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

UNITED STATES OF AMERICA,

Plaintiff,

v.

REPORT AND
RECOMMENDATION

BILLY L. McCARTER,

05-CR-181-C

Defendant.

REPORT

The grand jury has indicted defendant Billy McCarter on one charge of being a felon with a handgun. Before the court for report and recommendation is McCarter's motion to suppress evidence derived from a traffic stop on July 17, 2005 (dkt. 8). McCarter contends that there was no probable cause to support the car search and that his consent to search was involuntary because it resulted from an illegal predicate search. The government disputes both claims.

I am recommending that the court deny McCarter's motion to suppress. Although it is not clear that the trooper actually smelled marijuana as she claims, it is clear that McCarter's consent to search was voluntary.

On January 26, 2006, this court held an evidentiary hearing. I saw and heard the witness testify, watched the relevant portions of the recording of the traffic stop, considered the exhibits, and made credibility determinations, all of which lead me to find these facts:

FACTS

Heidi King is a trooper with the Wisconsin State Patrol, a position she has held for about five years. Her current duty station is Dunn County. Trooper King graduated from the 23-week State Patrol Academy, then received 12 weeks of on-the-job training with a field training officer. One aspect of Trooper King's training was drug recognition, which included becoming familiar with the aroma of burning marijuana. During her five years patrolling the highways, Trooper King has stopped thousands of vehicles and has detected the odor of marijuana in about 100 of them. Whenever Trooper King smells marijuana in a car, she performs a search; 98 percent of the time she finds and seizes marijuana from the vehicle.

On July 13, 2005, Trooper King was patrolling the interstate in Dunn County during the overnight shift. At approximately 3:53 a.m., she clocked a Chevy Malibu driving 89 MPH in a 65 MPH zone. Trooper King performed a traffic stop, which she recorded with an on-board video camera. Defendant Billy McCarter was driving the Malibu. His front seat passenger was a man named Deondre Maxwell. There was an 11-year old boy sitting in the back seat. A family friend had rented this car for McCarter to use for a weekend family trip between the Twin Cities and Great America amusement park near Chicago.

Trooper King approached the car from the passenger side and engaged McCarter in conversation. Because McCarter had his window open near traffic, Trooper King had trouble communicating with him, so she asked him to step out of the car.[1] McCarter walked

[1] Trooper King also testified that she had trouble hearing McCarter because the car radio was blaring, but the DVD soundtrack does not reflect this.

to the space between the back of his car and the front of Trooper King's patrol car. Trooper King looked back inside the front passenger window and saw a black plastic shopping bag under Maxwell's feet. She asked "What's in that black bag right under your foot?" Rather than respond verbally, Maxwell picked up the bag and handed it to Trooper King.

King opened the opaque bag and saw tobacco and cigar papers. Based on her training and experience, Trooper King knew that these were materials used for fashioning marijuana blunts. So, standing at the front passenger-side door of the Malibu, Trooper King confronted Maxwell and McCarter, asking if they had been "rolling blunts" in the car. Trooper King then walked to McCarter behind the Malibu, leaving Maxwell unwatched. She asked McCarter when he had last smoked marijuana in the car; he denied smoking any marijuana in there. Trooper King persisted, claiming that "You guys were rolling blunts in there, I know that!" (Trooper King never confronted McCarter or Maxwell with any claim that she could smell marijuana smoke in their car.)

McCarter disavowed any knowledge of the black bag or its contents. He explained that he had just picked up the rental for a family trip to Great America, and that there was a whole lot of junk in the car that had been there for three days, that is, prior to McCarter taking possession of the car. McCarter explained that he had a lot of brothers, so there was no telling when that bag was put in the car.[2] Trooper King asked McCarter "you got any

[2] To this day, McCarter persists in his denial of ownership of the bag. At the suppression hearing, he explicitly declined to claim any possessory interest in or knowledge of the contents of the bag prior to Trooper King opening it. Whether McCarter is telling the truth or taking a tactical position does not affect the analysis.

other stuff in there?" McCarter's answer is unintelligible on the tape, but Trooper King comments "Nothing else at all." So she asked McCarter "would you mind if I looked in your vehicle?" He responded "go ahead."

Trooper King called for backup to assist with the search. While waiting, she tried to obtain from McCarter a copy of the car rental agreement, then she subjected McCarter to a battery of field sobriety tests. Maxwell remained unattended in the front seat of the car.

The subsequent car search recovered a loaded 25-caliber pistol from under the floor mat at Maxwell's feet, about an ounce of marijuana under Maxwell's car seat and 60 grams of cocaine from the trunk. The troopers arrested McCarter and later questioned him; he admitted ownership of the firearm charged against him in this federal prosecution.

ANALYSIS

McCarter challenges the government's claim that there was probable cause to search the car and challenges the voluntariness of his consent to search it. The government's claim of probable cause is based on Trooper King's assertion that she could smell burning marijuana in McCarter's car from the moment she first approached it. If this assertion were true, then it would establish probable cause for the car search without regard to McCarter's consent. *See, e.g., United States v. Cherry*, ___ F.3d ___ , 2006 WL ___, App. No. 04-3527, slip op. at 4 (7th Cir. Feb. 3, 2006). The government, however, has not sufficiently established that Trooper King ever actually smelled the aroma of burning marijuana.

Trooper King has provided several different versions of events that do not correspond logically with what is heard and seen on the recording of this traffic stop. For instance, logic, caution and training all suggest that if Trooper King actually had smelled marijuana either while walking toward the Malibu, or after she stuck her head inside the passenger window (she has sworn to both versions at different hearings), then she would have handled the scene very differently. Trooper King, outnumbered 1 to 2 (or 1 to 3 if she included the eleven-year old in her risk assessment), almost certainly would have limited her comments to the speeding ticket, retreated to her squad car ostensibly to write the ticket, then called for backup without risking further interaction with the drug users.

In fact, Trooper King used this rationale to explain her failure ever to mention to McCarter or Maxwell that she could smell marijuana smoke: "I did not feel comfortable letting them know that I knew I could smell the marijuana when it was me and three other individuals." Transcript, dkt. 12, at 13. Trooper King explained that this was why she did not immediately call for backup: she did not want her three suspects to know that she was calling for help and for them perhaps hear the dispatcher announce that backup was 20 minutes away.

So far, so good. But what Trooper King actually did on the scene contradicts her proffered safety rationale. First, she moved McCarter from inside the car next to Maxwell to a flanking position behind the car, sandwiching herself between two suspects in a position whence she no longer could watch or control both of them at once. Although Trooper King

did not know this at the time, Maxwell had instant access to a loaded handgun. While Trooper King badgered McCarter about rolling blunts, Maxwell easily could have shot her in the back.

Which segues to the next contradiction: Trooper King claimed that she didn't mention smelling marijuana smoke because she didn't want McCarter and Maxwell to know she suspected them of drug use, yet as soon as she saw the cigar papers in the plastic bag, she hectored them about rolling blunts and smoking marijuana, as if repeating her accusations would cause them to slip up (or wear down) and change their story. Similarly, Trooper King testified that she did not immediately call for assistance after smelling marijuana because she did not want her suspects to learn her suspicions and perhaps learn that she was 20 minutes from her backup. But after obtaining McCarter's consent to search the car, she did exactly those things while he was standing within arms' reach, listening.

So which is it? If Trooper King actually was concerned about her personal safety, then she would not have moved McCarter out of the car so as to place herself in a highly vulnerable position and then repeatedly harangued her two suspects with her suspicions that they were drug users. Since Trooper King apparently was not actually concerned about her personal safety, then she would have no reason not to confront her suspects with further proof of their dope-smoking, namely her detection of the odor of marijuana smoke in their car. But she didn't.[3]

---

[3] At the September 19, 2005 state court suppression hearing, Trooper King testified that she also smelled "raw" marijuana in the car. *See* Dkt. 8, Exh. 2 at 50. For whatever reason, she did not make this claim at the federal suppression hearing.

When confronted with these discrepancies during cross-examination at the suppression hearing, Trooper King could only respond that she had engaged in "very poor police work." Dkt. 12 at 23 and 28. I draw no conclusions about the quality of Trooper traffic stop, because that issue is not before the court. The operative question is whether she actually smelled marijuana smoke at the beginning of the traffic stop. I conclude that she did not.[4]

This, however, is only half the story. During their interaction Trooper King asked McCarter for permission to search the Malibu and he gave it. The contraband charged against McCarter in this case was found as a result of that search. Therefore, probable cause is not necessary to support the search McCarter's car. *See United States v. Moore*, 375 F.3d 580, 585 (7th Cir. 2004).

The consent issue, however, is complicated slightly by the event that apparently motivated Trooper King's request to search: she came to believe that there was contraband in the car by virtue of looking in the bag containing materials that could be used to roll marijuana blunts. McCarter contends that this preliminary search compromised the validity of McCarter's subsequent consent to search the entire car. McCarter is incorrect.

---

[4] The government observes that McCarter and Maxwell later admitted that they had been smoking marijuana in the car. The government acknowledges that these admissions are not direct evidence of what Trooper King discerned on the scene, but it wants the court to consider them when determining the reasonableness of Trooper King's testimony. I'll give the government this much: these admissions establish that it would not have defied the laws of nature for Trooper King to have smelled marijuana smoke in the Malibu. However, nothing else in Trooper King's testimony or on the DVD sufficiently establishes that she actually did so.

First, McCarter did not and does not have a cognizable privacy interest in the bag that would allow him now to object to its search. McCarter contends that because he had a privacy interest in the rental car, he had a privacy interest in all the containers found within it. That's correct up to a point, but it does not help McCarter on these facts.

True, McCarter would have a cognizable interest in preventing Trooper King from reaching into the rental car and pulling out objects; but Trooper King didn't seize the bag out of the car, Maxwell voluntarily handed it to her. Where a defendant allows a third party to exercise actual or apparent authority over the defendant's property (here, the rental car), he assumes the risk that the third party might permit access to others. *United States v. Basinski* 226 F.3d 829, 834 (7th Cir. 2000). Actual authority is self-defining; apparent authority turns on the government's knowledge of the third party's use of, control over, and access to the property to be searched. *Id.* Maxwell, as a passenger in the car, had actual and apparent authority to pass a bag located at his feet out of the car to the inquisitive trooper.

But does handing the bag to Trooper King constitute consent to search it? McCarter says no: Maxwell did not voluntarily consent to the bag's search. But as the government notes, we don't know what Maxwell was thinking because he did not testify or submit an affidavit. What we do know is that Trooper King merely asked Maxwell to tell her what was in the bag under his feet. She did not ask or direct him to hand it to her. Without moving the bag, Maxwell could have answered her question sufficiently with a verbal response ranging from ignorance ("I don't know") to candor ("blunt-rolling stuff"). Instead, he chose

to hand the bag to Trooper King. The most logical and reasonable inference to draw from this act is that Maxwell was inviting Trooper King to see for herself what was in the bag. The DVD shows that McCarter stood and watched this whole exchange at close range, interposing no objection.[5] If McCarter had wished to assert a privacy interest in the bag, or to alert Trooper King that Maxwell actually had no authority to hand it to her so that she could search it (because it didn't belong to either of them), then he should have said so at the time. He said nothing.

To this day, McCarter has declined to claim a privacy interest in the black plastic bag. There may be sound tactical reasons for this decision, but it supplies yet another reason not to consider his challenge to the search of the bag. A person who abandons property by explicitly denying ownership has no protectable Fourth Amendment interest in that property. *United States v. Basinski* 226 F.3d at 836-37. Perhaps it is a misnomer to say that McCarter "abandoned" the bag: he is sticking to his story that someone else–maybe one of his brothers–put that bag in the rental car before McCarter ever took possession of the car. Regardless, whatever legitimate privacy interest McCarter had in the car itself, he cannot, on this record, claim a privacy interest in the contents of the black plastic bag that would allow him to challenge Trooper King's peek inside.

---

[5] It is an open question whether Trooper King would have been required to honor an objection by McCarter if Maxwell did not withdraw his consent, *see State v. Randolph,* 278 Ga. 614 (2004), *cert. granted,* __ U.S. __, 125 S.Ct. 184) (2005), but we never reach the question on these facts.

Which leads to the last question: did Trooper King's search of the black plastic bag somehow taint the voluntariness of McCarter's subsequent consent to a car search? This question arises because of the court's holding in *United States v. Robeles-Ortega*, 348 F.3d 679 (7th Cir. 2003) that

> Where the search following the illegal entry is justified based on alleged consent, courts must determine whether that consent was voluntary, and in addition the court must determine whether the illegal entry tainted that consent.

Id. at 681.

Here, however, no constitutional violation preceded Trooper King's request for McCarter's consent to search his car. Therefore, there is no taint that would compromise the validity of McCarter's consent.[6]

If there *had* been predicate taint, then the follow-up question would be whether the causal connection between the illegality and the consent was broken, with the government bearing the burden of persuasion on that issue. *See* 348 F.3d at 683. Assuming, *arguendo*, that it was improper for Trooper King to look inside the black bag, the evidence establishes that there was no causal connection between that search and McCarter's consent. The concern underlying the holding in *Robeles-Ortega* is that police should not be permitted to launder an illegal search with a subsequent consent search of the same property where the

---

[6] In apparent tension with *Robeles-Ortega* is the holding of *United States v. Liss*, 103 F.3d 617, 621 (7th Cir. 1997) that an officer's motivation for seeking consent to search is irrelevant, even if her motivation was triggered by a prior illegal search. The court in *Robeles-Ortega* distinguished *Liss* on its facts, *see* 348 F.3d at 684.

consent is a direct product of the illegal search. This would be improper bootstrapping: citizens not well versed in the nuances of Fourth Amendment law or pessimistic about their odds at a suppression hearing mistakenly might conclude that the cat is out of the bag after the illegal search, so they may as well consent to another search. The court's concern is understandable, but it does not apply to the facts of this case.

First, as already noted, McCarter never has deviated from his claim that the bag was not his and that he did not know what was in it before Trooper McCarter opened it. Second, the bag was just one item in what apparently was a junk-strewn car that had been passed from family-member to family-member over the course of its rental. Third, the items in the bag were not actually contraband. And fourth, even the tenuous connection of the cigars and papers to marijuana use was distinct from and unconnected to the nature of most of the contraband subsequently found. Therefore, Trooper King's search of the plastic bag could not have caused McCarter involuntarily to acquiesce to a search of the rental car out of some misguided sense of resignation and inevitability.

In sum, having considered the various circumstances attendant to this traffic stop, I conclude that no Fourth Amendment violation occurred. Therefore, McCarter is not entitled to any of the relief he requests in his motion.

RECOMMENDATION

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

Entered this 17th day of February, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

February 21, 2006

Rita Rumbelow
Assistant United States Attorney
P.O. Box 1585
Madison, WI 53701-1585

William Jones
Harlowe & Associates
519 N. Pinckney Street
Madison, WI 53703

Re: United States v. Billy L. McCarter
Case No. 05-CR-181-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before February 27, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by February 27, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge