

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDDIE ALCAREZ MORENO and
VICTOR ROJAS MADRIGAL,

Defendant.

No. CR00-3014-MWB

**ORDER REGARDING
MAGISTRATE’S REPORT AND
RECOMMENDATION CONCERNING
DEFENDANTS’ MOTIONS TO
SUPPRESS**

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I. INTRODUCTION AND BACKGROUND

On April 13, 2000, a one-count indictment was returned against defendants Eddie Alcaarez Moreno and Victor Rojas Madrigal, charging each with possessing with intent to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. §§ 841 (a)(1) and 841(b)(1)(A).¹ The methamphetamine which forms the basis for the charge against each of these defendants was discovered as the result of a traffic stop of the automobile in which defendants were travelling.

On June 1, 2000, defendant Moreno filed his Motion For Suppression Of Wiretaps, Oral Communications Or Other Electronic Eavesdropping (#26) and his Motion To Suppress Evidence Obtained Through Illegal Search (#28). Defendant Madrigal joined each of defendant Moreno's motions, but subsequently withdrew his joinder to defendant Moreno's Motion For Suppression Of Wiretaps, Oral Communications Or Other Electronic Eavesdropping. Defendants' motions to suppress were referred to United States Magistrate Judge Paul A. Zoss, pursuant to 28 U.S.C. § 636(b), for the purpose of holding an evidentiary hearing and preparing a Report and Recommendation on defendants' motions to suppress. On June 28, 2000, an evidentiary hearing was held, and on July 14, 2000, Judge Zoss filed a Report and Recommendation in which he recommends that defendants' Motion To Suppress Evidence Obtained Through Illegal Search be granted but recommends that defendant Moreno's Motion For Suppression Of Wiretaps, Oral Communications Or Other Electronic Eavesdropping be denied. The government filed objections to Judge Zoss's Report and Recommendation on July 20, 2000. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of defendants' motions.

The government has filed five factual objections to Judge Zoss's Report and Recommendation, and three objections to the legal conclusions reached by Judge Zoss in his

¹An amended indictment containing defendant Madrigal's correct name was filed on April 27, 2000.

Report and Recommendation. Specifically, the government asserts that Judge Zoss's legal conclusions were incorrect in the following three respects: First, the government asserts that the Iowa State Trooper's stop of the automobile in which defendants were travelling was lawful. Second, the government contends that defendant Moreno's consent to search the automobile was voluntary. Finally, the government asserts that defendant Madrigal does not have a reasonable expectation of privacy in the automobile and therefore, even if the evidence is suppressed, it should be suppressed only as to defendant Moreno.

The court held telephonic oral arguments on the government's objections on August 25, 2000. At the oral arguments, the government was represented by Assistant United States Attorney C.J. Williams. Defendant Moreno was represented by Charles Lee Hawkins, Minneapolis, Minnesota. Defendant Madrigal was represented by Assistant Federal Public Defender Jeffrey A. Neary.

II. LEGAL ANALYSIS

A. Standard Of Review

Pursuant to statute, this court's standard of review for a magistrate judge's report and recommendation is as follows:

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for review of a magistrate judge's report and recommendation on dispositive motions and prisoner petitions, where objections are made, as follows:

The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to

which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

As noted above, the government has filed objections to Judge Zoss's Report and Recommendation. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of defendants' motions.

B. Objections To Findings Of Fact

The court will address each of the government's factual objections seriatim.

1. The Government's First Factual Objection

First, the government objects to Judge Zoss's finding that the temporary transit tag was "clearly legible" from the distance in which Iowa State Trooper Chris Callaway was following the Chevrolet Beretta in which defendants were travelling. Report and Recommendation at p. 3 n.2. The government contends that the only portion of the temporary transit tag which was legible from the distance in which Trooper Callaway was following the Beretta were the four large numbers and two letters. The government further asserts that the Iowa Department of Transportation logo and the words on the tag are not legible from the distance in which Trooper Callaway was following the Beretta. The court finds that only the large numbers and letters "ZH3733" were clearly visible from the distance in which Trooper Callaway was following the Beretta. The court, however, further finds that the Iowa Department of Transportation logo and the words on the tag would have been legible to Trooper Callaway if he had pulled into the left, passing lane and driven up to near of the rear of the Beretta, an action which Trooper Callaway did not attempt before stopping the Beretta.

2. The Government's Second Factual Objection

The government next objects to Judge Zoss's finding that from the documents defendant Moreno gave Trooper Callaway, Trooper Callaway was able to determine the Beretta's temporary transit tag was valid, but nevertheless asked defendant Moreno to come back to the patrol car while he checked the validity of defendant Moreno's driver's license. Report and Recommendation at p. 4. The court finds that after obtaining defendant Moreno's license and documents related to the registration and sale of the Beretta, but before reading any of the documents, Trooper Callaway requested that defendant Moreno come back to the patrol car. Tr. at p.22. Once at the patrol car, Trooper Callaway looked through the documents given to him by defendant Moreno, the original title for the Beretta, an Iowa registration for the car and the bill of sale for the automobile, and determined that the Beretta's registration was valid. Tr. at pp. 22, 61.

3. *The Government's Third Factual Objection*

The government's third objection to Judge Zoss's findings of fact is not to a factual finding actually made by Judge Zoss but to the failure of Judge Zoss to make an additional factual finding that the government believes is significant. The government asserts prior to the second search of the Beretta, Trooper Callaway asked defendant Moreno for his consent to search the car and told him, "But if you don't want to, that's fine." The court finds that Trooper Callaway did make this statement to defendant Moreno prior to the second search of the Beretta. Ex. 1, Videotape of the Traffic Stop.

4. *The Government's Fourth Factual Objection*

The government's fourth objection to Judge Zoss's findings of fact is again not to a factual finding actually made by Judge Zoss but to the absence of an additional factual finding. The government asserts that although defendants were given the number of the towing company which they could have used to contact Trooper Callaway, defendant Moreno never telephoned or otherwise contacted Trooper Callaway to withdraw his consent to search. The government's assertion of fact is correct, defendants were in fact given the

number of the towing company which they could have used to contact Trooper Callaway. Defendant Moreno never telephoned or otherwise contacted Trooper Callaway to withdraw his consent to search.

5. *The Government's Fifth Factual Objection*

Again, the government's objection in this instance is not to an actual factual findings made by Judge Zoss but to the absence of an additional factual finding. The government argues that the factual findings fail to indicate that defendant Madrigal was only a passenger in the vehicle and, as such, had no ownership interest in the car. The government further asserts that defendant Madrigal did not introduce any evidence at the hearing establishing that he had an expectation of privacy in the Beretta. The court finds that the record does reflect that defendant Moreno was the owner of the Beretta and that defendant Madrigal was a passenger in the vehicle on the day it was stopped by Trooper Callaway. Moreover, the court finds that defendant Madrigal did not introduce any evidence establishing that he had an expectation of privacy in the Beretta.

C. Objections To Legal Conclusions

As noted above, the government lodges three objections to Judge Zoss's legal conclusions. First, the government asserts that asserts that Trooper Callaway's stop of the automobile in which defendants were travelling was lawful. Second, the government asserts that defendant Madrigal does not have a reasonable expectation of privacy in the automobile and therefore, even if the evidence is suppressed, it should be suppressed only as to defendant Moreno. Finally, the government contends that defendant Moreno's consent to search the automobile was voluntary. The court will take up each of the government's contentions in turn.

1. *Validity Of Investigatory Stop*

Initially, the government contends that Judge Zoss erred in concluding that Trooper

Callaway did not have reasonable suspicion to conduct an investigatory stop of Moreno's automobile pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). Therefore, the court must first determine whether Trooper Callaway had reasonable suspicion to stop the Beretta.

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that law enforcement officers have the authority under the Fourth Amendment to stop and temporarily detain citizens short of an arrest, and that such a stop is justified by less than the probable cause necessary for an arrest. *Terry*, 392 U.S. at 30; *Ornelas v. United States*, 116 S. Ct. 1657, 1660 (1996) (“An investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion . . .”). Under *Terry*, a police officer may detain and investigate citizens when the officer has a reasonable suspicion that “criminal activity may be afoot.” *Id.* at 30; see *United States v. Elkins*, 70 F.3d 81, 82 (10th Cir. 1995) (“It is well settled that an investigative stop is justified where police officers have ‘a reasonable, articulable suspicion that the detainee has been, is, or is about to be engaged in criminal activity.’”) (quoting *United States v. Nicholson*, 983 F.2d 983, 987 (10th Cir. 1993)); *United States v. Lee*, 68 F.3d 1267, 1270 (11th Cir. 1995) (“It is acceptable under the Fourth Amendment for the police to stop persons and detain them briefly in order to investigate a reasonable suspicion that the persons have engaged or are about to engage in criminal activity.”); *United States v. Johnson*, 64 F.3d 1120, 1124 (8th Cir. 1995) (“A police officer may ‘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”.’”) (quoting *Terry*, 392 U.S. at 30), *cert. denied*, 116 S. Ct. 971 (1996).² In this case, the court must determine whether Trooper Callaway had such reasonable suspicion. “Whether the particular facts known to the officer amount to an objective and particularized basis for a

