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

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND RECOMMENDATION

v.

04-CR-048-S

DEMETRIUS E. RUFFIN,

Defendant.

REPORT

The grand jury has charged defendant Demetrius Ruffin with being a felon in possession of a firearm. The charge arises out of a traffic stop during which Madison police found a handgun cached in a hidden compartment in Ruffin's SUV. Before the court is Ruffin's motion to quash his arrest and suppress the physical evidence and statements derived from it. *See* Dkt. 9. For the reasons stated below, I am recommending that the court deny all but one minuscule portion of Ruffin's motion.

On April 30, 2004, this court held an evidentiary hearing on Ruffin's motion. Having heard and seen the witnesses testify, and having considered all affidavits, reports and other evidence in the record, I find the following facts:

Facts

Denise Markham is a 16-year veteran of the Madison Police Department who serves as a patrol officer in the south precinct. On March 12, 2004, Officer Markham was working the day shift in a marked squad car. Prior to hitting the streets that day, Officer Markham and her colleagues had been briefed to look for a new, black Ford Expedition with temporary tags that was sought by police in Peoria, Illinois regarding a homicide investigation.

At about 2:00 p.m. that afternoon, Officer Markham saw a black Lincoln Navigator pull into the parking lot of a pawn shop on South Park Street. Since Expeditions and Navigators are sister vehicles, Officer Markham wondered if this might be the SUV Peoria sought. After the Navigator's three occupants entered the pawn shop, Officer Markham drove past and saw Illinois plates on the SUV. She ran the plate to see if the vehicle was from Peoria. It was not: these license plates were registered to an old Chevy, and they were expired to boot. At 2:15 the three men got back into their SUV and drove onto Park Street.

Officer Markham made a traffic stop so she could ask the driver why expired Chevy plates were on a Lincoln Navigator. The Navigator pulled over, and Officer Markham stepped up to query the driver, defendant Demetrius Ruffin.

Ruffin admitted that the Navigator was his and that he knew the license plates did not belong on this vehicle; he explained that he had put them on because he had just bought the Lincoln within the past week or so. Ruffin identified himself by name, but could not

produce either a driver's license or a picture ID that would allow Officer Markham to verify his identity. Ruffin reported that he lived in Chicago and was visiting Madison.

Pursuant to Madison Police Department Policy 7-100, it is appropriate for officers to arrest a driver for a traffic violation after issuing a citation if the officer cannot positively identify the violator, or if the violator is an out-of-state resident. Officer Markham tried to run Ruffin's name through her computer data terminal, checking both Wisconsin and Illinois; both came back "no record." So, Officer Markham arrested Ruffin for operating a vehicle with the wrong license plates. She removed him from the SUV, and handcuffed him. Officer Markham asked Ruffin if it was possible for someone to retrieve any sort of positive identification so the police could confirm Ruffin's identity. Ruffin thought he might have an I.D. in an apartment he rented at Capitol View Terrace.

Officer Markham knew that she could search the Navigator incident to Ruffin's arrest, but she nevertheless asked Ruffin for consent search. First she asked Ruffin if there were any drugs or weapons in his vehicle. Ruffin responded that there were not. Officer Markham then asked Ruffin if it was okay if she searched his truck, and he responded to the effect of "Sure, go ahead, you won't find any drugs in there." Officer Markham placed Ruffin in the back of her squad car, then began her search of the Navigator. By then, two other police officers had arrived to assist, and the two passengers had stepped out of the vehicle.

Officer Markham found marijuana leaves and stems on the SUV's floor and the stub of a marijuana blunt in the ashtray. When Officer Markham returned to her squad car,

Ruffin spoke first, asking repeatedly "You didn't find anything in there, did you?" Ruffin's persistence raised Officer Markham's suspicions, so she asked Ruffin what was in the car that she *should* have found. Ruffin responded "Nothing." Officer Markham told Ruffin that she had found the marijuana residue. Ruffin responded that he smokes marijuana.

At this point, with Ruffin's permission, Officer Markham moved the Navigator into a nearby convenience store parking lot to get it out of traffic. She also radioed for assistance from a drug-sniffing dog and its handler.

At about 3:00, Officer Christine Boyd and her certified drug-detecting canine partner Arno arrived to search the Navigator for drugs. Officer Boyd put Arno in the SUV and he promptly alerted to the center console, but not the top flip-up section. Officer Boyd and the other officers could not discern how to open the lower portion of the console. They worked at it diligently for almost an hour, ultimately unscrewing a piece, but they still could not pry it open. The officers finally levered up a corner of the console and looked into the gap with a flashlight. They saw a handgun.[1]

Upon learning of the find, Officer Markham ran a criminal record check on Ruffin and learned that he was a felon. Officer Markham then told Ruffin that he was going to jail for the gun. Ruffin responded, "You found it, huh?"

Officer Markham got into the back seat of her squad car with Ruffin and read him his *Miranda* rights.[2] Ruffin told her that he understood his rights, and he agreed to talk.

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[1] The police eventually discovered that a motor-operated, toggle-activated secret compartment had been built into the console; this might explain their difficulties.

[2] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Officer Markham questioned Ruffin for approximately five to ten minutes. Officer Markham focused on her suspicions that Ruffin was a drug trafficker and she asked Ruffin if he would become a police snitch; Ruffin responded that he couldn't help because he had no useful knowledge. Officer Markham asked Ruffin about his own drug dealing but Ruffin wouldn't admit to anything more than small beer.

Officer Markham took Ruffin to the jail for booking, then completed some paperwork. At some point that afternoon, Officer Markham, Officer Boyd and Arno visited Ruffin's Madison apartment, ostensibly to locate his picture ID (they found it). Whatever other evidence of drug trafficking they hoped to find was not there.[3]

At about 5:30 p.m. that same afternoon, Officer Markham and a fellow officer met with Ruffin in a jail interview room to continue the interrogation. Officer Markham reminded Ruffin that he had been *Mirandized* earlier. Ruffin responded that he remembered his warnings and agreed to speak with Officer Markham again. Officer Markham spent most of her time questioning Ruffin about drug activity; although Ruffin made some admissions, he continued to deny major involvement. He did, however, pontificate about his need to carry a firearm at all times, even while taking out the trash or going to the store.

[3] At some point during this process, Officer Markham realized that Ruffin's landlord previously had complained to her about suspected drug activity in this same apartment. But prior to the traffic stop, Officer Markham had not met Ruffin and did not know him or know what he looked like.

Analysis

Ruffin has advanced a variety of theories to support suppression of the handgun and his statements. First, he claims that Officer Markham's traffic stop was improper because it was pretextual. Second, he claims that the search of his SUV was improper because it was actually an inventory search rather than a search incident to arrest. Third, Ruffin challenges any statements he made to Officer Markham after she arrested him but before she provided him with *Miranda* warnings. Finally, Ruffin contends that he never consented to any search of his Navigator. As a fallback position, Ruffin contends that any consent he gave was not voluntary under the totality of circumstances.

I. Pretextual Traffic Stops

Notwithstanding Ruffin's claim to the contrary, pretextual traffic stops are constitutional. Ulterior motives do not invalidate a police stop for a minor traffic violation so long as the police actually detect an infraction. *Whren v. United States*, 517 U.S. 806 (1996). The Seventh Circuit has admonished attorneys to get used to *Whren* and stop kvetching: "That is the law, and the time for debating whether it is correct–historically or conceptually–has passed." *United States v. Murray*, 85 F.3d 459, 461 (7th Cir. 1996). Ruffin's pretext claim is a nonstarter.

II. The Vehicle Search

Ruffin opens this section with a riff on his pretext theme by arguing that, even if Officer Markham had a legal right to arrest him for a petty registration violation, she abused her discretion by not deeming him a Madison resident and by not promptly taking Ruffin to his Madison apartment to allow him to retrieve valid identification. First, even if Ruffin's factual predicates are correct, he loses: pursuant to *Whren*, Officer Markham had no obligation under the fourth amendment to cut Ruffin any slack. Even if she had violated the police department's arrest policy–which she did not–this would not be a ground to invoke the federal exclusionary rule. *See, e.g., United States v. Brack*, 188 F.3d 748, 758 (7th Cir. 1999) (state law is irrelevant to fourth amendment reasonableness determination).

Second, Ruffin's factual predicates are not completely accurate. He claims that Officer Markham could have released him because he was a Madison resident, but what Ruffin told Markham on the scene was that he lived in Chicago and was visiting Madison. Although he indicated he paid for an apartment in Madison, he explained that he didn't actually live there but used it more as a *pied a terre*. Further, Officer Markham had absolutely no intention of releasing Ruffin unless she was forced to do so. Obviously, she viewed him as a drug trafficking suspect and she intended to use this serendipitous (for her) traffic stop to extract maximum value from him. The last item on her agenda would be to go out of her way to assist Ruffin in remedying his failure to carry valid ID while driving and then send him on his way. In light of *Whren*, this stance was not unreasonable.

Once past this point, Ruffin acknowledges that full custodial arrests and concomitant car searches are allowed for minor traffic violations pursuant to *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). He argues, however, that the search of his car following his arrest was not *incident* to his arrest because it was too long and too invasive. Perforce it must have been an inventory search or something similar; but, claims he, in the absence of proof from the government that the Madison police actually followed their own policies for inventory searches, the two hours they spent prying open the Navigator's console were constitutionally unreasonable.

This last point is a canard, since the government has not attempted to justify the search under the inventory exception to the warrant requirement.[4] The reasonableness of the warrantless search depends on the allowable scope of three other exceptions: car searches based on probable cause, searches incident to arrest, and consent searches. This search was justified by probable cause, and it might have been justified as a search incident to arrest and as a consent search, although these are closer questions.

When searching a suspect's car incident to his arrest, police routinely may open secret compartments located within the passenger compartment. *United States v. Veras*, 51 F.3d 1365, 1371-72 (7th Cir. 1995). Even so, Ruffin argues that *this* search was not actually

[4] Frankly, the government's surprisingly slapdash response brief did not do much at all to justify the police actions challenged by Ruffin. But Ruffin isn't entitled to win by default: because the exclusionary rule exacts an enormous price from our society and our system of justice, courts should not apply it except when necessary. *See United States v. Espinoza*, 256 F.3d 718, 728 (7th Cir. 2001).

incident to his arrest because it took so long and because the police moved his SUV. The facts cut in both directions, but I conclude that Ruffin has the better argument on this one. Officer Markham completed an initial sweep of the interior, then returned to her squad car, talked to Ruffin, became suspicious as a result of his statements that she had missed something, moved the car, called and waited for a canine team, then had the new personnel conduct their own lengthy and invasive search.

This was not one continuous search incident to arrest because there was a clear end to the first search, a subsequently-discerned reason to search some more, a relocation of the vehicle, a time gap, then a different type of search (canine) by a different officer and her dog.[5] A lawful arrest justifies the *contemporaneous* search of the area around an arrestee to remove any weapons the arrestee might use to resist or escape, and to prevent the concealment or destruction of evidence; the scope of a search must be strictly tied to and justified by the circumstances which rendered its initiation permissible. *New York v. Belton*, 453 U.S. 454, 457 (1981). These justifications are absent when a search is remote in time or place from the arrest. *Chimel v. California*, 395 U.S. 752, 763 (1969). *Cf. United States v. Patterson*, 65 F.3d 68 70-71 (7th Cir. 1995) (as part of search incident to arrest, police could sic a drug-detecting dog on arrestee's car; once the dog alerted, police had probable

[5] A couple of facts weigh in the government's favor, such as the reason the search took so long (the hidden compartment was impregnable) and the justification for moving the car (Ruffin's consent plus a need to get out of traffic) but these do not counterbalance the other factors tilting toward deeming the canine search a second search.

cause to dismantle the tailgate under the automobile exception to the warrant requirement). In short, the police did not discover the gun during their search incident to arrest.

