

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN M. GONZALEZ-RUIZ,

Defendant.

REPORT AND
RECOMMENDATION

12-cr-28-wmc

REPORT

The grand jury has returned a one-count indictment charging defendant Juan M Gonzalez-Ruiz with being a felon in possession of two handguns on October 19, 2011. The handguns were discovered when a Fitchburg Police Officer searched the interior of Gonzalez's car following a traffic stop, believing that Gonzalez had verbally consented to this search. Gonzalez contends that he never consented to this search; rather the officer misinterpreted Gonzalez's words and gestures during a simultaneous cell phone conversation Gonzalez was having with his significant other, Camille Vazquez.¹ Gonzalez has moved to suppress the firearms discovered and seized as a result of this search, and derivative incriminating statements he made following his arrest. *See* dkt. 25. It is a close call, but as set forth below, I find that the government has established by a preponderance of the evidence that Gonzalez consented to the search of his car. I am recommending that the court deny Gonzalez's motion to suppress evidence.

On May 24, 2012, this court held an evidentiary hearing on this suppression motion, at which I heard and saw the testimony of two Fitchburg police officers and Camille Vazquez. The government also has submitted an audiovisual recording of the traffic stop, taken by a police dashboard camera, as well as an "enhanced" version of the pertinent snippet of the recording. *See*

¹ Gonzalez refers to Vasquez his wife during the traffic stop, but her testimony at the evidentiary hearing suggests that they are in a committed relationship with children.

Gov. Exhs. 1 & 2. Having heard and seen the witnesses, having judged their credibility and having reviewed the two recordings, I find the following facts:

FACTS

Matthew Laha is a Patrol Sergeant with the Fitchburg Police Department. As of October, 2011, Sgt. Laha had been with FPD for six years. On October 19, 2011, Sgt. Laha was on patrol in a squad car during the early morning hours. At about 3:15 a.m. Sgt. Laha ran the plates of a motor vehicle driving in front of him and learned that the registered owner of the vehicle, Juan Gonzalez-Ruiz (Gonzalez), had a suspended driver's license. Sgt. Laha performed a traffic stop of the vehicle, approached and spoke to the driver, who turned out to be Gonzalez. FPD Officer Peter Johnston arrived separately to assist Sgt. Laha with this traffic stop. Officer Johnston had been a police officer about one year. Sgt. Laha recorded this encounter with Gonzalez, capturing portions of what was said and done with a lapel microphone and a dash-mounted camera. A copy of this recording is admitted into evidence (Gov. Exh. 1).²

The encounter began unremarkably (and without audio on the recording) with Sgt. Laha telling Gonzalez that he is going to issue Gonzalez a ticket for driving after suspension. At some point, Sgt. Laha silently determined that he wanted to search Gonzalez's car. Sgt. Laha returned to his squad car, in which Officer Peterson now was sitting, and wrote up the OAS ticket, telling Officer Peterson that Sgt. Laha was going to ask Gonzalez for consent to search his car. As part of this, he intended to ask Gonzalez to step out of his car while Sgt. Laha explained the ticket to him. It took Sgt. Laha about eight minutes to write up the ticket; then he and Officer Johnston walked back to

² The government also has submitted as Exh. 2 a DVD on which the audio of the critical interaction between Sgt. Laha and Gonzalez is "enhanced." As is clear from watching both recordings, they do not capture everything that was said and done.

Gonzalez's car and asked him to step out. Sgt. Laha told Gonzalez that he was getting a ticket for driving after suspension. Sgt. Laha was informal and chummy, suggesting that if Gonzalez wanted to drive himself home that night, no one would be the wiser, and suggesting that if Gonzalez actually appeared in traffic court, the judge might reduce the fine amount.

About 11 minutes into the traffic stop, it was over: Sgt Laha asked Gonzalez if he had any questions; Gonzalez responded "no." Sgt. Laha announced "You're free to go, my man." Everyone started walking back to their vehicles. Sgt. Laha took four steps away from Gonzalez, then spun and called "Hey Juan!" Gonzalez responded "Yeah." Sgt. Laha asked "You don't have any weapons, drugs, anything like that?" Gonzalez responded "Oh? No, no. I just, I just left my house!" Talking simultaneously, Sgt. Laha asked "Mind if I search? Mind if I take a look?" Gonzalez responded "You can, you can . . . yeah." and walked to the back of his own car and opened up his jacket as Officer Johnston stepped back into the picture. As Sgt. Laha searched Gonzalez's person he asked him "Nothin' in your car that you're concerned about?" Gonzalez did not answer, but he answered Sgt. Laha's next question about how long ago he left his house "I just left there, just five minutes ago."

Gonzalez, still being searched by Sgt. Laha and closely flanked by Officer Johnston, pulled out his phone and asked "Can I call my wife [--], can my wife come and pick me [--] ?" Sgt. Laha answered jocularly "Absolutely!" Gonzalez called Camille Vazquez on his cell phone and talked with her while Sgt. Laha continued to search Gonzalez's clothing for drugs and weapons; on the recording, Gonzalez also appears to be talking to Officer Johnston simultaneously, although most of both men's words are obscured by rustling sounds picked up by Sgt. Laha's lapel mic while he continued searching Gonzalez's clothing. As Gonzalez held his phone to his left ear he gestured with his right hand. When Sgt. Laha moved in front of Gonzalez to continue his search, the mic picked up Gonzalez asking "*bébé*, can you take me home?" When Sgt. Laha changed position, Gonzalez can

be heard speaking into his phone, but his words are unintelligible because he was speaking *sotto voce* and his head was lowered.

Sgt. Laha, upon completing his body search, started walking past Gonzalez toward Gonzalez's left-side car door, pivoting to make and maintain eye contact with Gonzalez as he walked past. He asked "Nothing in your car that I should be concerned about? Mind if I take a look?" Gonzalez was talking into his phone while Sgt. Laha asked these questions, although his words are soft and indiscernible. Gonzalez looked up at Sgt. Laha and responded to him in a louder, lilting voice "I guess," raised his right hand straight up, and according to both officers, nodded in affirmation. Sgt. Laha, walking sideways asked "so we're good?" Gonzalez said nothing as Officer Johnston starts to shepherd him away from behind; Gonzalez was able to see Sgt. Laha as he opened the car door, although Gonzalez pivoted to his right to continue his phone conversation with his wife as Officer Johnston guided him backward, off screen to the curb, still in sight of Sgt. Laha and the car. Within nine seconds of starting his search, Sgt. Laha found the two handguns charged against Gonzalez in this case. The officers arrested Gonzalez, who later made self-incriminating statements.

ANALYSIS

The Fourth Amendment accommodates warrantless searches when police receive voluntary consent to search. The government must prove by a preponderance of the evidence that consent was freely and voluntarily given. *United States v. Hicks*, 650 F.3d 1058, 1064 (7th Cir. 2011). Here, the question is whether Gonzalez ever gave consent to search at all. Gonzalez claims that he did *not* consent: when he said "I guess" after Sgt. Laha asked "mind if I take a look?" he actually was talking to Vazquez on the phone, answering her question "should I come and pick you up now?" *See* May 24, 2012 Tr., dkt. 31, at 35-36.

To be precise, Gonzalez has not *personally* claimed that this is what he really was doing: Gonzalez has not submitted an affidavit and he did not testify at the evidentiary hearing on his motion to suppress. He supports his position with the audiovisual recording, Vazquez's testimony and his lawyer's cross-examination of Sgt. Laha and Officer Johnston.³ This certainly is Gonzalez's right, because it is the government's burden to prove that Gonzalez *did* consent, it is not Gonzalez's burden to prove that he did not. But absent Gonzalez's on-the-scene version of events, the testimony of the two officers on the scene is uncontested by anyone actually present.

I accept as accurate the officers' characterization of occurred: Gonzalez was answering Sgt. Laha's question, he was not talking to Vazquez on his cell phone. Given the nature of the dispute in this case, the grainy, sporadically intelligible recording showing Gonzalez from several yards away and usually from the back, has limited value in determining whether Gonzalez gave Sgt. Laha consent to search his car. Sgt. Laha was there, face-to-face, hand-on-shoulder with Gonzalez, able to gather and process all of the verbal and nonverbal aspects of Gonzalez's actual in real time. To the extent that the court is capable of gleaning accurate meaning from sights and sounds captured by the dashboard recording, I find that the recording corroborates Sgt. Laha's and Officer Johnston's testimony: Gonzalez actually consented to a search of his car. The recording does not support Camille Vazquez's version of events.

There is no doubt that Gonzalez was talking with Vazquez on his cell phone while Sgt. Laha searched Gonzalez's clothing and car, and there is no doubt that Gonzalez asked her to come pick him up. But the audible and visible indicators on the recording do not support Vazquez's claim that

³ This would have to be viewed as a tactical decision by Gonzalez. On one hand, what Gonzalez might have chosen to say in an affidavit or at the suppression hearing could not be used against him at trial, *see Johnson v. United States*, 604 F.3d 1016, 1021 (7th Cir. 2010), and if his testimony were persuasive or if it sufficiently ambiguated the situation, then Gonzalez might prevail on his motion and this prosecution would disappear. On the other hand, if Gonzalez testified at his suppression hearing and the court were to conclude that his testimony was false, then he ran the risk of a harsher sentence if convicted, *see, e.g., United States v. Quintero*, 618 F.3d 746, 749-50 (7th Cir. 2011).

Gonzalez's statement "I guess" was in response to *her* question, rather than Sgt. Laha's.⁴ As noted in the fact section, when talking to Vazquez on his cell phone, Gonzalez uses a low voice and keeps his head down. When Sgt. Laha asks Gonzalez whether he minds if Sgt. Laha looks in his car, Gonzalez raises his head, appears to look at Sgt. Laha and says "I guess" in a much louder, clearer tone of voice, one that carries to Sgt. Laha's lapel mic despite Sgt. Laha's distance from Gonzalez. Also, it seems as if Gonzalez is talking into his phone up to the instant Sgt. Laha poses his question; it does not seem as if there is time for Vazquez to have posed her question, and the tone and volume of Gonzalez's alleged response is inconsistent with all of his other conversation with her. I would have to guess at the intended meaning—if any—of Gonzalez's act of raising his right arm because I am not familiar with his hand gestures when he talks, but it is a broader, more dramatic motion than the tighter, closer right-hand movements that accompany his softer telephonic conversation with Vazquez. As such, this motion is not inconsistent with being part of his response to Sgt. Laha's question. As for Vazquez's version of events, the most charitable conclusion I can draw is that she is mistaken. What can be seen and heard on the recording supports the officers' testimony much more than it supports Vazquez's testimony.

Gonzalez challenges why Sgt. Laha would ask for confirmation from Gonzalez ("so we're good?") if he genuinely believed he already had consent to search the car. Common sense and investigative prudence suggest that an officer should attempt to verify a suspect's oral consent to search, so Sgt. Laha's posing of this question does not lead me to conclude he did not already have

⁴ A review of the difficulties presented by attempts to discern a speaker's meaning from incomplete and ambiguous information is presented in an article about forensic linguistics, "Words On Trial," by Jack Hitt, in the July 23, 2012 New Yorker Magazine. I mention this article merely to note that it captures neatly the essence of the exercise in which the parties and the court are engaged when addressing and deciding Gonzalez's motion. The court is not endowed with special interpretive powers that allow it to discern the true meaning of Gonzalez's conversation with Sgt. Laha, but it must nevertheless review the evidence presented to determine whether it shows by a preponderance that Gonzalez consented to Sgt. Laha's search of his car. I have concluded that it does.

consent. To the same effect, the fact that Gonzalez made no reply does not vitiate the consent he already had provided. That's because Gonzalez had a chance to say "*No! We're not good,*" but he didn't. After that, Gonzalez could see Sgt. Laha going into Gonzalez' car, but he does not protest to Sgt. Laha or Officer Johnston, instead *returning* his attention to his phone conversation with Vazquez. There is no evidence that Gonzalez did not or could not see what Sgt. Laha was doing, or that he felt too intimidated to say "no" to these chummy cops. His indifference to the search confirms that he already had consented to it.

This court confronted a similar consent dispute in *United States v. Price*, 54 F.3d, 342 (7th Cir. 1995). There, State Trooper Larry Brown performed a traffic stop (for speeding) on the car in which defendant was a passenger. The recording by the trooper's dashboard video camera showed that after the trooper gave the driver, William Pierce, his tickets (the second was for OAS), he asked Pierce if there were any drugs or guns in the car. Pierce said no. Brown then asked "Do you mind if I take a look?" Pierce responded "Sure." A confused conversation followed, with Pierce and Brown apparently talking past each other. In moving to suppress the contraband discovered during car search that followed, defendant Price argued that when Pierce said "sure," he meant, "sure I mind." *Id.* at 345 & 346. This court held that, under the totality of circumstances, Pierce's response actually meant "sure, go ahead." The court of appeals upheld this determination (under a clear error review), stating that

The crucial fact is Pierce's failure to protest upon learning that Brown understood his response as a consent to the search. Had Pierce not agreed to the search, now was the time to make that clear. Yet when confronted with Brown's understanding of his response, Pierce offered no objection at all; instead, he submitted to a pat-down search and took a seat in Brown's patrol car in order to get out of the rain.

54 F.3d at 346.

As the court noted when upholding a car search in *United States v. Stribling*, 94 F.3d 321, 324 (7th Cir. 1996), “[the defendant] was present during the search; she could (and should) have protested at the time if she believed [Trooper] Eisenbarger exceeded the scope of her consent, as it was her burden to limit that scope.”

This case is different from *Stribling* in that Gonzalez has no burden to prove anything. I also don’t want to put undue weight on the fact that Gonzalez did not protest Sgt. Laha searching his car, but it is not a weightless fact. Notwithstanding the fast pace at which events were occurring during this traffic stop, Gonzalez literally was in a position to see what Sgt. Laha was doing and he had enough time to object if that had been his intent. He didn’t.

The bottom line is that, except for Vazquez’s testimony, all of the discernible evidence is consistent (or at worst, not inconsistent) with Sgt. Laha’s assertion that Gonzalez actually consented to a search of his car, nodding as he did so. Vazquez’s version of events is not consistent with what can be seen and heard on the recording. Having heard and seen the witnesses testify and having watched and listened to the recording innumerable times, I find by a preponderance of the evidence that Gonzalez consented to a search of his car.

As a result of this conclusion, there is no need to consider at length the government’s fall-back argument that suppression would be too harsh a remedy to any Fourth Amendment violation. I simply note, as did Gonzalez in his reply brief, dkt. 35 at 5-6, that if Sgt. Laha was mistaken in his belief that he had consent to search, then suppression would appear to be a necessary remedy. The court’s observation in *United States v. Bohman*, ___ F.3d ___, 2012 WL 2432595 (7th Cir., June 28, 2012) would seem to apply with equal force here: removing this sort of police misconduct from the ambit of the exclusionary rule would eliminate the rule’s deterrent effect on unreasonable searches. If an officer could obtain the benefit of using against a defendant evidence seized during an illegal search simply by claiming that he mistakenly thought he had obtained consent, then the good faith

exception would swallow the exclusionary rule. If the government cannot prove by a preponderance of the evidence that a defendant actually consented to a challenged search, then the government should not be allowed to use the contested evidence. Therefore, if the court does not accept this report and recommendation, but determines instead that the government has not met its burden in the instant case, then it should suppress the evidence seized from Gonzalez's car and subsequently derived therefrom.

RECOMMENDATION

Pursuant to 42 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Juan Gonzalez-Ruiz's motion to suppress evidence

Entered this 27th day of July, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

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July 27, 2012

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Re: United States v. Juan Gonzalez-Ruiz
Case No. 12-cr-28-wmc

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 August 6, 2012, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by August 6, 2012, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,
/s/
Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

- (1) injunctive relief;
- (2) judgment on the pleadings;
- (3) summary judgment;
- (4) to dismiss or quash an indictment or information;
- (5) to suppress evidence in a criminal case;
- (6) to dismiss or to permit maintenance of a class action;
- (7) to dismiss for failure to state a claim upon which relief can be granted;
- (8) to dismiss actions involuntarily; and
- (9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and ©, the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth

with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. *See United States v. Hall*, 462 F.3d 684, 688 (7th Cir. 2006).