IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

	*	
THE UNITED STATES OF AMERICA	*	
v.	*	**Criminal No. _____**
_____		

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REPLY TO GOVERNMENT'S ANSWER
TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

I. STATEMENT OF FACTS.

The Defendant, _____, was stopped by Trooper Steven Jones shortly after midnight on December 12, 1996, for exceeding the speed limit on Interstate 95. Mr. ____ immediately pulled over when signaled to do so, and then produced a valid driver's license and a contract for the rental vehicle he was driving. The contract showed that a Mark Hamlin had rented the vehicle and that Mr. ____ was also an authorized operator. Although the rental agreement showed an expiration date of December 6, Mr. ____ informed the trooper that it had been extended to December 12.[1] Jones then directed ____ to wait inside the

[1] Jones has never contended that he believed the rental vehicle to have been stolen, and did not attempt to contact the rental company to determine the status of the contract. (He eventually determined the vehicle was indeed not stolen, although he claims to not know whether he learned this before or after Mr. _____ arrest).

trooper's vehicle,[2] and ran a computer check on the driver's license. Jones also ran a computer check to determine whether there were any outstanding warrants for Mr. ____'s arrest (there were none), and checked his criminal history.

In response to questioning, Mr. _____ informed the trooper that he was driving to Baltimore to return the rental vehicle. He explained that he had traveled from Miami, Florida to Newark, New Jersey to attend a funeral. Mr. ____ initially stated that the deceased person was a relative, but then corrected himself and stated that she was actually the grandmother of a friend. Mr. ____ provided the trooper with the names of both the deceased woman and her granddaughter. Mr. ____ further explained that he had obtained a cheaper rate by flying from Florida to Baltimore and then renting the car there and driving on to New Jersey. Jones continued to question Mr. ____, asking who Mark Hamlin was. Mr. ____ explained that Hamlin was his uncle and had rented the vehicle because he was able to obtain a better price by virtue of being a Maryland resident and getting a corporate rate.

The results of the computer check revealed that Mr. _____ license was valid and also showed that there were no outstanding

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[2] The government states that "____ was asked to exit" his vehicle, and cites Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977), to support the legality of this action. The trooper, however, did not merely ask Mr. ____ to step out of the car; rather, he ordered Mr. ____ to exit his vehicle and then detained him inside the police vehicle for a considerable period of time. This behavior far exceeds that which was deemed appropriate in Mimms.

warrants. The computer check did indicate that Mr. ____ had previously been arrested on a drug charge. The trooper then asked Mr. ____ about his criminal history. At this point, Jones was seeking to develop information that would support a search of the rental vehicle, due to _____ alleged nervousness and the supposed "discrepancies" in the rental agreement. Mr. ____ at first answered the trooper's question in the negative, and then mentioned that he had been arrested previously for shoplifting. The trooper then asked about the drug arrest, and Mr. ____ stated that he had once been arrested for some type of minor marijuana charge which was subsequently dropped. The trooper further asked Mr. ____ if he had guns in the car and whether there was anything else in the car that was illegal. He then asked permission to search the car, but Mr. ____ declined.

After Mr. _____ refusal to consent to a search, Jones stated that he was convinced there was criminal activity underway. He then made a request over the police radio for a dog trained to do drug sniff searches. Jones had already issued a warning ticket to Mr. ____ (the citation was only a warning because the driver's license was valid). Mr. ___ asked if he was being detained at this point, and the trooper informed him that he was. About 15-20 minutes later, the dog and its trainer arrived. After the dog allegedly alerted positive for the presence of drugs, the rental vehicle was searched. According to the officers, the search

revealed packages that contained what seemed to be cocaine, and Mr. _____ was then formally arrested and allegedly informed of his rights under Miranda v. Arizona, 384 U.S. 436 (1966).

II. ARGUMENT.

A routine traffic stop is a seizure under the Fourth Amendment which is akin to an investigative detention pursuant to Terry v. Ohio, 392 U.S. 1 (1968). Berkemer v. McCarty, 468 U.S. 420, 439 (1984); United States v. Rusher, 966 F.2d 868, 875 (4th Cir.), cert. denied, 506 U.S. 926 (1992). A police officer conducting such a traffic stop may request the driver's license and vehicle registration, run a computer check, and issue a citation. Rusher, 966 F.2d at 876; see also, Terry, 392 U.S. at 19 (scope of Terry stop "must be strictly tied to and justified by the circumstances which rendered its initiation permissible") (quotation and citations omitted); Florida v. Royer, 460 U.S. 491, 499 (1983) ("an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop").[3] Any detention or questioning which extends beyond the scope of a routine traffic stop is unlawful unless the officer has a reasonable suspicion that the driver is engaged in a serious crime.

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[3] Under Terry, the officer's actions must also have been justified at their inception. 392 U.S. at 20. As discussed below, Mr. _____ contends that, even if the police had a legitimate reason to initiate a traffic stop in this case, the subsequent detention and questioning exceeded the proper scope of a valid traffic stop.

Rusher, 966 F.2d at 876-77. The burden is on the government to establish that an investigative detention is supported by such a reasonable suspicion. See Terry, 392 U.S. at 21 ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonable warrants that intrusion.") (footnote omitted).

A. The Trooper Exceeded the Proper Scope of a Routine Traffic Stop When He Questioned Mr. _____ About a Prior Drug Arrest and the Presence of Contraband.

At the moment Jones began questioning Mr. _____ about his arrest record and the presence of contraband in the rental vehicle, the trooper exceeded the scope of a proper routine traffic stop. At this point, Mr. _____ had received a citation for the traffic violation that had precipitated the stop (although the trooper continued to retain possession of the driver's license and rental agreement), and the questioning concerned matters completely unrelated to either the speeding infraction or Mr. _____'s authority to operate the vehicle. See United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) ("[W]hen an officer's observations lead him reasonably to suspect that a particular vehicle may [be involved in criminal activity], he may stop the car briefly and investigate the circumstances that provoke suspicion. As in Terry, the stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'") (quoting Terry, 392 U.S. at

29); Rusher, 966 F.2d at 877 (during routine traffic stop, police may detain driver only long enough to run computer check to verify entitlement to operate vehicle and issue citation); see also, United States v. Wood, 106 F.3d 942, 945 (10th Cir. 1997) ("During a traffic stop for speeding, a police officer is permitted to ask such questions, examine such documentation, and run such computer verifications as necessary to determine that the driver has a valid license and is entitled to operate the vehicle. The officer may detain the driver and his vehicle as long as reasonable necessary to make these determinations and to issue a citation or warning.") (citations omitted).

It is well-understood that questioning a driver about criminal history and/or the presence of drugs or guns in the car exceeds the proper scope of a routine traffic stop. See e.g., United States v. Lee, 73 F.3d 1034, 1039 (10th Cir. 1996) ("[The officer's] questions about firearms and drugs were unrelated to his underlying justification for the detention, which was to determine if the Defendant was driving while impaired."); United States v. Mesa, 62 F.3d 159, 161 (6th Cir. 1995) (officer's questioning of driver regarding whether pistols or drugs were in car was "totally unrelated to the initial traffic stop," and therefore violated the Fourth Amendment because it was not supported by reasonable suspicion of drug activity); see also, United States v. Sandoval, 29 F.3d 537, 539-43 (10th Cir. 1994) (questioning of driver about

prior drug-related arrest and presence of drugs or weapons exceeded scope of traffic stop and violated Fourth Amendment). Accordingly, when Jones questioned Mr. _____ "about matters unrelated to the initial traffic stop, the detention entered a new phase." United States v. Soto, 988 F.2d 1548, 1555 (10th Cir. 1993).[4] Cf. United States v. Lattimore, 87 F.3d 647, 652-53 (4th Cir. 1996) (officer's questioning of driver about the presence of drugs in vehicle did not exceed lawful scope of traffic stop, only because questioning occurred after officer had returned driver's license, an action which "indicat[ed] that all business with [the driver] was completed and that he was free to leave"; no Fourth Amendment violation, because, from that point on, the encounter was consensual); Rusher, 966 F.2d at 877 (officer's questioning of driver about contraband was proper, because it occurred after the driver was informed that he was free to go).[5]

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[4] See also, Wood, 106 F.3d at 945 ("Contrary to circuit precedent, the government argues that an officer need not have reasonable suspicion about a matter unrelated to the initial stop before asking detainees questions about that matter."); United States v. Walker, 933 F.2d 812, 816 (10th Cir. 1991) (questioning of defendant during traffic about matters unrelated to speeding infraction or defendant's right to operate car was not reasonably related in scope to circumstances justifying initial detention), cert. denied, 502 U.S. 1093 (1992).

[5] Although, for the reasons just discussed, it is inappropriate to consider Mr. _____'s response to the questions about his prior arrest in determining whether the trooper possessed a reasonable suspicion of criminal activity at the time when he exceeded the proper scope of a routine traffic stop, it is important to note that the minor misstatement by Mr. _____ regarding his prior arrest was more likely caused by confusion on

B. At the Time the Trooper Exceeded the Scope of a Routine Traffic Stop, He did not Possess a Reasonable Suspicion That Criminal Activity was Underway.

Because Jones' questioning of Mr. _____ about his arrest record and the presence of contraband in the rental vehicle exceeded the scope of a proper routine traffic stop, the trooper's conduct violated the Fourth Amendment, unless he possessed a reasonable suspicion that Mr. _____ was then engaged in drug activity. The trooper stated under oath that, at the time he questioned Mr. _____ about his prior arrests, his suspicions had been aroused "due to [Mr. _____'s] nervousness, [and] the discrepancies in the rental contract." These factors, however, fail to establish a reasonable suspicion that criminal activity was underway. Although the government now suggests that Mr. _____'s travel plans also contributed to a reasonable suspicion that drug activity was underway, there was nothing about

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his part regarding whether the question concerned prior arrests or prior convictions than by any desire to mislead the trooper. In the circumstances of a routine traffic stop, it was quite reasonable for Mr. _____ to believe that the trooper's question did not require him to report a previous arrest on a minor marijuana charge that was subsequently dismissed. In any event, the response cannot be considered in making a determination about the existence of a reasonable suspicion that criminal activity was underway. See also, Sandoval, 29 F.3d at 539 (when asked about subject matter of prior arrest during traffic stop, defendant "initially responded that he did not recall," and, only after officer said he knew arrest was drug-related, did defendant engage officer in discussion about drug activity; court does not consider response in finding officer did not have reasonable suspicion of criminal activity).

his itinerary that was either implausible or which would contribute to a reasonable belief that he was engaged in drug-related behavior.

1. Mr. _____'s purported nervousness.

Courts have often warned against placing too much reliance on claims by police that a driver appeared nervous during a traffic stop as a basis for a subsequent investigation. See e.g., United States v. Fernandez, 18 F.3d 874, 879 (10th Cir. 1994) ("We have repeatedly held that nervousness is of limited significance in determining reasonable suspicion and that the government's repetitive reliance on the nervousness of either the driver or passenger as a basis for reasonable suspicion in all cases of this kind must be treated with caution.") (quotation omitted). "It is certainly not uncommon for most citizens -- whether innocent or guilty -- to exhibit signs of nervousness when confronted by a law enforcement officer." Wood, 106 F.3d at 947-48; see also, Mesa, 62 F.3d at 163 (during traffic stop, defendant was required to sit in back seat of police car for considerable period of time; "[a]ppearing nervous under such circumstances strikes us as being the norm rather than the exception"); United States v. Tapia, 912 F.2d 1367, 1371 (11th Cir. 1990) (although driver appeared visibly nervous and shaken during traffic stop, officer did not have particularized reasonable suspicion of criminal activity sufficient

to support further investigatory detention beyond citation for speeding).[6] Thus, even if Mr. _____ did indeed exhibit signs of nervousness, this factor is simply not that probative of any ongoing criminal activity.

There are also good reasons to question the credibility of the trooper's claims of alleged nervousness on the part of Mr. _____. Statistics show that, of the 45 highway searches conducted by Trooper Jones on Interstate 95 from January of 1995 through December of 1996 following routine traffic stops, 37 involved non-white drivers. Given that such drivers surely comprise a fairly small percentage of all drivers on I-95 at any given time, it is fair to wonder why 82.2% of the searches conducted by Jones involved minorities. If Jones believed all these drivers were "nervous," perhaps it is time that he be called on to explain why. In any event, it is fair to consider the fact that eight out of every 10 highway searches conducted by this

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[6] See generally, United States v. Millan-Diaz, 975 F.2d 720, 722 (10th Cir. 1992):

> In all search and seizure cases of the type here concerned, the Government argues that a defendant's nervousness, either alone or in conjunction with other factors, supports the contested search and seizure. This repetitive assertion by the Government in all cases of this kind must be treated with caution. It is common knowledge that most citizens, . . . whether innocent or guilty, when confronted by a law enforcement officer who asks them potentially incriminating questions are likely to exhibit some signs of nervousness. The recital of Defendant's alleged nervousness, which was denied, cannot be sufficient to create a meaningful suspicion of drug smuggling in these circumstances.

trooper involved minority drivers when assessing the veracity of his claim that Mr. _____, who, not surprisingly, is an African-American, engaged in conduct which prompted suspicion.

Moreover, in an interview conducted by an investigator from the Office of the Federal Public Defender, officer Mumpower of the Havre de Grace police department, the officer who arrived on the scene of the traffic stop with the drug dog, stated that Mr. _____ was seated in the police vehicle when he arrived, and that, during Jones' search of the rental car, he stayed back to watch Mr. _____. According to the officer, Mr. _____'s demeanor was quiet and calm until the point when Jones opened the trunk of the rental vehicle. Therefore, in order for Jones' claims to be true, it would have been necessary for Mr. _____ to have been exceedingly nervous when first questioned, then have become quite calm, and then again become very nervous. If Mr. _____ was as nervous as Jones claimed when first pulled over, it is unlikely he would have become less nervous as events proceeded toward a search. Accordingly, it is fair to consider the likelihood that he was much less nervous during the traffic stop than the trooper has alleged him to be.

2. The rental agreement.

Any questions concerning the status of the rental contract were innocent and could have easily been resolved, if the trooper saw fit to do so. The contract indicated that Mr. _____ was an authorized operator of the vehicle, and he fully explained why his uncle was listed as the primary driver (a circumstance which itself is neither out of the ordinary nor inappropriate).[7] In addition, although the rental agreement showed an expiration date of December 6, Mr. _____ informed the trooper that it had been extended to December 12. Furthermore, at most, any issue presented by the potential expiration of the agreement did not raise reasonable suspicions of drug activity, but instead related only to Mr. _____'s continued authority to drive the rental car. Trooper Jones, however, has never claimed that he was suspicious that Mr. _____ was somehow operating the rental car without authorization; indeed, the trooper never even sought to determine the status of the rental contract. Cf. United States v. Recalde, 761 F.2d 1448, 1455 & n.7 (10th Cir. 1985) (fact that driver stopped for traffic violation was operating vehicle registered to another person was of no moment in determining whether officer possessed reasonable suspicion of criminal activity, because officer "admitted he had no reason to believe the

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[7] Moreover, the trooper himself admitted that Mr. _____'s explanation why his uncle rented the vehicle was possible.

car was stolen and his testimony clearly indicates that his sole concern was his suspicion of narcotics"); see also, Walker, 933 F.2d at 816 (although driver produced registration in name of another person during traffic stop, this factor did not contribute to a reasonable suspicion of criminal activity, because officer did not pursue matter further or do anything that would indicate he was suspicious that driver had no authority to operate car; officer's subsequent questioning about presence of weapons or drugs was thus violative of Fourth Amendment). In short, any claim that the "discrepancies" in the rental agreement established a reasonable suspicion that drug activity was underway should not be credited.

3. Mr. _____'s travel itinerary.

The government now argues that Mr. _____'s travel plans also served to establish a reasonable suspicion of drug activity in this case. It is true that implausible travel plans may contribute to a reasonable suspicion of illegal activity; Mr. _____'s description of his travel plans, however, was neither implausible nor far-fetched,[8] and certainly was not so unusual to trigger a reasonable suspicion that drug activity was underway. Cf. United States v. Kopp, 45 F.3d 1450, 1453-54 (10th Cir.) (defendant's explanation of his travel plan and purpose was not plausible, where defendant said he was driving from California to North Carolina to

[8] Jones admitted that Mr. _____'s explanation regarding his travel plans was indeed possible.

take a very dilapidated sofa to friends and was vague about his actual destination), cert. denied, 115 S. Ct. 1721 (1995). It is indeed often cheaper to fly into a major airport (such as BWI) and rent a vehicle there then it is to fly into a much smaller and less-traveled airport (like that in Newark). Mr. _____ did not fly into an airport that was far outside his route of travel, nor did he otherwise go out of his way to obtain the rental vehicle. Cf. United States v. Sanchez-Valderuten, 11 F.3d 985, 989 (10th Cir. 1993) (reasonable suspicion existed in part because of defendant's "unlikely" travel route, where defendant claimed to be going to New York but said he was moving his family to state of Washington); see also, Wood, 106 F.3d at 946-47 (not suspicious for defendant to fly to California and then rent car there and drive back to Kansas).

In addition, although Mr. _____ initially misspoke and stated that the person's funeral which he attended was a relative, he then corrected himself and stated that she was a friend's grandmother. He explained that he was very close to the deceased individual, and provided both her name and that of her granddaughter. The fact that he corrected his initial misstatement does not in any fashion indicate that Mr. _____ was being deceitful. Indeed, given that the trooper was unaware of the deceased person's identity, a failure to correct the mistake by Mr. _____ would have remained undetected by Jones. That he

voluntarily cleared up the prior mistake is simply not an inconsistency which is indicative of criminal behavior. See e.g., Wood, 106 F.3d at 947 (driver's error in identifying city where he rented car did not support conclusion that criminal activity was underway); United States v. Ramos, 42 F.3d 1160, 1163 (8th Cir. 1994) (although occupants of vehicle stopped for traffic violation were not certain about which part of Chicago was their destination, officer did not have reasonable suspicion under Terry, because such confusion was "consistent with innocent behavior"), cert. denied, 115 S. Ct. 2015 (1995).[9]

[9] The facts of the traffic stop strongly suggest that Mr. _____'s refusal to consent to a search of the rental vehicle contributed to the trooper's claimed belief that drug activity was underway and indeed triggered the request for the drug dog. It is well-understood, however, that a traveler's refusal to consent to a search cannot be used by police to establish the requisite reasonable, articulable suspicion of criminal activity. See United States v. Torres, 65 F.3d 1241, 1247 (4th Cir. 1995), affirmed upon rehearing en banc, 77 F.3d 91 (4th Cir. 1996); see also, Wood, 106 F.3d at 946 ("[I]t should go without saying that consideration of such a refusal would violate the Fourth Amendment.").

C. Because the Trooper Exceeded the Proper Scope of a Routine Traffic Stop Without a Reasonable Suspicion That Drug Activity was Underway, any Evidence Obtained During the Encounter on December 12, 1996 Must be Suppressed.

Mr. _____ was detained for much longer then was necessary to ascertain the validity of his driver's license and his authority to operate the car, and to issue him a traffic citation. Cf. United States v. Jeffus, 22 F.3d 554, 556-57 (4th Cir. 1994) (sniff search of vehicle occurred while officer was waiting for report on driver's license and was therefore lawful, because "the entire time before the [sniff] search was occupied with traffic stop procedures"); see also, United States v. Sharpe, 470 U.S. 675, 685 (1985) (basis for and circumstances of investigative detention, rather than arbitrary time limitation, determines its permissible scope); United States v. Guzman, 864 F.2d 1512, 1519 n.8 (10th Cir. 1988) (even though detention was of relatively short duration, "it nevertheless unreasonably extended beyond the length necessary for its only legitimate purpose -- the issuance of a warning or citation for a seat belt violation"), overruled in part on other grounds, United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995), cert. denied, 116 S. Ct. 2529 (1996). As discussed above, this detention was not justified by a reasonable suspicion that Mr. _____ was engaged in drug activity, but instead was predicated on a hunch that may have been, at least in part, racially motivated. Accordingly, any evidence obtained during the

traffic stop of Mr. _____ on December 12, 1996 must be suppressed. See Weeks v. United States, 232 U.S. 383, 398 (1914) (evidence obtained in violation of the Fourth Amendment must be excluded in federal court).

For these reasons, Mr. _____ respectfully moves this Honorable Court to suppress evidence obtained pursuant to his traffic stop on December 12, 1996.

Respectfully submitted,

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REQUEST FOR HEARING

Pursuant to Rule 105.6 of the Local Rules of the United States District Court for the District of Maryland, a hearing is requested on the Defendant's Motion.

_____
James Wyda
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

_____I HEREBY CERTIFY that on this __th day of April, 1997, a copy of the foregoing was delivered to Tarra DeShields-Minnis, Assistant United States Attorney, 6625 United States Courthouse, 101 W. Lombard Street, Baltimore, Maryland 21201.

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James Wyda
Assistant Federal Public Defender