

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
	:	
v.	:	NO. 96-413-03
	:	
	:	
	:	
MILTON WELLES	:	

MEMORANDUM-ORDER

Presently before the Court is defendant's Motion to Suppress Physical Evidence and the United States' Response thereto. The physical evidence sought to be suppressed consists of \$3900 of marked currency which was used in an undercover drug transaction on June 9, 1997, and which was recovered during the course of a car stop of the defendant's vehicle. The defendant now argues that the car stop violated his Fourth Amendment rights. The government argues that it obtained the evidence from a constitutionally valid car stop. For the following reasons, defendant's motion will be denied.

Facts

Leading up to the events of June 9, 1997, federal DEA agents and Philadelphia narcotics police detectives had been conducting surveillance of the defendant, Milton Welles and his co-defendants, Levi Peters and Robert Harrison. Based on prior taped conversations between co-defendant Harrison and an undercover agent, the authorities

had information that Harrison had a supplier who would always be nearby when the drug transactions would take place, and that the supplier would come from New Jersey. Within the seven weeks prior to June 9, and on three separate occasions, the defendant was seen meeting with Harrison just prior to and/or just after Harrison sold cocaine to an undercover agent. The meetings lasted one to two minutes each and twice took place in the defendant's vehicle. The defendant was always seen driving vehicles with New Jersey license plates.

On June 9, 1997, the defendant again was seen by federal agents and Philadelphia police detectives meeting with Harrison at the corner of 27th and Ellsworth in southwest Philadelphia. The meeting lasted about two minutes and took place inside the defendant's parked Dodge Caravan. The vehicle had New Jersey plates CL703U. Those plates had been previously reported stolen to the Philadelphia police on February 28, 1994, and remained listed as stolen in the police computer system on June 9.

After the two minute meeting in Welles' vehicle, Harrison then exited the vehicle and proceeded to sell \$4000 worth of cocaine to an undercover DEA agent a few minutes later and a few blocks away. To pay for the cocaine, the undercover agent used pre-marked, identifiable currency. After that drug sale, Harrison immediately returned to the parked vehicle in which Welles had remained sitting. After sitting in Welles' vehicle for another two minutes, Harrison returned to his own vehicle and drove off. Shortly afterward, Welles drove off as well and was followed by undercover police surveillance units.

After trailing Welles for approximately fifty (50) minutes, special agent Colder

directed a uniformed officer to stop the defendant because of the reported stolen tags on his vehicle. Pursuant to the stop, officers “patted down” the defendant and found \$4177 in currency. In order to keep their identity as narcotics officers concealed, the police returned the money to Welles and asked him to accompany them to the detective station at 55th and Pine. There it was confirmed that the defendant did possess the marked money used in the prior drug sale. It was also determined that, though the tags on the vehicle had been reported stolen, they had been reported stolen by the defendant and that he was, in fact, the properly registered owner of the Dodge Caravan.

At the defendant’s trial, Philadelphia police narcotics detective Moffit testified that the stop of the defendant’s vehicle was nothing more than a “ruse” to stop the vehicle in order to check the money. Based on Moffit’s testimony, the defendant now moves to suppress the \$3900 of marked currency as being illegally obtained. The United States argues that, despite detective Moffit’s poor choice of words, the stop was not a ruse, because 1) the license plates were still listed as stolen in the computer, and 2) the police had probable cause to arrest the defendant based solely on the defendant’s prior drug activity. The government also argues that because the defendant failed to move for the suppression of the currency prior to trial, pursuant to Fed.R.Crim.P. 12(b)(3), he has waived his right to raise the issue now.¹

Discussion

¹ Defendant argues that he intentionally did not file a motion to suppress prior to trial because up until detective Moffit’s statement that the stop was “a ruse,” the defense had accepted the government’s contention that there had been probable cause to stop the vehicle based on the reported stolen tags. (Trans. of detective Moffit, at 47)

Generally, the burden of proof is on a defendant seeking to suppress evidence. United States v. Acosta, 965 F.2d 1248, 1256 n.9 (3d Cir. 1992). However, once the defendant has established a basis for his motion, the burden shifts to the government to show that the search or seizure was reasonable. United States v. Johnson, 63 F.3d 242, 245 (3d Cir. 1995). In this case, a proper analysis of the Fourth Amendment issues involves “an objective assessment of the officer’s actions in light of the facts and circumstances confronting him at the time’ and not on the officer’s actual state of mind at the time the challenged action was taken.” Id. at 246 (quoting Maryland v. Macon, 472 U.S. 463, 470-71, 105 S. Ct. 2778, 2783 (1985)). Thus, ulterior motives do not invalidate a police stop of a vehicle for a traffic violation, no matter how minor, if the motor vehicle law infraction is detected. United States v. Murray, 89 F.3d 459, 461 (7th Cir. 1996); see also Whren v. United States, 116 S. Ct. 1769, 1774 (1996) (constitutional reasonableness of traffic stop does not depend on actual motivations of individual officers involved). In Murray, the defendant argued unsuccessfully that the car stop based on the failure to display license plates was a pretext because the police really thought that a drug deal had occurred and they wanted to stop him for that reason. Id.

Similarly, in United States v. Johnson, a Pennsylvania state trooper, while following a car driven by the defendant on interstate 78, noticed “several large objects,” apparently air fresheners, hanging from the interior rearview mirror. Johnson, 63 F.3d at 243-44. The trooper then stopped the vehicle because he believed the hanging objects to be in violation of the Pennsylvania vehicle code. Id. at 244. See 75 Pa.Cons.Stat. Ann. § 4524(c) (prohibiting driving vehicle with material hung from interior

rearview mirror which materially obstructs or obscures driver's vision through front windshield). The driver was unable to produce a registration card, and while the police dispatcher ran a check on the car, the trooper noticed that the driver and occupants were exceedingly nervous. Id. The driver and occupants also gave the trooper conflicting statements about the origin and destination of their trip. Id. The trooper testified that the circumstances caused him to believe that there were narcotics or contraband in the car. Id. After obtaining consent to search the car, the trooper found a substantial amount of marijuana and cocaine. Id.

The District Court granted a defense motion to suppress the seized narcotics, finding that the traffic stop was used as a pretext for an otherwise unconstitutional stop based on a suspicion of narcotics possession. Id. In doing so, the District Court adopted the minority view, known as the "usual police practices" test (also known as the "would" test). Id. at 246. Under this test, in the context of a traffic stop, seized materials are admissible "only if a reasonable police officer would have made the stop in the absence of an invalid purpose." Id. Thus the District Court held that a reasonable police officer would not have stopped Johnson's car for the minor traffic violation described above, absent a hunch that the occupants were trafficking in narcotics. Id.

On appeal, the Court vacated the District Court's suppression order. Id. at 247. In doing so, the Court expressly rejected the minority "usual police practices" test in favor of the majority view, known as the "authorization test." Id. Under the "authorization test" (also known as the "could" test), the court inquires whether, at the time of the stop, the police officer reasonably believed that the defendant was

committing a traffic offense for which the law authorizes a stop. Id. at 246. Because, in Johnson the District Court had found that the trooper reasonably believed that the defendant's vehicle was in violation of the Pennsylvania Motor Vehicle code, the Court held that the stop was not "unconstitutionally pretextual under the Fourth Amendment because it was authorized under Pennsylvania law." Id. at 248.

In the present case, the New Jersey plates on the vehicle that the defendant was driving had been reported stolen to the Philadelphia Police on February 28, 1997. On June 9, 1997, they were still listed as stolen in the computer system. Pursuant to 18 Pa.Cons.Stat.Ann. § 3904, police may arrest without a warrant in all grades of theft and not just in instances of theft committed in conjunction with a felony. See Commonwealth v. Walker, 641 A.2d 1204, 1206-07 (Pa. Super. Ct. 1994) (rejecting defendant's argument that § 3904, providing for warrantless arrest in theft crimes, applied only in cases of theft in conjunction with felony). Thus, acting on information broadcast over their police radios that the tags on the defendant's vehicle were reported stolen, the police were authorized, under Pennsylvania law, to stop the defendant's vehicle.

Nonetheless, defendant argues that, though the police may have had a valid reason to stop the defendant, the stop was actually a pretext. Defendant bases this argument on a single response, during cross examination, of one detective involved in the surveillance. Under cross examination about the car stop, detective Moffit stated, "this whole transportation is a ruse to check that money." (Test. of James Moffit, at 45.) Thus, defendant's argument in the present case is similar to that expressly rejected by the Court in Johnson: that absent the ulterior motive of the desire to check the

defendant for the marked currency, the police would not have had a valid reason to stop Welles' vehicle.

However, detective Moffit was only one of "ten to fifteen" federal narcotics, and city police officers and detectives involved in the surveillance. (Trans. of detective Moffit, at 61.) He testified that his description of the car stop as a "ruse" was simply a "poor word choice." (Trans. of detective Moffit, at 54) He testified further that he was ordered to participate in the stop by his supervisor, who did receive information that the plates were reported stolen. (Trans. of detective Moffit, at 55 & 61) With respect to the actual reason for stopping the car, he stated under cross examination:

Q: And it's just total coincidence that on the same day you believe that there's money that somebody finds out the car is stolen? Total coincidence, right?

A: That tag was run by the group supervisor during, I believe, it was our surveillance. It is at that point that I find out, and I suppose everyone else finds out for the first time because we're all on the same radio band, that the car we're following being driven by Mr. Welles has a stolen plate on it.

(Trans. of detective Moffit, at 61.) Moreover, under further questioning, detective Moffit elaborated:

Q: Okay. And you agree with me that right before we broke for recess, you turned around and looked at Judge Green and said we had no reason for stopping him, he didn't break the law; didn't you tell the judge that before the recess?

A: No. The judge asked me about that there was a money question, and I said that -- I said something -- I don't know the exact words, that we wouldn't be able to -- we wouldn't have a reason to stop him. But then before I had finished, you said -- based on that, you went into a sidebar. The complete answer, of course, is that we didn't have a reason to stop him, just for the drugs and the money that we thought he had. But he was driving a car with the stolen tags.

(Trans. of detective Moffit, at 56.)

The officers' desire to check if Welles had the currency which had just been used in the drug deal most certainly constitutes an ulterior motive for wanting the car stopped. However, the fact remains that the tags on the defendant's vehicle had been, and were still reported stolen as of June 9, 1997. Moreover, under 18 Pa.Cons.Stat. Ann. § 3904, police are specifically authorized to arrest without a warrant in all theft offenses.

Because the stop was authorized under Pennsylvania law, it was not "unconstitutionally pretextual under the Fourth Amendment" -- so long as the police were reasonable in their belief that the tags were stolen. Here, there has been no evidence presented to suggest that the radio report on the stolen tags was anything but valid at the time the police received and acted on it. Nor has there been any evidence presented to suggest that the officers that conducted the surveillance and car stop knew, prior to determining so at the 55th and Pine station, that it was apparently Welles, himself, who originally reported the tags stolen. Thus, the law enforcement officers had a valid reason for stopping the vehicle.

In Johnson, the Third Circuit expressly rejected the present defendant's argument. Accordingly, the defendant's motion to suppress the money seized as a result of a valid car stop, despite one detective's characterization of the stop as a "ruse," will be denied. An appropriate order follows.