IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORIO SANCHEZ-SUZUNAGA,

Defendant.

ORDER

03-CR-127-C

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The grand jury has indicted defendant Gregory Sanchez-Suzunaga for illegally re-entering the United States as an alien after having been deported. Before the court is defendant's motion to suppress evidence based on his claim that a United States Border Patrol agent unlawfully detained him without reasonable suspicion to do so. Dkt. #12. For the reasons stated below, I am denying defendant's motion.

In his motion, defendant made an evidentiary proffer and asked for an evidentiary hearing. At a hearing held on November 12, 2003, the magistrate judge denied the request for a hearing, but gave the parties a chance to amplify their factual proffers. Nov. 13, 2003 Order, dkt. #15. After considering defendant's supplement, the magistrate judge advised the parties at the final pretrial conference that the defendant had not presented a disputed

issue of material fact that could affect the outcome of the motion. Final Pretrial Conf. Order, dkt. #16. United States v. Coleman, 149 F. 3d, 674, 677 (7th Cir. 1998). In light of this decision, defendant and the government both declined to provide additional briefing, but defendant asked for a ruling on his motion.

Facts

In the absence of an evidentiary hearing I will accept as true all of defendant's proffered facts:

On August 21, 2003, United States Border Patrol Agent John Donohoe was patrolling in an unmarked vehicle in Superior, Wisconsin. Agent Donohoe spotted the defendant and a companion walking alongside a public highway. In full view of defendant and his companion, Agent Donohoe drove his vehicle around the area in a manner meant to reconnoiter, eventually parking at a church parking lot near defendant and his companion. After watching the two men, Agent Donohoe stepped out of his vehicle. He was wearing a visible sidearm. Agent Donohoe summoned the defendant and his companion toward him verbally and with a hand motion. When the two men approached, Agent Donohoe asked defendant in Spanish whether he had papers to be in the United States legally. At some point, Agent Donohoe asked defendant to put his hands on top of Donohoe's vehicle. Defendant cannot remember whether this request occurred before or after he admitted to

Agent Donohoe that he was not legally in the United States. M. to Suppress, dkt. #12, at 1-2; see also Nov. 13, 2003 Letter of Ernesto Chavez (in correspondence file).

Analysis

Defendant contends that his encounter with Agent Donohoe on August 21, 2003 was an investigative detention that required reasonable suspicion that criminal activity was afoot. The government responds that this was a consensual encounter that does not implicate the Fourth Amendment. Defendant asked this court to take evidence to determine whether the totality of circumstances demonstrated a Fourth Amendment seizure.

To obtain an evidentiary hearing on a suppression motion, a defendant has the burden of establishing a dispute as to a material fact that requires resolution by the court. This burden can be met only upon presentation of definite, specific, detailed and nonconjectural facts that establish a disputed material issue of fact. United States v. Rodriguez, 69 F.3d 136, 141 (7th Cir. 1995). Defendant's inability to recall whether he was directed to place his hands on the agent's car before or after he admitted to being illegally in the country is fatal to his request for a hearing and augurs denial of his substantive motion.

Federal courts apply an objective standard to determine whether an encounter between a citizen and police amounts to a "seizure." Rodriguez, 69 F. 3d at 141. The

determination of the voluntariness of an encounter is made on the basis of all relevant circumstances. If a reasonable person would have felt free to disregard the police and go about his business, then the encounter is consensual. Id.

A person is "seized" when, by means of physical force or a show of authority, the police restrain his freedom of movement. The purpose of the Fourth Amendment is not to eliminate all contact between the police and citizens, but to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security interests of individuals. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy requiring some particularized and objective justification under the Constitution. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several agents, the display of weapons, physical touching of the person by the agent or the use of language or tone of voice indicating that compliance with the agent's request might be compelled. United States v. Mendenhall, 446 U.S. 544, 553-54 (1980).

In Rodriguez, 69 F.3d 136, the court found that the Fourth Amendment was not implicated when a government agent approached the defendant in O'Hare Airport and began asking questions. The agent was dressed in plain clothes; he approached in a non-confrontational manner; and he asked permission to speak with the defendant. The encounter took place in a busy public concourse. The court concluded that the

circumstances of this encounter would have communicated to a reasonable person that he was free to end the questioning and to continue on his way. Id. at 142.

In United States v. Borys, 766 F.2d 304 (7th Cir. 1985), cited by defendant, the court held that there was no Fourth Amendment seizure when two DEA agents approached the defendant in O'Hare and asked him for identification, whether they could see his ticket, and how long he had been in Orlando. "Such questions and conduct are not overly intrusive. The Supreme Court made very clear in [Florida v. Royer, 460 U.S. 491, 497 (1983)] that officers' questioning individuals who are willing to listen in a public place does not amount to a seizure." Id. at 310. The court found, however, that when the two agents finally told the defendant, after the initial questioning and after tailing him for some time, that they suspected him of drug dealing and asked permission to search his luggage, the encounter ripened into an investigative stop supported by reasonable suspicion. Id. at 311. The Seventh Circuit subsequently has tempered the apparent reach of this holding. See, e.g., Rodriguez, 69 F.3d at 142 (asking for consent to search luggage is not a "per se paralyzing communication" that escalates every consensual encounter into a Terry stop). In any event, Borys is not factually on point here because Agent Donohoe did not ask for consent to search defendant. Whatever his suspicions, he did not announce to defendant that he was a criminal suspect.

In this case, defendant was traveling on a public street with a companion. A single agent drove by, parked at a distance, and beckoned defendant and his companion to

approach. Although the agent was wearing a sidearm, defendant does not claim that he unholstered it or brandished it in any way. An objective view of these circumstances indicates that defendant and his companion were free to ignore the agent and go about their business. After the men approached Officer Donohoe, his asking them questions about alienage and papers did not convert this to a custodial situation. The Fourth Amendment does not prevent a policeman from addressing questions to anyone on the streets. Mendenhall, 446 U.S. at 553. Although Border Patrol agents may not seize or detain people to inquire about their citizenship absent reasonable suspicion that they may be aliens, United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975), the equation is not commutative: questioning about citizenship does not convert an otherwise consensual encounter into a seizure. Cf. United States v. Childs, 277 F.3d 947, 949 (7th Cir. 2002)(seizure means "taking possession," a category that does not comprise questioning). A seizure occurs only when government agents restrain a person's liberty in some way by means of physical force or show of authority. Id.

The only factor that could have converted this encounter into an investigative detention would be if Agent Donohoe had laid hands on defendant. See id. at 552. It is not clear that instructing a citizen to place his hands on a police car qualifies as a laying on of hands; but even if it does, defendant cannot recall whether this instruction occurred before or after he admitted being in the country illegally. This court is left to speculate whether this

was a questionable pre-confession show of authority, or the beginning of an allowable post-confession pat down. See Terry v. Ohio, 392 U.S. 1 (1968).

Absent a more positive statement from defendant as to when Agent Donohoe directed him to place his hands on the car, defendant cannot prevail on his motion to suppress. Whatever compulsion defendant may have felt to walk over to Agent Donohoe and answer his questions would have been internal and subjective. The other circumstances indicate that this was an objectively consensual encounter on the public streets. The government had no obligation to present testimony from Officer Donohoe on this point when defendant himself could not establish a sequence of events demonstrating anything more than a conjectural violation of the Fourth Amendment.

ORDER

IT IS ORDERED that defendant Gregorio Sanchez-Suzunaga's motion to suppress evidence is DENIED.

Entered this 16th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge