

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
vs.)
)
WILLIE GATEWOOD,)
)
 Defendant.)

No. 02-20172-G

REPORT AND RECOMMENDATION
ON DEFENDANT'S MOTION TO SUPPRESS

The defendant in this case, Willie Gatewood, has been indicted on two counts of violating 18 U.S.C. § 922(g). These charges arise out of a stop by police officers of a vehicle in which Gatewood was a passenger, and the subsequent seizure by police officers of .32 bullets and a .32 Smith and Wesson Revolver. Gatewood moved to suppress all evidence seized. His motion was referred to the United States Magistrate Judge for a report and recommendation.

Pursuant to the reference order, an evidentiary hearing was held on October 29, 2002. At the hearing, the government presented one witness, Officer Daniel Miller of the Memphis Police Department. The defendant called Officer Jesse Sandlin of the Memphis Police Department. The defendant also introduced two exhibits: an arrest ticket dated January 23, 2002, and an

affidavit of complaint, signed by officer Sandlin, also dated January 23, 2002.

After careful consideration of the statements of counsel, the testimony of the witnesses, the exhibits, and the entire record in this cause, the court submits the following findings of facts and conclusions of law and recommends that the motion to suppress be denied.

PROPOSED FINDINGS OF FACT

On January 23, 2002, at about 5:30 p.m., defendant Gatewood was a passenger in an automobile driven by one Andrew Wilkins, street-named "Poo-Poo." Officers Miller and Sandlin were on patrol in the area between South Parkway and Crump in Memphis, Tennessee. Each was patrolling alone and driving his own patrol car. Officer Miller saw a vehicle traveling at high speed. He recognized by sight the driver, Wilkins (known to Officer Miller only by his street name). Officer Miller had last encountered Wilkins about a week before and, at that time, learned that Wilkins did not have a valid driver's license. On this night, Officer Miller pulled over the vehicle because he suspected that Wilkins was exceeding the speed limit and driving without a license. He approached the driver's side and asked Wilkins for his license. Officer Miller saw that Wilkins was nervous and that his hands were shaking as Wilkins handed over his state identification card (not a driver's

license). He scanned the interior of the car and noted that Gatewood, the passenger, also appeared nervous. While Officer Miller ran the vehicle's tags, he stood at the vehicle's rear passenger side. There he saw the passenger, Gatewood, open the door and begin to exit the vehicle.

Here the facts are disputed. According to Officer Miller's direct testimony, Officer Miller saw Gatewood open the door and put his feet on the curb, saying something in the nature of, "I've gotta go, I've gotta leave." He saw Gatewood gesturing with his right hand while reaching for his waistband with his left hand. Officer Miller testified that he then saw the butt of a revolver in Gatewood's waistband. Next, he testified, Gatewood, still half-seated in the vehicle with the door open, pulled a gun from his waistband and surreptitiously tossed it under the vehicle. Simultaneously, Officer Miller was telling Gatewood "Okay, sit back down." He repeated this instruction three or four times before Gatewood finally sat down inside the vehicle. Officer Miller, believing that Gatewood had been armed and concerned that the driver might also be armed, called Officer Sandlin for backup. Wilkins and Gatewood remained in their vehicle. Officer Sandlin arrived two to three minutes later.

When Officer Sandlin arrived, Officer Miller told him, "I want the driver out [of the car]." Officer Sandlin removed the driver,

patted him down, and secured him in Officer Miller's squad car. Officer Sandlin next removed Gatewood from the vehicle, positioned him with his hands on the vehicle, and patted him down. He found on Gatewood's person a bag of marijuana and .32 caliber bullets. He secured Gatewood in handcuffs. Then, Officer Miller testified, the gun was retrieved from beneath the pulled-over vehicle and tagged as evidence.

Gatewood presented two documents to impeach the officers' direct testimony. The first was an arrest ticket, which did not report that Officer Miller saw Gatewood throw down a gun. It did report that Gatewood "was very nervous," "kept trying to get out of the vehicle," and "kept reaching into his waistband." It also reports that Gatewood had a .32 revolver "in his waistband." The second document is an affidavit of complaint signed by Officer Sandlin. The affidavit is not independently probative, however, because it merely repeats verbatim the information on the arrest ticket. Officer Sandlin candidly admitted that he wrote the affidavit of complaint by copying the information from the arrest ticket while he assisted Officer Miller with paperwork on the scene.

Gatewood argues, pointing to the arrest ticket, that Officers Miller and Sandlin's testimony is not credible. He insists that police officers are well-familiar with the plain view doctrine.

Therefore, he says, the arrest ticket would surely reflect that Officer Miller saw Gatewood throw down the gun, if that was indeed what happened. Gatewood further argues that the arrest ticket implies that the gun was still in Gatewood's waistband when the pat-down occurred. He claims that the officers therefore searched Gatewood's person without any reasonable suspicion that Gatewood was armed or dangerous. Moreover, Gatewood insists that the officers' testimony should be disregarded in the entirety, leaving the government with no evidence to sustain its burden of proof.

