IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Action
	)	
v.	)	No. 04-10144-01 -MLB
	)	
MITCHELL J. HARRINGTON	)	
Defendant .	)	

GOVERNMENT'S RESPONSE TO
MOTION TO SUPPRESS EVIDENCE

Comes now the United States of America, by and through Mona Lee Furst, Assistant United States Attorney, and in response to the motion to suppress evidence and statements states as follows:

STATEMENT OF STANDING

The United States submits that the defendant has shown he had authority to drive the vehicle in question, and can therefore contest the stop and search of the vehicle . United States v. Jones, 44 F.3d 860, 872 (10th Cir.1995). United States v. Mendez, 118 F.3d 1426, 1429 (10th Cir.1997); United States v. Villa-Chaparro, 115 F. 3d 797, 800 n. 1 (10th Cir. 1997).

PROFFERED STATEMENT OF THE FACTS

The Court has heard the facts as testified by Kansas Highway Patrol Officer Andrew Schippers during the hearing held October 12, 2004. Initially, the Court did not require a response to the motion to suppress, which was to be filed by the defense by Friday, October 8, 2004. However, after hearing the testimony, and having the video admitted into evidence, the court requested that the United States respond to the motion.

The facts established a valid stop for speeding by Trooper Schippers of the defendant, which occurred on December 7, 2003 at 9:00 am within the District of Kansas. Trooper Schippers obtained information for the warning ticket he wrote, and learned that the defendant lived in Wisconsin; had a California driver's license; had flown to Utah to visit a friend, then had decided to rent a car to drive back home, planning to stop in Indiana for a surprise visit with an ex-girlfriend. Trooper Schippers noticed that the defendant was nervous, made little or no eye contact with him, and that the car's trunk was riding low to the ground. He saw an atlas and cellular telephone in the passenger area. He had also noted the rental agreement was for three days, and that the car was due back to Utah the day of the stop in Kansas.

After giving the warning to the defendant, and returning his documents, approximately 7 minutes after the initial stop, the defendant agreed to visit more when asked to by the trooper. However, when the trooper asked for consent to search, the defendant denied permission. The trooper then detained him for about 18 minutes until the drug dog arrived, and gave a positive alert on the car. The defendant had been asked to drive his car to an exit to get out of traffic during this detention, and he did so without any law enforcement officer riding with him.

The issue to be addressed is whether or not the trooper had reasonable suspicion to detain the defendant awaiting the drug dog once consent was denied.

ARGUMENTS AND AUTHORITIES

A. Validity of Initial Stop

The defense does not appear to contest the lawfulness of the initial stop for speeding, however it will be addressed in an abundance of caution. A police officer may stop and detain someone who has committed a traffic offense. Whren v United States 517 U.S. 806, 135 L. Ed

2d 89, 116 S.Ct. 1769 (1996); United States v. Anderson, 114 F. 3d 1059, 1063 (10th Cir. 1997). See also State v. Chapman, 23 Kan. App. 2d 999, 1002, 939 P. 2d 950, 953 (1997). In Kansas "... an officer may stop a person whom he sees commit a crime, whether it be a felony, a misdemeanor, or a traffic offense. K.S.A.1987 Supp. 21-3105, and 22-2402." State v. Guy , 242 Kan. 840, 843, 752 P. 2d 119 (1988). The stop must be reasonable and based upon either reasonable suspicion or probable cause to believe a traffic law was violated, and the decision to stop a vehicle based upon the belief a traffic violation occurred has been ruled reasonable. Whren, Id. at 135 L. Ed 2d 95; Pennsylvania v. Mimms, 434 U.S. 106, 109, 54 L. Ed 2d 331, 98 S. Ct 330 (1977). The court must consider the " 'totality of the circumstances' of each case to see whether the detaining officer ha[d] a 'particularized and objective basis' for suspecting legal wrongdoing." United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) (emphasis added) . United States v. Callarman, 273 F. 3d 1284, 1287 (10th Cir. 2001); United States v.Ozbirn, 189 F.3d 1194 (10th Cir. 1999); United States v. Botero-Ospina, 71 F. 3d 783, 787 (10th Cir. 1995), *cert. denied* 518 U. S. 1007 (1996). The subjective reason for the stop is irrelevant, as long as a traffic infraction exists. See United States v. Hunnicutt, 135 F.3d 1345, 1348 (10th Cir.1998).

A valid traffic stop must be "'based on an observed traffic violation'" or a "reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring.'" United States v. Cline, 349 F.3d 1276, 1286 (10th Cir. 2003) quoting United States v. Callarman, 273 F.3d 1284, 1286 (10th Cir. 2001). "Our sole inquiry is whether this particular officer had reasonable suspicion that this particular motorist violated any one of the multitude of applicable traffic and equipment regulations of the jurisdiction." United States v. Manjarrez

348 F.3d 881, 884 (10th Cir. 2003) quoting United States v. Botero-Ospina, 71 F.3d 783, 786 (10th Cir. 1995).

The trooper observed the defendant speeding, going 76 in a 70 mph zone. Kansas Statutes Annotated 8-1557 and 8-1558 require vehicles to maintain the posted speed limit, or be ticketed for a traffic infraction.

B. Consensual Encounter

Once the warning ticket was given to the defendant by Trooper Schippers, he was free to leave. He however agreed to talk further with the trooper, who requested permission to ask him more questions. Therefore, the initial conversation before consent was denied was also voluntary. Generally, "[i]f a driver produces a valid license and proof of the right to operate a vehicle an officer must allow him to continue on his way without delay for further questioning." United States v. Cervine, 347 F.3d 865, 871 (10th Cir. 2003) quoting United States v. Soto, 988 F.2d 1548, 1554 (10th Cir. 1993). An officer may extend a detention for reasons unrelated to the traffic stop under two circumstances: (1) if the officer has an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring; or (2) if the initial detention has become a consensual encounter. Cervine, 347 F.3d 871. "A consensual encounter between police and a private citizen occurs when there is voluntary cooperation by the private citizen in response to non-coercive questioning by the police officer." United States v. Morin, 949 F.2d 297, 300 (10th Cir.1991). In this case, there was no " 'coercive show of authority, such as the presence of more than one officer, the display of a weapon, physical touching by the officer, or his use of a commanding tone of voice indicating

that compliance might be compelled.' " United States v. Elliot, 107 F.3d 810, 814 (10th Cir.1997) (quoting United States v. Turner, 928 F.2d 956, 959 (10th Cir. 1999).

C. Reasonable Suspicion to Detain

The determination of whether investigative detention beyond the scope of the initial stop is supported by an objectively reasonable suspicion of illegal activity "does not depend upon any one factor but on the totality of the circumstances." United States v. Jones, 44 F.3d 860, 872 (10th Cir. 1995) citing United States v. Soto, 988 F.2d 1548, 1555 (10th Cir. 1993). The Court makes this determination "with deference to a trained law enforcement officer's ability to distinguish between innocent and suspicious circumstances." United States v. Mendez, 118 F.3d 1426, 1431 (10th Cir. 1997).

The factors cited by the trooper in his testimony have been acknowledged as factors that can give rise to reasonable suspicion. It is correct that a trooper could not rely solely upon his feelings, but he had more. United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). Factors that are not by themselves proof of illegal conduct and that are consistent with innocent travel may, taken together, amount to reasonable articulable suspicion. Id. at 9-10 *See also* United States v. Fernandez, 18 F.3d 874, 881 (10th Cir.1994).

1. Nervousness

Although nervousness is rarely a factor that is dispositive in the inquiry, it can contribute to reasonable suspicion, even if not abnormal or excessive. United States v. Wald, 216 F. 3d 1222, 1227 (10th Cir. 2000);United States v. Hunnicut, 135 F. 3d 1345, 1350 (10th Cir. 1998); United States v. Kopp, 45 F.3d 1450, 1454 (10th Cir. 1995); United States v. Soto, 988 F.2d 1548, 1554 (10th Cir. 1993). Nervousness alone cannot support such an

inference. United States v. Fernandez, 18 F.3d 874, 79 (10th Cir.1994). Although Harrington's nervousness and lack of eye contact alone may not be significant, it does contribute to reasonable suspicion. See United States v. Kopp, 45 F.3d 1450, 1454 (10th Cir.1995); United States v. Soto, 988 F.2d 1548, 1554 (10th Cir.1993).

2. Cellular telephone

Cellular telephones and pagers are known tools of the drug trade. See United States v. Slater, 971 F.2d 626, 637 (10th Cir.1992) (stating that a cell phone is a "recognized tool of the trade in drug dealing"). Although cellular telephones and maps are used by many people traveling, when considered in connection with the other facts before the Court, these things become more significant when considered together with all the other factors.

3. Travel Plans

The complicated nature of the defendant's travel plans- supposedly flying one way to Utah from Wisconsin, then renting a car with Utah tags to drive back through Indiana- when coupled with his California driver's license, gave rise to a suspicious set of circumstances. *See* Kopp, 45 F.3d at 1454 (finding reasonable suspicion based, in part, on implausibility of defendant's explanation of his travel plans and purpose). *See also* United States v. Pena, 920 F.2d 1509, 1514 (10th Cir.1990) (reasonable suspicion existed in part due to fact that defendant had an Illinois license but drove a car with California plates; he could not provide registration; he gave inconsistent answers regarding his destination; and the trunk lock was punched out). *See also* United States v. Pinedo-Montoya, 966 F.2d 591 (10th Cir. 1992) (reasonable suspicion existed to justify border guard's referral of defendant to secondary stop when defendant claimed to be from Tucson, but had California driver's license and car with Texas plates).

In United States v. Salzano, 158 F. 3d 1107 (1999), cited by the defense, the defendant had driven to and from his destination, and the Court did not find his choice of driving rather than flying to be significant. In the present case, the defendant flew one way, then was driving back, a common and recognized manner of hauling drugs across country, especially on I-70 through Kansas, as the trooper knew based upon his training and experience.

A short turn around can and is often considered by the Courts as a factor in reasonable suspicion. *See* United States v. Wood, 106 F. 3d 942, 946 (10th Cir. 1997)(citing United States v. Sokolow, 490 U.S. 1, 9, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). Rental cars are often used to transport drugs. See United States v. Christian, 43 F.3d 527, 530 (10th Cir.1994). *See also* Kopp, *supra*, 45 F. 3d at 1454. Rental vehicles are consistently seen by troopers in Kansas hauling drugs across country, often in the name of a third party. However, the vehicles can also be rented in the driver/defendant's name. In fact, the defendant in Wood had rented the RV in his own name. Wood at 106 F. 3d 946. The car Harrington rented was due back to Utah the same day the he was driving through Kansas, *away* from Utah. This time frame also added to the trooper's suspicions that the defendant was not being forthright, and even though the defendant said he had called the rental company to extend the contract, the trooper had no information to verify that statement.

4. Lowness of Trunk to Ground

The Supreme Court has recognized this as a factor supporting reasonable suspicion that a vehicle is transporting drugs. See United States v. Sharpe, 470 U.S. 675, 682 n. 3, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985); United States v. Brignoni-Ponce, 422 U.S. 873, 885, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). Unlike the officer in Salzano, Trooper Schippers testified the

lowness of the trunk to the ground *was* a factor he considered in the present case. This is fact which can be used in the Tenth Circuit to determine if reasonable suspicion to detain exists. See Salzano, *supra*, 158 F. 3d at 1113. *But see* United States v. Guillen-Cazares, 989 F, 2d 380, 383 (10th Cir. 1993)(testimony that trunk was "slanted" was not sufficient to establish reasonable suspicion).

When viewed collectively, the factors testified to by the trooper support a finding of reasonable suspicion of illegal activity.

CONCLUSION

In conclusion, if the Court finds there was reasonable suspicion to detain Harrington, then an 18 minute delay between the time of the warning ticket and when the canine unit arrived was not unreasonable. See United States v. Sharpe, 470 U.S. 675, 686-88, 105 S.Ct. 1568, 1575-77, 84 L.Ed.2d 605 (1985) (upholding 20 minute detention where police "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."); United States v. Williams, 271 F.3d 1262, 1271 (10th Cir.2001); (fifteen minute wait for canine unit reasonable); United States v. Villa-Chaparro, 115 F.3d 797, 802-03 (10th Cir.1997) (thirty-eight minute wait for canine unit reasonable).

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on October 20, 2004, I electronically filed the foregoing Response to the Defendant's Motion to Suppress with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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s/Mona Lee Furst
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