IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

	*	
UNITED STATES OF AMERICA	*	
v.	*	**Case No. 00-464PWG**
SHAWN C. WILSON	*	

* * * * *

MOTION TO EXCLUDE EVIDENCE

Because Officer Toscano lacked probable cause when he arrested Mr. Wilson and transported him to the police station, evidence subsequently obtained from Mr. Wilson – results of field sobriety tests and a breathalyzer test – must be suppressed under the exclusionary rule of the Fourth Amendment.

STATEMENT OF FACTS

According to police reports, on February 20, 2000, at approximately 12:26 a.m., Staff Sergeant Patrick Hannon observed an individual (not Mr. Wilson), who appeared to Staff Sgt. Hannon to be intoxicated, exit a vehicle in the barracks parking lot of Building 4502 on Aberdeen Proving Ground, Maryland (APG). Staff Sgt. Hannon reported the driver to the APG Police. He also reported noisy behavior in the parking lot. Officer Toscano responded to the call.

Upon Officer Toscano's arrival, Staff Sgt. Hannon directed his attention to three vehicles in the parking lot – a green Isuzu, a red Mitsubishi, and a black Cadillac – and indicated that the person he believed to be intoxicated exited from the green Isuzu. Officer Toscano observed a person enter the Isuzu. He also observed the driver of the red Mitsubishi shouting to someone in

the barracks building.

Officer Toscano stopped the driver of the green Isuzu. While doing so, he observed the black Cadillac begin to drive away. He stopped that vehicle by waving his arms and loudly commanding the driver to stop. He commanded the driver of the Cadillac to exit the car and put his hands on the roof. He then observed the red Mitsubishi begin to drive away. He stopped that vehicle from afar by waving his arms and loudly commanding the driver, Mr. Wilson, to stop. Mr. Wilson stopped the car. Officer Toscano then ordered Mr. Wilson and his wife to get out of the car and place their hands on the roof of the car. Mr. Wilson obeyed the order. He uttered profanities while doing so. Officer Toscano immediately placed Mr. Wilson in handcuffs. Officer Toscano then detected an odor of alcohol on Mr. Wilson's person. He put Mr. Wilson in the police car and transported him to the police station.

At the police station, Mr. Wilson was kept in handcuffs. Officer Toscano conducted a number of field sobriety tests on Mr. Wilson. After the tests, Mr. Wilson was advised of his rights. Mr. Wilson was then given a breathalyzer test. He was subsequently charged under Md. Code Ann., Transp. § 21-902(a), (b), and (c), with driving while intoxicated, driving while intoxicated per se, driving under the influence of alcohol, and driving under the influence of drugs or any combination of drugs or alcohol.

ARGUMENT

I. THE FOURTH AMENDMENT PROTECTS ENLISTED MILITARY SERVICEMEN WHO RESIDE ON ABERDEEN PROVING GROUND, EVEN WHEN THE BASE IS CLOSED TO CIVILIANS.

A. Where a serviceman who lives on base is arrested by military police for allegedly violating Maryland's law against driving under the influence of alcohol, the Fourth Amendment applies as

vigorously as it would in a civilian context.

The Fourth Amendment protects military servicepeople from unreasonable searches and seizures as it does all Americans. *United States v. Chapman*, 954 F.2d 1352, 1367 (7th Cir. 1992); *Committee for G.I. Rights v. Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975). The Fourth Amendment's reasonableness requirement may occasionally function differently in military settings because the special mission and security needs of the military may make different applications reasonable. *See, e.g., United States v. Jenkins*, 986 F.2d 76, 79 (4th Cir. 1993) (nature of closed military base restrictions, signs at gate, and barbed wire together deprived civilian of reasonable expectations of privacy while on base); *United States v. Grisby*. 335 F.2d 652, 656 (4th Cir. 1964) (search of military quarters conducted in accordance with military law based on probable cause was reasonable even though conducted without civilian search warrant). But where there are no special security or military-specific interests at stake, a search or seizure on base must meet the same standards of a search or seizure conducted on any public street. *United States v. Vaughan*, 475 F.2d 1262, 1264 (10th Cir. 1973).

In this case, Officer Toscano stopped and arrested Mr. Wilson in the parking lot of the barracks for allegedly driving while under the influence of alcohol – a state law violation assimilated by federal law pursuant to 18 U.S.C. § 13. There were no special military or security interests at stake. The suspected offense was a state law violation of no more particular relevance to the military's mission than an assault, a larceny, or any other violation of state or federal law might be. Mr. Wilson was not an intruder or stranger posing a terrorist or military threat – indeed, he resides on base and is a member of the APG community. Officer Toscano was not Mr. Wilson's superior officer, nor was the arrest authorized by anyone in Mr. Wilson's

chain of command. Rather, Officer Toscano was exercising the same power of arrest that a civilian police officer might exercise under similar circumstances. In sum, the incident differed little from the sort of stop and arrest that might take place on the streets of Baltimore, and the Fourth Amendment accords Mr. Wilson the same protections that would have applied had he been stopped off base. *United States v. Vaughan*, 475 F.2d at 1264.

B. *United States v. Jenkins* does not govern arrests or searches of enlisted servicemen who live on base, even when the base is closed.

In *United States v. Jenkins*, the Fourth Circuit held that civilians who enter closed military bases can be searched without probable cause. 986 F.2d at 78-79. Reasoning that closed military bases have significant security concerns such as terrorist and military threats and that civilians have only restricted access to such bases in the first place, the court found that these special military concerns trumped the Fourth Amendment rights of civilians seeking access to closed bases. *Id.* The court also reasoned that "[t]he barbed wire fence, the security guards at the gate, the sign warning of the possibility of search, and a civilian's common-sense awareness of the nature of a military base – all these circumstances combine to puncture any reasonable expectations of privacy for a civilian who enters a closed military base." *Id.* at 79.

The rule and reasoning of *Jenkins* do not apply to enlisted servicepeople who live and work on closed bases, or bases such as APG that are closed some of the time. Resident servicepeople have much stronger expectations of privacy than civilians seeking temporary access to such a base. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (in order to warrant Fourth Amendment protection, individual must have subjective expectation of privacy which society recognizes as objectively reasonable). Military personnel

are protected not only by the Fourth Amendment but by the Uniform Code of Military Justice (UCMJ) which requires that searches and apprehensions be based on probable cause. *See* 10 U.S.C. § 807; *United States v. Wallace*, 11 M.J. 445, 446, n.2 (1981). The Military Rules of Evidence likewise require probable cause for arrests and searches, as well as reasonable suspicion for stops. *See* Mil. R. Evid. 311, 314, 315, 316. Military servicepeople thus can reasonably expect that their privacy on base will be protected by the probable cause requirement, even where civilians might not share that expectation.

More fundamentally, servicepeople must live and work on military bases. They raise their families and carry on private lives, secure in the knowledge that "[t]he private possessions of a member of the military, like that of a private citizen, are not open to indiscriminate or unreasonable search for evidence of criminal misconduct." *United States v. Neer*, 9 M.J. 575, 576 (1980). The application of *Jenkins* to such people would render the applicable UCMJ provisions and Military Rules of Evidence nullities, and establish the drastic proposition that military personnel who live or work on closed bases have no Fourth Amendment protections whatsoever.

Finally, servicepeople who live and work on base do not pose the same potential threat as visiting civilians. Enlisted persons are well known and accounted for by the military, whereas visiting civilians are strangers who may require stronger security measures. The military has ample tools for monitoring, apprehending, and searching its soldiers if necessary. Thus the military's interest in protecting its mission and its security would not be served by extending *Jenkins* to expand the military's ability to invade the privacy of servicepeople.

Accordingly, Mr. Wilson was not subject to the rule in *Jenkins* but was fully protected by

the Fourth Amendment when he was stopped and arrested on the base on which he lives and works.

II. OFFICER TOSCANO HAD NO ARTICULABLE, PARTICULARIZED SUSPICION THAT MR. WILSON WAS ENGAGED IN CRIMINAL ACTIVITY AND THEREFORE LACKED AUTHORITY TO STOP HIS CAR.

In order to justify even a brief investigatory seizure, an officer must have particularized articulable suspicion of criminal activity. *Ybarra v. Illinois*, 444 U.S. 85, 92-93 (1979) (no reasonable suspicion to detain patron in tavern where police had only generalized suspicion that drug transactions were taking place). "[A]n officer who stops and detains a person for investigative questioning 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *United States v. Sprinkle*, 106 F.3d 613, 617 (4th Cir. 1997) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). An officer, moreover, may not conduct a generalized preventative sweep, stopping everyone in an area, merely because a crime may have been committed there. *Ybarra v. Illinois*, 444 U.S. at 93 (stop and frisk not permitted even where individual is "on 'compact' premises subject to a search warrant . . . where the police have a 'reasonable belief' that such persons 'are connected with' drug trafficking and 'may be concealing or carrying away the contraband'").

When Officer Toscano commanded Mr. Wilson from afar to stop his car and ordered him and his wife to exit the vehicle and place their hands on the roof, the officer lacked specific, articulable facts indicating criminal activity. All Officer Toscano had was a report from Staff Sgt. Hannon that there was noisy behavior in the parking lot, the fact that Sgt. Hannon had pointed out a number of vehicles in the lot, including Mr. Wilson's, and Officer Toscano's

personal observation that Mr. Wilson had shouted toward the barracks. These facts, if established, do not amount to reasonable suspicion that Mr. Wilson was committing any crime. The fact that Officer Toscano apparently stopped every car that tried to leave the parking lot further indicates that he was conducting an improper, generalized sweep of the area.

II. OFFICER TOSCANO LACKED PROBABLE CAUSE TO ARREST MR. WILSON IN THE BARRACKS PARKING LOT.

A. Mr. Wilson was under arrest in the barracks parking lot when he was handcuffed, placed in the police car, separated from his wife, and transported to the police station.

Even if Officer Toscano had reasonable suspicion to stop Mr. Wilson's car, the stop quickly escalated into an impermissible arrest. As the Supreme Court has explained, "[i]n the name of investigating a person who is no more than suspected of criminal activity . . . police [may not] seek to verify their suspicions by means that approach the conditions of arrest." *Florida v. Royer*, 460 U.S. 491, 499 (1983) (plurality opinion) (finding *de facto* arrest where police took suspect to small room in airport, kept his ticket, retrieved his luggage, and never told him he was free to leave). In order to satisfy the Fourth Amendment's reasonableness requirement, the scope of a *Terry*-stop detention "must be carefully tailored to its underlying justification." *Id.* at 500. "It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Id.*

Generally speaking, a person is under arrest if "a reasonable person would have believed he was not free to leave" and the stop is more intrusive or lasts longer than necessary to dispel the police's reasonable suspicions. *Royer*, 460 U.S. at 501 (quoting *United States v. Mendenhall*,

446 U.S. 544, 554 (1980)); *see United States v. Leshuk*, 65 F.3d 1105, 1110 (4th Cir. 1995). In assessing whether an individual has been placed under arrest, courts should "examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *United States v. Sharpe,* 470 U.S. 675, 686 (1985).

The standard method of investigating probable cause for alcohol-related offenses is to conduct roadside field sobriety tests. In this case, Mr. Wilson was handcuffed, placed in a police car, and taken in chains to the police station. Nothing indicates that such drastic measures were appropriate. There were at least two officers at the scene, Mr. Wilson was not armed, nor did he hit an officer or physically resist arrest. The fact that Mr. Wilson may have used vulgar language did not warrant a full custodial detention; the mere use of vulgarity does not indicate that Mr. Wilson was armed, dangerous, or might flee. *Cf. United States v. Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989) (brief handcuffing of armed suspect at scene of crime in order to frisk for weapons was reasonable in light of fear that he might be dangerous or flee). In sum, the means used by Officer Toscano exceeded the reasonable scope of an investigatory stop and converted it into an arrest. *See, e.g., United States v. Fountain*, 2 F.3d 656, 666 (6th Cir. 1993) (because handcuffed suspect was "not removed from the home, placed in a squad car, or taken to the police station" he was not under arrest); *United States v. Richardson*, 949 F.2d 851, 857-58 (6th Cir. 1991) (placing of suspect in back of police car converted *Terry* stop into arrest).

B. Officer Toscano lacked probable cause to arrest Mr. Wilson in the barracks parking lot prior to administering standardized field sobriety tests.

The existence of probable cause is an objective inquiry: whether the facts possessed by the officer at the time would convince a reasonable person that the suspect is committing an

offense. *United States v. Gray*, 137 F.3d 765, 770 (4th Cir. 1998). In this case, Officer Toscano lacked probable cause to arrest Mr. Wilson in the barracks parking lot. At the moment he put Mr. Wilson in handcuffs, the only facts at Officer Toscano's disposal were Sgt. Hannon's report of noisy behavior, Sgt. Hannon's indication of several vehicles, including Mr. Wilson's, Officer Toscano's own observation of Mr. Wilson shouting towards the barracks, and Officer Toscano's observation that when ordered to get out of his car and put his hands on the roof of his vehicle, Mr. Wilson complied and used profanity. These facts, if established, do not amount to probable cause to believe that any crime was taking place, much less that Mr. Wilson had been drinking.

Once he placed Mr. Wilson in handcuffs, Officer Toscano detected an odor of alcohol on Mr. Wilson's person. This additional fact, if established, did not create probable cause to believe that Mr. Wilson was intoxicated or under the influence of alcohol. If the mere odor of alcohol on a person established probable cause of intoxication, field sobriety tests would be unnecessary. But a whole panoply of standard procedures exist to assist officers in assessing probable cause: field sobriety tests, portable breathalyzer tests, and careful personal observation of the individual by the police officer. *See United States v. Reid*, 929 F.2d 990, 994 (4th Cir. 1991) (officer had probable cause to arrest two suspects who drove in suspicious manner <u>and</u> smelled of alcohol <u>and</u> failed three and four sobriety tests respectively); *United States v. Iron Cloud*, 171 F.3d 587, 589 (8th Cir. 1999) (purpose of portable breathalyzer test is to screen for probable cause); *see generally,* DWI Detection and Standardized Field Sobriety Testing: Student Manual (Nat'l Highway and Traffic Safety Admin., 1995) (describing three scientifically validated field sobriety tests and their reliability in assessing probable cause). No field sobriety tests were conducted until after Mr. Wilson had been stopped, placed in handcuffs, transported to the police station,

and kept there for some period of time. Accordingly, Officer Toscano lacked probable cause to arrest Mr. Wilson in the parking lot.

CONCLUSION

For the reasons set forth above and for any other reasons developed at a hearing on this matter, Mr. Wilson respectfully moves this Honorable Court to suppress the fruits of the illegal search and seizure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of July, 2000, a copy of the foregoing Motion to Exclude Evidence was delivered to Paul Marone, Special Assistant Federal Public Defender, U.S. Army Garrison, Building 310, Wing 10, Aberdeen Proving Ground, Maryland, 21001.

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SASHA NATAPOFF
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