

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

TRAVIS A. STULEN,

Defendant.

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ORDER

04-C-0103-C-01

In a report and recommendation entered on September 3, 2004, United States Magistrate Judge Stephen L. Crocker recommended denial of defendant Travis A. Stulen's motion to suppress evidence, after declining to hold an evidentiary hearing on the motion. Defendant has filed objections to the decision to deny him an evidentiary hearing. I am persuaded that the denial was proper.

From the record it seems that sometime around 3:00 a.m. on June 9, 2004, in Superior, Wisconsin, defendant was one of three passengers in a maroon Cadillac driven by April Herubin. Police Officer Benita Johnson stopped the car, either because it appeared to match the description of a car driven by Dean Swenson, who was wanted for a weapons offense, or because it lacked vehicle license plates. Before doing so, she called for backup.

The officer asked the occupants to get out of the car, after which other officers searched the car and found a handgun behind the arm rest on the passenger's seat where defendant had been sitting.

The magistrate judge gave defendant two opportunities to show that he had a factual basis for the holding of such a hearing. Defendant was unable to make that showing. He based his first request on no particularized facts, only the statement that the basis for a hearing could be found in the indictment, the records and files in the case and "any and all motions which may be presented prior to or at the time of the hearing of said motion." Mot. to Suppress, dkt. #17, at 1. He made a second request in the form of a motion "to expand pretrial issues." Dkt. #20. Defendant alleged that the police had had no legitimate basis on which to stop the car in which he was riding because once the officers stopped the car and saw that the occupants were white (defendant seems to have thought that Dean Swenson was black; in fact, he is white), they were not justified in taking any further action. The magistrate judge denied defendant's motion for an evidentiary hearing for the second time.

In a memorandum filed in support of defendant's second suppression motion, defendant alleged that the car in which he had been riding had a valid Minnesota dealer temporary permit. This was the first time that defendant had said anything about the registration. The government objected to defendant's raising this issue for the first time after the time for taking evidence had run and the magistrate judge refused to consider the

untimely new allegations concerning the temporary permit. The magistrate judge noted that Fed. R. Crim. P. 12(b)(3)(c) requires a defendant to file motions to suppress before trial; Rule 12(c) allows the court to set deadlines for the filing of such motions; and Rule 12(c) provides that a party waives any Rule 12(b)(3) defense not raised by the deadline set under Rule 12(c). In the magistrate judge's opinion, defendant's dilatoriness in filing an adequate motion amounted to a waiver of his right to file a motion to suppress.

In his objections, defendant argues that he could not have filed an adequate motion any earlier than he did because his attorney did not receive the police reports concerning the investigation of Dean Swenson's possession of a sawed off shotgun until August 25, 2004. Defendant seems to be arguing that until those reports were made available to his counsel, he would not have known to interview the person who had called the police to tell them that Dean Swenson had threatened her with a sawed off shot gun and driven off in what she thought was a maroon Lincoln. Until counsel interviewed the complaining witness, he would not have known that she believed that Swenson had already been pulled over and fled on foot before she even had even talked to the police about the incident. Therefore, defendant argues, because the police knew ninety minutes before stopping the car in which defendant was riding that Swenson was no longer in a maroon Lincoln, they cannot defend their stop of his car on the ground that it resembled Swenson's.

At this late date, this snippet of information does not justify re-opening the case to

hold an evidentiary hearing. In the absence of any evidence that the police had either Swenson or his car in custody, defendant has shown no reason why they would not be justified in continuing their search for him and his car and making a Terry stop of a maroon Cadillac on the chance that Swenson was in it. In any event, the magistrate judge did not need to reach the issue of the validity of a Terry stop. Without the evidence that Herubin had a valid temporary permit on her rear window, which the magistrate judge had ruled he would not consider because it was not timely raised, defendant could not show that the police did not have good reason to stop Herubin's car for missing license plates. Defendant has not shown that he was unable to obtain the information about the temporary permit at the time he filed his first motion.

Defendant tries to raise another issue, arguing that the magistrate judge erred in accepting as fact the government's assertion that a temporary Minnesota dealer sticker is not valid in Wisconsin. Defendant misses the point. When he asked for an evidentiary hearing, it was his burden to raise the issue that the dealer sticker is valid in Wisconsin and that the police officers would have known this; it is not the government's burden to show that the sticker is invalid.

I conclude that the magistrate judge made the correct decision in denying defendant an evidentiary hearing when defendant was unable to make any kind of showing that would have justified holding such a hearing. Therefore, I will adopt his recommendation to deny

defendant's motion to suppress the gun found in April Herubin's car on June 9, 2004.

ORDER

IT IS ORDERED that defendant Travis Stulen's motion to suppress the evidence of the handgun seized from him by the Superior, Wisconsin police on June 9, 2004, is DENIED.

Entered this 17th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge