

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 19-cr-20357-JTF-tmp
)	
)	
BRIAN KEITH STOWERS,)	
)	
Defendant.)	

REPORT AND RECOMMENDATION

Before the court by order of reference is defendant Brian Keith Stowers's Motion to Suppress, filed on December 17, 2021. (ECF No. 28.) The government filed its response on January 7, 2022. (ECF No. 32.) The undersigned conducted a suppression hearing on April 4, 2022. (ECF No. 47.) For the following reasons, it is recommended that the Motion to Suppress be granted.

I. PROPOSED FINDINGS OF FACT

On January 17, 2019, Agent Tim Russell of the West Tennessee Judicial Violent Crime & Drug Task Force was conducting a traffic stop on the shoulder of Interstate 40 near mile marker 28 in Fayette County, Tennessee. (Ex. 3 at 1.) Agent Russell's duties were mainly to stop traffic violators and look for "something beyond the traffic ticket" during the stop. (Tr.

5.) Agent Russell's car was equipped with a dash camera that captured most of the relevant events discussed below.

As Agent Russell was walking back to his vehicle while conducting this initial stop, an 18-wheeler truck with "CRST" branding drove by quickly in the right lane without getting over or slowing down. (Ex. 1 at 2:46.)¹ The "passenger side wheels of the [truck] veered off over the fog line of the shoulder" as well. (Tr. 6.) Agent Russell returned to the vehicle he had stopped, told the driver that he was "going to get that big truck," and let the driver go. (Ex. 1 at 3:02.) Agent Russell then followed the CRST truck and, roughly two minutes later, pulled the truck over and approached from the passenger side. (Ex. 1 at 4:40-5:30.) Inside the truck were two individuals: the driver, Melvin Terrance, Jr., and the passenger, defendant Brian Stowers. (Tr. 7.) Agent Russell told the two men to get out of the truck, at which time Terrance asked Agent Russell, "what's the problem?" (Ex. 1 at 5:30-5:45.) Agent Russell told Terrance that he would explain what "the problem" was and appeared

¹Two video sources were submitted as evidence at the suppression hearing. Exhibit 1 is approximately ninety minutes long without breaks, and was taken from Agent Russell's dash camera starting from the point at which he began the initial stop. Exhibit 2 contains three separate video files, 0055, 0056, and 0057, all of which were taken from Agent Russell's body camera. Specific points in the videos will be reflected with timestamps.

agitated.² (Ex. 1 at 5:45-5:50.) When Agent Russell asked Terrance why he had asked that question, Terrance replied that he did not think he had done anything wrong. (Ex. 1 at 6:00.)

Agent Russell told Terrance to retrieve his license and registration. (Ex. 1 at 6:15.) He then asked Stowers if he (Stowers) was a "co-driver," and Stowers indicated that he was. (Ex. 1 at 6:25.) Stowers also indicated that this was his first trip as a driver; Terrance was training him to be a driver for CRST and was supposed to drop him off in Texas.³ (Ex. 1 at 6:40.) Terrance and Stowers were taking shifts driving the truck and Stowers had only recently finished driving. After Terrance retrieved his documentation, Agent Russell walked him over to the police vehicle, and Stowers joined them soon after. (Ex. 1 at 7:10.) Once they reached the vehicle, Agent Russell told Terrance that he was pulled over for violating the "Move Over law." (Ex. 1 at 7:35.) Terrance disputed the details of what had happened, stating that he had tried to slow down and had been

²Agent Russell testified that he was frustrated due to Terrance's violation of the Move Over law. (Tr. 24-25.) The Move Over law requires a driver to move over to the left lane if they are in the right lane and approaching any kind of emergency vehicle. (Tr. 25.) If a driver is prevented from moving over into the left lane by another car, they are required to slow down. (Tr. 25.) Agent Russell later told Terrance and Stowers that he took the Move Over law seriously because he had hit by a vehicle in 2010. (Ex. 1 at 13:58.)

³Documentation confirmed that Stowers was a licensed driver, a designated co-driver on the trip, and was being trained by Terrance. (Ex. 5; Tr. 70.)

unable to move over because there was a car in the other lane. (Ex. 1 at 7:35-8:05.) Agent Russell disagreed, stating that Terrance had been going at least seventy miles an hour and asking him if he "wanted to argue with me [Agent Russell] right now." (Ex. 1 at 8:05.)

After a minute of further argument, Agent Russell explained to Terrance that he had also pulled him over because the truck had drifted into the shoulder. (Ex. 1 at 8:50.) The two continued to debate what exactly had happened for another two minutes, with Stowers mostly remaining silent except in response to Agent Russell's occasional questions. (Ex. 1 at 8:50-10:45.) Agent Russell eventually told Terrance to turn around and look at his dash camera, explaining that he had captured the whole incident on video. (Ex. 1 at 10:50.) Terrance continued to insist he had tried to give Agent Russell's vehicle space, and Agent Russell told him that if he continued to argue he would start receiving tickets. (Ex. 1 at 11:30-11:45.) Terrance eventually became quieter as Agent Russell sorted documentation from both men. (Ex. 1 at 13:00-14:00.)

As Agent Russell went to check Terrance and Stowers's driver's license information, he asked both men if there was any alcohol, weapons, firearms or other illegal items in the truck. (Ex. 1 at 14:10.) Stowers answered "no." (Ex. 1 at 14:15.) Agent Russell then moved back to the passenger side of his vehicle and

called Fayette County dispatch to run the men's driver's licenses and to check for any outstanding warrants. (Tr. 10.) He requested a check on Terrance's license first. (Tr. 10.) During this time, the three of them largely remained quiet except for occasional questions from Agent Russell and Terrance. Both men had difficulty hearing each other due to the noise from passing cars on the interstate. (Ex. 1 at 15:00-21:00.)

After around six minutes of waiting for Terrance's license report, Agent Russell asked Terrance if there was anything "illegal in that cab?" (Ex. 1 at 21:40.) Terrance answered "no." (Ex. 1 at 21:45.) Agent Russell then asked Terrance, "Do you care if I search it?" (Ex. 1 at 21:48.) Terrance, appearing confused, asked Agent Russell why he wanted to search the cab, while Stowers shrugged his shoulders. (Ex. 1 at 21:50.) Agent Russell told Terrance that it was a "yes or no question," and Terrance said that he did not care if Agent Russell searched and that he had "nothing to hide." (Ex. 1 at 21:54.) He repeated this multiple times as Agent Russell continued to repeat that it was a "yes or no" question. (Ex. 1 at 21:54-22:04.) After around ten seconds of Terrance continuing to ask why Agent Russell needed to search, Agent Russell sent a radio message to Tennessee State Trooper Owen Gear, who was close by. (Ex. 1 at 22:00-22:04.) Agent Russell stated: "Hey Owen, can you come down here? I've got a refusal." (Ex. 1 at 22:01-22:05.) At the

suppression hearing, Agent Russell testified that, initially, "because of what [Terrance] said [he] thought there was a refusal[.]" (Tr. 29.)

Around thirty seconds after Agent Russell radioed Trooper Grear, and in response to continued questioning about why he was "being so defensive," Terrance gestured with his hands at the truck and told Agent Russell that he could "do whatever you need to do, sir." (Ex. 1 at 22:30.) In response, Agent Russell again stated that he needed to hear "yes I can, or no I can't." (Ex. 1 at 22:35.) Terrance said that he had "nothing to hide" before again gesturing at the truck. (Ex. 1 at 22:40.) When Agent Russell asked if that was a "yes," Terrance again just motioned towards the truck and stated that he had nothing to hide. (Ex. 1 at 22:45.) Agent Russell later testified that it was Terrance's "pointing to the truck" in conjunction with saying "do what you've got to do" that convinced him that Terrance had consented to a search of the cab. (Tr. 31.) This line of questioning trailed off after Stowers asked if he could go grab his jacket from the truck and Agent Russell told him he could not. Agent Russell then began running a check on Stowers's license. (Ex. 1 at 24:12.)

After around three minutes of waiting on Stowers's license report, Trooper Grear arrived. (Ex. 1 at 27:00.) Agent Russell approached Terrance and told him, "I've got a trooper here to

explain things for you since you don't want to hear it from me." (Ex. 1 at 27:02.) Agent Russell then approached Stowers, who was on the phone, and told him to hang up. (Ex. 1 at 27:10.) Agent Russell began to put on black gloves and asked Stowers if there was "anything in [his] pockets that I need to know about?" (Ex. 1 at 27:20.) In response to this question, Terrance asked Agent Russell if they were being arrested. (Ex. 1 at 27:25.) Agent Russell responded by asking Terrance, "are you in handcuffs right now?" (Ex. 1 at 27:30.) Terrance explained that he was uncomfortable, which caused another brief argument. (Ex. 1 at 27:30-28:15.) Eventually, Agent Russell told Terrance that "the way you've acted from the start, from the get go here is how someone would act if they had something to hide." (Ex. 1 at 28:20.)

After some more back and forth in which Terrance stated that he did not understand why Agent Russell was "checking [his] truck," Trooper Gear asked Terrance if the truck belonged to him. (Ex. 1 at 30:29.) Terrance eventually told Trooper Gear that the truck belonged to him on a lease-to-own program with CRST. (Ex. 1 at 31:18.) The two conversed about the truck and Terrance's driving history, with Trooper Gear also questioning Stowers about his driving on the trip and presence in the cab when the truck was pulled over. (Ex. 1 at 31:18-33:20.) Trooper Gear told Terrance to go get the trailer registration and told

him that he was going to do an inspection on the truck. (Ex. 1 at 33:45.) He told both men that "[a]s a CDL driver you give up your right to privacy" and that he would be checking the cab as well. (Ex. 1 at 35:00.) Trooper Gear later testified that he performed a "Level 2 roadside inspection" on the truck, which included a cab and trailer inspection to look for illegal alcohol, narcotics, weapons, or "anything [they're] not supposed to have in the truck." (Tr. 52.) Trooper Gear also testified that "anywhere in the cab is open to inspection" including "any bags on the top bunk[.]" (Tr. 53.) When Terrance returned with the requested paperwork, Trooper Gear asked the two men if they were convicted felons and both indicated that they were. (Ex. 1 at 36:00-37:00.)

Agent Russell patted Stowers down before heading over to search the truck. (Ex. 1 at 38:00-38:40.) Agent Russell left the truck at one point to bring Stowers his jacket, (Ex. 1 at 44:00), before getting back in the truck, (Ex. 1 at 44:45.) Agent Russell testified that he entered the cab of the truck on the passenger's side. (Tr. 15.) The cab was small and a person in the middle could "almost touch everything with [their] hands." (Tr. 15.) Agent Russell first searched the front seat area but found nothing besides "papers, receipts, things like that." (Tr. 15.) He then moved to the sleeping area, which consisted of twin sized bunk beds. (Tr. 15.) Agent Russell

checked the top bunk first, moving some clothes around before finding a "black toiletry bag underneath the clothes." (Tr. 15-16.) Upon unzipping that bag, Agent Russell saw a "pistol in a holster as well as some toiletry items mixed in with the bag." (R. 16.) The search took roughly five minutes, after which Agent Russell came out of the truck and indicated to another officer who had since arrived that there was a gun in the cab. Stowers was then handcuffed and led away.⁴ (Ex. 51:00-51:30.)

While Agent Russell searched the cab, Trooper Gear inspected the truck's trailer and paperwork as part of an administrative "Level II - Walk Around Inspection" designed to check for violations of federal and state commercial trucking regulations. (Tr. 52-54, 64.) He testified that he did not conduct a thorough search of the cab area after Agent Russell found the gun, but noted that:

Anywhere in the cab is open to inspection. Anywhere that those items that we're looking for can be found. As far as under the bunk, any bags on the top bunk, in the refrigerator, microwave. Anywhere those items can be stored.

(Tr. 53-54.) When asked again about the cab inspection on cross-examination, Trooper Gear stated that the reason he did not search the cab was because Agent Russell had already done so. (Tr. 74.) When asked to describe what a cab search entails,

⁴The video evidence becomes unhelpful after this point, as both Terrance and Stowers are out of frame and no audio is picked up by the dash camera.

Trooper Gear agreed that it would have involved "a full top to bottom, pulling every single thing out" procedure to search for alcohol and drugs. (Tr. 74-75.) Ultimately, Trooper Gear's inspection did not discover any violations. (Tr. 69.)

According to Agent Russell, Stowers quickly admitted that the gun was his without any prompting. (R. 17.) Agent Russell then read Stowers his Miranda rights. Stowers stated that he had bought the gun off of another truck driver at a truck stop in East Tennessee for \$150. (R. 17-18.) Stowers had intended "to turn around and resell the gun for more money." (R. 18.)

Stowers was indicted on December 17, 2019, and charged with possession of a firearm after having been previously convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). (ECF No. 1.) Stowers filed the present Motion to Suppress on December 17, 2021, arguing that Agent Russell had searched the cab without consent in violation of the Fourth Amendment. (ECF No. 28.) The government responded on January 7, 2022. (ECF No. 32.) In its response, the government argues that Stowers does not have standing to challenge the search of the cab and that Terrance's consent to the search was valid and voluntary. (Id.) A suppression hearing was held on April 4, 2022. (ECF No. 47.) At the hearing, the government raised a new argument: that Trooper Gear's administrative inspection of the truck would have led to the inevitable discovery of the gun regardless of whether

Terrance's consent was valid or not.

II. PROPOSED CONCLUSIONS OF LAW

The Fourth Amendment provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and protects this right by requiring search warrants to issue only upon a finding of "probable cause." U.S. Const. amend. IV. Violations of the Fourth Amendment are often remedied through the exclusionary rule, which "forbids the use of improperly obtained evidence at trial." Herring v. United States, 555 U.S. 135, 139 (2009). However, not all violations of the Fourth Amendment will trigger the exclusionary rule. Instead, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Id. at 144. "[E]vidence should be suppressed only if it can be said that the law enforcement officer had knowledge or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." United States v. Buford, 632 F.3d 264, 270-71 (6th Cir. 2011) (quoting Herring, 555 U.S. at 143).

Stowers does not challenge Agent Russell's basis for initiating the traffic stop. Instead, he argues that Agent Russell searched the truck "without a warrant, without probable cause, and without reasonable suspicion." (ECF No. 28 at 4.) He

claims that Terrance never consented to the search and that he was never asked for consent, and “as a result, the search was in violation of [his] Fourth Amendment rights, and all evidence seized as a result of that search should be suppressed as fruit of the poisonous tree.” (Id.) (citing Wong Sun v. United States, 371 U.S. 471, 484 (1963)). The government argues Stowers does not have standing to challenge the search of the truck, and that even if he did, Terrance gave valid consent.

A. Standing

The Fourth Amendment “protects people, not places[.]” Katz v. United States, 389 U.S. 347, 351 (1967). A person has “standing to challenge the admission of evidence only if [their] own constitutional rights have been violated.”⁵ United States v. Davis, 430 F.3d 345, 359-60 (6th Cir. 2005). In the context of the Fourth Amendment, courts “determine standing by deciding whether a defendant can establish a legitimate expectation of privacy in the area or item searched.” United States v. Hermiz, 42 F. Supp. 3d 856, 864 (E.D. Mich. 2014) (citing Davis, 430 F.3d at 360). To decide this, courts “must determine first,

⁵As cases often note, “standing” in the Fourth Amendment context is not the same as Article III standing, and instead functions as a “useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search[.]” United States v. Davenport, No. 19-cr-20229-JTF-tmp, 2020 WL 8513831, at *2 n.4 (W.D. Tenn. Oct. 29, 2020) (quoting Byrd v. United States, 138 S. Ct. 1518, 1531 (2018)).

whether [the defendant] had an actual, subjective expectation of privacy, and second, whether that expectation was a legitimate, objectively reasonable expectation." United States v. Smith, 263 F.3d 571, 582 (6th Cir. 2001) (citing Smith v. Maryland, 442 U.S. 735, 740 (1979)).

A legitimate expectation of privacy is one with a "source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Id. (quoting Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978)). As the Sixth Circuit has explained, "[c]ourts have routinely held that passengers who have no expectation of privacy or possessory interest in a stopped vehicle do not have standing to challenge the validity of a subsequent search of that vehicle[.]" United States v. Bah, 794 F.3d 617, 626 (6th Cir. 2015). However, "[t]he expectation of privacy is shown when a defendant has a possessory or property interest in the relevant item searched or seized," even for a vehicle's passenger. United States v. Gonzalez, 849 F. App'x 557, 564 (6th Cir. 2021). "Ownership, possession, and/or control; historical use of the property searched or the things seized; ability to regulate access; the totality of the surrounding circumstances; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of a given

case" will determine whether a defendant has Fourth Amendment standing. Smith, 263 F.3d at 584 (quoting United States v. Sanchez, 943 F.2d 110, 113 (1st Cir. 1991)).

The undersigned finds that Stowers has standing to challenge the search of his toiletry bag. See Mead v. Burkart, No. 20-cv-10721, 2022 WL 1494714, at *7 n.3 (E.D. Mich. May 11, 2022) (finding as "well-reasoned and consistent with the general rules applied by the Supreme Court" a decision by the Michigan Supreme Court, which held that "although the defendant had no (and claimed no) legitimate expectation of privacy in the interior of [a driver's] vehicle, he had a legitimate expectation of privacy in his backpack" and that he consequently had standing to "challenge the search of his backpack on Fourth Amendment grounds") (quoting People v. Mead, 931 N.W. 2d 557, 563 (Mich. 2019)); see also United States v. Singletary, No. CR-12-00798 YGR, 2013 WL 1680260, at *3 (N.D. Cal. Apr. 17, 2013) ("A person has an expectation of privacy in his or her private, closed containers' and 'does not forfeit that expectation of privacy merely because the container is located in a place that is not controlled exclusively by the container's owner.'") (quoting United States v. Davis, 332 F.3d 1163, 1167 (9th Cir. 2003)).

Furthermore, he has standing to challenge the search of the truck's cab. Stowers was a licensed driver, was listed as the

co-driver on this particular trip, had previously driven the truck, and had been given permission to drive the truck both by the employer, CRST, and the truck's owner, Terrance. (Ex. 5); (Tr. 70) (Q: "And both of them are responsible, obviously, for safely operating the vehicle?" A: "That's right.") He kept his personal effects in the cab and slept there during the trip. (Tr. 70.) (Q: "Both of [the co-drivers] have possessions in there like -" A: "Yes, sir." Q: "-toiletries and stuff, clothes, right?" A: "Yes, sir.") This demonstrates that Stowers had a possessory and privacy interest in the cab. In United States v. Smith, the defendant was one of two drivers of a rental van that had been rented by his wife. 263 F.3d at 586-87. His wife had given him permission to drive the vehicle and the defendant was a licensed driver. Id. at 581-82, 586-87. There, the Sixth Circuit found that the defendant had standing even though the defendant did not have a legal relationship to the rental van on paper. Id. at 587; see also United States v. Warren, 39 F. Supp. 3d 930, 933-34 (E.D. Mich. 2014) (driver not on rental agreement but given permission by renter to drive had a reasonable expectation of privacy). Here, the evidence is even more compelling of an expectation of privacy given Stowers's closer ties to the cab and presence throughout the work trip. The totality of the circumstances demonstrates that Stowers had a reasonable expectation of privacy in his toiletry bag and the

cab of the truck, and has standing to challenge Agent Russell's search.

B. Consent

Warrantless vehicle searches are presumed unreasonable under the Fourth Amendment. United States v. Snoddy, 976 F.3d 630, 633 (6th Cir. 2020) (citing Arizona v. Gant, 556 U.S. 332, 338 (2009)). However, "it is well settled that a person may waive his Fourth Amendment rights by consenting to a search via words, gestures, or conduct." Albin v. Louisville Metro Gov't., No. 3:19-cv-576-DJH-RSE, 2022 WL 964193, at *10 (W.D. Ky. Mar. 30, 2022) (quoting United States v. Carter, 378 F.3d 584, 587 (6th Cir. 2004) (internal quotation marks omitted)). For consent to be valid, it must be voluntary and must come from someone with apparent or actual authority over the place or property to be searched. United States v. Sheckles, 996 F.3d 330, 346 (6th Cir. 2021). It is undisputed that, as the owner and driver of the truck, Terrance had actual and apparent authority to consent to its search.⁶ Jenkins, 92 F.3d at 437-38. The only question is whether Terrance voluntarily consented.

The government must prove that consent was voluntarily given by a preponderance of the evidence. United States v. Lee,

⁶Stowers was never asked for consent to search the vehicle. Stowers's consent was not necessary, and since Stowers never objected, the principles of Georgia v. Randolph, 547 U.S. 103, 122-23 (2006), and other third-party consent cases do not apply.

793 F.3d 680, 685 (6th Cir. 2015). "Where the government purports to rely on a defendant's statement to establish that valid and voluntary consent was rendered, [courts] must also examine the content of that statement to ensure that it unequivocally, specifically, and intelligently indicates that the defendant consented." United States v. Worley, 193 F.3d 380, 386 (6th Cir. 1999) (quoting United States v. Tillman, 963 F.2d 137, 143 (6th Cir. 1992)). Voluntariness is a question of fact, and is determined by "examining the totality of the circumstances, including the individual's age, intelligence, and education; whether the individual understands his right to refuse consent and his constitutional rights; the length and nature of the detention and whether the police used any coercive or punishing conduct, including subtle forms of coercion that might flaw an individual's judgment." United States v. Collins, 683 F.3d 697, 701-02 (6th Cir. 2012) (citing United States v. Crowder, 62 F.3d 782, 787 (6th Cir. 1995) and United States v. Beauchamp, 659 F.3d 560, 571 (6th Cir. 2011)).

The following exchange is particularly relevant to determining whether Terrance validly consented to the search of the truck. When this exchange began, Terrance and Stowers had been standing outside of the vehicle, in January temperatures on a busy stretch of interstate, for approximately twenty minutes. Agent Russell was standing at the passenger door of his vehicle,

waiting for Fayette County dispatch to report back to him regarding the status of Terrance's license:

RUSSELL: Nothing illegal in that cab?

TERRANCE: What's that?

RUSSELL: Nothing illegal in that cab?

TERRANCE: No.

RUSSELL: Do you care if I search it?

TERRANCE: Why - Why -

RUSSELL: Hey, yes or no?

TERRANCE: I'm just asking -

RUSSELL: Yes or no?

TERRANCE: I don't care if you search it, I ain't got nothing -

RUSSELL: It's a yes or no question.

TERRANCE: I don't care. I mean, why are you trying, it's like you're trying to get after me for something.

RUSSELL: (into radio) Hey Owen, can you come down here? I've got a refusal.

RUSSELL: (to Terrance) Why are you being so defensive?

TERRANCE: (leaning into hear) What?

RUSSELL: Why are you being so defensive?

TERRANCE: Because I don't understand why, why you're - I've - I've been pulled over before. I've never had to get out of the truck.

STOWERS: Is it okay if I go get a jacket?

RUSSELL: Just a minute.

TERRANCE: And man, I'm cold, I'm cold and there's no reason why I'm being defensive. I tried - - (Terrance

turns away from Russell).

RUSSELL: That's why I'm asking you. It's yes or no.

TERRANCE: (Turning back) You can do whatever you need to do, sir. I've got nothing to hide.

RUSSELL: I need to hear "yes I can" or "no I can't."

TERRANCE: (silent)

RUSSELL: "Yes I can" or "no I can't."

TERRANCE: I have nothing to hide. (Gestures at the truck). If that's what you need to do. (Gestures at the truck).

RUSSELL: So that's a yes?

TERRANCE: (Gestures at the truck). I have nothing to hide.

(Ex. 1 at 21:40-23:00.)

Viewing the totality of the circumstances, the undersigned finds that Terrance did not give valid, unequivocal consent to search the truck. Terrance's age and intelligence make him presumed able to consent. However, the government has not carried its burden to show that Terrance voluntarily consented rather than merely acquiesced to authority. See United States v. Moon, 513 F.3d 527, 538 (6th Cir. 2008) ("[M]ere acquiescence does not suffice to establish free and voluntary consent.") (citing Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968)). The undersigned first notes that Terrance's understanding of his rights was informed by Agent Russell's framing of the question. Agent Russell repeatedly told Terrance that consent was a "yes

or no" question. Terrance never answered either way, which would lead an objective officer to assume that Terrance was not "unequivocally" consenting to a search. This is backed up by Agent Russell's own conduct: he believed that Terrance had refused to consent to the search when he called Trooper Gear to the scene. (Ex. 1 at 22:45) ("Hey Owen, can you come down here? I've got a refusal."); (Tr. 29-30) ("I didn't want to sit there all day with him not giving me a definite, so I thought when I'd had another car come down so we could run the dogs."). Agent Russell stated that he believed Terrance had changed his mind when he gestured at the truck and said Agent Russell could "do what you need to do." (Tr. 29.) However, Terrance's demeanor in fact did not change materially after the above-quoted exchange. The gesture came only after Agent Russell continued to tell Terrance that consent was a "yes or no question" and had refused to answer Terrance's other questions. When Agent Russell asked Terrance if "do what you need to do" was a yes, he responded only by saying, "I have nothing to hide." This does not demonstrate unequivocal consent; Terrance equivocated.⁷

⁷The undersigned emphasizes that consent under the Fourth Amendment does not require an individual to use or express any specific words or actions, such as saying "yes." United States v. Ortiz, 455 F. App'x 669, 671 (6th Cir. 2012) "Yes" is not required to obtain consent as a general matter. But given the interaction here, Terrance not saying "yes" is highly relevant to interpreting his actions, and bears on the ultimate finding of whether he validly, unequivocally consented to the search of

Other courts confronting similar situations have agreed. In United States v. Culp, a Michigan state trooper pulled Culp over for a traffic violation. 860 F. Supp. 2d 459, 461 (W.D. Mich. 2012). After telling Culp that he was not issuing him a ticket, the trooper asked Culp to step out of the car and the two moved to the trunk. Id. at 467. The following exchange then took place, with both men standing in the rain:

TROOPER: Can I search your car?

DEFENDANT: It's up to you, sir. (Gesturing towards car)

TROOPER: I would like to search your car, I mean, you say you don't have your gun with you,⁸ I just want to make sure—is that true?

DEFENDANT: That's true.

TROOPER: Okay. Is that Okay?

DEFENDANT: It's up to you, buddy. (Gesturing with both hands towards officer.)

TROOPER: Okay, okay. Can I search you quick?

DEFENDANT: Sure. (Defendant then consents to a pat down search of his person.)

Id. at 467-68. The district court there found that “defendant’s statements, ‘It’s up to you,’ constitute nothing more than mere acquiescence to authority and cooperative demeanor in a coercive context - being detained for an extended period on the shoulder

his truck.

⁸A check on Culp’s license had revealed that he had an expired concealed carry permit. Culp, 860 F. Supp. 2d at 462.

of the expressway, standing in the rain." Id. at 468 (citing United States v. Worley, 193 F.3d 380, 386 (6th Cir. 1999) (finding that "You've got the badge, I guess you can" in response to a request to search indicated "a response conveying an expression of futility in resistance to authority or acquiescing in the officers' request.")). Terrance's statement that Agent Russell could search "if that's what you need to do" is similar to Culp's declaration that a search is "up to [the officer]"; both statements place the decision to search on the officer, which falls well short of "unequivocal" consent to a search. Both also made these statements while detained on the side of busy expressways, during unpleasant weather conditions, and confronted with persistent officer questioning. Collins, 683 F.3d at 701-702. In addition to the weather and location, Culp acquiesced after extended, probing questions from the officer, while Terrance's statement came after 20 minutes of contentious back and forth between him and Agent Russell. Throughout the interaction, Terrance's attempts to receive clarification or explain his actions were met with immediate push back and further questioning from Agent Russell. (Ex. 1 at 5:40-5:50) (Terrance: "What's the problem?" Agent Russell: "I'm going to explain to you the problem. When has there ever been a traffic stop made where no officer explained what the problem was? When has that ever happened? When in the history of law enforcement

has that ever happened?"); (Ex. 1 at 27:25) (Agent Russell: (putting on black gloves) "Anything in your pockets that I need to know about?" Terrance: "Are we being arrested or something?" Agent Russell: "Are you in handcuffs? Did I ask you a simple question? Are you in handcuffs?" Terrance: "No, sir.") The totality of the circumstances demonstrate that Terrance merely sought to acquiesce to the officer's show of authority.

Perhaps most persuasively, in Culp the court noted that had the officer "interpreted defendant's response to be express consent, he would not have asked for permission to search a second time." Here, after Terrance made the statement that Agent Russell testified made him think he now had consent, he nevertheless asked Terrance if he could search the truck three additional times. (Ex. 1.) The government's burden is to show that consent was unequivocal, by a preponderance of the evidence. The evidence here suggests that, at best, even Agent Russell was unsure about whether Terrance had consented. Accordingly, the undersigned finds that the search was performed without voluntary consent.

C. Inevitable Discovery

1. Trooper Gear's Administrative Inspection

Although not raised in its response to the Motion to Suppress, the government argued at the suppression hearing that even if Terrance's consent was invalid, the gun would have been

inevitably discovered during Trooper Gear's administrative inspection. "The inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without [an] unconstitutional source." United States v. Cooper, 24 F.4th 1086, 1091 (6th Cir. 2022). Where evidence was discovered due to unconstitutional conduct, but would have been discovered even if no unconstitutional conduct had occurred, then the exception "ensures that the exclusionary rule puts police in the same position they would have been in without the illegality, not a worse one." Id. (citing Murray v. United States, 487 U.S. 533, 541 (1988)). Put another way, where the "evidence discovered during the illegal search would have been discovered during a later, legal search, and the second search inevitably would have occurred in the absence of the first," then the doctrine applies. United States v. Keszthelyi, 308 F.3d 557, 573-75 (6th Cir. 2002). Determining whether evidence would have been inevitably discovered does require some speculation, but courts should "keep speculation at a minimum by focusing on 'demonstrated historical facts capable of ready verification or impeachment[.]'" United States v. Ford, 184 F.3d 566, 577 (6th Cir. 1999) (quoting Nix v. Williams, 467 U.S. 431, 444 n.5 (1984)). "Evidence of a police officers' intentions in a particular case may inform our judgment about what they would have done absent the illegality." Cooper, 24 F.4th at 1094. The

government must prove that evidence would have been inevitably discovered by a preponderance of the evidence. United States v. Leake, 95 F.3d 409, 412 (6th Cir. 1996) (citing Nix, 467 U.S. at 444).

Agent Russell's search was not the only search of the truck. Trooper Gear also conducted a "Level II - Walk-Around" inspection, pursuant to a Tennessee law that allows such inspections "upon reasonable belief that any motor vehicle is being operated in violation of [Tennessee traffic laws]." Tenn. Code Ann. § 65-15-106(3); see also United States v. Dominguez-Prieto, 923 F.2d 464, 468 (6th Cir. 1991) (finding Tennessee's commercial trucking regulations to "clearly fall within the established exception to the warrant requirement for administrative inspections in closely regulated business.") (quoting New York v. Burger, 482 U.S. 691, 703 (1987)). Stowers does not challenge Trooper Gear's authority to perform this inspection, the procedures of which come from the "Federal Motor Carrier Safety Administration" or "FMCSA". (Tr. 54); see Tenn. Comp. R. & Regs. 1340-06-01-.08 (adopting Department of Transportation safety regulations incorporating FMCSA standards and inspection methods, specifically 29 C.F.R. §§ 303.1-399.201 (excepting §§ 391.11(b) and 398), under authority of T.C.A. § 65-15-106); 49 C.F.R. § 350.105 (defining North American Standard Inspection procedure as those "developed by FMCSA in

conjunction with the Commercial Vehicle Safety Alliance (CVSA)"); (Tr. 71) (Q: "[Y]ou talked about the different levels. Is that the same levels from CVSA, the commercial vehicle - -" A: "That's right.") Trooper Gear testified that "as long as there's a lawful traffic stop made, [he] can perform an inspection." (Tr. 57); T.C.A. § 65-15-106(3)(C) ("Such enforcement officers, upon reasonable belief that any motor vehicle is being operated in violation of this part, shall be authorized to require the driver thereof to permit such officer to inspect the contents of such vehicle . . .") As part of the inspection, Trooper Gear stated that there is typically a "cab inspection," which includes "looking in the truck for illegal alcohol, narcotics, weapons, anything [the driver is] not supposed to have in the truck." (Tr. 52.) When asked for clarification about what such a cab inspection would entail, Trooper Gear testified:

Anywhere in the cab is open to inspection. Anywhere that those items that we're looking for can be found. As far as under the bunk, any bags on the top bunk, in the refrigerator, microwave. Anywhere those items can be stored.

(Tr. 53-54.) When asked again about the cab inspection on cross-examination, the following exchange took place:

COUNSEL: There was some testimony earlier about when you go into the cab, does that mean you have a full, top to bottom, pulling every single thing out - -

GREAR: Yes, sir.

COUNSEL: -- that type of thing? And you didn't do that in this case because it had already been done; is that right?

GREAR: That's right.

COUNSEL: Okay. But your testimony is that that's something that you do sometimes - -

GREAR: Yes, sir.

COUNSEL: - - in these inspections? Okay.

(R. 74-75.)

Trooper Gear clearly intended to inspect the truck whether Terrance consented or not, as shown by the video. (Ex. 1 at 33:40); (Ex. 1 at 35:00) ("As a CDL driver you give up your right to privacy[.]") Further, Trooper Gear's testimony demonstrates that he would have located the gun had he gone ahead with his full inspection. Trooper Gear testified that the reason he did not do a "full, top to bottom, pulling every single thing out" search of the cab was because Agent Russell had already done so and already located the gun. (Tr. 74-75.) The gun was found inside a toiletry bag on the top bunk of the truck's sleeper unit underneath some clothes, (Tr. 15-16), and Trooper Gear testified that "anywhere in the cab is open to inspection" including "any bags on the top bunk[.]" (Tr. 53.) No evidence was offered to dispute Trooper Gear's testimony or call into question how thorough his Level II search would have been.

Although the undersigned finds that Trooper Gear would

have inevitably discovered the gun, as discussed below, it is submitted that the doctrine does not apply because Trooper Grear's search procedures in conducting a Level II inspection of the truck would have been unconstitutional.

2. Constitutionality of Trooper Grear's Intended Inspection of the Cab

The warrant requirement to the Fourth Amendment has an exception "for searches of 'closely' or 'pervasively' regulated industries." Dominguez-Prieto, 923 F.2d at 467 (quoting Donovan v. Dewey, 452 U.S. 594, 600 (1981)). As outlined by the Supreme Court in New York v. Burger, "warrantless inspection of a pervasively regulated business is reasonable when three criteria are present:"

First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. . . .

Second, the warrantless inspection must be "necessary to further [the] regulatory scheme." . . .

[Third], "the statute's inspection program, in terms of certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." . . . In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.

Id. (quoting Burger, 482 U.S. at 702-03). Every court to examine the commercial trucking industry under this test has found that it is a "closely regulated industry within the meaning of

Burger,” and that the “North American Standard Inspection Program for commercial vehicles also adequately limits officer discretion and provides notice to truckers of the possibility of roadside inspection.” United States v. Mendoza-Gonzales, 363 F.3d 788, 794 (8th Cir. 2004) (citing United States v. Vasquez-Castillo, 258 F.3d 1207, 1210 (10th Cir. 2001)); United States v. Fort, 248 F.3d 475, 480-82 (5th Cir. 2001); Dominguez-Prieto, 923 F.2d at 468-70; see also Killgore v. City of South El Monte, 3 F.4th 1186, 1189 (9th Cir. 2021); Owner-Operator Independent Drivers Ass’n, Inc. v. United States Dep’t of Transportation, 840 F.3d 879, 895 (7th Cir. 2016). However, just because an industry is closely regulated and a particular regulatory scheme passes the Burger test does not mean that all administrative warrantless searches done under that scheme are *per se* reasonable. As the Tenth Circuit has stated, “the Burger criteria are applied generally to a statutory scheme, not to a given set of facts arising under that scheme.” United States v. Mitchell, 518 F.3d 740, 751 (10th Cir. 2008) (quoting United States v. Gwathney, 465 F.3d 1133, 1140 (10th Cir. 2006)).

Where an officer “obviously exceed[s] the authority vested in him by the [constitutional scheme],” they also “exceed the scope of a constitutionally permissible regulatory search.” United States v. Knight, 306 F.3d 534, 536 (8th Cir. 2002). In Knight, the Eighth Circuit was confronted with a situation

almost identical to the one here. Knight, a truck driver and convicted felon, was stopped by an Iowa state trooper for a traffic violation. Id. at 535. The trooper then performed a "Level III" inspection, which is identical to the Level II inspection done in the present case, except in that it involves examining the undercarriage of the truck.⁹ Id.; see United States v. Coleman, 554 F. Supp. 3d 1124, 1133-34 (D.N.M. 2021). The regulations there allowed for an officer to "check the cab for possible illegal presence of alcohol, drugs, weapons or other contraband." Id. (quoting *North American Standard Level III Driver-Only Inspection Procedure*; citing 49 C.F.R. § 350.105). The trooper proceeded to search throughout the cab and discovered a briefcase that belonged to Knight, and Knight did not consent to the search of the briefcase. Id. The trooper opened the briefcase anyway and discovered a handgun. Id. The Eighth Circuit rejected the idea that the inspection "permitted [an officer] to search all containers in the vehicle capable of

⁹A review of the caselaw suggests that certain jurisdictions switch the numbering of these inspections, meaning that sometimes the most thorough inspection is referred to as Level I and sometimes as Level III. In Coleman, for example, the most thorough inspection is referred to as a Level I inspection. Coleman, 554 F. Supp. 3d at 1133. However, common among all jurisdictions is that a Level II inspection is identical to the most thorough inspection, except for not requiring a brake check or examination of the undercarriage of the truck. (Tr. 69) (Q: "[N]o brake measurements required for Level 2?" A: "That's right." Q: "Is that what you were talking about earlier in your testimony?" A: "Level 2 is everything except for the brake adjustments.")

concealing papers, contraband, or weapons," because the Supreme Court had held that "an officer may search all containers in a vehicle capable of concealing the object of the search only when he or she has probable cause to search the vehicle." Id. at 536 (citing Wyoming v. Houghton, 526 U.S. 295, 302 (1999) and United States v. Ross, 456 U.S. 798, 820-21 (1982)). "The regulatory statute serves the function of a warrant because it explicitly limits the time, place, and scope of the authorized search as the [F]ourth [A]mendment requires, but it does not provide probable cause." Id. (internal citations omitted).

The undersigned finds that the reasoning of Knight applies here. "[E]ven when permitted, the Constitution requires that administrative inspections be 'appropriately limited.'" Bruce v. Beary, 498 F.3d 1232, 1240 (11th Cir. 2007) (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000)); see also Routhier v. Goggins, 229 F. Supp. 3d 299, 304 (D. Vt. 2017) ("An administrative search under a scheme that meets these criteria nonetheless can be unreasonable under the Fourth Amendment if it exceeds its statutorily authorized scope.") (citing Club Retro, L.L.C. v. Hilton, 568 F.3d 181, 201 (5th Cir. 2009)). Allowing Trooper Gear's search of "[a]nywhere that [illegal] items that we're looking for can be found" would place no limits on the scope of an administrative search and is precisely the type of

unfettered discretion that is prohibited by Burger.¹⁰ (Tr. 53-54); see also Liberty Coins, LLC v. Goodman, 880 F.3d 274, 291 (6th Cir. 2018) (striking down an administrative scheme for, in part, "effectively allow[ing] searches of dealers' entire businesses.").

As noted above, the Sixth and other circuits have affirmed the constitutionality of the commercial trucking regulations relevant here under the Burger test multiple times. However, those regulations limit warrantless roadside inspections to the purpose of ensuring compliance with safety standards. 49 C.F.R. § 396.9. When searching a cab or sleeper cabin, an officer may not exceed "the spatial scope" of the administrative inspection, which by the regulations' own terms is limited to the cab,

¹⁰This finding does not comment, in any way, on Trooper Gear's individual motives for the inspection. "Where officers are engaged in a proper administrative search, the officers' motive is irrelevant; what matters is whether their conduct was objectively reasonable." Salem v. City of Akron, 448 F. Supp. 3d 793, 810 (quoting Johnson, 408 F.3d at 1323 (citing Whren v. United States, 517 U.S. 806, 813 (1996))). By contrast, a program wherein troopers are told to perform administrative inspections, not based on any independent reasonable suspicion, which are explicitly meant to search for illegal items could be seen as indistinguishable from a general aim to prevent "ordinary criminal wrongdoing," which the Supreme Court has found to be an unconstitutional purpose for administrative searches. Edmond, 531 U.S. at 41 ("[W]hen the government seeks to ferret out crime, it is fully expected to comply with the Fourth Amendment."); see also United States v. Johnson, 408 F.3d 1313, 1321 (10th Cir. 2005) ("Inspections of . . . business premises . . . conducted not as part of a pre-planned and dispassionate administrative procedure but instead pursuant to direct criminal suspicion . . . give [] cause for grave constitutional concern.").

sleeper, and compartments within those areas, not the personal belongings housed therein. See 49 C.F.R. §§ 300-399; see also Mendoza-Gonzalez, 363 F.3d at 791 (inspecting officer testifying that “*consent* permits an officer to go *beyond* the standard inspection and to look inside the driver’s personal belongings for illegal items,” implying that a search of personal belongings exceeds a Level II search) (emphasis added); State v. Pompa, 414 N.J. Super. 219, 232-33 (N.J. Sup. Ct. App. Div. 2010), cert. denied, 205 N.J. 14 (2010) (analyzing the same federal administrative search and safety regulations and finding that “the regulations do not encompass closets or personal belongings located inside a sleeper cabin[.]”). Such limits on scope are necessary to prevent administrative stops from becoming “pretexts for crime control.” Knight, 306 F.3d at 537 (quoting Edmond, 531 U.S. at 40) (internal quotation marks omitted).

Trooper Grear’s testimony about what he would have done had Agent Russell not found the gun describes an unconstitutional search that would fall outside the scope of the administrative regulations he was enforcing. The inevitable discovery doctrine applies where evidence was “obtained illegally but would have [been] obtained legally in any event.” United States v. Johnson, 380 F.3d 1013, 1014 (7th Cir. 2004) (citing Murray, 487 U.S. at 539). The evidence before the court establishes that the gun,

which was found through an illegal consent search, would have been found inevitably by an illegal administrative search.

III. RECOMMENDATION

Because the gun was found as a result of an unlawful search, the gun and Stowers's statements about the gun must be suppressed. See Wong Sun, 371 U.S. at 486 (1963). It is recommended that the Motion to Suppress be granted.

Respectfully submitted,

s/ Tu M. Pham

TU M. PHAM
Chief United States Magistrate Judge

May 13, 2022

Date

NOTICE

WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THIS REPORT AND RECOMMENDED DISPOSITION, ANY PARTY MAY SERVE AND FILE SPECIFIC WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS. FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.