The government counters that the arrest ticket is merely a summary of what occurred and is not meant to be a fully accurate account. The government claims that the officers reasonably suspected that Gatewood was armed, and therefore, the search of Gatewood's person did not violate his Fourth Amendment right to be free from unreasonable searches and seizures.

Despite the discrepancies between the arrest ticket and the officers' testimony, the court finds the testimony of both officers to be credible and consistent with each other's testimony. The court agrees that the arrest ticket is a hastily completed summary of the events leading up to Gatewood's arrest and that it does not accurately reflect everything that transpired. For instance, the court notes that the arrest ticket does not even mention bullets being found on Gatewood's person, yet no one disputes that the

officers retrieved bullets from Gatewood. In addition, there was no other testimony presented at the hearing which contradicts the officers' version of the circumstances leading up to Gatewood's arrest. Therefore, the court finds that the officers' testimony is fact.

PROPOSED CONCLUSIONS OF LAW

Gatewood's motion raises three issues: (1) the legality of the initial stop; (2) whether the officers illegally detained Gatewood in the automobile or ordered him from the automobile; and (3) whether the officers searched his person without probable cause or a reasonable suspicion of criminal activity.

A. Lawfulness of Initial Stop

Gatewood argues that the fruits of the search should be suppressed because they were seized during an illegal stop of the vehicle in which Gatewood was riding. *Wong Sung v. United States*, 371 U.S. 471, 484-85 (1963); *United States v. Palomino*, 100 F.3d 446, 448-49 (6th Cir. 1996). "Probable cause is defined as 'reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion.'" *United States v. Ferguson*, 8 F.3d 385, 392 (6th Cir. 1993), cert. denied 513 U.S. 828 (1994). (quoting *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990)). Analysis of the circumstances allegedly supporting probable cause must be assessed from a law enforcement officer's

perspective. *Id.* at 391. “[S]o long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop . . . does not violate the Fourth Amendment.” *Id.* Whether another motive existed is constitutionally inconsequential with regard to the initial stop. *Id.*; *Whren v. United States*, 517 U.S. 806, 812-13 (1996).

Officer Miller testified that he saw Wilkins’s vehicle speeding in a thirty-five-mile-per-hour zone. He also testified that he recognized Wilkins, and, based on their encounter about a week before, suspected that Wilkins was still driving without a valid drivers’s license. Gatewood points out that Officer Miller did not issue Wilkins a speeding ticket, only a ticket for driving without a license. He emphasizes that Officer Miller could not know for certain whether Wilkins had rectified his lack of a driver’s license during the preceding week. Officer Miller’s testimony is credible, however: he reasonably believed, based on his own knowledge and experience, that the driver was speeding and driving without a valid license. Further, this court does not find Officer Miller’s decision not to ticket Wilkins for speeding probative on the question of whether Officer Miller believed Wilkins was speeding when Officer Miller initiated the stop. See *Ferguson*, 8 F.3d at 391 (recognizing that “courts may not determine whether there was probable cause [to stop] by looking at events

that occurred after the stop"). Accordingly, this court submits that the traffic stop was lawful under *Ferguson* and *Whren*.

B. Lawfulness of Detaining Gatewood in the Vehicle and Ordering Gatewood from the Vehicle

Gatewood's detention arguments address two incidents: the officers' detention of Gatewood in the vehicle and the officers' order that Gatewood exit the vehicle.

A passenger has a Fourth Amendment right to be free from an unreasonable seizure, see *United States v. Hensley*, 469 U.S. 221, 226 (1985), and can challenge his own detention, *United States v. Carter*, 14 F.3d 1150, 1154 (6th Cir. 1994). Accord *United States v. Erwin*, 875 F.2d 268, 270 (10th Cir. 1989) (holding that a passenger may challenge his own seizure). "Although stopping a car and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment, the governmental interest in investigating an officer's reasonable suspicion, based on specific and articulable facts, may outweigh the Fourth Amendment interest of the driver and passengers in remaining secure from the intrusion." *Hensley*, 469 U.S. at 226. The reasonableness of an investigatory detention is determined under a two-pronged analysis: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1,

19-20 (1968).

Gatewood first argues that the officers were not justified in detaining him in the stopped vehicle after he said he wanted to leave. Officer Miller testified that his command for Gatewood to stay in the vehicle occurred at the same time Officer Miller was waiting for the results of a tag and license search. The defendant's reliance on *Ybarra v. Illinois*, 444 U.S. 85 (1979), appears somewhat misplaced under these facts. In *Ybarra*, a man was detained and subjected to a *Terry* frisk when he was present in a tavern that officers entered pursuant to a search warrant. The officers found on Ybarra a cigarette pack containing heroin. The court suppressed the heroin, holding that the officers had no reasonable suspicion that the cigarette pack was a weapon or that Ybarra was otherwise dangerous to officer safety. The circumstances surrounding a traffic stop, however, justify a higher level of officer vigilance. See *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997) (noting higher likelihood of danger to an officer when a stopped vehicle has passengers).

In *Maryland v. Wilson*, 519 U.S. 408 (1997), the Supreme Court expressly declined to consider the question whether an officer may forcibly detain a passenger for the entire duration of the stop. 519 U.S. at n3. However, a review of applicable law reveals no blanket prohibition on detaining a passenger in the vehicle in

which he was riding, if the detention is reasonable under the circumstances. See, e.g., *United States v. Garner*, 108 F. Supp. 2d 796, 800 (N.D. Ohio 2000), *aff'd* 2002 U.S. App. LEXIS 18668 (6th Cir. 2002) (holding that detaining a passenger in his vehicle is a de minimis intrusion that merely maintains the status quo); *United States v. Moorefield*, 111 F.3d 10, 13 (3rd Cir. 1997) (determining that a police officer may lawfully order a passenger to remain in the car with his hands in the air for officer safety); *United States v. Holt*, 264 F.3d 1215, 1223 (10th Cir. 2001) (enumerating an officer's power to keep a detainee in his own vehicle as one of several lawful actions attendant to a traffic stop).¹

Here, Officer Miller testified that both occupants appeared nervous, and that he believed Gatewood was armed by the way Gatewood kept reaching for his waistband. Officer Miller was patrolling alone at twilight. Out of concern for his own safety, he testified, he ordered Gatewood to stay in the vehicle while the vehicle tags were checked and until Officer Sandlin arrived two to three minutes later. In light of these facts, it is submitted that Gatewood's detention was reasonable at its inception, quite brief,

¹ The act of relocating a passenger to a patrol car is distinguished as a more intrusive action. See *United States v. Richardson*, 949 F.2d 851, 857-58 (6th Cir. 1991) (holding that police unconstitutionally seized a passenger when he was placed in rear of patrol car and questioned without probable cause for arrest).

and reasonably related to the scope of a lawful traffic stop.

Gatewood next argues that the officers were not justified in ordering him out of the vehicle. During a traffic stop, an officer is entitled to ask the driver as well as any passengers to exit the vehicle. See, e.g., *United States v. Saucedo*, 226 F.3d 782, 790 (6th Cir. 2000) (ordering passenger out) (citing *Maryland v. Wilson*, 519 U.S. 408, 414 (1997) (ordering passenger out)). For officer security and safety reasons, this rule applies during a *Terry* stop even where there is no suspicion that the passenger committed a crime. *Wilson*, 519 U.S. at 414.

In the present case, Officer Miller reasonably believed that the passenger was armed, and he feared the driver might be armed as well. Officers Miller and Sandlin ordered Gatewood out of the car because of concern for officer safety. Accordingly, this court submits that their actions were justified at their inception and reasonably related in scope to protecting officer safety during a lawful traffic stop.

C. Lawfulness of Search of Gatewood's Person

When an officer has a reasonable suspicion that an individual may be armed and presently dangerous to the officer or others, he may conduct a pat-down search to determine whether the person is in fact carrying a weapon. *Terry*, 392 U.S. at 24.

Gatewood urges the court to find that Officer Miller did not

see Gatewood throw down the gun, and therefore that the officers had no reasonable suspicion of a criminal activity that justified searching Gatewood's person. This court has found as fact that Officer Miller saw Gatewood throw a gun under the car. Accordingly, this court submits that the officers had not only a reasonable suspicion, but also probable cause to believe criminal activity was afoot. See *Terry*, 392 U.S. at 24.

Even if the court did not believe Officer Miller saw Gatewood throw a gun under the vehicle, Officer Miller still had a reasonable suspicion of criminal activity. Officer Miller had already observed Gatewood looking nervous and repeatedly putting his hand to his waistband. Officer Miller feared for his safety even before he saw Gatewood toss what appeared to be a gun under the car. Officer Sandlin performed the pat-down upon his arrival. Officer Miller had advised Officer Sandlin that Gatewood had a gun. He was on the scene because Officer Miller had reported two detainees, potentially armed, and had requested backup. When Officer Sandlin arrived on the scene, both detainees were still in the same vehicle where Officer Miller had seen them behaving nervously, had seen Gatewood try to exit the vehicle, and had seen Gatewood reaching for his waistband. Based on this information from Officer Miller, and on Officer Sandlin's experience as a patrol officer, this court submits that Officer Sandlin had a

reasonable suspicion that either Gatewood or the driver was armed and dangerous to the officers. This court, accordingly, recommends a finding that a *Terry* pat-down was proper to ensure officer safety under these circumstances and did not violate Gatewood's Fourth Amendment rights.

RECOMMENDATION

Based on the foregoing, this court submits that the traffic stop was valid because Officer Miller reasonably believed that the driver was speeding and driving without a valid license, both of which are traffic offenses. This court also submits that Officer Miller's detention of Gatewood in the car and Officer Sandlin's order that Gatewood exit the car were lawful detentions under *Terry* because they were justified from inception, brief in time, and within the scope of concern for officer safety during a traffic stop. Finally, this court submits that the officers' search of Gatewood was justified by a reasonable suspicion that Gatewood was armed and dangerous. Accordingly, this court submits that none of the officers' actions violated Gatewood's Fourth Amendment rights and recommends that Gatewood's motion to suppress all evidence arising from the incident be denied.

Respectfully submitted this 4th day of November, 2002.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE