

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BINION,

Defendant.

Case No. CR07-0105

REPORT AND RECOMMENDATION
REGARDING MOTIONS TO
SUPPRESS

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I. INTRODUCTION

On the 30th day of April 2008, this matter came on for hearing on the Motion to Suppress Evidence (Fourth Amendment) (docket number 32) and Motion to Suppress Evidence (Fifth Amendment) (docket number 33) filed by Defendant on April 18, 2008. The Government was represented by Assistant United States Attorney Daniel C. Tvedt. Defendant Daniel Binion appeared personally and was represented by his attorney, David Nadler.

II. PROCEDURAL HISTORY

On December 5, 2007, Defendant Daniel Binion was charged by Indictment (docket number 1) with one count of conspiracy to distribute crack cocaine after having previously been convicted of two or more felony drug offenses, one count of possession with intent to distribute crack cocaine after having previously been convicted of two or more felony drug offenses, and one count of money laundering. Defendant entered a plea of not guilty and trial was scheduled for April 28, 2008. On March 25, 2008, Defendant filed a Motion to Continue Trial and Extend Pretrial Deadlines (docket number 29). On March 28, 2008, an Order Rescheduling Trial (docket number 30) was entered rescheduling Defendant's trial during the two-week period beginning on May 27, 2008. On April 18, 2008, Defendant filed the instant motions to suppress evidence.

III. ISSUES PRESENTED

Defendant claims that evidence seized as a result of a traffic stop must be suppressed because law enforcement (1) lacked reasonable suspicion to stop the vehicle, (2) lacked reasonable suspicion to detain him, (3) arrested him without probable cause, (4) frisked him without indication that he presented a threat of harm, and (5) exceeded the reasonable scope of detention. Thus, Defendant contends that the evidence seized by law enforcement was obtained in violation of his Fourth Amendment rights. Defendant also claims that statements he made to law enforcement while he was in custody on August 1, 2006, must also be suppressed because those statements were made after he invoked his

right to be silent. Accordingly, Defendant argues that any statements made to law enforcement officers were in violation of his Fifth Amendment rights.

IV. RELEVANT FACTS

A. Traffic Stop

On August 1, 2006, at around 2:00 a.m., Illinois State Police Trooper Jeanette Beck stopped a red 2002 Hyundai automobile for traveling 61 miles per hour (“mph”) in a 45 mph zone on Interstate 80, near Joliet, Illinois. Trooper Beck initiated the stop by activating the emergency lights on her patrol car. Before the vehicle pulled off the interstate, Trooper Beck observed the driver making furtive movements. It appeared to Trooper Beck that the driver was attempting to hide something under the front seat.

Once the car was stopped, Trooper Beck approached the vehicle from the driver’s side. When the driver rolled down his window, Trooper Beck observed a cloud of smoke exit the window and she smelled burnt marijuana. The driver produced his license and registration. The driver was Christopher Montgomery. The vehicle also had two passengers. Dennis Ogburn occupied the front-passenger seat and Defendant occupied a rear-passenger seat.

Trooper Beck returned to her patrol car and ran a computer check of Montgomery’s driver’s license. The computer check revealed an outstanding arrest warrant. Trooper Beck returned to the Hyundai and placed Montgomery under arrest. Again, Trooper Beck smelled the odor of burnt marijuana emanating from the vehicle.

Next, Trooper Beck asked Defendant to exit the vehicle. Upon exiting the car, Trooper Beck asked Defendant to put out his cigarette. After several requests, Defendant complied and extinguished his cigarette. Trooper Beck observed Defendant to be sluggish, lethargic, slow-moving, extremely nervous, and shaky. Trooper Beck also smelled the distinct odor of marijuana on Defendant’s person. Trooper Beck placed Defendant in handcuffs and patted him down for officer safety reasons. In performing the pat-down,

Trooper Beck felt several bulges in Defendant's crotch area. Trooper Beck believed Defendant was hiding contraband in his pants.

A second trooper, who had arrived on the scene shortly after Trooper Beck stopped the vehicle, also performed a pat-down on Defendant. The second trooper agreed with Trooper Beck, and concluded that Defendant was hiding contraband in his pants. Defendant told the troopers that he had an ounce of "weed" in his pants. Because the troopers determined that the contraband could not be retrieved without making Defendant remove his pants on the side of the roadway, they decided to arrest Defendant and transport him to District 5 Headquarters.

During the ride to District 5 Headquarters, Trooper Beck observed Defendant to be extremely nervous and fidgety. When Defendant got out of the patrol car, a baggie of marijuana fell out of his pant leg. Inside the headquarters, law enforcement conducted a full search of Defendant. The search revealed a baggie of cocaine in Defendant's front pocket, and a second baggie of marijuana was found in the crotch area of his pants.

B. Questioning at District 5 Headquarters

After Defendant was searched at the headquarters, he was taken into an interview room. Illinois State Police Sergeant Tim Zych and Special Agent Ray Rodriguez of the Illinois State Police Narcotics Unit entered the interview room, and Sgt. Zych read to Defendant the Illinois State Police Statement of Constitutional Rights and Waiver form.¹ When asked whether he understood his rights, Defendant answered that he understood them; however, he refused to sign the waiver form. Sgt. Zych and Special Agent Rodriguez immediately asked Defendant if there was anything else he wanted to say. Defendant stated "I'm booked, I'll be back in 10 to 15 [years]. Did you see what they took off of me?"² Sgt. Zych and Special Agent Rodriguez proceeded to ask Defendant

¹ See Government's Exhibit 1.

² In their respective briefs, both the Government and Defendant agree that Defendant made this statement to Sgt. Zych and Special Agent Rodriguez. See Government's Memorandum Re: Government's (continued...)

questions necessary to fill out a Personal History Report.³ Special Agent Rodriguez testified at the hearing that after Defendant refused to sign the waiver form and made his statement about being booked, he and Sgt. Zych only asked Defendant questions necessary to fill out the administrative form, and did not ask Defendant any questions about the traffic stop or the drugs found on his person.

V. ANALYSIS

A. Fourth Amendment -- Traffic Stop

1. Was there Probable Cause to Stop the Hyundai?

When a police officer observes even a minor traffic violation, the police officer has probable cause to conduct a traffic stop. *United States v. Sallis*, 507 F.3d 646, 649 (8th Cir. 2007); *see also United States v. Coney*, 456 F.3d 850, 855-56 (8th Cir. 2006) (“An officer has probable cause to conduct a traffic stop when he [or she] observes even a minor traffic violation.”); *United States v. Brown*, 345 F.3d 574, 578 (8th Cir. 2003) (“An officer who observes a traffic violation, even a minor one, has probable cause to initiate a traffic stop.”). Moreover, there is probable cause to conduct a traffic stop, “[w]hen police officers have an objectively reasonable basis to believe that a driver is speeding.” *Sallis*, 507 F.3d at 649. Here, Trooper Beck credibly testified that she stopped the Hyundai for traveling 61 mph in a 45 mph zone. Accordingly, the Court finds that Trooper Beck had probable cause to stop the vehicle.

2. Was there Reasonable Suspicion for further Investigation?

At a traffic stop, a police officer is permitted to “check the driver’s identification and vehicle registration, ask the driver to step out of his vehicle, and ask routine questions

²(...continued)

Resistance to Motion to Suppress Evidence (Fourth and Fifth Amendment) at 3 (docket number 37-2) and Defendant’s Brief in Support of Motion to Suppress Evidence (Fifth Amendment) at 2 (docket number 33-2). At the hearing, Special Agent Rodriguez testified that Defendant said that he was booked and “[d]id you see what they caught me with or what they got me with and I’ll see you in ten to 15 years.”

³ *See* Government’s Exhibit 2. The Personal History Report is a standard administrative form used for booking purposes.

concerning the driver's destination and the purpose of his [or her] trip." *United States v. Long*, 320 F.3d 795, 799 (8th Cir. 2003) (citing *United States v. Gregory*, 302 F.3d 805, 809 (8th Cir. 2002)). An investigative stop, however, "can grow out of a traffic stop so long as the officer has reasonable suspicion of criminal activity to expand his [or her] investigation, even if his [or her] suspicions were unrelated to the traffic offense that served as the basis of the stop." *United States v. Gomez Serena*, 368 F.3d 1037, 1041 (8th Cir. 2004) (citing *Long*, 320 F.3d at 799-800); *see also United States v. Carrate*, 122 F.3d 666, 668 (8th Cir. 1997) ("An officer must have a reasonable, articulable suspicion that a person is involved in a criminal activity unrelated to the traffic violation before the officer may expand the scope of the traffic stop and continue to detain the person for additional investigation.").

After the vehicle was stopped, Trooper Beck approached the driver's side window and observed a cloud of smoke come from the car. Trooper Beck also detected the odor of burnt marijuana coming from the car. Trooper Beck asked for the driver's identification and ran a computer check of his identification. The computer check revealed that the driver had an outstanding arrest warrant. Trooper Beck returned to the vehicle, had the driver exit the car, and placed him under arrest. At the hearing, Trooper Beck testified that when the driver exited the vehicle, she once again smelled the odor of burnt marijuana coming from within the vehicle.

Next, Trooper Beck asked Defendant to exit the car. Trooper Beck described Defendant as sluggish, lethargic, slow-moving, extremely nervous, and shaking when he exited the vehicle. Trooper Beck also detected a strong odor of marijuana on Defendant's person. Defendant was initially unresponsive to the trooper's directives to remove his cigarette. The Court finds that under such circumstances, Trooper Beck had a reasonable, articulable suspicion of the use of marijuana by the passengers in the car, thereby permitting an expansion of the scope of the traffic stop and a continuation of her investigation. *See Gomez Serena*, 368 F.3d at 1041; *Carrate*, 122 F.3d at 668; *see also*

United States v. McCoy, 200 F.3d 582, 584 (8th Cir. 2000) (per curiam) (in a traffic stop, the odor of burnt marijuana on the individual stopped and the strong smell of air freshener in the stopped vehicle provided the investigating officer with probable cause to expand the investigation and search the vehicle for marijuana).

3. *Were Defendant's Fourth Amendment Rights Violated when the Trooper Performed a Pat-Down Search of Defendant for Officer Safety?*

In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court considered the constitutional limitations on a police officer's decision to perform a pat-down search of a suspicious individual. The Supreme Court held that a protective search for weapons is constitutional "where a police officer observes unusual conduct which leads him [or her] reasonably to conclude in light of his [or her] experience that criminal activity may be afoot and that the persons with whom he [or she] is dealing may be armed and presently dangerous." *Id.* at 30; *see also United States v. Ellis*, 501 F.3d 958, 961 (8th Cir. 2007) ("To be constitutionally reasonable, a protective frisk must be . . . based upon reasonable suspicion that criminal activity is afoot." [*United States v. Davis*, 202 F.3d 1060, 1062 (8th Cir. 2000).] A protective frisk is only warranted if 'specific articulable facts taken together with rational inferences' support the reasonable suspicion that a party was potentially armed and dangerous. *United States v. Clay*, 640 F.2d 157, 159 (8th Cir. 1981)."). Furthermore, "[a]t any investigative stop-whether there is an arrest, an inventory search, neither, or both-officers may take steps reasonably necessary to protect their personal safety.'" *United States v. Stachowiak*, ___ F.3d ___, 2008 WL 878403, *3 (8th Cir. 2008) (quoting *United States v. Shranklen*, 315 F.3d 959, 961 (8th Cir. 2003)). In making a determination on the reasonableness of a pat-down search, courts view the facts under an objective standard, and consider the totality of the circumstances known to the officer at that time. *Ellis*, 501 F.3d at 961. Additionally, it not necessary to find that the police officer is "absolutely certain that the individual is armed, rather the issue in determining the legitimacy of the search is 'whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was

in danger.’” *United States v. Abokhai*, 829 F.2d 666, 670 (8th Cir. 1987) (quoting *Terry*, 392 U.S. at 27).

At the hearing, Trooper Beck explained that she performed the pat-down search of Defendant for officer safety. Specifically, Trooper Beck was concerned that Defendant might pose a threat because he was both uncooperative and fidgety when he was removed from the car. In addition, Trooper Beck’s concern for her safety was also raised because of Defendant’s suspected involvement with drugs. *See United States v. Robinson*, 119 F.3d 663, 667 (8th Cir. 1997) (at an investigatory stop, when an individual is suspected of drug involvement, it is reasonable for a police officer to believe that the individual may be armed and dangerous).

This case presents a situation where: (1) A vehicle containing three individuals was stopped on the Interstate for speeding at 2:00 a.m.; (2) the driver of the vehicle had an outstanding arrest warrant; (3) the State Trooper had a reasonable suspicion of drug activity in the vehicle; and (4) the Defendant was uncooperative and fidgety when he exited the car. Based on the totality of the circumstances, the Court determines that a prudent person in such a situation would be warranted in the belief that his or her safety was in danger. *See Abokhai*, 829 F.2d at 670. Therefore, the Court finds that Trooper Beck was justified in performing a pat-down search of Defendant for officer safety.

4. Results of the Pat-Down Search

During the pat-down search of Defendant, Trooper Beck felt several bulges in Defendant’s crotch area. At the hearing, Trooper Beck testified that she immediately knew the bulges were contraband, believing them to be a baggie of marijuana. Trooper Beck had the other trooper at the scene confirm her suspicions. After also performing a pat-down search, the second trooper also concluded that Defendant had contraband in the crotch area of his pants.

In *United States v. Bustos-Torres*, 396 F.3d 935, 943-45 (8th Cir. 2005), the Eighth Circuit Court of Appeals explained:

While the ‘purpose of a pat-down search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence,’ and while the search must therefore ‘be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby,’ *Minnesota v. Dickerson*, 508 U.S. 366, 373, 11 S. Ct. 2130, 124 L. Ed. 2d 334 (1993) (internal citations and quotations omitted), officers may lawfully seize contraband they incidentally discover in ‘plain touch’ during a *Terry* frisk.

In *Dickerson*, the Supreme Court established the “plain touch” or “plain feel” concept as an analogue to the plain-view doctrine. . . . *Dickerson* requires the officer conducting a pat-down search have probable cause to believe the item in plain touch is incriminating evidence. . . . To give rise to probable cause, the incriminating character of the object must be immediately identifiable. . . . That is to say, the object must be one ‘whose contour or mass makes its identity immediately apparent.’ [*Dickerson*, 508 U.S. at 376.]

Id. According to her testimony, Trooper Beck immediately suspected the bulges in Defendant’s crotch area was contraband. Therefore, the Court finds that Trooper Beck was entitled to seize the drugs. *See Id.*; *see also United States v. Hughes*, 15 F.3d 798, 802 (8th Cir. 1994) (applying *Dickerson*, the Eighth Circuit determined that upon first impression, when a detective performed a *Terry* pat-down search and felt lumps that he believed to be crack cocaine, the detective was entitled to seize the contraband under the *Terry* test).

5. Transporting Defendant to Headquarters

The troopers determined that they could not retrieve the suspected marijuana from Defendant’s pants without requiring him to take his pants off on the side of the road. Because the troopers could not retrieve the marijuana in a “dignified manner,” they arrested Defendant and transported him to headquarters to retrieve the contraband. The facts of this case are similar to *United States v. Davis*, 457 F.3d 817 (8th Cir. 2006). In *Davis*, a police officer properly executed a traffic stop and conducted a pat-down search

of the defendant. *Id.* at 823. The police officer swept the defendant's buttocks area and felt a hard, marble-like substance and suspected the defendant was attempting to conceal drugs. *Id.* The Eighth Circuit determined that the police officer had probable cause to believe the defendant was attempting to conceal drugs, had probable cause to arrest the defendant, and was permitted to transport the defendant to the police station and remove the drugs from his person as a search incident to arrest. *Id.* Similarly, in this case, the Court determines that the troopers had probable cause to believe Defendant was concealing marijuana in the crotch area of his pants based on their individual pat-down searches of Defendant and Defendant's statement that he had an ounce of "weed" in his pants. Thus, the troopers had probable cause to arrest Defendant and were permitted to transport him to District 5 Headquarters to remove the marijuana from his person as a search incident to arrest.

6. Summary

In summary, the Court finds that Defendant's Fourth Amendment rights were not violated by the actions of the state troopers. Specifically, the Court determines that: (1) Trooper Beck had probable cause to stop the Hyundai for speeding; (2) Trooper Beck had a reasonable suspicion of marijuana use by the passengers in the vehicle, thus authorizing an expansion of the scope of the traffic stop and continued investigation; (3) Trooper Beck was justified in performing a pat-down search of Defendant for officer safety; (4) after both state troopers conducted pat-down searches of Defendant, the troopers had probable cause to arrest him based on their suspicions that he was concealing marijuana in the crotch area of his pants; and (5) the troopers were permitted to transport Defendant to their headquarters to retrieve the marijuana from his person as a search incident to arrest.

B. Fifth Amendment -- Miranda Rights

Defendant argues that officers at the District 5 Headquarters violated his Fifth Amendment rights by failing to honor his right to remain silent and interrogating him after he refused to waive his *Miranda* rights.

The United States Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” *Id.* at 444. Among other things, the person must be warned that he or she has a right to remain silent and “that he [or she] has a right to the presence of an attorney, either retained or appointed.” *Id.* The Supreme Court noted, however, that the defendant may waive his or her rights, “provided the waiver is made voluntarily, knowingly, and intelligently.” *Id.* at 444. The Supreme Court further held that not only must an accused be warned of his or her right to remain silent, he or she must also be advised of the consequences associated with waiving that right.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it.

Id. at 469.

At District 5 Headquarters, Defendant was interviewed by Sgt. Zych and Special Agent Rodriguez. Before asking Defendant any questions, Sgt. Zych read Defendant his *Miranda* rights from the Illinois State Police Statement of Constitutional Rights and Waiver form. Defendant told the officers that he understood his rights, but he refused to sign the waiver form. The officers asked Defendant if there was anything else he wanted to say. Defendant stated “I’m booked, I’ll be back in 10 to 15 [years]. Did you see what they

took off of me?” The officers proceeded to ask Defendant questions necessary to fill out a standard administrative form.

“‘A voluntary statement made by a suspect, not in response to interrogation, is not barred by the Fifth Amendment and is admissible with or without the giving of *Miranda* warnings.’” *United States v. Altaic*, 477 F.3d 1008, 1016 (8th Cir. 2007) (quoting *United States v. Withorn*, 204 F.3d 790, 796 (8th Cir. 2000)); *see also United States v. Londondio*, 420 F.3d 777, 783 (8th Cir. 2005) (“Voluntary statements that are not in response to interrogation are admissible with or without the giving of *Miranda* warnings.”); *United States v. Lawrence*, 952 F.2d 1034, 1036 (8th Cir. 1992) (same). In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Supreme Court held that:

Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term “interrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Id. at 300-01; *see also United States v. Tail*, 459 F.3d 854, 857 (8th Cir. 2006) (discussing the meaning of “interrogation” under *Innis*).

The Court finds that Defendant’s statement “I’m booked, I’ll be back in 10 to 15 [years]. Did you see what they took off of me” was a voluntary statement, and was not given in response to interrogation. When Defendant refused to sign the *Miranda* rights waiver form, Sgt. Zych and Special Agent Rodriguez simply asked Defendant whether he wanted to say anything. The Court determines that this is not a question that the officers should have known was reasonably likely to elicit an incriminating response from Defendant. *See Innis*, 446 U.S. at 300-01. At the hearing, Special Agent Rodriguez testified that, after Defendant refused to sign the *Miranda* rights waiver form, he did not expect Defendant to discuss the traffic stop or drugs found on his person. Thus, neither he nor Sgt. Zych asked Defendant any questions regarding the traffic stop or drugs.

Special Agent Rodriguez testified that he and Sgt. Zych only asked Defendant questions necessary to fill out the Personal History Report. Because Defendant's statement was not the result of an interrogation by law enforcement, the Court concludes that Defendant's Fifth Amendment rights were not violated.⁴

VI. CONCLUSION

The Court concludes that the actions of the troopers did not violate Defendant's Fourth Amendment rights during the traffic stop on August 1, 2006. The Court further concludes that Defendant's Fifth Amendment rights were not violated because the statements in question were both voluntary and not in response to interrogation by law enforcement.

VII. RECOMMENDATION

For the reasons set forth above, I respectfully recommend that the District Court **DENY** the Motion to Suppress Evidence (Fourth Amendment) (docket number 32) and Motion to Suppress Evidence (Fifth Amendment) (docket number 33) filed by Defendant on April 18, 2008.

The parties are advised, pursuant to 28 U.S.C. § 636(b)(1)(B), that within ten (10) days after being served with a copy of this Report and Recommendation, any party may serve and file written objections with the District Court. *Defendant is reminded that*

⁴ At the hearing, Defendant "amended" his motion to suppress to include Defendant's statement at the scene of the traffic stop, that he had an ounce of "weed" in his pants, which was made after the troopers had conducted their respective pat-down searches. Defendant claims that he was in custody when the pat-down search was conducted and that he was not mirandized prior to making the statement, in violation of the Fifth Amendment and *Miranda*. Even if Defendant was in custody at the time he made the statement, Defendant presents no evidence that either trooper asked him whether he had marijuana in his pants. Specifically, at the hearing, Trooper Beck testified that she did not recall asking Defendant whether he had marijuana in his pants after she performed the pat-down search on him. A voluntary or spontaneous statement made by a suspect, not in response to officer questioning, is not protected under *Miranda*. *McCoy*, 200 F.3d at 584; *see also United States v. Hayes*, 120 F.3d 739, 744 (8th Cir. 1997) ("'*Miranda* does not protect an accused from a spontaneous admission made under circumstances not induced by the investigating officers or during a conversation not initiated by the officers.' *United States v. Hawkins*, 102 F.3d 973, 975 (8th Cir. 1996)."). Accordingly, because Defendant's statement was voluntary and not in response to questioning by either trooper, the Court finds that Defendant's Fifth Amendment rights were not violated.

pursuant to Local Rule 72.1, “[a] party asserting such objections must arrange promptly for a transcription of all portions of the record the district court judge will need to rule on the objections.” Accordingly, if Defendant is going to object to this Report and Recommendation, he must promptly order a transcript of the hearing held on April 30, 2008.

DATED this 6th day of May, 2008.



JON STUART SCOLES
United States Magistrate Judge
NORTHERN DISTRICT OF IOWA