

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND
RECOMMENDATION

v.

JUSTIN J. JOHNSON and
DUSTIN C. BASKIN,

04-CR-003-C

Defendants.

REPORT

Defendants Justin Johnson and Dustin Baskin are charged with manufacturing methamphetamine and possessing methamphetamine production equipment. Before the court for report and recommendation are the defendants' motions to suppress evidence. Both defendants challenge the validity of a traffic stop and seek to quash all evidence derived from that encounter with deputy sheriffs. At one point, Johnson separately sought to suppress his post-arrest statements but has abandoned that motion. For the reasons stated below, I am recommending that the court deny the remaining motions to suppress.

Facts

Glen Hills County Park is a heavily-wooded county park in rural eastern St. Croix County, Wisconsin. The park contains scenic overlooks and rock indentations in the hills large enough to be called "caves" by some people. It is accessible by Rural Route 4 (RR4),

a sinuous dirt road. Although there are a few houses along RR4, apparently it is, for the most part, very rural.

On September 22, 2003, hikers in the park contacted the St. Croix County Sheriff's Department to report suspicious equipment in a cave. Deputies responded and found paraphernalia associated with a methamphetamine lab. Because such sites can be toxic and volatile, the sheriff's department wanted a specialist to examine and dismantle the equipment. Pending the expert's arrival, deputies monitored the area to protect the site's integrity. Deputies rotated two-hour shifts throughout the evening of September 22 and into the morning of September 23, 2003.

Deputy Sheriff Brandie Uhan had the 2:00 a.m.- 4:00 a.m. shift. Deputy Uhan is a five year veteran of the department who has received basic and specialized training in drug investigation, including a course earlier that same month (September '03) focusing on methamphetamine investigation. Deputy Uhan has dealt with meth cases and users, and has seen and dealt with meth paraphernalia such as pipes, straws, bindles, packaging and methamphetamine residue.

Deputy Uhan parked her marked, light-topped squad car on RR4 near the cave containing the meth lab. It was a dark, isolated area with no lighting whatsoever. The posted speed limit on RR4 was 35 mph, although Deputy Uhan was unaware of it. The dirt road was narrow (perhaps 12' across) and had no shoulder, but Deputy Uhan pulled over far enough for cars to pass her, on the right side of the road facing northbound. She did not

have her engine running, nor did she have any car lights on. This turned out to be unimportant, because absolutely no cars passed between 2:00 a.m. and 3:17 a.m. In fact, Deputy Uhan had been told by Deputy Brent Standaert that no vehicles had passed from 10:00 p.m. -2:00 a.m., either.

At about 3:17 a.m. Deputy Uhan saw the lights of a vehicle approaching from the north. The car was traveling no more than 10 to 15 miles per hour, which Deputy Uhan considered a remarkably low speed, even at that time on that road. Deputy Uhan turned on her car's parking lights to make it visible. The approaching car, a Chevrolet Lumina, seemed to accelerate. Deputy Uhan turned on her headlamps. The vehicle drove by without stopping. Although there was a crack on the Lumina's windshield, Deputy Uhan did not see it at that time.

Deputy Uhan immediately was suspicious of this car because it was the *only* car in five hours to drive through this remote area, so late at night, so slowly, so near the meth lab, and the driver had accelerated upon seeing another vehicle near the lab site. Deputy Uhan performed a Y-turn so she could intercept and investigate. She had to travel at about 45-50 MPH to catch up to the car, which she estimated was going about the same speed as she was traveling. Deputy Uhan followed the car for about ½ mile to where RR4 intersected County Road W, a safer place to stop because the road was paved and wider. Deputy Uhan already had alerted dispatch that she was stopping the car.

The car pulled over appropriately and Deputy Uhan approached. Defendant Justin Johnson was driving, and defendant Dustin Baskin was sitting in the front passenger seat beside him. Deputy Uhan asked Johnson where he was going. He responded that they had come from “The Farm” in Emerald and were on their way to the “128 Restaurant.” Deputy Uhan was familiar with both locations and she remarked to Johnson that taking RR4 from the Farm to 128 was a very indirect route. Johnson replied that they just wanted to go for a drive.

During this conversation, Johnson appeared intoxicated to Deputy Uhan: he would not make eye contact, he used choppy short movements that manifested nervousness, his eyes were bloodshot and his speech was slurred. Baskin manifested nervousness as well, pulling out a cigarette, placing it behind his ear, forgetting it was there, then pulling out a second cigarette to place in his mouth and smoke.

With her flashlight, Deputy Uhan surveyed the interior of the car. In the back seat she saw a broken light bulb and two hose clamps. Both are indicia of methamphetamine production and use. (As Deputy Uhan knew, broken light bulbs are used to smoke methamphetamine, and hose clamps are used with hoses to transfer anhydrous ammonia from a storage tank to a thermos or something similar. Anhydrous ammonia is a necessary ingredient for the “Nazi” method of cooking methamphetamine.)

Deputy Uhan left both men in the car while she took their drivers’ licenses to her squad car to run past dispatch. She watched both men during this process, and saw both of

them reach under their seats and into the back seat. Baskin appeared to be doing something to the passenger side door. Deputy Uhan became concerned that the men might be caching or retrieving weapons. She re-approached the car and now saw a baseball bat next to Johnson that had not been there before. She asked Johnson about the bat; he responded that it was “no big deal” and placed it in the back seat. Deputy Uhan now was very concerned about weapons.

She noticed that Baskin was clasping his hands together at his abdomen. Deputy Uhan asked Baskin what he had in his hands. Baskin did not answer. Deputy Uhan repeated her question. In response, Baskin opened his hand: it contained several small (2 inch x 2 inch) plastic bags commonly called gem packs. Deputy Uhan could see white residue inside the bags. Gem packs with white residue were highly consistent with methamphetamine storage. Deputy Uhan asked Baskin to hand them over, and he did. Deputy Uhan counted eight gem packs containing residue.

By then several back up deputies had arrived, so Deputy Uhan and her colleagues removed Johnson and Baskin from their car. The deputies advised both men that they were not under arrest but were being detained for investigation. They then handcuffed them and put them in squad cars while Deputy Uhan searched the car for weapons.

Deputy Uhan found another gem pack under the driver’s seat with substantially more residue than the previously-retrieved gem packs. She also found a glass plate with white residue on it and some napkins. All these items were consistent with methamphetamine use.

Deputy Uhan noticed that the key ring in the car's ignition sported a red cap similar to that used to cap anhydrous ammonia tanks. The deputies then formally arrested both men for possession of drug paraphernalia.¹

Analysis

The government and both defendants agree that the sole issue before the court is whether it was reasonable for Deputy Uhan to stop the car in which the defendants were traveling. *See* Baskin Brief in Support, dkt. 29, at 9, n. 6; Johnson Memorandum in Support, dkt. 22, at 3. The government asserts that there are two bases for the court to conclude that the stop was reasonable: first, Deputy Uhan observed a regulatory violation, namely the Lumina's cracked windshield, which provided probable cause for a traffic stop; second, the totality of circumstances known to Deputy Uhan prior to the stop raised a reasonable suspicion that criminal activity was afoot, justifying an investigative stop related to potential drug crimes. I deal with each in turn.

¹ The parties also presented testimony relevant to Johnson's oral motion to suppress his post-arrest statement, *see* transcript, dkt. 27, at 119-27, but I have not found facts on this issue because Johnson did not brief it, *see* Johnson's memorandum, dkt. 22. Failure to address or develop a claim in an opening brief constitutes waiver of that claim. *See United States v. Hook*, 195 F.3d 299, 309-10 (7th Cir. 1999).

I. The Traffic Stop

There is no need to dwell on the regulatory violation because I have concluded that Deputy Uhan did not see the cracked windshield before she stopped the car. Nobody disputes that the windshield was cracked, but to this day there is conflicting information about the size and location of the crack. Deputy Uhan's written report simply indicates that she observed "a large crack across the windshield." Def. JJ Exh. 2 at 1. Deputy Uhan testified at the suppression hearing that the crack ran across the entire "lower portion of the windshield, maybe right above the dash." Tr., dkt. 27, at 19. Defendant Johnson and Baskin's private investigator (who extensively investigated this issue) both testified that the crack was at the top of the windshield, several inches from the roofline, and that it did not extend the length of windshield, starting on the passenger's side and continuing partway into the driver's side. *Id.* at 82 and 101.

I have no reason to doubt Johnson or the investigator on this point because they both have spent more time more recently looking at the crack and the windshield. The court cannot determine the location or size of the crack from a review of the photographs or videotape submitted by the parties because the crack is not visible in any of them. The government challenges the foundations undergirding the photographs and the investigator's video, and some of its objections are valid. The point is that there is no physical evidence in the record establishing the size and location of the crack.

Does this mean Deputy Uhan *couldn't* have seen the cracked windshield before she stopped the car? Well, her recollection that she did see it does not violate the physical laws of nature: the crack was there, somewhere, and her squad car's headlights illuminated Johnson's Lumina for about a second before it passed her in the otherwise darkened forest.² But it would have been virtually impossible for Deputy Uhan to have observed the crack under these circumstances. This, coupled with her inability at the suppression hearing accurately to describe the location and appearance of the crack lead to me conclude that she is mistaken in her recollection that she saw the crack before stopping Johnson's car. (I have no doubt she saw it after, but that's irrelevant to the suppression claim).

II. The Investigative Stop

That leaves the government's fallback position: reasonable suspicion based on the totality of circumstances. The parties essentially agree on the applicable law, but disagree on its application to these facts.

In *United States v. Felix-Felix*, 275 F.3d 627 (7th Cir. 2001), the court noted that to justify an investigatory stop,

² Deputy Uhan testified that the Lumina approached her parked 2001 Chevy Impala at about 10 -15 MPH and that she turned on her headlights when the Lumina was about one car length in front of her. Using the slower speed and assuming a car length of about 200" (like a 2001 Impala) would give Deputy Uhan about 1.2 seconds to view the Lumina before it passed her headlights. The record does not reflect whether the low beams of a police squad car even would illuminate the top right portion of the windshield of an oncoming Lumina at a distance of 16.6 feet.

an officer need only have specific articulable facts that give rise to a reasonable suspicion of criminal activity. This level of suspicion is considerably lower than proof of wrongdoing by a preponderance of the evidence.

Id. at 633.

In *Felix-Felix*, police engaged in a long-term investigation of two cousins, Guadalupe and Francisco, suspected of drug dealing. The investigation culminated when police arrested Guadalupe and a cohort in possession of 50 kilograms of cocaine. Agents went back to Francisco's house to watch it until he returned. When Francisco drove by, he saw the agents' cars and sped past, not stopping at his own home. Agents pursued him, cornered his jeep in an alley, asked him why he drove past his house, and ultimately obtained permission to search his house, in which they found 50 more kilograms of cocaine. *Id.* at 630. In response to Francisco's challenge to the reasonableness of the stop, the Seventh Circuit held that the police had reasonable suspicion to stop his car and talk to him: he had been seen in a drug crime area, police had discovered cocaine in a van garaged in a house in which Francisco had been seen, and he drove past his own house upon seeing the agents. *Id.* at 636.

Similarly, in *Illinois v. Wardlow*, 528 U.S. 119 (2000), the court acknowledged that pursuant to *Brown v. Texas*, 443 U.S. 47 (1979), mere presence in a high crime area does not provide a sufficiently particularized suspicion of criminal activity. Even so, the defendant's presence in such an area still was relevant, and when coupled with unprovoked flight from the police, justified the agents' suspicion that the defendant was engaged in criminal activity and therefore allowed them to investigate further. *Id.* at 124-25. As the court noted,

Headlong flight—where it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.

Id. at 124-25. The court acknowledged that flight is susceptible to innocent explanation and therefore is not necessarily indicative of criminal activity; it noted, however, that the whole point of an investigative detention is to attempt quickly to resolve ambiguous situations.

Id. at 125-26.³ See also *United States v. Raibley*, 243 F.3d 1069, 1075 (7th Cir. 2001) (defendant’s unconsented videotaping of teenage girl walking through store parking lot, followed by his flight from police, while susceptible to innocent explanation, raised suspicion of criminal stalking sufficient to justify stopping defendant’s truck for investigative detention.)

Both sides have cited these cases and others like them to argue that the facts in the instant case fall on the side of the line favorable to that party. Both sides make valid arguments and on the facts in this record, perhaps the court could justify granting or denying the motion. I am recommending that the court find that the facts known to Deputy Uhan were sufficient to justify her investigative intention.

³ For what it’s worth, four Justices in *Wardlow* dissented from upholding an investigative detention on the facts, although their reasoning was based in large part on the history of abuse citizens of color had received at the hands of law enforcement officials. See 528 U.S. at 131-38 (Stevens, Souter, Ginsberg and Breyer, JJ., concurring in part and dissenting in part).

The relevant articulable circumstances can be headlined as location, timing and (purported) flight. Each of these items can be explained away individually, but in conjunction they are sufficiently suspicious as to justify a reasonable deputy performing a brief stop to confirm or allay her suspicions.

RR4 in Glen Hills County Park is close to the middle of nowhere. Obviously, there are valid recreational uses for the park (after all, dayhikers promptly had found the drug lab), and the road itself is a public highway open 24 hours a day. So, it is *possible* that hunters, fisherman, or other law-abiding citizens innocently might happen to drive down this desolate dirt road in the middle of a wild county park at 3:15 a.m., within spitting distance of a hidden meth lab discovered within the past 24 hours.

Was the mere presence of this vehicle at this time in this location of legitimate investigative interest to Deputy Uhan? Absolutely. Although anything is possible, an experienced law enforcement officer reasonably would wonder why a car was inching its way down this forsaken road at this forsaken hour, so close to the meth lab. But timing and location of a slow-moving car probably do not rise above the level of a hunch. Late night driving on a public road, even a remote one, cannot justify a stop, especially in the absence of any evidence the driver knew that s/he was in the area of a hidden meth lab.

But adding evidence of flight tips the balance in favor of the stop. The defendants argue that there is no evidence of actual flight: they contend Johnson merely was driving slowly through the winding section of the narrow road, after which he appropriately

accelerated upon reaching the straightaway. This is a possible explanation of what happened, but it's not what Deputy Uhan saw or inferred. Although I have concluded Deputy Uhan was mistaken about when she first saw the crack on the Lumina's windshield, she was not mistaken—and the defendants do not seriously contest—that she saw the Lumina driving very slowly until its driver saw her marked squad car (purposely parked in proximity to the cave-cached contraband), at which point the Lumina accelerated markedly.

As a field officer with training and experience in drug cases, Deputy Uhan was entitled to draw the inference that the occupants of the Lumina were fleeing from her because they knew the meth lab was nearby and they didn't want her linking them to it. It wasn't the only inference she could have drawn, but it was based on articulable, objective facts and therefore it was fair and reasonable. Accordingly, Deputy Uhan had a right to perform a brief investigative stop to determine whether the Lumina contained flatlander fishermen floundering through the forest, or nervous dope-smoking locals lacking a good explanation for their predawn wander through the woods. As defendants concede, upon encountering the latter, Deputy Uhan was justified to continue her investigation in the manner described at the evidentiary hearing.

In sum, this was not a stop based on a hunch or inchoate suspicions. The combination of articulable facts provided Deputy Uhan with a reasonable suspicion that the occupants of the Lumina might be engaged in criminal activity. This justified the investigation detention. This court should deny both defendants' motions to suppress evidence.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny Defendants Justin Johnson's and Dustin Baskin's motions to suppress evidence in all respects.

Entered this 19th day of April, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge