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DISTRICT OF UTAH  
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IN THE UNITED STATES DISTRICT COURT DISTRICT OF UTAH  
CENTRAL DIVISION

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UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	MEMORANDUM DECISION
	:	AND ORDER
v.	:	
	:	
IGNACIO SANCHEZ and MARTIN	:	
CARDENAS-BARBOZA,	:	
	:	
Defendant.	:	Case No. 94-CR-114G

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This matter came before the Court on defendants' Motions to Suppress evidence of methamphetamine found in an automobile in which defendant Sanchez was the driver and defendant Cardenas-Barboza was a passenger. Plaintiff United States of America was represented by Assistant United States Attorney Richard G. MacDougall; defendant Sanchez was represented by James C. Bradshaw; and defendant Cardenas-Barboza was represented by Thomas A. Mix and Jerome H. Mooney.

At an initial hearing, the court found that the vehicle stop was valid and not pretextual. At a further hearing on March 3, 1995, evidence on the remaining issues was presented, final arguments of counsel were heard by the court, and the matter was taken under advisement. After

due consideration, the Court renders its Memorandum Decision and Order.

### FACTS

On July 22, 1994, Deputy Phil Barney ("Barney") of the Sevier County Sheriff's Office, was on routine patrol on I-70 near Richfield, Utah. Barney is a seasoned police officer with many years of experience, including particularly drug investigation and detection. The rather desolate stretch of I-70 being patrolled by Barney on the day in question has been the scene of several prior interceptions of drug laden vehicles by Barney. At about 7:00 a.m., Barney noticed a 1985 Mercury 4-door automobile, cream or tan in color, straddling the centerline between lanes. He pursued and stopped the vehicle in order to investigate whether the driver was sleepy or impaired. After turning on his video camera, Barney walked to the vehicle and asked the driver for license and registration. The driver, defendant Sanchez, seemed to be alert and did not appear to be impaired. Sanchez produced the documents, both of which were in the name of Ignacio Sanchez ("Sanchez"). Barney also collected identification from the passenger, Martin Cardenas-Barboza ("Barboza").

Barney returned to his patrol car and ran warrants checks and criminal histories on Sanchez and Barboza. Dispatch advised that Barboza had no prior record, that Sanchez had a criminal history including narcotics violations, but that neither man was currently wanted. On the basis of the initial contact with defendants, Barney had already concluded that Sanchez was not impaired, and he decided not to issue a citation for the lane-straddling violation. Barney returned to the car occupied by defendants and returned to them the license, registration and other

documents of identification.

After returning the documentation, Barney engaged defendants in brief conversation, asking whether they were carrying firearms or drugs. They responded that they weren't carrying any firearms or drugs. At that point, Barney asked Sanchez whether he could look inside the vehicle and search it, to which Sanchez agreed. Barney then asked defendants to step out of the vehicle and instructed them where to stand while he conducted the search. Defendants freely cooperated. Barney searched the passenger compartment, engine compartment, and defendants' luggage for about twenty minutes. He found a pager in the glove compartment which he put into his pocket. From his experience the pager suggested a possible communication arrangement in connection with drug dealing. Barney then asked whether he could search the trunk of the vehicle. Sanchez agreed and opened the trunk as well as the gas tank. Barney searched the trunk and noticed what appeared to him to be a built up area in the trunk which he suspected to be a secret compartment. He also observed what he believed to be new paint, smelled what he believed to be new paint, and observed that the spare tire was out of place in the trunk. At no time during the course of the initial stop and the search conducted by Deputy Barney was there any evidence of coercion or harassment.

After the search, Barney interrogated the defendants regarding the pager he had found in the passenger compartment. Barney did not return the pager to defendants, and continued to possess it. Barney then requested the defendants to follow him to the nearby town of Salina, Utah, so that the vehicle could be put on a hoist and searched further. Sanchez agreed to follow Barney into Salina.

At the Salina Texaco station, Barney had defendants' vehicle raised on a hoist in order to search the undercarriage. The search proved fruitless and the vehicle was taken off the hoist. Barney again searched the interior of the vehicle and noticed something suspicious about the air vent. Dismantling a portion of the rear door, Barney recovered more than one kilogram of methamphetamine inside a sock in the air vent.

### ANALYSIS

Defendants claim that their continued detention after the initial stop constituted an unlawful and unconstitutional detention, and that they did not voluntarily consent to the questioning, detention, and searches by Deputy Barney. Defendants also claim that the investigative detention was transformed into a custodial arrest which was not supported by valid consent or probable cause when the defendants were requested by Barney to follow him to a service station in the nearby town of Salina.

The United States contends that the Motion to Suppress should be denied because the continued encounter with Deputy Barney was consensual and voluntary. The United States argues that defendants consented to all searches, but that removal of the vehicle from the scene of the initial stop to the town of Salina was also independently supported by probable cause.

#### **I. Voluntary Consent as Basis for Investigative Detention and Search.**

The Tenth Circuit has made it clear that vehicular detentions "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." U.S. v. Sandoval, 29 F.3d 537,

538 (10th Cir. 1994) (quoting Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L. Ed.2d 229, 236 (1983)). Furthermore, "[w]hen the driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning." Sandoval, 29 F.3d at 540 (1994) (quoting U.S. v. Guzman, 864 F.2d 1512, 1519 (10th Cir. 1988)).

A. Search of Vehicle at Scene of Original Stop.

The defendants were free to leave when officer Barney returned the license, registration and other documents to them. What took place thereafter was not within the course of the traffic stop since that aspect of the encounter was concluded upon return of defendants' documentation. It may well be that no objective articulable suspicion existed to justify the further questioning and the search which took place thereafter at the scene of the original stop. That need not be determined, however, because the government does not urge or rely upon that point.

In U.S. v. Gonzalez-Lerma, 14 F.3d 1479, 1483 (10th Cir. 1994), cert. denied, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1862, 128 L. Ed.2d 484 (1994), the Tenth Circuit held that further questioning and the concomitant detention of a driver are permissible only under either of two circumstances. First, "during the course of the traffic stop the officer acquires an objectively reasonable and articulable suspicion that the driver is engaged in illegal activity." Sandoval, 29 F.3d at 540 (citing Gonzalez-Lerma, 14 F.3d at 1483); see, e.g., U.S. v. Soto, 988 F.2d 1548, 1554 (10th Cir. 1993). Second, "the driver voluntarily consents to the officer's additional questioning." Sandoval, 29 F.3d at 540 (citing Gonzalez-Lerma, 14 F.3d at 1483).

In this case, the propriety of the officer's actions depends upon whether the continued encounter was consensual. The government relies solely upon voluntary consent by defendants to justify the further questioning and searches which occurred at the scene of the initial stop. The voluntariness of a continuing encounter between a citizen and officer, after the conclusion of an investigation pertaining to the initial stop, depends on whether a reasonable person would feel free to decline the officer's requests, as measured by the totality of the circumstances. Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed.2d 389 (1991). Here, it was apparent when officer Barney returned the documentation to defendants that he had determined not to issue a ticket for the lane straddling violation which occasioned the initial stop. After returning the license, registration and other documents, the officer engaged defendants in brief conversation and asked whether he could search the vehicle. Defendants responded freely, gave the officer permission to search and assisted him in that regard. The conversation and subsequent search was not coercive and defendants agreed and cooperated. From all of the circumstances, this court finds that the defendants voluntarily acquiesced in and affirmatively consented to the questioning and searches which were conducted at the scene of the initial stop.

B. Transfer of Vehicle from Scene of Original Stop and Further Search.

In the absence of a warrant, transfer of the vehicle after the initial stop and voluntary search to a service station in the nearby town of Salina would have to be supported by valid voluntary consent or probable cause. In this case, the Court rules that the transfer and subsequent search cannot be supported by voluntary consent. This is so because even though Sanchez agreed

to follow Barney into Salina, and did so, the officer retained possession of his pager after having asked pointed questions about it. Sanchez was unsure as to whether he would regain possession of his pager if he did not comply. Retention of the pager at this point could only be regarded as intentional and not mere inadvertence. Under such circumstances, the Tenth Circuit reasoned in Sandoval, 29 F.3d at 540, that return of property is a "necessary condition" to a finding that a defendant's actions are voluntary. Further, the request to remove the car to another place for further search could well have been regarded as a directive or order rather than a mere request or suggestion. At this point, it was clear that defendants were not free to leave. From the totality of the circumstances, this court finds that the removal of the automobile from the scene of the initial stop to a service station in the nearby town of Salina was not supported by truly voluntary consent, even though verbal acquiescence was given.

Removal of the vehicle from the scene of the initial stop, and further search of the vehicle in the nearby service station must be justified, if at all, by the existence of probable cause apart from any voluntary consent. The government claims that such probable cause existed in this case.

## **II. Probable Cause for Custodial Arrest and Further Search.**

Once a detaining officer removes a detainee from the site of the initial stop, the line between investigative detention and custodial arrest has been crossed, and in the absence of voluntary consent, such transfer must be supported by probable cause. U.S. v. Soto, 988 F.2d 1548 (10th Cir. 1993). An officer has probable cause when, under the totality of the circumstances, there is a fair probability that the vehicle contains contraband or evidence. U.S. v.

Nielsen, 9 F.3d 1487, 1490 (10th Cir. 1993).

In this case, in the course of the voluntary search of the vehicle at the original site, Officer Barney detected what he subjectively believed was probable cause for a further warrantless search. Barney believed that there was a secret compartment in the trunk which likely contained contraband or evidence because (1) he thought he detected a faint smell of "new" paint, (2) he observed what he believed to be new paint in the area of what he believed was a secret compartment, (3) he saw the spare tire out of the place for storage provided in the trunk, and (4) he observed what he thought was an irregularity in the trunk in that it appeared to be higher than normal. Barney admitted on cross examination that he was unfamiliar with the make and model of defendants' vehicle. Barney also admitted that he had no direct experience in determination of the aging of primer paint or the normal height of the trunk in Mercury automobiles. Barney admitted that it was a "guess" on his part that the primer paint was new. He also admitted that later investigation proved the trunk had not been altered in any way.

The observations and suspicions of Officer Barney, upon which he relied to conclude that there was probable cause to continue the search, turned out to be incorrect and in error. Nevertheless, those observations—even though erroneous—could establish sufficient justification for a comprehensive search of the trunk. As the Supreme Court stated in U.S. v. Cortez, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed.2d 621 (1981), the information available to an officer “must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.” Thus, the test is not whether the observations in fact were correct or later proved to be accurate or inaccurate, but whether a police officer’s

observations are such as to create a reasonable articulable suspicion that there is a "fair probability" that the vehicle contains contraband or evidence. See U.S. v. Chaidez, 906 F.2d 377, 384 (8th Cir. 1990).

Accordingly, this court rules that the further search of the trunk area for a secret compartment after removal of the vehicle to the service station was justified. That further search turned out to be fruitless, however, and produced no evidence to support Officer Barney's suspicions.

The further search conducted by Officer Barney of the interior of the car was not justified by probable cause even though dismantling of part of the interior rear door of the car revealed methamphetamine in the air vent. Under the doctrine set forth in U.S. v. Nielsen, 9 F.3d 1487, since no evidence had been produced to support the officer's initial suspicions, further search of the interior was not justified. Quoting the Supreme Court, the Nielsen court stated that "[t]he scope of a warrantless search of an automobile 'is defined by the object of the search and the places in which there is probable cause to believe that it may be found.'" Id. at 1491 (quoting U.S. v. Ross, 456 U.S. 798, 824, 102 S. Ct. 2157, 72 L. Ed.2d 572 (1982)).

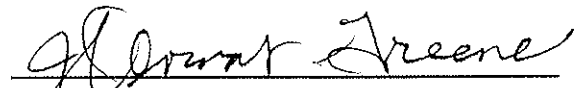
In this case, the object of the search was controlled substances. The information available to Officer Barney at the time of the initial voluntary search of the vehicle raised his suspicions with regard only to the trunk of the car. It follows that there was not a fair probability that the interior of the car contained controlled substances. Therefore, the evidence discovered through the invasive search of the interior of the car must be suppressed.

Based on the foregoing, it is hereby

ORDERED, that defendant Sanchez's Motion to Suppress is GRANTED; it is further

ORDERED, that defendant Cardenas-Barboza's Motion to Suppress is GRANTED.

DATED: June 21<sup>st</sup>, 1995.

  
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J. Thomas Greene  
United States District Judge