But, because there was probable cause to search the Navigator, the subsequent search and the dismantling of the console were reasonable under the Fourth Amendment. *See United States v. Webb*, 83 F.3d 913, 916 (7th Cir. 1996). Here, Officer Markham discovered in the SUV marijuana residue and a used marijuana blunt, and Ruffin admitted that he used marijuana (more on the admissibility of this statement below). These facts by themselves established probable cause for a full search, but there's more: Arno alerted to the console, which independently provided probable cause to search the entire Navigator from stem to stern. *See United States v. Jones*, 275 F.3d 648, 653-54 (7th Cir. 2001). This defeats Ruffin's motion to suppress the handgun.

In light of this, there is no need to resolve the consent dispute, but for completeness's sake–and for future reference–I note that it would be a close call if the government attempted to justify this search solely on Ruffin's oral consent. The concern is not whether Ruffin consented, because I have found that he did. Having carefully considered Officer Markham's expansive, specific and contemporaneous written report in which she spells out Ruffin's consent; Ruffin's terse denial in his pre-hearing affidavit; and Officer Markham's unwavering testimony at the suppression hearing, I have concluded that Officer Markham asked Ruffin for consent to search the Navigator and Ruffin gave it.

Therefore, the operative question is whether the police exceeded the scope of Ruffin's consent by prying a gap into the console after having unsuccessfully tugged and prodded at it for an hour. Ruffin was on the scene and watched all this happen without comment or protest, so this court might deem his consent as unlimited.

For instance, in *United States v. Torres*, 32 F.3d 225 (7th Cir. 1994), Illinois state troopers performed routine traffic stop of a Chevy Blazer towing a long horse trailer. After issuing some minor tickets, they asked for and received oral and detailed written consent to search the truck, trailer and all objects and containers found therein. As part of their search, the troopers discovered in the trailer a wooden box-like compartment near the front of the trailer covered with couch pillows and secured with "six shiny new screws." The troopers unscrewed the six shiny new screws and discovered 450 pounds of marijuana inside the box. The court of appeals found that this search had not exceeded the scope of the consent granted because it was within the scope of objective reasonableness. *Id.* at 230-31. Upon receiving permission to search a specific area for narcotics, it is reasonable for police to search any compartment or container within the specified area where narcotics may be found. *Id.* at 231; *see also Jimeno*, 500 U.S. 248, 251 (1991). A suspect's failure to object to the scope of a search that he can see occurring may be considered an indication that the search is within the scope of his consent. *Id.*

But in *Jimeno*, although the Supreme Court authorized the search of some closed containers during a consensual car search, it noted that consent to search a car did not

necessarily extend to prying open a locked briefcase in the trunk. *Id*. Here, the police were trying to pry apart an integral piece of the SUV's interior. If this was being done as a necessary and reasonable nondestructive removal of an impediment to a legitimate search, then it might fit within Ruffin's general and unrevoked consent. *See Torres*, 32 F.3d at 323. But it is not clear on this record just how necessary and nondestructive the search was. To avoid such concerns it would be better practice for the police actually to use their written consent forms in order to spell out the scope of the allowed search.

It doesn't matter in this case whether this court resolves the consent issue: the only reason that the officers were attacking the console was because Arno had alerted to it. So we circle back to probable cause, which the police had in abundance, not only for the vehicle in general, but specifically for the interior of the console. The bottom line is that the warrantless search that led to the discovery of the firearm was reasonable. This court should not suppress the physical evidence seized by police in this case.

III. Ruffin's Post-Arrest Statements

Ruffin seeks to suppress all statements he made on the scene because he claims that Officer Markham did not advise him of his *Miranda* rights prior to interrogating him. The heart of the government's substantive response to this claim is three words: "That's not true." *See* Dkt. 14 at 6. I have found as a fact that Officer Markham did *Mirandize* Ruffin on the scene, but prior to doing so, did ask one question and she did make statements to

Ruffin that might be construed as the functional equivalent of questioning. First, after arresting Ruffin, Officer Markham asked him if there were any guns or drugs in the SUV. This was custodial interrogation, and in the absence of *Miranda* warnings, Ruffin's response (a false exculpatory) must be suppressed.

A bit later, but still pre-*Miranda*, Officer Markham told Ruffin that she had found marijuana residue in the car, prompting him to respond that he smoked marijuana. Then after the officers finally managed to peek inside the console, Officer Markham told Ruffin that he was being taken downtown on a gun charge, to which Ruffin responded "You found it, huh?"

By its own terms, *Miranda* does not apply to volunteered statements, *see* 384 U.S. at 478, but it does apply to the functional equivalent of express questioning, which the Court defines as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980). The latter portion of this definition focuses primarily on the perceptions of the suspect, rather than the intent of the police. *Id*. "Briefly reciting to a suspect in custody the basis for holding him, without more, cannot be the functional equivalent of interrogation." *Enoch v. Gramley*, 70 F.3d 1490, 150 (7th Cir. 1995); *See also United States v. Payne*, 954 F.3d 199, 202 (4th Cir. 1992), quoted with approval in *United States v. Jackson*, 189 F.3d 502, 510 (7th Cir. 1999) (agent's declaratory

statement to defendant that police had found a gun in defendant's house did not constitute interrogation so as to require *Miranda* warnings).

Similarly, Miranda does not apply to responsive police questioning intended to clarify a voluntary declaration, because such exchanges are not the sort of coercive interrogations that *Miranda* seeks to prevent. *See Andersen v. Thieret*, 903 F.2d 526, 532 (7th Cir. 1990).

Finally, a request for consent to search is not covered by *Miranda* because it is not considered "interrogation." *See United States v. Scheets*, 188 F.3d 829, 841 (7th Cir. 1999).

Pursuant to this case law, except for Officer Markham's one direct, uninvited question to Ruffin, it does not appear that she violated *Miranda*. The only other direct question she posed to Ruffin before *Mirandizing* him was in response to his volunteered and uninvited question to her. He asked "You didn't find anything in there, did you?" She replied by asking what was in the Navigator that she should have found? Ruffin replied "Nothing." Actually, Ruffin's answer to Officer Markham's question is innocuous; more damaging to him is his first question to her, which could imply his knowledge that the gun is in the car. But this was a volunteered utterance by Ruffin, so it is not protected by *Miranda*. Officer Markham's follow-up question was neutral and intended to clarify Ruffin's ill-advised but voluntary question. So, this exchange should not be suppressed.

Next, *Miranda* clearly does not apply to Officer Markham's request for consent to search the Navigator, although as noted above, the entire consent issue falls to the wayside in light of the probable cause to search the vehicle

Finally, it does not appear that Officer Markham engaged in the functional equivalent of interrogation when she told Ruffin about finding the drugs and about finding the gun. Whatever her subjective motivation (and she clearly was motivated to convince Ruffin to talk to her), such neutral, factual announcements, without more, cannot be deemed constructive interrogation.

Even if the district judge were to determine that there was a *Miranda* violation here, pursuant to *Oregon v. Elstad*, 470 U.S. 298 (1985), any statements Ruffin made to Officer Markham *after* she advised him of his *Miranda* rights in the squad car–and the entire jailhouse interview later that afternoon–are admissible against Ruffin. In *Elstad*, the Supreme Court held that when police obtain a voluntary confession in violation of *Miranda*, but then *Mirandize* the defendant and obtain a second confession, the second confession is not tainted by the original violation and may be used as evidence against the defendant. 470 U.S. at 308-18.

In short, but for one ultimately insignificant question and answer, there was no fifth amendment violation here. Ruffin's motion to suppress his post-arrest statements should be denied in all but that one small respect.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court grant defendant Demetrius Ruffin's motion to suppress his answer to the post-arrest question whether there were guns or drugs in his vehicle, but that it deny his motion to suppress in all other respects.

Entered this 21st day of June, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge