

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.

Case No. 19-CR-151

FRANCISCO MARTINEZ,
Defendant.

**REPLY BRIEF FOLLOWING HEARING ON MOTIONS TO SUPPRESS
EVIDENCE RECOVERED FROM STOPS OF DEFENDANT AND SEARCH
OF VEHICLES**

INTRODUCTION

On September 4, 2020, The Court held an evidentiary hearing on Francisco Martinez's motions to suppress evidence arising out of stops of defendant and searches of vehicles he operated on January 30, 2019 in Mohave County, Arizona and on May 24, 2019 in Fond du Lac County, Wisconsin. As to the Mohave County, Arizona stop, law enforcement seized approximately \$77,745.00 from the trap compartment of the Dodge which Martinez had been driving before the stop on Interstate 15 by Arizona Department of Public Safety Officer Thomas Callister.

Subsequent to an arrest of Martinez, he was Mirandized and gave a statement to law enforcement. As to the Fond du Lac County stop, Wisconsin State Patrol Officer Matthew Ackley stopped a Cadillac Escalade operated by Martinez on May 24, 2019 in Fond du Lac County, Wisconsin. As to the Fond du Lac County, Wisconsin stop, a trap compartment was found in the Cadillac Escalade and \$1,000.00 was also recovered. A warrant was obtained and the car was further searched. The trap compartment was located in the rear area.

I. Law of The Fourth Amendment

The Fourth Amendment guarantees the right to be free from "unreasonable searches and seizures" by the government. This protection "extend[s] to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273(2002). Thus, whenever a police officer decides to stop a vehicle, the stop must meet the reasonableness requirements of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 663(1979). If a search or seizure violates the Fourth Amendment, courts will

exclude evidence gained from that violation in judicial proceedings against the person injured. *United States v. Wilbourn*, 799 F.3d 900, 910 (7th Cir. 2015); see also *Terry v. Ohio*, 392 U.S. 1, 29, 88 (1968) ("[E]vidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation.").

The determination of whether a stop is reasonable and based on enough information requires examining the totality of the circumstances. See *United States v. Swift*, 220 F.3d 502, 506 (7th Cir. 2000). A person is considered seized when documents are taken from them that they need to continue on their way, and when given commands by an officer that indicate compliance might be compelled. See *United States v. Noble*, 69 F.3d 172, 181 (7th Cir. 1995).

A. Prolonging the Seizure for a Traffic Matter Beyond the Time Reasonably Required to Issue Citations for Traffic Infractions Violates the Fourth Amendment.

To pull a car over for a brief investigatory stop, a police officer must have "at least [an] articulable and reasonable suspicion" that the particular person stopped

is breaking the law. *Prouse*, 440 U.S. at 663. *United States v. Muriel*, 418 F.3d 720, 724 (7th Cir. 2005) (officer-observed traffic violation triggers probable cause to stop). But a seizure that is "lawful at its inception" can nonetheless violate the Fourth Amendment if it is "prolonged beyond the time reasonably required to complete" the initial mission of the stop. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (citing *United States v. Jacobsen*, 466 U.S. 109, 124, (1984)). And this is what Martinez prays the district court concludes as to both of the stops in question.

In *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), the U.S. Supreme Court stressed that a seizure justified only by a police-observed traffic violation becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation. The stop may not exceed the time needed to handle the matter for which the stop was made. In *Rodriguez*, the issue was raised in the context of whether the police unnecessarily extended the

traffic-violation stop to conduct a dog sniff of the exterior of the vehicle for drugs.

The suspect in *Rodriguez* was lawfully stopped for driving on the shoulder of the highway, a violation of the traffic code. *Id.* at 1610. The officer ran his license, and issued him a warning, and then asked permission to conduct a drug sweep of the vehicle. *Id.* The driver declined and the officer called a drug dog who arrived and conducted a sweep of the vehicle *Id.* The Court held that although only seven (7) to eight (8) minutes passed from the issuance of the citation to the dog's alert, the short detention was illegal, and unreasonable under the Fourth Amendment. *Id.* at 1610-11. The *Rodriguez* court clarified that "[t]he critical question is not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff adds time to the stop." *Id.* at 1612. The authority to detain a vehicle and its occupants for a police-observed traffic violation, the Court reasoned, ends when the "tasks tied to the traffic infraction are — or reasonably should have been — completed." *Id.* at

1614. Absent reasonable suspicion, then, law enforcement may not extend a traffic stop with measures like a dog sniff unrelated to the mission of the stop. See *United States v. Rodriguez-Escalera*, 884 F.3d 661, 666-67 (7th Cir. 2018) (affirming grant of motion to suppress where district court declined to credit officer's explanation for extended traffic stop).

B. Pretext Stops

An officer's decision to stop a vehicle is reasonable when the officer has reasonable suspicion or probable cause to believe that a traffic violation has occurred. *Heien v. North Carolina*, 574 U.S. 54 (2014); *Whren v. United States*, 517 U.S. 806, 810 (1996). The Fourth Amendment permits pretextual traffic stops as long as they are based on an observed violation of a traffic law. *Whren*, 517 U.S. 806, 810. ("The temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement

objective."). However, police may not use a traffic stop as a pretext to search for evidence without a traffic violation. *United States v. Willis*, 61 F.3d 526, 530 (7th Cir. 1995). Without the alleged traffic violation, the stop was pretextual and unconstitutional.

The Government is not required to prove that defendant actually committed the traffic violation; this is irrelevant so long as law enforcement officers had probable cause or reasonable suspicion to think that he did. *United States v. Lewis*, 920 F.3d 483, 489 (7th Cir. 2019). Without contrary evidence of the traffic violation, the probable cause determination turns entirely on the credibility of the witnesses. *Id.*

ARGUMENT

II. Law Enforcement Unreasonably Seized Martinez on January 30, 2019 in Mohave County, Arizona by Prolonging the Seizure for a Traffic Matter Beyond the Time Reasonably Required to Issue Citations for Traffic Infractions.

On January 30, 2019, Arizona Department of Public Safety Trooper Thomas Callister stopped a vehicle operated by the defendant on Interstate 15 in Mojave

County, Arizona. The Trooper claimed he was stopping the 2018 Dodge because he believed that the positioning of the GPS Unit and radar detector obscured the driver's view of the road through the front windshield. The Trooper Callister identified the driver as Francisco Martinez. He believed Martinez to be "nervous". He also took Martinez's driver's license and told Martinez to sit in the passenger side of the vehicle. Trooper Callister continued to detain Martinez in the front passenger side of the patrol car for an extended period while the Trooper engaged in a lengthy series of questions. At one point, the he asked if the car could be searched and if a drug dog could run around the vehicle. After extended detention and continued questioning, Martinez reluctantly consented to a search of the vehicle. According to the Trooper Callister, Martinez did not want to wait for a drug dog. After a search of the vehicle and compartments, \$77,745.00 was recovered and seized.

Here, the initial reason for Trooper Callister's stop of Martinez was to check on the radar detector and GPS device affixed to the front wind shield of the vehicle.

But it is equally clear that almost immediately after this initial contact he went from acting in the role of a police officer checking on a equipment violation to an officer searching for evidence of a crime. In a sense, Officer Callister's actions in stopping Martinez, taking his driver's license, removing him to the squad car and asking him incriminating questions was not "totally divorced from the detection, investigation, or acquisition of evidence relating" to a crime, see *Cady v. Dombrowski*, 413 U.S. 433, 441(1973). This is so despite the fact that Trooper Callister lacked any reasonable suspicion that Martinez was involved in the commission of a crime.

Hence, the determination of whether his seizure of the defendant was reasonable and based on sufficient information requires examining the totality of the circumstances. See *United States v. Swift*, 220 F.3d 502, 506 (7th Cir. 2000). Analysis of a seizure is limited to the moment it occurs and excludes any facts learned later, no matter how compelling they may be. See *United States v. Odum*, 72 F.3d 1279, 1284 (7th Cir. 1995).

A few facts lend themselves to the conclusion that Trooper Callister was not acting reasonably in the sense that the Fourth Amendment expects of officers. *Prouse*, 440 U.S. at 663. First, Trooper Callister makes the not so credible claim that Martinez seemed nervous. But a close review of the video does not demonstrate any nervousness on Martinez's part. Trooper Callister's claim to that effect is not credible. But even if Martinez was nervous, the nervousness alone does not justify the prolonged stop and detention for a traffic offense of over 30 minutes from the initial stop to the point Martinez is arrested. It is well established that nervousness alone cannot justify a stop. *See Huff v. Reichert*, 744 F.3d 999, 1007 fn. 3 (7th Cir. 2014). Likewise avoiding eye contact and some other "nervous" body shifts or movements do not justify a stop either. *See United States v. Williams*, 731 F.3d 678, 687 (7th Cir. 2013). It is also important to note that just about 28 minutes pass from the stop, the detention and interrogation in the car, the consent to search, and the discovery of the suspected trap in the car, asking

questions to Martinez about the trap, gaining preliminary access to the trap.

Second, Trooper Callister is engaging in questions to Martinez designed not only to obtain incriminating answers, but also most certainly designed to prolong the detention. For example, after questioning Martinez about present and future travel plans, he turns to the following questions:

"Francisco, you don't have anything illegal in your car?"

"No guns, drugs, guns, bombs?"

"Do you have any large amounts of currency in your car?"

"Would it be okay if I did a search of your car?"

"Would it be okay if I have a dog run around the car?"

Third, nothing Martinez said about his travel plans were anything, but innocent. Nothing should have set off any alarm bells mandating prolonged detention, more questions, a request for consent or longer detention followed by a wait for dogs. Martinez was traveling to California to visit cousins. Nothing out of the usual in this claim. He would be traveling again to California this time with his family for a 15 year olds birthday

party. Again not an unusual or extraordinary explanation. On this trip, Martinez was traveling by himself on a vacation to see cousins. And so what is wrong or illegal or, in any way suspicious, with wanting to go on another trip a few weeks later? Nothing. What difference does it make if he travels to California once a year or every other year? Again reasonable answers to unreasonable questions. See *United States v. Rodriguez-Escalera*, 884 F.3d 661, 666-67, 670-671 (7th Cir. 2018)

This was supposed to be a stop to issue a warning citation about an equipment violation. It clearly was not so. Most people have been stopped for some equipment violation or traffic infraction in our lives. This much may be said with some certainty, most people are not subject to the type of treatment and questioning and delayed detention Martinez encountered. Trooper Callister may be experienced, but he did not exhibit that he was reasonable in the way that the Fourth Amendment demands. *Prouse*, 440 U.S. at 663. The question remains if Martinez did not have a Hispanic last name and driving a

vehicle with out of state plates, would he have been treated the way he was? Highly unlikely.

Writing up the warning ticket should have lasted at best ten minutes, maybe less. Despite the Government's claims to the contrary, Trooper Callister held onto Martinez's drivers license and never gave him a warning ticket. It is not credible to suggest that Martinez was free to leave during any point in his encounter with the Officer. And if he had tried to leave Trooper Callister most certainly would have prevented him from leaving the police car and the area. And without a driver's license, where would he have been able to go?

The prolonged stop and detention for a traffic offense of over 30 minutes from the initial stop to the point where Martinez is arrested - includes the time Martinez is moved to the back seat of the squad car, Trooper Callister gains access into the trap, pulls out a large plastic bag filled with currency, and Martinez is arrested. It is also worth noting 28 minutes pass from the stop, the detention and interrogation in the car, the consent to search, and the discovery of the suspected

trap in the car, asking questions to Martinez about the trap, gaining preliminary access to the trap.

Martinez was allegedly stopped for a traffic offense involving GPS and radar detector obscuring his vision from his windshield on a highway in Mojave County Arizona. But he was detained much longer than is reasonable under the Fourth Amendment and far past the time necessary to issue traffic citations. Here the extended questioning of Martinez in the police car added time to the stop and prolonged the detention far beyond the time reasonably required to complete the mission of issuing a ticket for the violation of any traffic laws. The police action here violates the Fourth Amendment. The teaching of the United States Supreme Court decision in *Rodriguez* must be followed as it relates to the Mohave County, Arizona stop and search. The United States Court of Appeals decision in *United States v. Rodriguez-Escalera*, 884 F.3d 661, 666-67, 670-671 (7th Cir. 2018) seems to be on point here and calls for suppression of evidence as well.

The government tries to make the case that Martinez half-hearted, involuntary consent means that no constitutional violation occurred. Martinez disagrees. He also argues that his consent to the search was not voluntary, because his consent was vitiated by the length of the stop and detention. Here the prolonged detention violating the defendant's 4th Amendment rights had occurred by the time consent was requested. Because law enforcement unreasonably seized Martinez by prolonging the seizure for a traffic matter beyond the time reasonably required to issue citations for traffic infractions, Martinez's consent to the search of the car was tainted. *Cf. United States v. Cellitti*, 387 F.3d 618, 622 (7th Cir. 2004) ("Consent given during an illegal detention is presumptively invalid."). Therefore, Martinez's consent to the search of the Dodge was vitiated on account of the length of the seizure.

III. Law Enforcement Unreasonably Seized Martinez on May 24, 2018 in Fond du Lac County, Wisconsin on a Pretext and by Prolonging the Seizure for a Traffic Matter Beyond the Time Reasonably Required to Issue Citations for Traffic Infractions.

Without the alleged traffic violation, the stop was unconstitutional. And Martinez maintains he did not violate any traffic laws. Neither the testimony of Narcotic Investigator Alexander Wysocki, nor the testimony of Wisconsin State Trooper Matthew Ackley may be trusted as credible. Neither of these officers presented a credible account of events for these reasons. First, the government fails to meet its burden that the stop was based on a violation of the traffic law. Investigator Wysocki claimed Brown County Drug Task Force Officers told Trooper Ackley about an ongoing drug investigation of Martinez and also directed him to pull Martinez over when Martinez violated traffic laws. But on cross-examination, Trooper Ackley said he was simply told by Wysocki to stop Martinez. Trooper Ackley followed Martinez for some time and he testified that is not unusual for drivers to drive slower when they are being followed by police. Second, he claimed that he pulled

Martinez over for two violations: (1) illegal license plate bracket and (2) failure of slower vehicle to keep right. Yet, if investigators and law enforcement with the Brown County Task Force had even a remotely reasonable suspicion to stop Martinez for violating traffic laws or other laws, then it is baffling why they chose not to stop him when they conducted surveillance of him in Appleton at a Wendy's restaurant or at any other time after he was seen leaving Brown County and heading south towards Fond du Lac County.

The only reasonable answer is that they lacked reasonable suspicion to do so. And so did Trooper Ackley when he eventually stop Martinez's vehicle in Fond du Lac County. Officer Ackley was following orders, not acting on reasonable suspicion based upon his own observations. Put simply, he didn't stop Martinez because of traffic violations he observed. Officer Ackley stopped Martinez because he was told to do so. Not because he saw a violation of the traffic laws. And the government did not show a video of Martinez actually violating the traffic laws by driving too slowly. The illegal license

plate bracket violation is really a bit too much. In all likelihood, it was probably only observed once the Trooper had already stopped the car.

And so, it would seem that this stop of Martinez is wholly unreasonable and completely pretextual in the sense that no traffic violation supports the stop. The Fourth Amendment permits pretextual traffic stops as long as they are based on an observed violation of a traffic law. *Whren*, 517 U.S. 806, 810. ("The temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective."). However, police may not use a traffic stop as a pretext to search for evidence without a traffic violation. See *United States v. Willis*, 61 F.3d 526, 530 (7th Cir. 1995).

Shortly after the stop, former Deputy Sheriff Weisbecker arrived with a drug dog to sniff at the Cadillac Escalade operated by Martinez. This dog, as the

video of the March 24, 2018 confirms, did not alert to the rear of the vehicle where the trap compartment was eventually discovered and searched. This dog only alerted on the passenger side. So the dog could have been alerting to food, not drugs. In any event, former Deputy Sheriff Weisbecker is not credible at all. He is no longer employed by the Fond du Lac County Sheriff because he was either discharged or resigned because he had made false statement to a supervisor during an OWI stop.

This was an unconstitutionally prolonged detention unjustified by reasonable suspicion or probable cause to search. This is so because, for hours upon hours, Martinez was detained and his driver's license seized while a drug dog sniff occurred and a search warrant was obtained and executed. Martinez was allegedly stopped for traffic offenses, "illegal license plate bracket and failure of slower vehicle to keep right." But he was detained much longer than is reasonable under the Fourth Amendment and far past the time necessary to issue citations. Here the dog sniff added time to the stop and so did towing the car from the roadway and so did

obtaining a warrant. The police action here violates the Fourth Amendment. The teaching of the United States Supreme Court decision in *Rodriguez* must be followed as it relates to the Fond du Lac County, Wisconsin stop and search. The United States Court of Appeals decision in *United States v. Rodriguez-Escalera*, 884 F.3d 661, 666-67, 670-671 (7th Cir. 2018) seems to be on point here and calls for suppression of evidence as well.

CONCLUSION

In light of the above, Martinez requests an that the District Court suppress all evidence recovered subsequent to the unreasonable and prolonged detention arising out of the stop of the defendant and search of the vehicle he operated in Mohave County, Arizona on January 30, 2019 and the stop of the defendant and the search of the vehicle he operated on May 24, 2019 in Fond du Lac County, Wisconsin. The illegal seizures here mandate that all evidence obtained subsequent to the illegal stop and seizure must be suppressed as fruit of the poisonous tree. See *Wong Sun v. United States*, 371 U.S. 471, 487-93 (1963).

Dated this 25th of September, 2020.

Respectfully submitted,

HUNT LAW GROUP, S.C.

Electronically Signed by/s/Edward J. Hunt
Attorney for
Francisco Martinez
Edward J. Hunt
Attorney at Law
SBN: 1005649
Edhuntlaw@gmail.com

Mailing Address:

THE HUNT LAW GROUP, S.C.

342 North Water Street
Milwaukee, Wisconsin 53202-3910
(414) 225-0111