²The *Terry* rationale also applies equally to investigatory stops of an automobile. *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *United States v. Williams*, 876 F.2d 1521, 1524 (11th Cir. 1989).

reasonable suspicion of criminal activity is determined in light of the totality of the circumstances.’” *United States v. Halls*, 40 F.3d 275, 276 (8th Cir. 1994) (quoting *United States v. Garcia*, 23 F.3d 1331, 1334 (8th Cir. 1994)), *cert. denied*, 115 S. Ct. 1721 (1995); *see Johnson*, 64 F.3d at 1124; *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990), *cert. denied*, 502 U.S. 962 (1991).

Here, the government argues that Trooper Callaway properly stopped the automobile in which defendants were travelling in order to check the validity of the temporary transit tag on the vehicle. The flaw in the government’s argument is that Trooper Callaway never saw anything improper about the temporary transit tag and, thus, had no reason to question its validity. The temporary transit tag on the Beretta was properly displayed, with the tag’s numbers and letters clearly visible. Thus, this case is the antithesis of those relied on by the government in which the view of a motor vehicle’s temporary tags was obstructed. *See United States v. Peltier*, 217 F.3d 608, 610 (8th Cir. 2000) (holding that sheriff’s deputy lawfully stopped truck where dark tint of the truck’s rear window prevented deputy from seeing the temporary registration tag); *United States v. Dexter*, 165 F.3d 1120, 1123-26 (7th Cir. 1999) (holding that law enforcement officer could lawfully stop vehicle where officer could not see temporary registration tag through darkly tinted windows); *United States v. Dumas*, 94 F.3d 286, 290 (7th Cir. 1996) (holding that law enforcement officer had reasonable suspicion to stop van where temporary tag was behind tinted window and was not legible to the officer); *United States v. Tipton*, 3 F.3d 1119, 1122-23 (7th Cir. 1993) (holding that law enforcement officers had reasonable suspicion to stop automobile where no license plates were visible on either the front or back of the car and temporary license sticker had partially fallen off inside of rear window and was not readily visible). Here, in stark contrast, Trooper Callaway stopped the Beretta only because of his unfamiliarity with this particular style of temporary transit tag. Indeed, Trooper Callaway testified that had the Beretta been bearing the more commonly used 45-day temporary tag, *see Gov’t Ex. 3*, or

even the less used 15-day temporary tag, see Def. Ex. 102, he would not have stopped the automobile. Tr. at pp. 55, 58. The only reason Trooper Callaway questioned the validity of the temporary transit tag on the Beretta was his unfamiliarity with its appearance. Although the 30-day temporary transit tag on the Beretta did not resemble either the 45-day or 15-day temporary tags more commonly used in Iowa, this tag's existence and use should have been known by a law enforcement officer specifically charged with enforcing the traffic laws of the State of Iowa. Thus, the court concludes that an objective assessment of the facts and circumstances of this stop compels the conclusion that the officer lacked any articulable, reasonable suspicion of unlawful conduct. See *United States v. Wilson*, 205 F.3d 720, 722 (4th Cir. 2000) (holding that law enforcement officer did not have reasonable suspicion for stopping defendant's car simply because officer could not read handwritten expiration date on temporary tag as he drove behind defendant after darkness had fallen); cf. *United States v. McSwain*, 29 F.3d 558, 560 (10th Cir. 1994) (holding that once police officer observed that the temporary sticker on vehicle was valid, the purpose of the stop was satisfied and the officer's further detention of the vehicle to question occupant about the vehicle and to request his driver's license and registration exceeded "the scope of the stop's underlying justification."). Because Trooper Callaway did not have any articulable, reasonable suspicion of unlawful conduct, he had no legal justification for pulling over the Beretta. Therefore, this objection to Judge Zoss's Report and Recommendation is overruled.

2. Defendant Madrigal's Standing

The government's next objection to Judge Zoss's conclusions of law is not to a conclusion of law made by Judge Zoss but to an issue not addressed in the Report and Recommendation, whether defendant Madrigal had a reasonable expectation of privacy in the Beretta and, if not, the affect that has on the issue of suppression of the evidence with respect to defendant Madrigal.

The issue of a defendant's standing is "invariably intertwined" with substantive Fourth Amendment analysis. *Rakas v. Illinois*, 439 U.S. 128, 140 (1978); *United States v. Miller*, 84 F.3d 1244, 1249 (10th Cir.), *cert. denied sub nom. Hicks v. United States*, 117 S. Ct. 443 (1996); *United States v. Betancur*, 24 F.3d 73, 76 (10th Cir. 1994); *United States v. Arango*, 912 F.2d 441, 444 (10th Cir. 1990), *cert. denied*, 499 U.S. 924 (1991); *United States v. Chuang*, 897 F.2d 646, 649 (2d Cir.), *cert. denied*, 498 U.S. 824 (1990); *United States v. Paulino*, 850 F.2d 93, 96 (2d Cir. 1988), *cert. denied*, 490 U.S. 1052 (1989); *United States v. Biondich*, 652 F.2d 743, 745 (8th Cir.), *cert. denied*, 454 U.S. 975 (1981). In ascertaining whether a search violated the Fourth Amendment rights of the defendant, the court considers two factors: whether the defendant has manifested a subjective expectation of privacy in the area searched and whether that expectation is one society would recognize as objectively reasonable. *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *see California v. Greenwood*, 486 U.S. 35, 39 (1988); *see also Miller*, 84 F.3d at 1249; *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995); *United States v. Stallings*, 28 F.3d 58, 60 (8th Cir. 1994); *United States v. Gomez*, 16 F.3d 254, 256 (8th Cir. 1994); *United States v. Mancini*, 8 F.3d 104, 107 (1st Cir. 1993); *United States v. Morales*, 737 F.2d 761, 763 (8th Cir. 1984). The defendant moving to suppress has the burden of proving a reasonable expectation of privacy in the area searched. *Rakas*, 439 U.S. at 130-31 n.1; *Muhammad*, 58 F.3d at 355; *Gomez*, 16 F.3d at 256; *Mancini*, 8 F.3d at 107; *United States v. Hoey*, 983 F.2d 890, 892 (8th Cir. 1993); *United States v. Kiser*, 948 F.2d 418, 423 (8th Cir. 1991), *cert. denied*, 503 U.S. 983 (1992); *United States v. Sanchez*, 943 F.2d 110, 113 (1st Cir. 1991); *United States v. Monie*, 907 F.2d 793, 794 (8th Cir. 1990).

Here, the record before the court is that defendant Madrigal was a passenger in the automobile owned and driven by defendant Moreno. The government contends that since the methamphetamine was found in an automobile belonging to defendant Moreno, defendant Madrigal lacks standing to object to the troopers' search of Moreno's Beretta.

In *Jones v. United States*, 362 U.S. 257 (1960), the United States Supreme Court held that automatic standing applied to any person charged with an offense in which possession is an essential element, and that any person legitimately on the premises where a search takes place could challenge the lawfulness of the search. Automatic standing was eliminated in *Rakas v. Illinois*, 439 U.S. 128 (1978). In *Rakas*, the defendants were passengers in an automobile that had been lawfully stopped on reasonable suspicion but unlawfully searched. The search uncovered a sawed-off rifle under the passenger seat and a box of shells in a locked glove box, which helped link the defendants to a robbery. The defendants never asserted a property interest in the evidence but claimed standing because of their lawful presence as passengers in the vehicle. Thus, the question before the court in *Rakas* was whether the *Jones* test conferring standing on one "who is lawfully on the premises" applied to automobiles. Writing for the Court, Justice Rehnquist noted that the inquiry requires a determination of whether the disputed search and seizure has infringed on an interest of the defendant which the Fourth Amendment was designed to protect. Justice Rehnquist contended the phrase "lawfully on the premises" created too broad a gauge for measurement of Fourth Amendment rights. The Court noted that the defendants asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized, nor did they have a "legitimate expectation of privacy" in the glove compartment or the area under the seat of the car in which they were merely passengers.

Id. at ; *see also United States v. Lewis*, 24 F.3d 79, 81 (10th Cir.) ("Rakas provides the definitive teaching that a 'passenger qua passenger' has no reasonable expectation of privacy in a car that would permit the passenger's Fourth Amendment challenge to the search of the car."), *cert. denied*, 513 U.S. 905 (1994). Courts have applied *Rakas* to conclude that passengers lack standing to challenge vehicle searches. *See, e.g., Lewis*, 24 F.3d at 81; *United States v. Jefferson*, 925 F.2d 1242, 1249 (10th Cir.) (nonowner passenger lacked standing to challenge search even though he shared in the driving in a long-distance trip),

cert. denied, 502 U.S. 884 (1991); *United States v. Erwin*, 875 F.2d 268, 271-72 (10th Cir. 1989) (passenger's possession of key to rear door of car insufficient to establish standing).

Thus, in the instant case, with regard to his interest in the Beretta, defendant Madrigal has not offered any evidence upon which to base a foundation that he had a legitimate expectation of privacy in the Beretta. Accordingly, the court concludes that defendant Madrigal does not have standing to directly challenge the search of the Beretta. However, the court's conclusion that defendant Madrigal lacks standing to directly challenge the search of the Beretta does not end the court's inquiry.

In his motion to suppress, defendant Madrigal challenges not only the search but also the initial stop. Courts have distinguished passenger standing to directly challenge a vehicle search from passenger standing to seek suppression of evidence discovered in a vehicle as the fruit of an unlawful stop, detention, or arrest. That distinction is important to this case.

As scholars and subsequent cases have noted, the passengers in *Rakas* challenged neither the initial traffic stop nor their arrests. *See Rakas*, 439 U.S. at 130 ("[W]e are not here concerned with the issue of probable cause."); *see also United States v. Kimball*, 25 F.3d 1, 5-6 n. 3 (1st Cir. 1994); (discussing *Rakas*); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3(e), at 172-73 (3rd ed. 1996).

As a result, *Rakas* does not foreclose a passenger's Fourth Amendment challenge to the seizure of his person:

Does [*Rakas*] mean that persons who are "merely passengers" (i.e., asserting neither a property nor a possessory interest in the vehicle, nor an interest in the property seized) will never have standing? Although Justice Rehnquist's opinion unfortunately does not even hint at a stopping point short of such an absolute rule, thus prompting some courts to give *Rakas* such an interpretation, it does not seem that *Rakas* goes this far. For one thing, it is important to note, as the concurring opinion in *Rakas* takes great pains to emphasize, that the "petitioners do not challenge the constitutionality of the police action in

stopping the automobile in which they were riding; nor do they complain of being made to get out of the vehicle," so that the question before the Court was "a narrow one: Did the search of their friend's automobile after they had left it violate any Fourth Amendment right of the petitioners?" This would indicate, as two-thirds of the Court (the two concurring justices and the four dissenters) recognize, that a passenger does have standing to object to police conduct which intrudes upon his Fourth Amendment protection against unreasonable seizure of his person. If either the stopping of the car or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit.

LAFAVE, *supra*, § 11.3(e), at 172-73 (footnotes omitted).

Several courts have read *Rakas* in accord with Professor LaFave. *United States v. Eylico-Montoya*, 70 F.3d 1158, 1163 (10th Cir. 1995) ("This Circuit has read *Rakas* as Professor LaFave suggests"); *Erwin*, 875 F.2d at 270 (holding that a passenger had standing to challenge a traffic stop); *accord United States v. Twilley*, ___ F.3d ___, 2000 WL 1140605, at *4 (9th Cir. Aug. 14, 2000) (holding that passenger of automobile had standing to challenge the stop of the vehicle); *United States v. Hill*, 855 F.2d 664 (10th Cir. 1988) (holding that defendant had standing to challenge his own arrest and that evidence discovered in a boat could be suppressed if defendant established that the evidence was the fruit of his unlawful arrest); *United States v. Williams*, 589 F.2d 210, 214 (5th Cir. 1979) (interpreting *Rakas* to allow passengers to challenge traffic stops and to argue that evidence obtained from these stops should be excluded as fruit of the poisonous tree), *aff'd en banc*, 617 F.2d 1063 (5th Cir. 1980).

Courts have further concluded that if the defendant could establish that the initial stop of the car violated the Fourth Amendment, then the evidence that was seized as a result of that stop would be subject to suppression as "fruit of the poisonous tree." *Twilley*, ___ F.3d

___, 2000 WL 1140605, at *4; *Eylico-Montoya*, 70 F.3d at 1162 (holding that passenger has “standing to seek suppression of evidence discovered in a vehicle as the fruit of an unlawful stop.”); *see also United States v. Kimball*, 25 F.3d 1, 5 (1st Cir. 1994) (because passenger's interests are affected when vehicle is stopped, he has standing to challenge the stop and if stop was illegal, evidence may be excluded as fruit of poisonous tree); *United States v. King*, 990 F.2d 1552, 1564 (10th Cir. 1993) (affirming suppression of evidence as to passenger and driver because the evidence was the fruit of unlawful detention of the passenger and the driver); *Erwin*, 875 F.2d at 269 n.2

Accordingly, the court concludes that a passenger has standing to challenge a constitutionally improper traffic stop, detention, or arrest on Fourth Amendment grounds even though, when the seizure occurs, he has no possessory or ownership interest in either the vehicle in which he is riding or in its contents. *See Twilley*, ___ F.3d ___, 2000 WL 1140605 at *4; *Eylico-Montoya*, 70 F.3d at 1162; *Erwin*, 875 F.2d at 270. Therefore, the court concludes that defendant Madrigal has "standing to seek suppression of evidence discovered in a vehicle as the fruit of an unlawful stop." *Eylico-Montoya*, 70 F.3d at 1162; *accord Twilley*, ___ F.3d ___, 2000 WL 1140605, at *4. Therefore, this objection to Judge Zoss's Report and Recommendation is also overruled.

3. Consent To Search

Finally, the government objects to Judge Zoss's conclusion that defendant Moreno's consent to search the automobile did not purge the taint from the initial illegal stop. The government argues that the search was legal because defendant Moreno's consent provided a basis for it that was independent of whether Trooper Callaway's stop of the Beretta comported with the Fourth Amendment. As the Eighth Circuit Court of Appeals has instructed: “Even if a consent to search is the result, in a ‘but for’ sense, of a fourth amendment violation, we will uphold a subsequent search if the consent was sufficiently an act of free will to purge the original taint.” *United States v. Kreisel*, 210 F.3d 868, 869 (8th

Cir. 2000); accord *United States v. Beason*, ___ F.3d ___, 2000 WL 1036338, at *3 (8th Cir. July 28, 2000); *United States v. McGill*, 125 F.3d 642, 644 (8th Cir. 1997), *cert. denied*, 522 U.S. 1141 (1998); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994), *cert. denied*, 514 U.S. 1134 (1995); *United States v. Thomas*, 83 F.3d 259, 260 (8th Cir. 1996), *cert. denied*, 120 S. Ct. 625 (1999); *United States v. Dickerson*, 64 F.3d 409, 411 (8th Cir. 1995).

In *Brown v. Illinois*, 422 U.S. 590 (1975), the United States Supreme Court outlined three factors that should be considered in determining whether a confession retains the taint of a prior illegal seizure: (1) the temporal proximity of the illegality and the confession; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *Id.* at 603-04. These factors should also be applied when determining whether to suppress evidence obtained through a voluntary consent to search given after an illegal stop or arrest. See *United States v. Tovar*, 687 F.2d 1210, 1215 (8th Cir. 1982).

The government argues that this case is controlled by the decision of the Eighth Circuit Court of Appeals in *United States v. Ramos*, 42 F.3d 1160. The court agrees. In *Ramos*, a police officer stopped two brothers because the passenger was not wearing a seat belt. *Id.* at 1161. Neither a computer check nor the driver's answers to the officer's question raised suspicion. *Id.* The officer, nonetheless, kept the two brothers separated and asked them additional questions. *Id.* at 1162. The Eighth Circuit Court of Appeals held that although the initial stop was legitimate, the scope of the officer's additional questioning and delay was not reasonably related to the circumstances justifying the stop. *Id.* at 1164. Thus, the Eighth Circuit Court of Appeals held that the additional questioning of the brothers and the delay escalated the stop into a *Terry* stop requiring reasonable suspicion. *Id.* The defendant in *Ramos*, following his illegal detention, consented to a search of his car. *Id.* Before consenting, the defendant was specifically made aware of his right to refuse to consent. *Id.* at 1163. Based on these facts, the Eighth Circuit Court of Appeals

concluded that the voluntary consent rendered the evidence seized admissible. *Id.* at 1164. The court of appeals noted that although the defendant was illegally detained, his consent was "'sufficiently an act of free will to purge the primary taint'":

The officer told [the defendant], both orally and in writing, that he did not have to sign the consent form. Such a warning is not required by law, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed.2d 854 (1973), and so the fact that the officer gave it indicates rather strongly to us that he was not attempting to exploit an illegal situation. The arrest and consent were close in time, and there were no intervening circumstances, but the officer's conduct was in good faith, and the violation of *Terry* was not flagrant. What happened here, really, went beyond voluntary consent. It was an affirmative waiver of [the defendant's] Fourth Amendment right to prevent a search of his vehicle.

Id. (quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)).

Here, as in *Ramos*, the request for consent followed immediately upon the Fourth Amendment violation, without relevant intervening circumstances. But here, as in *Ramos*, it is apparent that defendant Moreno understood his right to withhold consent. Prior to the second search of the Beretta, Moreno was specifically told of his right to refuse consent. The Eighth Circuit Court of Appeals noted in *Ramos*, such action "indicates rather strongly to us that [the officer] was not attempting to exploit an illegal situation." *Id.* Moreover, the court does not understand defendant Moreno to contend that he did not understand his right to withhold consent. Furthermore, as the Eighth Circuit Court of Appeals instructed earlier this year, in addressing whether a consent to search was an act of free will that validated a search,

"we have given special attention to the Supreme Court's admonition that in deciding whether evidence should be admitted in circumstances much like the present ones, we should consider "particularly, the purpose and flagrancy of the official misconduct," *Brown v. Illinois*, 422 U.S. 590, 604, 95

S. Ct. 2254, 45 L. Ed.2d 416 (1975).

Kreisel, 210 F.3d at 870; *accord McGill*, 125 F.3d at 644 (noting that the nature of the constitutional violation is “the most critical factor”). Here, the court finds no police misconduct such that the third *Brown* factor could weigh in favor of defendants.³ Although the court has found Trooper Callaway’s initial stop of the defendants to be a Fourth Amendment violation, his actions were not taken in bad faith and the constitutional violation was not purposeful or flagrant.

Therefore, the court concludes that, like the factual situation in *Ramos*, the government has demonstrated that under the totality of the circumstances, defendant Moreno’s voluntary consent to search was sufficiently an act of free will to purge the original taint of the illegal stop. *Ramos*, 42 F.3d at 1164; *see Beason*, ___ F.3d ___, 2000 WL 1036338, at *3; *Kreisel*, 210 F.3d at 869. Therefore, this objection to Judge Zoss’s Report and Recommendation is sustained.

III. CONCLUSION

Initially, the court concludes that the trooper did not have reasonable suspicion to conduct an investigatory stop of Moreno’s automobile. Because the trooper did not have any articulable, reasonable suspicion of unlawful conduct, he had no legal justification for pulling over the automobile in which defendants were travelling. The court further

³Defendants attempt to distinguish this case from *Ramos* by pointing to Trooper Callaway’s confusing statement to defendant Moreno: “What I always tell them, if ya, if ya have drugs in your car, don’t consent to a search, but if ya, if ya have drugs, then you don’t have anything to hide. Right?” Ex. 1, Videotape of the Traffic Stop. The court finds that this statement was not made with the intent to trick defendant Moreno into consenting to a search of his vehicle. Moreover, the court does not find that this statement, which was made after Moreno had already orally consented to a search of the Beretta, improperly induced defendant Moreno’s consent.

concludes that defendant Madrigal has standing to seek suppression of evidence discovered in the vehicle as the fruit of an unlawful stop. Finally, the court concludes that defendant Moreno's consent to search the automobile purged the taint from the initial illegal stop. The court therefore **accepts in part and rejects in part** Judge Zoss's Report and Recommendation of July 14, 2000, and defendants' motion to suppress and defendant Moreno's Motion For Suppression Of Wiretaps, Oral Communications Or Other Electronic Eavesdropping are **denied**.

IT IS SO ORDERED.

DATED this 6th day of September, 2000.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA