

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	No. 15-20132-JTF-tmp
v.)	
)	
MARIO AVANT,)	
)	
Defendant.)	

REPORT AND RECOMMENDATION

During the late night hours of January 21 and 22, 2015, officers with the Memphis Police Department ("MPD") received multiple reports of armed robberies taking place in an area in the south part of Memphis, Tennessee. The victims reported being robbed outside of their homes by black males with scarves and bandanas partially covering their faces. The get-away vehicle from the January 21 robbery was described as a four-door Pontiac, tan or "greenish" in color, occupied by two black males. The vehicle involved in the January 22 robberies was described only as "small" and black in color, occupied by three black males. Shortly after the last robbery, MPD Officers Jaboa Ollie and Jackie Parker spotted a tan Toyota Avalon occupied by two or three black males traveling in an area near one of the

robberies. The officers initiated a traffic stop when they observed the vehicle make a left turn without using its turn signal. The officers found a handgun on the rear floorboard, which the rear passenger, defendant Mario Avant, admitted belonged to him. Avant was arrested and later indicted for being a felon in possession of a firearm.

On August 6, 2015, Avant filed a Motion to Suppress, arguing that the officers violated his Fourth Amendment rights when they initiated the traffic stop without probable cause or reasonable suspicion. The government responded in opposition to the motion on August 20. Pursuant to an order of reference, the court conducted a suppression hearing on the motion. The court heard testimony from Officers Ollie and Parker, and admitted into evidence six exhibits, including the recordings of the police dispatch radio transmissions from the nights of the robberies and photographs of the street where the traffic stop occurred.

The court has now considered the memoranda of law filed in support of and in opposition to the Motion to Suppress, the testimony of the witnesses, the exhibits, and the applicable law. The court hereby submits the following proposed findings of fact and conclusions of law, and recommends that the Motion to Suppress be granted.

I. PROPOSED FINDINGS OF FACT

A. The Dispatch Radio Calls from January 21 and 22

On January 21, 2015, at around 9:37 p.m., the MPD received a report of an armed robbery of an individual at 4046 Wisteria Drive in Memphis, Tennessee. The MPD dispatcher broadcasted over the radio that the victim described the suspect as a tall, black male wearing dark clothing with a blue scarf around his mouth. The dispatcher further relayed that the suspect was "occupying a small four-door tan Pontiac," and that he took the victim's wallet and Bank of America card. Officer Jaboa Ollie was on patrol that night and responded to the scene. A few minutes after the dispatcher's initial broadcast, an unidentified male officer asked over the radio, "what we looking for again?" Officer Ollie, who by that time was at the crime scene with the victim, responded over the radio that they were looking for "a tan Pontiac four-door," and that the suspect was a black male with a slim build and had on dark clothing and a blue scarf. Minutes later, an unidentified male officer requested further clarification, asking "[inaudible] boy sure that tan color, Pontiac?" Officer Ollie responded over the radio, "he [the victim] said tan or greenish, but it's occupied by two black males, a older model Pontiac." She repeated that one of the suspects had on dark clothing with a blue scarf or bandana wrapped around his face. A few minutes later, an unidentified male officer, who apparently had spotted a Pontiac

and wanted to further investigate the vehicle, read out the vehicle's license plate number to the dispatcher in order to obtain the vehicle's registration information. Upon hearing this, Officer Ollie asked this officer over the radio whether the vehicle in question was a Pontiac ("that's a Pontiac, Rico?"). The dispatcher, after running the license plate number, reported that the vehicle came back as a black Pontiac. About a minute later, an unidentified male officer asked over the radio whether the victim had been able to identify the model of the Pontiac ("[inaudible] he [the victim] couldn't say a G6, a Grand Am?").¹ Another unidentified male officer responded, "he just said it was a Pontiac, just a four-door Pontiac, tan, [inaudible] green." The officers were unable to find the suspects from the Wisteria Drive robbery that night.

The following night (January 22), at approximately 10:21 p.m., the MPD received a report of a burglary at 1290 Oakwood Drive in Memphis. Officer Ollie responded to the scene with her partner, Officer Jackie Parker, and met with the victim. Several minutes later, Officer Ollie broadcasted over the radio that the reported burglary was actually an armed robbery with two victims. She stated that the perpetrator took a Wells Fargo bankcard and an ID card from the first victim and a wallet from

¹The court takes judicial notice that a G6 and Grand Am were two models of vehicles manufactured by Pontiac.

the second victim, which contained a Regions bankcard, an ID card, and ten dollars in cash. The suspect also demanded a bank account personal identification number ("PIN") from the second victim. Officer Ollie relayed the description of the suspect as being a black male, slim build, with a blue and white bandana covering his mouth. She further stated over the radio that the suspect left the scene in a "small car." At around 11:00 p.m., the supervising Lieutenant asked the dispatcher to rebroadcast the description of the suspect from the Wisteria Drive robbery from the night before.² The dispatcher rebroadcasted the physical description of the suspect, but did not reference the description of the vehicle. The dispatcher stated that the suspect in the Oakwood Drive robbery was "possibly the same suspect that was responsible for a robbery of an individual, same MO, as yesterday."

Shortly after 11:00 p.m., the MPD received a report of another armed robbery of an individual. The initial report was that the robbery occurred at the Walgreens store on Elvis Presley Boulevard at East Raines Road. The dispatcher stated that the victim reported being robbed at gunpoint by three black males, all wearing black clothing and black bandanas, "occupying

²At the suppression hearing, Officer Ollie identified this officer as her supervising Lieutenant who was assigned to the Delta shift that night.

a black vehicle last seen going on Sullivan Drive." The victim later clarified that the robbery actually occurred at her home at 483 Sullivan Drive as she was getting out of her vehicle, and that the suspects took her purse.³ Officer Ollie, who responded to the scene with Officer Parker, later updated the broadcast by stating that the suspects also demanded the victim's PIN number. The dispatcher later stated over the radio that the suspects took the victim's Bank of America card. Several minutes later, an unidentified officer reported over the radio that the suspect was a black male with a bandana around his face and that "he hopped into a four-door - I'm sorry, just a black - he hopped inside of a black vehicle."

B. The Traffic Stop

At around midnight on January 22, as Officers Ollie and Parker were in their police cruiser patrolling the area near where the Oakwood Drive robbery had occurred, they spotted a tan, four-door Toyota Avalon ("Avalon") with two or three black male occupants traveling west on East Raines Road.⁴ East Raines Road runs in an east-west direction, with two lanes of traffic in each direction and a center median lane (marked with solid yellow lines) that allows vehicles to execute left turns. When

³Officer Ollie testified that the suspects forced the victim into her car and drove the victim to a nearby bank.

⁴The citation issued after the officers completed the traffic stop indicates that the vehicle was a 1997 Avalon. (Ex. 6.)

the officers first spotted the Avalon, it was traveling in the left-hand passing lane or "fast" lane. The officers pulled directly behind the Avalon and attempted to get its license plate number. However, they were unable to read the license plate number because the Avalon quickly merged into the center median lane and then turned left onto East Wind Drive (a street that runs north-south and ends where it meets East Raines Road at a "T" intersection). The officers saw that the Avalon made the left turn onto East Wind Drive without using its turn signal. Based on what the officers believed was a traffic violation, they initiated a traffic stop. Officer Parker, who was driving the police cruiser, approached the driver's side of the Avalon while Officer Ollie approached the passenger's side. Officer Ollie asked the rear passenger, Mario Avant, to step out of the vehicle. As Avant got out of the car, Officer Ollie heard a thump, "like something heavy hitting the floorboard." Once Avant was out of the Avalon, Officer Ollie looked into the backseat area and saw a handgun on the rear floorboard. Avant admitted that the gun belonged to him. The officers seized the firearm, a loaded Smith and Wesson .38 caliber revolver. They also found inside the vehicle a blue and white bandana, a black skull cap, and a \$10 bill laced with cocaine. Avant was arrested and transported to jail, where he provided a signed statement admitting ownership of the gun. Avant was

subsequently indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

C. The Suppression Hearing

Both Officers Ollie and Parker testified at the suppression hearing. When questioned about what drew her attention to the Avalon, Officer Ollie testified that it was the vehicle's "color, the number of occupants and the area." (Tr. at 20.) Likewise, Officer Parker testified that he noticed the Avalon because "[t]he color of the vehicle stood out and the multiple occupants inside the vehicle." (Tr. at 48.) Officer Ollie testified as follows regarding the suspects' vehicle:

Q: And did you get a description from the victim in that [January 21] incident, as well?

A: Yes.

Q: And what was the description that you were given?

A: Tan - male black who approached him basically left the scene in a tan four-door vehicle. He advised that it's possibly a Pontiac.

. . . .

Q: So the description [from the January 22 robberies] that you were working off was that it could be a tan vehicle or a dark vehicle?

A: Yes.

Q: You didn't have anything more specific than that. Correct?

A: A four-door.

. . . .

Q: Officer Ollie, you gave testimony regarding the description of a tan vehicle from January 21st. Is that correct?

A: Yes.

Q: On the night of January 22nd of 2015, would you be looking for tan vehicles on that day?

A: Yes.

Q: Why?

A: Because they were still occurring.

Q: They, meaning what?

A: The robberies were still occurring.

Q: So but the description you received on the 22nd from the victims described a dark colored vehicle. Is that correct?

A: Yes.

Q: Why would you still be looking for a tan vehicle on that day?

A: It could be multiple cars. We just took all the information that we had that we were given and kept it in mind while we were patrolling.

Q: Did any of the victims that you spoke with in regard to the robberies give you a very specific make and model of a car?

A: No.

Q: Were you on the lookout for specifically Pontiacs in relation to the robberies from January 21st?

A: We was on the lookout for a tan, four-door sedan.

. . . .

Q: And on the previous day [January 21], what was the dispatch? What was the description?

A: Tan four-door vehicle.

(Tr. 17, 30, 40-42.) Officer Parker also testified that the suspects' vehicles from the recent robberies were described as either being tan or dark colored:

Q: What, if anything - why would that have stood out to you?

A: Due to the broadcasts that were sent on the radio from the previous robberies that were occurring throughout the week and that night that we had responded to two robberies that night involving either a tan vehicle or dark colored vehicle.

Q: And based on the descriptions that you had been given earlier on the 22nd and on the 21st, did you make a decision to stop this vehicle?

A: Yes.

(Tr. at 47.)

The court finds that Officer Ollie's testimony regarding the lack of information on the specific make of the suspect's vehicle is inconsistent with the recording of the dispatch radio transmissions from January 21. The radio calls from that night make clear that Officer Ollie and other officers were not just looking for any tan or greenish four-door vehicle - they were specifically looking for a Pontiac. The initial dispatcher broadcast described the vehicle as a "small four-door tan Pontiac." When an officer asked that the description be repeated, Officer Ollie (who had met with the victim) stated, "a

tan Pontiac four-door." After another officer asked if the victim was sure about the description, Officer Ollie responded that the victim said it was an "older model Pontiac" that was "tan or greenish." Later, when an officer read out the license plate number of a vehicle he was checking into for the robbery, Officer Ollie asked specifically if the vehicle in question was a Pontiac. The dispatcher confirmed that the vehicle's registration came back as a black Pontiac. And when an officer asked if the victim had been able to identify the exact model of the suspect's Pontiac, such as a G6 or Grand Am, another officer responded that the victim "just said it was a Pontiac, just a four-door Pontiac, tan, [inaudible] green." At no time did the officers indicate that the suspect's vehicle was "possibly" a Pontiac. In fact, while the officers were somewhat unsure about the color of the vehicle (tan or greenish), and at various times offered other descriptors (a single reference each to the vehicle being "small" and "older model"), the one constant descriptor that was repeated numerous times was that it was a Pontiac. In addition, contrary to Officer Parker's testimony, at no time during the dispatch radio calls was the suspects' vehicle from the January 22 robberies described as being tan in color. The suspects' vehicle from that night was only described as "small" and black in color.

D. The Motion to Suppress

In his Motion to Suppress, Avant argues that the traffic stop of the Avalon violated his Fourth Amendment rights because the officers lacked reasonable suspicion to believe that the Avalon or any of its occupants were involved in criminal activity. Avant also argues that the Avalon's (or more precisely, its driver's) failure to use a turn signal when it executed the left turn onto East Wind Drive did not provide the officers with a valid basis to initiate the traffic stop because under Tennessee law a turn signal is required only when another vehicle may be affected by the turn. Since there were no other vehicles in the vicinity of the Avalon when it made the turn, Avant argues the officers did not have probable cause to believe that a traffic violation had occurred. Avant moves to suppress the firearm and all other items seized pursuant to the traffic stop. He also moves to suppress his incriminating statements made at the scene and after being transported to jail, as fruits of the unlawful stop. Wong Sun v. United States, 371 U.S. 471, 491 (1963).

II. PROPOSED CONCLUSIONS OF LAW

A. **Terry Stop Based on Reasonable Suspicion of Criminal Activity**

"An investigative stop of a vehicle is permissible under the Fourth Amendment where the stop is supported by reasonable suspicion of wrongdoing." United States v. Flores, 571 F.3d

541, 544 (6th Cir. 2009) (citing Terry v. Ohio, 392 U.S. 1, 22 (1968) and United States v. Williams, 962 F.2d 1218, 1223-24 (6th Cir. 1992)). When considering what constitutes reasonable suspicion, “[c]ourts must determine from the totality of the circumstances whether law enforcement had an objective and particularized basis for suspecting criminal wrongdoing.” United States v. Perez, 440 F.3d 363, 371 (6th Cir. 2004) (citing United States v. Arvizu, 534 U.S. 266, 273-77 (2002) and United States v. Orsolini, 300 F.3d 724, 728-29 (6th Cir. 2002)). Reasonable suspicion can arise “not only from the officer's ‘own direct observations,’ but also ‘from such sources as informant tips, dispatch information, and directions from other officers.’” United States v. Phillips, 553 F. App’x 533, 534-35 (6th Cir. 2014) (quoting Dorsey v. Barber, 517 F.3d 389, 395 (6th Cir. 2008)). Additionally, an “officer has reasonable suspicion to justify an investigatory stop of a vehicle when (1) he observes that the vehicle (and/or its occupants) matches a sufficiently detailed description provided in a [‘be on the lookout, or ‘BOLO’] report, and (2) this observation is made at a place and time that is not inconsistent with any information provided in the BOLO report.” United States v. Nance, No. 3:09-CR-163, 2010 WL 4004782, at *9 (E.D. Tenn. Sept. 17, 2010); see also United States v. Babb, 77 F. App’x 761, 767-68 (6th Cir. 2003) (holding that an officer had reasonable suspicion to stop

a vehicle because the vehicle and its driver matched a BOLO report that was detailed enough to create "a sufficiently narrow class of suspects"); United States v. Avery, No. 07-20040, 2010 WL 419946, at *3 (W.D. Tenn. Jan. 28, 2010) (holding that officers "clearly had a reasonable suspicion sufficient to justify an investigative stop" of a vehicle because it "matched the BOLO description in every detail"). When reasonable suspicion for an investigative stop is based on a police dispatch or BOLO report, the court "must view the description as a whole to determine whether it describes a sufficiently narrow class of vehicles." Babb, 77 F. App'x at 767.

The court finds that, under the totality of the circumstances, the officers lacked reasonable suspicion to initiate the traffic stop of the Avalon. As discussed at length above, the police dispatch radio calls on the evening of January 21 informed officers that the suspect's vehicle was a four-door Pontiac, either tan or green in color, occupied by two black males. Dispatch radio calls on the next night described the suspects' vehicle from that evening's robberies only as "small," black in color, and occupied by three black males. Each and every time a description of the suspect's vehicle from the January 21 robbery was mentioned over the police radio calls, the vehicle was described as a Pontiac, including multiple times by Officer Ollie herself. By the time Officers Ollie and Parker

pulled directly behind the Avalon on January 22, they knew or should have known that the vehicle they were following was not a Pontiac. See United States v. Jackson, 188 F. App'x 403, 409 (6th Cir. 2006) (holding that officers lacked reasonable suspicion to conduct Terry stop of defendant's vehicle "because the vehicle differed in significant ways from that described in the police broadcast, and was traveling down the street in the wrong direction"; suspect was described as driving a green BMW traveling westbound on Esmonde Street and defendant was stopped less than a minute later in a green Dodge Neon traveling eastbound on Esmonde Street). Even if the Avalon turned too quickly for the officers to determine that it was not a Pontiac, they could have and should have made that determination once they followed the Avalon onto East Wind Drive or, at the very latest, after the Avalon came to a stop. At that point, the officers should have terminated the traffic stop and let the Avalon go. Jackson, 188 F. App'x at 411 (stating that officer could clearly see that defendant did not match the physical description of the suspect before officer approached car, at which point officer should have immediately let defendant go).

The court notes that in one Sixth Circuit case, United States v. Hurst, 228 F.3d 751 (6th Cir. 2000), the court found that officers had reasonable suspicion to conduct a Terry stop of the defendant's dark blue Mercury Cougar even though the

victim described the suspect's vehicle as a dark-colored Thunderbird. In Hurst, the victim of a burglary reported having seen what he thought was a dark-colored Thunderbird in the driveway of his house shortly before he discovered the burglary had occurred. Id. at 754. Shortly thereafter, an off-duty sheriff's deputy observed a vehicle matching the victim's description not far from his residence traveling at a high rate of speed. Id. The deputy noticed that the front end of the vehicle was damaged and the grill was missing. Id. This information was provided to law enforcement. Id. Soon thereafter, another sheriff's deputy observed and stopped a vehicle matching the reported description approximately twenty-five minutes' driving time from the victim's residence. Id. The court found that the deputy had reasonable suspicion to conduct the traffic stop. Id. at 757. The court determined that the defendant's vehicle "roughly match[ed]" the color and style of the suspect's vehicle, the defendant's vehicle was also missing a front grill, and the defendant's vehicle was less than a half-hour away from the victim's home. Id. Regarding the discrepancy between the suspect's Thunderbird and defendant's Mercury Cougar, the court noted that the arresting deputy had testified that a "Cougar and a Thunderbird 'look practically alike.' He characterized them as 'sister models,' . . . identical except for a few cosmetic differences.'" Id. at 757

n.2. Unlike in Hurst, the government in the present case has not offered any evidence to explain why the officers might have reasonably mistaken the Avalon for a Pontiac.

The court concludes that the officers were not justified in stopping the Avalon based on their suspicion that it or its occupants were involved with the recent robberies.

B. Terry Stop Based on Probable Cause of Traffic Violation

Next, the court must determine whether the officers were justified in stopping the Avalon based on their belief that a traffic violation had occurred. "Although 'virtually every other circuit court of appeals has held that reasonable suspicion suffices to justify an investigatory stop for a traffic violation,' this circuit has required probable cause to justify an investigatory stop for *completed* misdemeanor traffic violations." United States v. Guajardo, 388 F. App'x 483, 487 (6th Cir. 2010) (quoting United States v. Simpson, 520 F.3d 531, 540 (6th Cir. 2008)); see also Gregory v. Burnett, 577 F. App'x 512, 516 (6th Cir. 2014) (stating that "[p]robable cause is required for an investigatory stop for completed misdemeanor traffic violations; an investigatory stop for an ongoing violation, no matter how minor, requires only reasonable suspicion."). "The requirements of probable cause are satisfied where the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy

information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” United States v. Davis, 430 F.3d 345, 352 (6th Cir. 2005) (quoting Brinegar v. United States, 338 U.S. 160, 175-76 (1949)) (internal quotation marks omitted).

The government argues that the officers had probable cause that the driver of the Avalon violated Tennessee Code Annotated § 55-8-143(a) by turning left without using a turn signal. That statute provides as follows:

Every driver who intends to start, stop or turn, or partly turn from a direct line, shall first see that that movement can be made in safety, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal required in this section, plainly visible to the driver of the other vehicle of the intention to make such movement.

In interpreting this statute, courts have held that “a turn signal is only required by law when another vehicle may be affected by the turn.” United States v. Cornielius, No. 3:11-CR-62, 2011 WL 3949806, at *6 (E.D. Tenn. July 26, 2011) (quoting State v. Gonzalez, 52 S.W.3d 90, 99 (Tenn. Crim. App. 2000)) (quotation marks omitted); see also State v. Turk, No. 3:11-CR-62, 2011 WL 3949806, at *5 (Tenn. Crim. App. Dec. 5, 2012). Courts have routinely held that a vehicle’s failure to use a turn signal does not provide officers with a basis to stop the vehicle if other vehicles in the area are not affected by the vehicle's failure to signal before turning. See Cornielius,

2011 WL 3949806, at *6 (holding that a vehicle's failure to use a turn signal before turning left at a three-way stop did not affect the sedan or the police cruiser behind it); United States v. Bias, No. 3:08-cr-52, 2008 WL 4683217, at *3-4 (E.D. Tenn. Oct. 20, 2008) (finding no probable cause or reasonable suspicion to stop defendant's vehicle for failure to use a turn signal because no cars other than the police cruiser were on the roadway when the vehicle turned); Gonzalez, 52 S.W.3d at 99 (holding that because "there was no traffic directly behind or around [the] vehicle" other than the officer's cruiser, "no other vehicles could have been affected by [the vehicle's] movement and thus, the vehicle "did not violate any provision of the traffic code by failing to give a signal"); cf. United States v. Dean, No. 14-20290, 2015 WL 3952715, at *4 (W.D. Tenn. June 29, 2015) (holding that officer had probable cause that a traffic violation occurred because the defendant "immediately changed lanes without signaling, almost causing a collision with another car"); United States v. Pittman, No. 3:10cr0046, 2011 WL 3420624, at *12 (M.D. Tenn. Aug. 4, 2011) (finding that officer had probable cause to pull the defendant over when his failure to signal caused the officer to "hit his brakes" and wait for a car to pass before turning); United States v. Tyler, No. 2:10-cr-20124-STA-tmp, 2011 WL 2551177, at *3 (W.D. Tenn. June 27, 2011) (finding that officer had probable cause to stop the

defendant when defendant's vehicle turned into the officer's lane without signaling, requiring the officer to apply his brakes and swerve to avoid a collision).

The government has provided no evidence that any other vehicles (other than the police cruiser) were in the vicinity of the Avalon when it turned left onto East Wind Drive. The government also has provided no evidence that the officers' police cruiser was in any way affected by the vehicle's left turn or its failure to use the turn signal. In fact, the Avalon was in a designated left turn lane just before it made the left turn. Therefore, the court finds that the officers did not have probable cause to stop the Avalon for a violation of the traffic laws.⁵

III. RECOMMENDATION

For the above reasons, the court recommends that Avant's Motion to Suppress be granted.

Respectfully submitted,

s/ Tu M. Pham

TU M. PHAM
United States Magistrate Judge

October 8, 2015

Date

⁵Even if the court were to apply the reasonable suspicion standard, the court would nevertheless find, for the same reasons above, that the officers lacked reasonable suspicion to believe that a traffic violation had been committed.

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.