

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	No. 03-20058 BV
)	
YOSVANY CABRERA and)	
YORDANIS ESCRIBA RUIZ,)	
)	
Defendants.)	

REPORT AND RECOMMENDATION
ON DEFENDANTS' MOTIONS TO SUPPRESS

The defendants, Yosvany Cabrera and Yordanis Escriba Ruiz, have been indicted on charges of knowingly possessing and using more than fifteen counterfeit access devices during November of 2002, and of conspiring to use and possess such counterfeit access devices, all in violation of 18 U.S.C. §§ 371 and 1029(a)(1) and (3). Cabrera is additionally charged with one count of using a counterfeit access device in violation of 18 U.S.C. § 1029(a)(1) and (2).

Before the court are motions to suppress filed by Cabrera and Ruiz. The defendants seek to suppress items seized on or about November 26, 2002 by police officers from their persons and vehicle and a statement made during transport to Memphis's 201 Popular Avenue police station. As grounds for their motions, both

defendants contend that the evidence was obtained from an unlawful stop and search in violation of the Fourth Amendment and an unlawful custodial interrogation in violation of the Fifth Amendment. Both motions were referred to the United States Magistrate Judge for an evidentiary hearing and a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C).

An evidentiary hearing was held on July 31, 2003. The government called three witnesses: Officer Corey Tate, Officer Antonio Castro, and Sergeant Joseph Poindexter, all of the Memphis Police Department. The defendants called no witnesses but introduced the arrest ticket from November 26, 2003 as an exhibit. After carefully considering the arguments of counsel, the testimony of the witnesses, and the entire record in this cause, the court submits the following proposed findings of facts and conclusions of law and recommends that the motions should be denied.

PROPOSED FINDINGS OF FACT

Because the defendants presented no witnesses, the testimony presented by the government stands uncontradicted. The court finds that testimony credible and accepts as fact the officers' version of events.

At about 6:15 p.m. on November 26, 2002, Memphis Police Department officers on patrol received a general dispatch call to a '76 gas station at 4585 Poplar Avenue in Memphis, Tennessee,

where a clerk had reported that two Hispanic-looking men driving a 90's model green Chevrolet Suburban had attempted to make a purchase with a stolen credit card.¹ Neither the dispatcher nor the complainant indicated which man actually had attempted to use the card. Officer Corey Tate was the first to respond, approaching in his patrol vehicle within a couple of minutes of the dispatch call. From his patrol car, he saw a green Chevrolet Suburban leaving the parking lot of the '76 station at 4585 Poplar. He activated his blue lights and stopped the Suburban on Perkins Avenue, a cross street intersecting Poplar. The stop occurred about one thousand feet from the '76 gas station exit. Sergeant Poindexter arrived on the scene shortly thereafter.

Officer Tate exited his patrol vehicle and saw two Hispanic-looking males inside the Suburban. Without his weapon drawn, he approached the Suburban on Cabrera's side. Officer Tate ordered both the Suburban's occupants out of the Suburban as Sergeant Poindexter approached in his patrol car. Officer Tate asked Cabrera to place his hands on the hood of the Suburban and frisked him. Officer Tate detected nothing resembling a weapon, but removed Cabrera's wallet and placed it on the hood of the Suburban.

¹ The arrest ticket introduced into evidence indicates that the complainant identified two "Arabic-looking" males. See Ex. 1. At the hearing, the officers uniformly testified that the dispatch call went out for two "Hispanic-looking" males.

Tate proceeded to question Cabrera, asking his name, where he was from, what he was doing at the '76 station, and whether he had the credit card used at the station. Cabrera appeared to understand some English but spoke only in broken English. He followed Officer Tate's English instructions to remove his hands from the pockets of his coat, but could not answer questions with English narrative responses. Cabrera produced a Pennsylvania driver's license from his wallet. When he did so, Officer Tate saw inside the wallet several credit cards all issued by the same bank. Cabrera named a town as his residence, but it did not match the town on the driver's license that he had produced. The officers also testified that none of them believed the town was in Pennsylvania. Cabrera could not repeat other identifying information on the Pennsylvania driver's license. He indicated that he was visiting Ruiz in Memphis on the way to California.

Sergeant Poindexter dealt with Ruiz. Ruiz was questioned minimally if at all, and no witness testified to the specifics of any such questioning. Apparently Ruiz's wallet also was removed from his person at some point, but none of the testifying officers could recall who had removed it, whether Ruiz also was frisked, or whether Ruiz produced any form of identification.

The officers adjudged that the questioning "wasn't going anywhere" because of the language barrier and sent out a general

dispatch call for a Spanish-speaking officer.

The officers and both defendants gathered on the passenger side of the green Suburban. At this juncture, approximately six credit cards were removed from Cabrera's wallet. It is unclear who removed them. Officer Duke, who had arrived on the scene but who did not testify, went to the '76 gas station where the complaint had originated, obtained the card number associated with the complaint, and matched it to one card from Cabrera's wallet. The name on the card matched the name on the Pennsylvania driver's license. Officer Duke brought the remaining credit cards back to the '76 station, where he began to call the issuing banks.

Officer Castro, a Spanish-speaking officer, then arrived on the scene. He saw that the defendants were not cuffed or physically restrained but testified that they were in custody and not free to leave. The officers on the scene asked Officer Castro to question the defendants about their identities. He did not administer *Miranda* warnings. He did not ask whether other officers had administered *Miranda* warnings but assumed they had not, because no other Spanish-speaking officer was on the scene. Officer Castro asked Cabrera, in Spanish, the same identifying questions Officer Tate had attempted to ask. In response to Officer Castro's questioning in Spanish, Cabrera again produced the Pennsylvania driver's license. He then produced a Florida driver's license and

handed it to Officer Castro. Officer Castro asked Cabrera the identity of his friend (Ruiz), and Cabrera responded in Spanish, "I only know him as 'The Mouth' ('La Boca')." Officer Castro does not recall asking any questions other than those associated with identification, nor asking any permission to search the defendants or the Suburban.

Officer Duke then returned from the gas station with word that the remaining credit cards, although valid, had been issued in names other than those of the defendants. At this point, officers handcuffed both Cabrera and Ruiz, placing them in the back of a patrol vehicle. Officer Castro drove the defendants from the scene to the booking station at 201 Poplar Avenue. En route, Officer Castro overheard one defendant say to the other in Spanish, "Keep your mouth shut; don't tell them anything." At no time during transport did Officer Castro converse with either defendant. The remaining officers determined that the Suburban would be towed, searched the Suburban, and recovered from the center console between the driver and passenger's seats about fifteen credit cards bundled together with a rubber band.

PROPOSED CONCLUSIONS OF LAW

Because the initial stop, the seizures and searches of the defendants, the search of the Suburban, and the seizure of evidence all were performed without a warrant, the government bears the

burden of proving that they were lawful under the Fourth Amendment.
5 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.2(b) (3d ed. 1996).
Each of the government's acts must be considered separately.
United States v. Bentley, 29 F.3d 1073, 1075 (6th Cir. 1994).

The government argues that probable cause to stop and arrest both defendants arose when Officer Tate first spotted the green Suburban leaving the '76 gas station from which the complaint originated. Thereafter, the government argues, the seizures and searches were exempt from the Fourth Amendment's warrant requirement because probable cause to arrest had arisen and all searches were incident to the defendants' lawful arrests.

The defendants contend that the facts leading up to the stop gave rise to only a reasonable suspicion justifying a *Terry* stop of the defendants, and that the probable cause to arrest is tainted because it arose from an unconstitutional search of Cabrera and his wallet. See *Terry v. Ohio*, 392 U.S. 1 (1968).

The Fourth Amendment prohibits warrantless seizures and searches of both persons and vehicles unless an exception to the warrant requirement applies. U.S. CONST. amend. IV; *United States v. Roarke*, 36 F.3d 14, 17 (6th Cir. 1994) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). "Stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning

of" the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). However, no warrant is needed to stop a vehicle traveling on the open highway when police have probable cause to believe the vehicle contains contraband or evidence of a crime. *United States v. Ross*, 456 U.S. 798, 805 (1982) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1923)). In addition, a warrantless arrest is lawful when the arresting officer has probable cause to believe a crime has been or is being committed. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 112-14 (1975) (noting that the Supreme Court "has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant"). "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)).

A stop of a vehicle is permitted if there is "reasonable suspicion" that a crime has been committed. *Terry v. Ohio*, 392 U.S. at 21. In this case, there clearly was reasonable suspicion to justify an initial *Terry* stop. The two men in the Suburban matched the description of the individuals who allegedly had attempted to use an illegal credit card; the vehicle matched the description of the one in which the individuals were observed

leaving the gas station; and the two men and the Suburban were in the right time at the right place.

The critical issue in this case is whether officers have probable cause to stop a vehicle, seize its occupants, search them, and arrest them when an identified witness lodges a complaint of credit card fraud with a description of the vehicle occupied by the individuals who attempted to use the stolen card, and when responding officers see a matching vehicle leaving the location where the complaint originated.

The Sixth Circuit considered similar circumstances in *United States v. Jackson*, 525 F.2d 1025 (6th Cir. 1975). In *Jackson*, an identified witness, Mike Lewellyn, reported that a green Chevrolet Camaro with a black hood in his driveway contained four males with sawed-off shotguns. By the time officers responded, the Camaro was on the move. The officers interviewed Debbie Lewellyn. The officers then issued an order over the police radio that described the Camaro and the direction in which the Camaro was traveling. Other officers stopped the vehicle, searched it, and arrested the occupants. The Sixth Circuit held that, under the circumstances, probable cause to arrest arose prior to the actual stop. (*Id.* at 1026.)

The facts at bar differ very little from *Jackson*. The information supplied to the police was very specific; the car and

its occupants were distinctive; very little time, less than a few minutes, had elapsed between the call and the officers' response; and Officer Tate saw the vehicle matching the one described by the complainant leaving the gas station. The only difference is that the police officers in the present case did not interview the complainant upon their arrival on the scene. However, the officers' visual corroboration of the complainant's description of the vehicle, the two individuals, and the location and time sufficiently verified the information received from the complainant. Based on *Jackson*, this court submits that probable cause to arrest arose at the point in time Officer Tate saw the green Suburban leaving the gas station driveway. *But see United States v. Ngai Man Lee*, 317 F.3d 26 (1st Cir. 2003) (finding that nearly identical facts gave rise to reasonable suspicion rather than probable cause).

Even if probable cause did not exist at the time of the stop of the defendants, probable cause developed during the stop. Cabrera could not recall the identifying information on the Pennsylvania driver's license that he provided to the police. The town Cabrera named as his residence did not match the town on the Pennsylvania driver's license. In addition, the officers did not believe that the town Cabrera identified as his hometown in Pennsylvania was even in Pennsylvania. These inconsistencies gave

rise to probable cause to search Cabrera's wallet. After retrieving credit cards from Cabrera's wallet, Officer Duke interviewed the clerk at the gas station and obtained additional information, that is, the name and number on the credit card used at the gas station. It matched a credit card in Cabrera's wallet and the name on the Pennsylvania driver's license. Officer Duke obtained additional information from the credit card companies. The credit card companies reported that the other credit cards in Cabrera's wallet were validly issued but not to Cabrera. Thus, probable cause developed to arrest the defendants.

Accordingly, this court submits also that the searches of Cabrera, Ruiz, and the Suburban were proper searches based on probable cause. In addition, the search of the Suburban is independently justified by the inventory search exception to the warrant requirement. This exception arises when law enforcement officers search a legitimately seized vehicle in accordance with official procedure. *United States v. Hurst*, 228 F.3d 751, 758 (6th Cir. 2000); *United States v. Lumpkin*, 159 F.3d 983, 986-87 (6th Cir. 1998). Here, both potential drivers had been arrested and the officers determined in the course of the arrests that the vehicle would be towed; these circumstances would justify an inventory search.

The final issue is whether the statements made during

transport should be suppressed. The Constitution's Fifth Amendment privilege against self-incrimination prohibits the introduction of statements made during custodial interrogations unless the defendant was advised of his constitutional rights and subsequently waived them. *Miranda v. Arizona*, 384 U.S. 436 (1966). The parties stipulate that the defendants were in custody in Officer Castro's patrol vehicle. See *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) to define "custody" as the level of restraint on freedom of movement normally associated with a formal arrest). However, the statement "Keep your mouth shut; don't tell them anything," was not the result of interrogation; it was spontaneously communicated from one defendant to the other. Officer Castro testified that he engaged in no conversation or interrogation with the defendants. He could not even discern who made the statement. At the hearing, Ruiz, through his attorney, stipulated that it was a voluntary, spontaneous statement, and this court finds it voluntary and spontaneous as to Cabrera also. Accordingly, it is submitted that the statement should not be suppressed.

RECOMMENDATION

For the foregoing reasons, this court submits that probable cause existed to stop and arrest Ruiz and Cabrera and search their persons and the vehicle, and that the statements made in the patrol

car during transport were voluntary and spontaneous and therefore not the result of custodial interrogation. Accordingly, this court recommends that both Cabrera and Ruiz's motions to suppress be denied.

Respectfully submitted this 6th day of August, 2003,

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE