

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. Defendant.	MEMORANDUM DECISION Case No. Honorable BRUCE C. LUBECK DATE: September 11, 2009
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The above matter came before the court for decision on Defendant's Motion to Suppress.

BACKGROUND

An information was filed on April 23, 2009 charging defendant with possession of a controlled substance (marijuana) with intent to distribute, alternatively possession of more than a pound of marijuana, and a traffic offense of following too closely. After being bound over after a preliminary hearing on June 2, 2009, defendant filed a motion to suppress with a memo on June 19, 2009. An evidentiary hearing was held July 13, 2009. Evidence was received from one law enforcement officer and a DVD was received in evidence showing the stop at issue in this case.

The court set a briefing schedule. The State filed its opposition brief on August 10, 2009 and defendant filed a reply on August 24. Oral argument was held September 8, 2009, and the court took the issues under advisement.

FINDINGS OF FACT

1. Utah Highway Patrol Trooper Niel Ekberg (Ekberg) was on patrol on April 21, 2009, on Interstate 80 between Wanship and Coalville. He was headed eastbound. He observed a vehicle he believed was following a semi-truck too closely, and based on that observation stopped a silver Toyota Camry at about milepost 162, near the Coalville exit. Defendant was the driver and sole occupant of the vehicle. The events are captured on the DVD and the court finds as follows based on the testimony of Ekberg and that DVD. The camera is activated at 2:09 p.m. It ends at approximately 3:15, as Ekberg is driving defendant to the jail.

2. The DVD shows the vehicle behind a semi-truck and it is following at points quite closely, and the court finds it was a violation of the traffic laws, as being unsafe, to be so close to a fast-moving semi truck going 70 mph.

3. The vehicle is stopped at 2:11, and Ekberg approached the passenger side, after calling in the Nevada plate number.

4. Ekberg states he stopped defendant because he was following too closely. Not all words could be heard on the recording but it is evident defendant was saying something about Ekberg coming up behind him. Ekberg stated he was sorry, he sort of forced defendant into it. The conversation began at 2:12 and Ekberg began talking about where defendant was going and where he was coming from. Ekberg asked where defendant was coming from,

had he been driving awhile, what part of California he was coming from, how long he had been there, where he was working, if he drove from New York to California, what was in Cheyenne, if that was where he was going, where he was going beside Cheyenne for a stop, if he had plans to stay anywhere, and if he had a hotel. Again, not all of the words are discernible, but the conversation went on for over 2 minutes, until 2:14 and about 30 seconds, before Ekberg asked for the rental agreement. Ekberg asked for the driver license at 2:14:59 according to the video. In that just over two minutes, Ekberg talked about the travel of defendant as summarized above. Defendant said, in essence, that he was driving from San Francisco, was stopping in Cheyenne, that he had friends in Park City, some friends in Michigan, and defendant had business in Nebraska where he was going to buy municipal tax liens. He said he flew from New York to California for his cousin's festivity in California, and was driving back, sight seeing, and that he had a fight with his wife, was considering a divorce, and had the time to drive.

5. The DVD does not show, but Ekberg observed a coffee cup in the vehicle, a cell phone, and the cleanness of the vehicle and that there was no luggage in the vehicle upon approaching the vehicle and speaking with defendant. Later, after asking for the documents and after defendant went into the console, Ekberg observed a "large wad" of cash in the console, with a \$100 bill

on the outside. (It turned out, later, that the money was approximately \$500). Ekberg could not determine how much money was there simply by seeing it. After getting the rental agreement, Ekberg asked where the luggage was and defendant said it was in the trunk. After getting the license, Ekberg returned to his patrol vehicle at 2:15.

6. There is silence until 2:18, when Ekberg called in requesting a license check and the Triple III, or criminal history. Ekberg noted out loud, recorded on the DVD, that the fee for the rental car was \$889 which he believed, or assumed, was more than the cost to fly back to New York.

7. At 2:21 dispatch said the license was valid and defendant had a "DWI" as a criminal history. Though not shown, at that time another State agent, Jeffrey, arrived by the side of Ekberg and they conversed through the car windows. Ekberg explained what he had found, relating the factors Ekberg believed were important. Those included that defendant was very nervous and shaking, that he first looked for the rental in the glove box then the console, the coffee cup, and the details of the travel story which Ekberg concluded was fanciful and made no sense.

8. At 2:25 Ekberg returned to defendant on the passenger side, and returned his license. Ekberg gave a verbal warning about following too closely, and explained defendant should remain at least 2 seconds behind other vehicles. Ekberg remained

leaning into the passenger window in so doing.

9. Ekberg then inquired again about the travel, how long he was staying in Cheyenne, if he stayed somewhere between San Francisco, and other questions.

10. Ekberg than asked if defendant had anything illegal in the car, and named marijuana and other drugs. Defendant, in response said to the question about marijuana, that he was not a crazy man. He said no, he did not have any thing illegal in the car. Ekberg asked if he could search the vehicle and defendant said "huh?" Ekberg asked again if he could search the car and defendant asked why he would want to do that. Ekberg explained drugs on Interstate 80 were a problem and that he had various indicators and wanted to search. Defendant said he was going say yes, but that Ekberg was making him uncomfortable. Defendant could not be heard, but Ekberg then said it was a yes or no question. There is no audible response on the DVD but Ekberg testified, and the court finds, that defendant said yes. The trunk was then opened by defendant, it just popped open without a request and obviously defendant did so mechanically from inside the car. That was at 2:27.

11. Ekberg asks defendant to go to the front, frisked him, and began searching the trunk. There were 3 bags in the trunk, an incidental bag and two bags of clothing. Ekberg opened them, and each contained a separated zippered compartment where Ekberg

found a mylar bag. Ekberg held that up and asked defendant what it was and defendant stated it was a mylar bag. Ekberg asked what was inside, and defendant said he believed there was marijuana inside. Defendant was handcuffed then by Jeffrey. Defendant was taken to the police vehicle.

12. Though not relevant to the search, defendant continued to speak and made various statements, asking about his wallet and cell phone, asking what would have happened if he had not given consent, and so forth.

13. The search continued, other officers arrived, pictures were taken, Sgt. Loveland arrived, and the vehicle was towed and defendant taken to the Summit County jail, where on the way he continued to make statements about helping his girl, and so forth, but that he had made the wrong choice.

DISCUSSION and CONCLUSIONS OF LAW

THE STOP

1. Ekberg was justified in stopping the vehicle as he observed a traffic violation of following too closely Defendant argues that the court should not believe Ekberg and that under a 1994 case the officer's credibility can still be examined to determine his motivation for the stop. Even if the court believes that case, *State v. Lopez*, 873 P.2d 1127 (Utah 1994) is

still good law on this point, the court still believed Ekberg about the stop. The DVD shows the vehicle, and whatever the motivation of Ekberg, there was a factual rational basis to stop the vehicle. This is true even if the traffic violation stop is a pretext for what otherwise may be a stop due to an improper motivation. *State v. Chevre*, 994 P.2d 1278 (UT App. 2000).

2. This court believes the pretext doctrine, and *Lopez* is a subset of that doctrine, is not viable in Utah. Again, even if the court can and should examine the motivation of Ekberg to determine his credibility, based on the video and other factors, the court finds and concludes that Ekberg was justified in stopping the vehicle, whatever his motivation, as there was a traffic violation.

THE DETENTION.

3. Once the stop is made, the detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop, to give a warning, citation, or receive some explanation by the driver. *Florida v. Royer*, 460 U.S. 491 (1983). In a routine traffic stop, the officer may request a license and registration, conduct a computer check and issue a citation. Once those items have been produced, the motorist is entitled to proceed on his way, without being subject to further delay by police for additional questioning. Any further temporary

detention for investigative questioning after the fulfillment of the purpose for the initial traffic stop is justified only if the officer has reasonable suspicion of other serious criminal activity. *State v. Robinson*, 797 P.2d 431 (UT App 1990).

4. Under Utah law, as recently reflected in *State v. Baker*, 2008 UT App 115, a seizure occurs if in view of all the circumstances a reasonable person would have believed he was not free to leave. The State bears the burden of proving the reasonableness of the officer's actions during an investigative detention. The officer may detain the driver to conduct a limited investigation of the circumstances that caused the detention. The detention, if it exceeds the reason for the original traffic stop detention, must be temporary and necessary and must be based on reasonable suspicion the officer can articulate. The court looks to the totality of the circumstances to determine if there is an objective basis for suspecting criminal activity and for a continued detention. "Investigative acts that are not reasonably related to dispelling or resolving the articulated grounds for the stop are permissible only if they do not add to the delay already lawfully experienced and do not represent any further intrusion on the [the detainee's] rights."

5. This case shows the importance of the sequence and timing of officer conduct. Certainly what the officers sees upon approaching a vehicle is and can be a factor that justifies a

detention for something other than the traffic violation. Under Utah cases, the purpose for the stop may be explored but unless there is reasonable suspicion to conduct other investigation which lengthens the detention, that investigation is not permissible. Thus, in a traffic stop this court believes the law is that an officer may and must pursue that investigation. That involves, in a case such as this, pursuing the traffic violation investigation by asking for license and registration documents and not in asking about travel plans unless the observed "indicators" justify such an investigation.

6. In this case, however, Ekberg did not ask for license and registration until almost 3 minutes had passed. Those three minutes were consumed by Ekberg asking about travel plans, destination, stays, where defendant worked, and so forth. Those had nothing to do with determining whether defendant was alert, in determining why he was following too closely, or in attempting to resolve that traffic violation by issuance of a citation or warning.

7. That questioning about travel plans, in this court's view, is NOT justified at the inception of a stop unless the officer sees things that justify his suspicion, on an objective basis, that some other offense is being committed. IF the suspicion is obtained during the gathering of the documents and during the actual investigation of the traffic violation, that

may entitled an officer to question a driver about other things than the traffic stop. The State did not demonstrate that such questions were asked while the documents were being gathered such that the questioning did not lengthen the stop beyond the traffic stop. Clearly, from the DVD, the stop and the investigation of the traffic violation did not get under way for almost three minutes.

8. In this case the suspicions of Ekberg were BECAUSE of the answers given by defendant. The "indicators" objectively examined were that there was a coffee cup, a clean car, no luggage, and it was a rental car. Again, the timing and sequence are so important. Not until AFTER the travel discussion did Ekberg note the "wad" of cash in the console nor observe what Ekberg describes as the nervousness. At that point, however, the detention had already become improper and unjustified.

9. Thus, that questioning amounted to impermissible questioning unless there was reasonable suspicion that justified such questions, and here there was no such justification based on the immediate observations of Ekberg BEFORE the questioning about travel plans.

10. The immediate observations about the vehicle by themselves did not, even considering and deferring to the training and experience of Ekberg, amount to reasonable suspicion to believe there was criminal activity. The court cannot agree

that such observations as Ekberg immediately made (a clean rental car, a cup of coffee, and no luggage) was even suspicious at all. Those factors certainly are not objectively reasonable suspicions. Even though many "drug couriers" may have those factors in common, they cannot, even in combination, be considered sufficient suspicion or any rental car driver would be subject to detention. Virtually all rental cars are clean.

11. The travel on a freeway, from a major city, also cannot be a legitimate factor. Similarly, having a cell phone (multiple cell phones may be, and in this court's view, IS a different matter) and coffee or some energy drink is not a factor that is a legitimate indication of suspicion. In some cases, of course, these factors may be present to one degree or another, but they must be combined with some factor that is itself suspicious. These factors are just not sufficient, when considered with the other factors, in the normal case to amount to reasonable suspicion to justify the detention.

12. Failing to have luggage in the vehicle CANNOT be a factor amounting to reasonable suspicion. A motorist in a passenger vehicle either has luggage or not. If there is luggage, it is either in the passenger compartment or in the trunk. Law enforcement officers may not claim to be suspicious because luggage is in the rear seat in some cases and claim to be suspicious because there is no luggage in the rear seat.

Certainly luggage being in the rear seat is a factor in the "reasonable suspicion" equation because it is logical to conclude there is something else in the trunk and that is why the luggage is not in the trunk. However, failing to have luggage in the rear seat leads only to one of two logical explanations: there is no luggage, or if there is, that luggage is in the trunk. That is not suspicious and is not a legitimate factor in this court's view, at least in this case.

13. In this case, DURING THE DETENTION, that is all that Ekberg saw. He had not seen the nervousness he described in the passing of the documents, and he had not seen the "wad" of money. Had Ekberg seen that money BEFORE the questioning, that may have justified the expansion of the investigation, but the money was not seen until after the questioning and detention. Ekberg described that only when defendant passed the rental agreement, looking first in the glove box then the console, did defendant shake and only then did Ekberg see the money. Thus, the detention had occurred already, before these factors were observed. Thus, the questioning cannot be justified by these other minimal and innocuous factors Ekberg observed upon approach to the vehicle. Other factors, had they been present, of course, may justify a detention and questions about travel plans BEFORE inquiry about license and such, but in this case there was nothing that is objectively reasonable that justified the

questioning of defendant as occurred here.

14. Once the questioning began, the answers to questions may or may not provide a basis to conclude legally that reasonable suspicion exists. In this case it is not necessary to decide that, because the unlawful detention had already occurred. To the extent the court needs to determine that issue, this is a close case. Many cases involve travel plans that clearly are very suspicious. Some are not suspicious from an objective basis. This case is not on either end of the spectrum. The court agrees that these travel explanations were somewhat suspicious, but objectively not as suspicious as Ekberg believed them to be, even given his training. Again, using as a basis that the trip began in California cannot be suspicious, even a city such as San Francisco and whatever connotations that elicits. Ekberg did not in fact know the cost to fly back to New York, but assumed renting a car for \$889 was more than flying. It is not certain, and the court has no idea as to airfares at any given time. However, certainly taking 4-5 days to return to New York when 4-5 hours by air could be achieved causes one to wonder why someone would drive. However, many people perhaps do want to take a "road trip" and "see the country" on the way. Defendant did say he had business in Nebraska. When the cost of food for 4-5 days, plus 4-5 nights of motel or hotel bills is considered, it no doubt is likely cheaper to fly than rent a car from San Francisco

to New York, and an officer is not unreasonable in so believing, even without knowledge, that such a plan is a bit unusual. However, that does not make it necessarily suspicious but it certainly is a factor to examine in determining whether there is overall reasonable suspicion. Again, however, that information was obtained in an improper detention.

15. The court may not find reasonable suspicion was developed during an unlawful detention. This detention was unlawful from the time when Ekberg began asking questions about travel plans and exploring those without pursuing the reason for the traffic stop. That questioning, unlawful under *Baker* as it extended the detention beyond the reason for the stop, may not be used to establish reasonable suspicion even if the answers were suspicious. Ekberg began to extend the stop by asking questions at roadside, and it became even more "unlawful" as the conversation went on.

CONSENT

16. Once Ekberg returned the documents to defendant he was in the view of Ekberg still not free to leave. Again, Ekberg's view being subjective is not dispositive. Even if Ekberg believed defendant was not free to leave, but objectively he was, then the detention had de-escalated to a level one consensual encounter.

17. Here, Ekberg returned the license and rental, but remained leaning in the window and began asking further questions about the travel, where defendant stayed between San Francisco and Utah, and so forth. Ekberg did not tell defendant he was free to leave. Ekberg then began to ask about illegal substances in the car, and for permission to search. Ekberg was not certain if his emergency equipment was still on, nor if that equipment on Jeffrey's vehicle was on. Jeffrey was in the area as well.

18. For a seizure, temporary detention caused by a traffic stop, to cease, it must be clear to the seized person, here defendant, either from the words of an officer or from the clear import of the circumstances, that the person is at liberty to go about his or her business. That is true even if an officer tells the motorist he is free to leave, steps back, then re-approaches the vehicle (which did not happen here). *State v. Mogen*, 52 P.3d 462 (UT. App. 2002). The court is to look at the totality of the circumstances. It is certainly necessary for a return of the documents to occur, but that is not sufficient. A motorist must feel free to leave because a reasonable person would so believe, based on the totality of the circumstances, that he was free to end the encounter and depart. *State v. Hansen*, 63 P.3d 659, 661 (UT 2002).

19. Here, the detention had NOT de-escalated to a consensual encounter. Ekberg did not mention defendant could leave, did not

even pause after returning the documents in going back into the travel plans, and then immediately began asking about illegal items in the vehicle.

20. While the court concludes the consent was voluntary, the consent was not effective.

21. If there is a prior illegality that taints the consent then the consent is not effective. Here, the unlawful detention never ended as it began with the unjustified questioning, the traffic stop purposes then intervened, and the detention for questioning again began. There were no intervening circumstances. Ekberg asked for permission to search, without coercion, and after a brief interchange, defendant clearly stated he would say yes to allow the search, but said Ekberg made him, defendant, feel uncomfortable. Even though it could not be heard on the DVD, defendant again said yes to the "yes or no" question of whether a search was allowed. Defendant certainly without even being asked opened the trunk himself.

22. However, the "voluntary" consent given by defendant was obtained as a direct result of the conduct of Ekberg in obtaining information improperly. There was no attenuation from the illegal detention and thus the consent is not effective under Utah law.

CONCLUSION

23. In summary, the stop of the vehicle was lawful. The temporary detention was unlawful from the beginning as the officer questioned about matters, at some length, which were not justified by objective circumstances. That questioning is what much of the suspicion of the officer. That unlawful detention never ended and so any consent was tainted by that illegality. The factors observed by the officer concerning the state of the car and its coffee, cell phone, travel from California on I-80, cleanness and lack of luggage did not by themselves justify other questioning about matters apart from the traffic stop when such questioning extended the length of the stop. The money observed, though it may make a substantial difference had it been observed BEFORE the unlawful detention, does not change the analysis given when it was seen. Similarly with the nervousness, and the totality of the factors. That is because objectively those factors first observed by Ekberg, while suspicious to him based on his training and experience, do not under Utah law amount to reasonable suspicion that justified the asking of the questions about travel plans if those questions further detain the suspect, and they did so detain him. Thus, from that point on any further questions beyond the traffic stop questions were also improper as they delayed the stop and extended the time of the stop, and the later questions built upon the earlier improper questions and

delay.

The questioning itself is the delay and that delay must be justified by objective factors amounting to reasonable suspicion. The only factors present here before the questioning were the observations about the traffic violation and the interior of the vehicle and its coffee cup and cell phone and cleanness and lack of luggage. Those were, as stated, not objectively suspicious and insufficient to justify further questioning that extended the stop. The questioning, again, was not *per se* unlawful but it was unlawful because of its timing and consequent delay without sufficient justification for asking such questions.

Because the detention was unlawful, even though the consent was given "voluntarily," the consent was not legally voluntary because it came about based on the taint of the illegal detention and there were no factors that dissipated that taint. The consent was thus not legally voluntary.

The court GRANTS the motion to suppress the results of the search of defendant's rented vehicle.

This Ruling and Order is the Order of the court and no other order is required.

The case is scheduled for a scheduling conference at 8:30 a.m. on September 28, 2009, and will be either scheduled for trial or some other disposition.

DATED this 11 day of Sept, 2009.

BY THE COURT:



BRUCE C. LUBECK
DISTRICT COURT JUDGE

