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

UNITED STATES OF AMERICA,

Plaintiff,

v.

TRAVIS A. STULEN,

Defendant.

REPORT AND RECOMMENDATION

04-CR-103-C

REPORT

The grand jury has charged defendant Travis A. Stulen with being a felon in possession of a firearm based on a June 9, 2004 traffic stop in Superior, Wisconsin, during which the police found a handgun wedged into the rear passenger seat on which Stulen had been sitting. Before the court is Stulen's motion to suppress the handgun. For the reasons stated below, I am recommending that the court deny this motion.

At the June 24, 2004 arraignment, this court set a schedule requiring the government to provide its discovery not later than July 1, Stulen to file all pretrial motions by August 5, 2004, and the preliminary pretrial conference and any evidentiary hearing to follow on August 10, 2004. This court advised Stulen that if he wanted an evidentiary hearing on any motion, he had to provide a factual basis for holding such a hearing by way of a sworn affidavit or something similar. *See* Scheduling Order, Dkt. 9, at 1.

On August 5, 2004, Stulen filed a motion to suppress evidence seized during the police search of the car in which Stulen was a passenger, stating these grounds:

> 1. That the search in this case was without a warrant or exigent circumstances.
>
> 2. That the search and seizure was conducted without consent or properly obtained consent.
>
> 3. That the search was conducted without probable cause.

Motion to Suppress, Dkt. 17, at 1. Stulen requested an evidentiary hearing on his motion; as his factual basis supporting these claims, Stulen alleged simply that his motion was based on the indictment, the records and files in this case, and "any and all matters which may be presented prior to or at the time of the hearing of said motion."

The very next day, August 6, 2004, the government submitted a letter objecting to taking evidence on this motion because Stulen had not made the required prima facie showing of illegality, *see United States v. Randle*, 966 F.2d 1209, 1212 (7th Cir. 1992). The government attached to its letter a police report which stated that at the time of the challenged search, Stulen was a passenger in a car owned and driven by April Herubin. The government claimed that absent some prima facie showing to the contrary, Stulen lacked standing to object to the search of Herubin's car. *See United States v. Price*, 54 F.3d 342 (7th Cir. 1995). The police report further noted that officers had conducted a felony stop of Herubin's purple Cadillac because they believed it contained a man named Dean Swenson who was suspected of possessing a sawed-off shotgun. The report also noted that

> the car was not currently registered. It had a temporary Minnesota dealer sticker in the rear window. It was dated 6-2-04. April Herubin lives in Superior. The sticker from a Minnesota dealer is only for getting the car from the dealership to WI, then it must be registered. Herubin had not taken steps to register it. The car was towed by Budget Towing, and a hold placed on it for proper registration.

(Dkt. 18, first attachment).

On August 9, 2004, this court held a telephonic hearing to address the government's objection to taking evidence. After hearing from both sides, I agreed with the government that Stulen had not made any showing that he had a privacy interest in the car that would justify holding an evidentiary hearing, let alone granting his motion to suppress. Nonetheless I gave Stulen a chance to amend his motion to add any other viable theories of relief and any factual support for his claims that actually would entitle him to a hearing.

On August 13, 2004, Stulen filed his amended motion (dkt. 20), in which he added these issues:

> 1. Defendant objects to the stopping of the car.
>
> 2. Defendant objects to the ejection of the defendant from the car.
>
> 3. Defendant objects to the seizing of his person after ejection from the car.
>
> 4. Defendant objects to the search of the immediate area of the backseat of the car where he was sitting prior to his ejection.

Dkt. 20 at 1.

Stulen proffered (actually, his attorney verified the motion under oath) that the reason for the stop was an anonymous tip that a man named Dean Swenson was driving around Superior in a maroon car carrying a sawed off shotgun. According to Stulen, Superior Police Officer Bonita Johnson stopped Herubin's car because it generally matched the color of the car for which police were searching. Stulen further proffered that "the subject car did not have a license plate." *Id*. Stulen argued that it was immediately apparent to the officers that this car was not the one they were looking for containing Swenson: Stulen proffered that at an evidentiary hearing he believed he could show that Swenson and the occupants of his car were African American, while all of the occupants of Herubin's car were white. According to Stulen, any probable cause to search would have evaporated prior to the actual search. *Id*. at 1-2.

For the second time I declined to hold an evidentiary hearing, finding that none was needed on the basis of Stulen's additional allegations. *See* August 16, 2004 Order, Dkt. 21.

Thereafter, on August 18, 2004, Stulen filed his memorandum in support of his suppression motion. Stulen noted that because the court had denied his request for an evidentiary hearing, the only facts available were those in the police reports, file, "and facts known to him." Defendant's Memorandum, Dkt. 22 at 1. Stulen repeated his proffer that Swenson was African American, and that Herubin and the occupants of her car were white. Stulen further proffered that

> Additionally, the Cadillac had no rear license plate, but was found after the stop to have a valid Minnesota dealer temporary

> permit, which had been issued June 2nd, 2004. The temporary permit would have been displayed in the left rear window of the Cadillac pursuant to Minnesota law, thereby visible to the officer as she approached from the rear of the vehicle.

Id. at 2.

In his brief Stulen reframed his legal theories yet again, asking: 1) Whether a passenger in a car ever could have standing to assert a Fourth Amendment claim; 2) Whether a passenger in a car could have a legitimate expectation of privacy immediate to his person in someone else's vehicle; and 3) Whether a passenger could object to his removal from a car and his seizure and which was a necessary predicate to the search and discovery of the contraband. *Id*. at 2. Stulen went on to argue that the stop was invalid, first because the officers had no probable cause, and second because there was a valid temporary permit issued by the State of Minnesota.

This prompted not only the scheduled response brief from the government, but a letter of complaint in which the government noted that Stulen had not claimed in either his initial or expanded suppression motion that Herubin's car had displayed proper, visible registration. The government complained it was sandbagging for Stulen to raise this issue for the first time in a brief after the time for taking evidence had passed.

In his reply brief, Stulen proffered even more new "facts" about Dean Swenson, Herubin and the temporary tag on her car. Stulen closed his final brief by asking again for an evidentiary hearing.

But he won't get one because the government is correct: it is too late for Stulen to attempt to challenge the validity of the registration of Herubin's car, and that issue is waived as a basis for suppression. It is also too late to offer new facts in a belated attempt to obtain an evidentiary hearing. F. R. Cr. P. 12(b)(3)(C) requires a defendant to file a motion to suppress evidence before trial; Rule 12(c) allows the court to set a deadline for the parties to file pretrial motions; Rule 12(d) requires the court to decide every pretrial motion before trial, absent circumstances not present here; and Rule 12(e) provides that a party waives any Rule 12(b)(3) defense or objection not raised by the deadline set under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from such waiver.

Here, Stulen did not raise a timely challenge to the police officers' claim of a registration violation as a basis to stop Herubin's car. The registration issue was specifically addressed in the police reports (which Stulen had received) and was before the court at the time I invited input from the parties at the August 9 telephonic hearing in order to determine the need for an evidentiary hearing. Stulen did not claim or imply that Herubin's temporary registration actually was valid. Therefore, the unchallenged information available to the court indicated that the police were aware of Herubin's temporary Minnesota registration, had deemed it insufficient, and had used this as one basis to stop her car. That was the state of the record at the time the government objected to taking evidence on Stulen's motion and at the time I ruled in the government' favor.

Indeed, even when Stulen accepted the court's invitation to expand his motion, all he did was "object[ ] to the stopping of the car" without providing any factual basis for his objection. The only logical inference to draw from this was that there were no supporting facts and that Stulen was making a pro forma objection merely to preserve his record. As a result, this court again declined Stulen's unsupported request for an evidentiary hearing because it was Stulen's burden timely to present "definite, specific, detailed and nonconjectural facts" to establish that there was a disputed issue of material fact as to the propriety of the car stop. It was Stulen's obligation to make this prima facie showing of illegality without relying on vague or conclusory allegations. *United States v. Toro*, 359 U.S. 879, 885 (7th Cir. 2004). He did not do so.

It is now too late for Stulen to attempt to raise a dispute on this material fact. The government would be prejudiced if the court were to entertain this new assertion. The time for holding an evidentiary hearing passed weeks ago, which means the government has been denied the opportunity to attempt to resolve the registration dispute in its favor with evidence from the officers. Additionally, the government has been denied the opportunity to develop evidence supporting its secondary justification for the vehicle stop, namely that it was a valid *Terry* stop based on reasonable suspicions that this was the car in which Dean Swenson was cruising with his sawed-off shotgun. Stulen has thrown additional disputed facts into the mix that this court ordinarily would resolve after taking evidence. (For instance, Stulen claims, without any support but his say-so, that Swenson and the passengers

in his car were African American; the government responded by submitting a mug shot of Swenson showing that he is white.) Additionally, the government's on-the-fly factual proffer in support of its *Terry* stop justification is pallid from lack of interstitial detail. For instance, is it reasonable for police to stop a purple Cadillac sedan when they are looking for a large maroon Lincoln? Maybe, maybe not. This court ordinarily explores such questions with the witnesses at an evidentiary hearing. Because there was no hearing, the government was denied its opportunity to make its best case.

All of the facts and argument proffered by Stulen for the first time in his brief would have been known to him prior to his first motion deadline in this case. Therefore, Stulen cannot show good cause for having waited until his first brief to raise these issues. Stulen's helter skelter pursuit of suppression has left the court and the government guessing what will be his factual assertion and legal theory *du jour*. This is exactly the sort of uncertainty that Rule 12 was designed to eliminate. *See e.g., United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir. 1999) (failure timely to raise a particular ground in support of a motion to suppress constitutes waiver); *United States v. Yousef*, 327 F.3d 56, 124-25 (2nd Cir. 2003) (untimely suppression argument completely waived where there is no reasonable excuse).

Therefore, pursuant to Rule 12(e), both the factual record and the issues in dispute on Stulen's motion to suppress are limited to the materials in the court's file as of 12:13 p.m. on August 13, 2004, the date and time at which Stulen timely filed his motion for leave to

expand pretrial issues (which the court subsequently accepted).[1] As outlined above, nothing in the record up to that point supported Stulen's various claims.

First, there is no evidence whatsoever that the stop itself was improper. To the contrary, the only evidence actually in the record reveals that the officers had grounds to perform a valid traffic stop by virtue of the missing license plate (*see* affidavit in support of criminal complaint at ¶ 3). The evidence also indicates that the temporary Minnesota dealer sticker on Herubin's car was not valid in Wisconsin. (*See* June 9, 2004 police report, attached to dkt. 18 and quoted above). If it were to matter, the evidence in the court record as of August 13 suggests that the police may have had grounds for a valid *Terry* stop. *Id.*

Second, there is no evidence that Stulen had any privacy interest in Herubin's car; therefore, he has no standing to object to its search. *See Rakas v. Illinois* 439 U.S. 128, 148 (1978); *United States v. Price*, 54 F.3d 342, 345 (7th Cir. 1995)(Fourth Amendment rights are personal and may not be asserted vicariously, so "mere passenger" in another's car may not challenge the car search). Accordingly, Stulen is not entitled to suppression.

This court does not glorify form over substance. If adhering to Rule 12 in this case would lead to a palpably unjust outcome, then the court would proceed differently. But a review of all the facts and arguments offered by both sides suggests that the outcome would not change if this court were to have held an evidentiary hearing to clarify the record and

[1] It is not clear whether the invocation of Rule 12(e) to decline to consider proffered evidence is a ruling under subsection (A) or (B) of 28 U.S.C. Section 636(b)(1); if subsection (B) applies, then I *recommend* that the court freeze the facts and legal issues thusly.

resolve the disputed facts.[2] Stulen's belated and half-hearted attempts to create disputes of material fact are uncompelling. He had two chances to make a sufficient record, and he did not do so. Trial is firmly set for September 20, only seventeen days away. The government is entitled to timely resolution of Stulen's motion. Because Stulen has never made a prima facie showing that his fourth amendment rights were violated, this court should deny his motion to suppress evidence in all respects.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Travis Stulen's motion to suppress evidence.

Entered this 3rd day of September, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge

[2] For instance, as the government observes, even if the Minnesota dealer sticker on Herubin's car turned out to be valid, the police would have been justified in stopping her car to verify this. *See United States v. Dexter*, 165 F.3d 1120, 1126 (7th Cir. 1999).