of the car.

The Folcroft Borough Police Department contracts with a private company to tow vehicles to a private lot. Because of this, it is standard procedure for the officers to do an inventory search of the vehicle in order to make a record of all

items of value prior to its being taken to a private lot where the officers are unable to account for and monitor any valuables. After the officers radioed in to request a tow of the Charger, they began an inventory search.

At some point prior the inventory search Officer McLean had noticed a clear plastic bag on a shelf in the dashboard area near or under the radio, though she could not identify specifically what the bag contained. Once she began the inventory search, she identified the bag and its contents as a clear plastic bag with a one-inch stack of credit cards inside it and a rubber band around it. During the inventory search Officer Stymiest also identified a clear plastic bag with credit cards bundled with a rubber band on the passenger side front door pocket of the Charger.

At some point during the inventory search, Officer McLean decided that the officers should stop and secure a search warrant from a magisterial district judge. The officers also decided at this time that the Charger should be towed to the police station instead of the private lot. A call was then made to change the destination of the tow. Officers McLean and Stymiest went to the police station to perform suspect identification on the three occupants of the Charger. When fingerprint identification was performed on Barry, the system identified him as Barry, which is who he had identified himself

as at the scene of the traffic stop. It also identified multiple aliases. The three occupants of the Charger were detained over night at Sharon Hill Police Station.

At some point during the evening of June 29, 2016, Officer McLean obtained a strip scanner from Ridley Township Police Department and used it to scan certain credit cards that had been found in Barry's possession during the traffic stop. The strip scanner was used to identify whether the bank account information associated with black strip on the back of the credit card match the number on the front of the credit card.

The following day June 30, 2016, Barry's New Jersey driver's license that he had provided to Officer McLean was verified as authentic and correct. It was determined at a later date that Barry owned the Charger.

On June 30, 2016, Officer McLean signed a search warrant application as the affiant. It was granted the same day by a magisterial district judge in Delaware County. Items recovered from the car included thirty-five credit/debit cards, multiple cartons of cigarettes, computers, and cameras.

II.

The government first argues that the police officers made a valid "Terry stop" and consequently that the seizure of the credit cards from Barry's wallet, pocket, and the front

passenger area of the Charger was not in violation of the Fourth Amendment.

The Fourth Amendment provides:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend IV.

Under Terry v. Ohio, 392 U.S. 1 (1968), a police officer is permitted without a warrant to "stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." United States v. Sokolow, 490 U.S. 1, 7 (1989) (citing Terry, 392 U.S. at 30). The Supreme Court has determined that in making the stop the officer must be able to articulate something more than "inchoate and unparticularized suspicion or hunch," which requires "some minimal level of objective justification" for the stop. See Sokolow, 490 U.S. at 7 (citing Terry, 392 U.S. at 27 and INS v. Delgado, 466 U.S. 210, 217 (1984)).

The standard for reasonable suspicion as required for a valid Terry stop is less demanding than the standard for

probable cause, which exists if "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). When assessing the validity of a Terry stop, courts should consider the totality of the circumstances. Sokolow, 490 U.S. at 8 (citing United States v. Cortez, 449 U.S. 411, 417 (1981)).

The Supreme Court has acknowledged that there are circumstances in which lawful conduct may give rise to reasonable suspicion. Reid v. Georgia, 448 U.S. 438, 441 (1980). Individual acts on their own may not give rise to reasonable suspicion, but considering the totality of the circumstances multiple acts viewed together may amount to reasonable suspicion. See Sokolow, 490 U.S. at 9 (citing Florida v. Royer, 460 U.S. 491, 502 (1983)); see also Terry, 392 U.S. at 22. The knowledge of the officer to whom reasonable suspicion exists is imputed to officers in the field. See United States v. Whitfield, 634 F.3d 741, 745 (3d Cir. 2010).

An investigatory stop pursuant to Terry supported by reasonable suspicion is valid under the Fourth Amendment as long as it is not "excessively intrusive in its scope or manner of execution." United States v. Johnson, 592 F.3d 442, 451 (3d Cir. 2010) (citing United States v. Rickus, 737 F.2d 360, 366 (3d Cir. 1984)). The manner in which the stop is conducted must be "reasonably related in scope to the circumstances

which

justified the interference in the first place." Terry, 392 U.S. at 19-20.

Pursuant to a lawful Terry stop, the police may require the driver to exit the vehicle and may pat down the driver if the officer believes the driver may be armed and dangerous. Pennsylvania v. Mimms, 434 U.S. 106, 110-12 (1971).

This rule also applies to passengers of those vehicles.

Maryland v. Wilson, 519 U.S. 408, 418 (1997). The police may also briefly question an individual so as to investigate further the officer's reasonable suspicion that led to the stop.

Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty., 542 U.S.

177, 185 (2004). The investigation must be "reasonably related in scope to the circumstances which justified the interference in the first place[,] . . . cannot continue for an excessive period of time[,] . . . [and] [cannot] resemble a traditional arrest." Id.; see also United States v. Sharpe, 470 U.S. 675,

682 (1985) (internal citations and quotations omitted). Routine questions by the police for the purpose of obtaining a suspect's identity serve important governmental interests and are permissible in the course of a Terry stop. Hiibel,

542 U.S. at

186; see also United States v. Hensley, 469 U.S. 221, 229

(1985). Under the exclusionary rule, evidence obtained outside

the parameters of a Terry stop must be suppressed as fruit of the poisonous tree. Murray v. United States, 487 U.S. 533, 536-

37 (1988); Wong Sun v. United States, 371 U.S. 471, 485-86 (1963).

A police officer may also conduct a limited search of a vehicle pursuant to a valid Terry search. See Michigan v.

Long, 463 U.S. 1032, 1049 (1983). The scope of a Terry search is limited to "those areas in which a weapon may be placed or hidden . . . if the police officer possesses a reasonable belief based on 'specific and articulable facts . . . [that] reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of the weapons." Long, 463 U.S. at 1049 (citing Terry, 392 U.S. at 21).

A Terry search is grounded in the notion that a "reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Terry, 392 U.S. at 27; Long, 463 U.S. at 1050.

At the Royal Farms Mini Market in Glenolden Detective Jay observed that McCray was unable to provide the zip code for her credit card in attempting to purchase cartons of cigarettes. It is certainly unusual that an individual would not know the zip code associated with her legitimate credit card.

Detective Jay learned that this unusual scenario was repeated at the Wawa in Folcroft when McCray's

effort to purchase cigarettes was again thwarted. He was also unable to obtain information about the ownership of the Charger. Detective Jay had been a

detective for nine years and in law enforcement for nineteen years. This series of events was sufficient to raise a reasonable articulable suspicion in his mind and in the mind of any objective observer that criminal activity in the form of attempted credit card fraud was afoot. The reasonable suspicion of Detective Jay is imputed to Officers Stymiest and McLean. See Whitfield, 634 F.3d at 745. Based on the totality of the circumstances, we find that the stop of the Charger and the request for identification from its occupants constituted a valid exercise of police power under Terry.

Pursuant to the valid Terry stop of the Charger, the police officers were permitted not only to seek the identity of Barry but also to conduct a protective search for weapons on the suspect's person. Hiibel, 542 U.S. at 186; Long, 463 U.S. at

1049. The scope of a Terry search may further extend to those areas of the vehicle in which a weapon may be placed or hidden, including the passenger compartment, and which may be accessible to the suspect. Id. While no weapons were found, a police officer need not ignore contraband that is discovered in a car during the course of a legitimate Terry search. Id. at 1050.

The search of the front passenger area of the vehicle

was certainly permitted under Terry since it was an area readily accessible to Barry. A large quantity of credit cards, at least an inch thick, was found before the officers stopped the search

to obtain a search warrant. We are not persuaded by Barry's argument that the officers mingled together the credit cards from the front passenger area with the credit cards from Barry's person. No evidence presented at the evidentiary hearing supports this argument. The credit cards from the front passenger area will not be suppressed.

The government further argues that even if the seizure of the credit cards was not permissible under Terry, the credit cards found in the Charger should not be suppressed because they were the subject of a lawful inventory search.

Warrantless searches and seizures are presumed to be unreasonable and thus prohibited by the Fourth Amendment unless an exception to the warrant requirement applies.

California v. Acevedo, 500 U.S. 565, 580 (1991). An inventory of a lawfully seized vehicle is one such exception. Illinois v. Lafayette, 462 U.S. 640, 643 (1983). Police officers may conduct an inventory search of and seize contraband from a vehicle when it is necessary to remove the vehicle from the highway for the purposes of "caretaking and traffic-control activities" or when the vehicle "jeopardize[s] both the public safety and the efficient movement of vehicular traffic." South Dakota v. Opperman, 428 U.S. 364, 368-69

(1976). This inventory search protects the owner of the vehicle's property while it remains in police custody, protects the police against potential danger, and protects the police

from accusations of theft over lost or stolen property. Id. To be permissible under the Fourth Amendment, the inventory search must be conducted pursuant to standard police procedures consistent with the purpose of a non-investigative search and must be reasonable. Id. at 372; see also Colorado v. Bertine, 479 U.S. 367, 371 (1987). Officers may conduct an inventory search prior to any towing as long as the car is in police custody and the search follows standard police department procedure. United States v. Morris, 179 F. App'x 825, 827 (3d Cir. 2006).

Officers McLean and Stymiest began conducting a routine inventory search of the vehicle after the Charger's three occupants were placed in police custody in the back of patrol vehicles and the towing service had been called. As noted above, this search uncovered numerous credit cards in the front passenger area before the officers decided to stop the search and to obtain a search warrant.

The police officers had legitimate safety and traffic-control reasons to have the car towed in accordance with the standard policy of the Folcroft Borough Police Department.

The officers reasonably determined that the Charger was obstructing traffic on Primos Avenue, a two-lane road with

very little shoulder on which a vehicle could pull over. In addition, they were unable to determine the identity of the

owner of the Charger, and no record of ownership of the Charger to the police by the occupants. It was clearly appropriate to have the Charger towed rather than allow the occupants to move it.

We find that the police officers conducted a valid inventory search pursuant to the Fourth Amendment, and the credit cards found in the Charger during the inventory search will not be suppressed.

A search conducted with a person's consent is valid without a warrant. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). We find that the search of Barry's wallet was with his consent. However, the government has not established that he consented to the search of his pockets which also contained credit cards. There is no support on the record that the credit cards in his pockets were immediately identifiable by touch or sight. Minnesota v. Dickerson, 508 U.S. 366, 375 (1993). Based on Officer McLean's testimony we find that the credit cards from his wallet and those from his pockets have been comingled so that it is now impossible to separate the two groups of cards.

The government does not argue that the search of Barry's pocket was proper under Terry or as incident to a lawful arrest.

See

Riley v. California, 134 S. Ct. 2473, 2482-2484 (2014). Because

of the comingling, the credit cards from Barry's wallet and pocket will be suppressed.

On June 30, 2016, a day after the Terry stop, the police obtained a search warrant for the Charger from a local magisterial district judge. The government contends that the evidence obtained from the Charger pursuant to the search warrant is admissible. Franks v. Delaware, 438 U.S. 154, 165

(1978). A search warrant must be supported by an oath or affirmation that sets forth particular facts that support the existence of probable cause. Id. at 165. "The probable cause inquiry is 'commonsense,' 'practical,' and 'nontechnical;' it is based on the totality of the circumstances and is judged by the standard of 'reasonable and prudent men.'" United States v.

Donahue, 764 F.3d 293, 301 (3d Cir. 2014) (quoting Gates, 462 U.S. at 230-31). "We evaluate 'the events which occurred leading up to the . . . search, and then . . . [decide] whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause.'" See Donahue, 764 F.3d at 301 (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996)).

We find that the affidavit signed by Officer McLean supplied facts that constituted probable cause. Thus the search conducted pursuant to the search warrant was valid under the Fourth Amendment. Based on the totality of the circumstances,

it was fairly probable that evidence of a crime would be found
in the Charger after the permissible Terry search and the

inventory search had occurred. When the police officers legally conducted an inventory search of the Charger, they identified contraband that likely related to credit card fraud, of which Detective Jay was initially reasonably suspicious. The evidence obtained pursuant to that search, namely credit cards, computers, and cartons of cigarettes, will not be suppressed.

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ORDER

AND NOW, this 7th day of June, 2017 for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

- (1) the motion of defendant Mamadou Billo Barry to suppress evidence (Doc. # 15) is GRANTED in part and DENIED in part;
- (2) the motion to suppress evidence of the credit cards seized from his pockets and wallet is GRANTED; and
- (3) the motion to suppress evidence is otherwise DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.