

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

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

No. 03-20082-BV

ANDREW CLAYBORN,)

Defendant.)

REPORT AND RECOMMENDATION
ON DEFENDANT'S MOTION TO SUPPRESS

The defendant in this case, Andrew Clayborn, has been indicted on one count being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). The charge arises out of an encounter by police officers with a stationary vehicle in which Clayborn was sitting as a passenger and the subsequent seizure by police officers of a loaded .25 caliber pistol from Clayborn's person. Clayborn has moved to suppress the pistol and ammunition, as well as all statements made during his detention. As a basis for the motion, Clayborn argues that he was unreasonably detained and searched in violation of his rights under the Fourth Amendment and that his statements were the result of an unconstitutional custodial interrogation in violation of his rights under the Fifth Amendment.

Clayborn's motion was referred to the United States Magistrate Judge for a report and recommendation. Pursuant to the reference order, an evidentiary hearing was held on August 5, 2003. At the hearing, the government presented one witness, Officer Shayne Tarena of the Memphis Police Department, and introduced as an exhibit a Rights Waiver Form signed by the defendant. The defense called no witnesses, but introduced into evidence a misdemeanor citation ticket issued the night of Clayborn's arrest. After careful consideration of the statements of counsel, the testimony of the witnesses, the exhibit, and the entire record in this cause, this court submits the following findings of facts and conclusions of law and recommends that the motion to suppress be denied.

PROPOSED FINDINGS OF FACT

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

At approximately 2:00 a.m. on April 9, 2002, Memphis Police Department Officers Shayne Tarena and Michael Bishop were conducting their routine patrol in a marked squad car in the north precinct of Memphis, Tennessee, near the intersection of the Joseph and Bellevue. Officer Tarena had worked this precinct before and knew from his experience that the area suffered from high rates of

drug, firearm, and burglary activity.

While proceeding north on Bellevue, the officers saw a van parked in the middle of the road facing south, several feet away from the curb. Officer Tarena testified that another vehicle trying to get around it would be forced into the oncoming traffic lane. The officers saw two men in the van and noted that the van was not moving and was dark except for its running lights. The officers, after observing that the van had been motionless for at least thirty seconds, made a U-turn in their patrol car to pull up behind the van, facing south. The area had a few streetlights but was dark in that particular spot. Without using blue lights or sirens, the officers fixed their squad car spotlights on the van.

Immediately, a man later identified as James Holmes got out of the van's driver's side and approached the police vehicle at a rapid pace. Officer Tarena, based on his experience with traffic stops, testified that this was unusual. The officers promptly left their police vehicle and moved to intercept Holmes. Officer Bishop met Holmes near the front of the squad car. Officer Tarena stayed on the passenger side of the squad car where he could see and hear the exchange while simultaneously watching Clayborn, who remained seated in the van's front passenger seat.

Officer Bishop asked Holmes a series of questions, including, "What are you doing here?" and "Why are you parked in the street?"

While this exchange occurred, Officer Tarena saw Clayborn "fidgeting" in the passenger seat of the van and making "furtive" movements. Clayborn was constantly checking the passenger side rear-view mirror and simultaneously moving from side to side in the seat, bobbing his shoulders up and down, and occasionally leaning over. Officer Tarena testified that, based on his experience with traffic stops, this physical activity was unusual and potentially associated with an attempt to hide contraband of some kind. Officer Tarena was concerned because he could not see Clayborn's hands.

Officer Bishop then asked Holmes if he could produce a driver's license, and Holmes said he could not. Officer Bishop secured Holmes and placed him in the back seat of the squad car. The officers then turned their attention to Clayborn, and Officer Tarena told Officer Bishop, "He's got something." Officer Tarena cautiously approached the van on the passenger side. Officer Bishop approached the van on the driver's side, coming around the front of the van to cover Clayborn. They asked Clayborn to exit the van, which he did. At this point the officers could see Clayborn's hands, and Clayborn appeared cooperative.

Officer Tarena asked Clayborn, "Do you have anything [on you] that I need to know about?" Clayborn said, "No." Officer Tarena then asked, "Mind if I check?" Clayborn answered, "Sure." Officer

Tarena then conducted a pat-down of Clayborn and felt in Clayborn's waistband a hard, heavy object that he believed was a gun. Officer Tarena called to Officer Bishop, "Gun!" and simultaneously used his forearm to secure Clayborn against the side of the van. Officer Tarena then reached into Clayborn's right front pocket and removed a .25 caliber pistol. The weapon was loaded. The officers handcuffed Clayborn and secured him in the squad car.

The officers then initiated questioning pursuant to Memphis Police Department policy. Following the execution by Clayborn of Rights Waiver Form, introduced into evidence as Exhibit 1, Officer Tarena determined that Clayborn last completed a Grade 14 education, advised Clayborn that this was an investigatory interview, advised Clayborn of the crime with which he may be charged, and administered *Miranda* warnings. Officer Tarena then asked, after the *Miranda* warnings, "Do you understand each of these rights I have explained to you?" and "Having these rights in mind do you wish to answer my questions at this time?" (Ex. 1.) Clayborn answered both questions in the affirmative, and Officer Tarena wrote down these responses on the form. Still following the form, Officer Tarena then asked for Clayborn's criminal history, where he obtained the gun, why he was carrying it, and other questions. Clayborn answered all the questions. At the end of the interview, Officer Tarena, still following the form, asked two

concluding questions: "Have you given these answers freely and voluntarily without any threats, coercion, or promises?" and "Have you been treated fairly?" Clayborn again answered both in the affirmative. Officer Tarena wrote down these responses, and then Clayborn signed the form and dated it April 9, 2002, 2:27 a.m. Officer Tarena testified that he did not threaten Clayborn or promise him anything in return for his statement.

PROPOSED CONCLUSIONS OF LAW

Clayborn now argues that the fruits of the search should be suppressed because they were seized during an unconstitutional detention and search of his person, and that his statements should be suppressed because they were obtained during a custodial interrogation in violation of his rights under the Fifth amendment and because they were the result of a detention that was based solely on evidence discovered during an unconstitutional search.

In a supplemental motion filed after the hearing, Clayborn contends, in addition, that certain statements he made to the police, specifically the oral consent to search, should be excluded as violative of Rule 16 of the Federal Rules of Criminal Procedure. In the alternative, Clayborn urges that Officer Tarena's testimony on that issue was not credible and seeks an additional evidentiary hearing in order to recall Officer Tarena and to elicit testimony from Officer Bishop on that point.

A. The Detention and Frisk

A vehicle passenger has a Fourth Amendment right to be free from an unreasonable seizure, see *United States v. Hensley*, 469 U.S. 221, 226 (1985), and can challenge his own detention, *United States v. Carter*, 14 F.3d 1150, 1154 (6th Cir. 1994). The parties do not genuinely argue over the propriety of the officers' initially detaining Clayborn or ordering him from the van. They stipulate to the clearly-established rule that an officer is entitled to ask the driver as well as any passengers to exit a vehicle during an investigatory stop. See, e.g., *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997); *United States v. Saucedo*, 226 F.3d 782, 790 (6th Cir. 2000) (citing *Wilson*). They also stipulate that, under the totality of the circumstances, such a request was justified in this case.

Clayborn's argument primarily addresses his frisk, urging that regardless of their reasons for detaining Holmes, the officers had no justification for searching Clayborn's person. Clayborn urges that under *Terry* a reasonable suspicion of criminal activity is only enough to detain, and that before frisking a detainee officers also must have a particularized suspicion that the detainee is armed and dangerous. He insists that he was cooperative upon leaving the van, that Officer Tarena did not know what, if anything, his unusual movements in the passenger seat might mean,

and that Officer Tarena was speculating when he testified that he believed Clayborn was attempting to hide something.

In support of his argument, Clayborn relies on *Ybarra v. Illinois*, 444 U.S. 85 (1979). In *Ybarra*, a man was detained and subjected to a *Terry* frisk when he was present in a tavern that officers entered pursuant to a search warrant. The officers found on Ybarra a cigarette pack containing heroin. The court suppressed the heroin, holding that the officers had no reasonable suspicion that the cigarette pack was a weapon or that Ybarra was otherwise dangerous to officer safety.

It is submitted, however, that *Ybarra* does not control under the facts at bar. The circumstances surrounding a traffic stop justify a high level of officer vigilance, see *Wilson*, 519 U.S. at 414-15 (noting higher likelihood of danger to an officer when a stopped vehicle has passengers), and under the totality of the circumstances it is submitted that Officer Tarena reasonably could suspect that Clayborn was armed and dangerous. The encounter took place in the early morning hours. The van under investigation was parked, with its lights doused, in a dark area with few streetlights. It was not pulled to the curb but was partly blocking the traveling lane and had been stationery in that lane for at least thirty seconds. The area was known to officers from personal experience to be a high-crime, high-drug area. The

officers also testified that, in their experience, guns and drugs often traveled together. The other van occupant already had behaved atypically by leaving the van and approaching the patrol car at a rapid pace. Clayborn, too, had been unusually active, checking the rear-view mirrors more often than a typical passenger during a traffic stop, and moving around inside the van and bending over in an odd way that Officer Tarenta, in his experience, associated with the motions of a person trying to hide something. Although Officer Tarenta admitted on cross-examination that the object being hidden, if that was the case, could be drugs, guns, or any other object, at the time Officer Tarenta was so convinced that Clayborn was hiding potentially dangerous contraband that he not only indicated to his fellow officer, "He's got something," but also requested assistance from his fellow officer before he approached Clayborn in the van.

It is submitted that, under the circumstances, Officer Tarena was reasonable in his suspicion that Clayborn was armed and dangerous. This court, accordingly, submits that a *Terry* pat-down was proper to ensure officer safety under these circumstances and did not violate Clayborn's Fourth Amendment rights.

B. Consent to Frisk

Even if Officer Tarenta lacked a reasonable suspicion that Clayborn was armed and dangerous, the frisk still is justified by

the consent exception to the warrant requirement. A search conducted with the property owner's voluntary consent is an exception to the Fourth Amendment's proscription against warrantless searches. *Schneckloth v. Bustmonte*, 412 U.S. 218, 222 (1973). An officer does not violate the Fourth Amendment by approaching an individual and asking for consent to search, even when there is no reasonable suspicion that a crime has been committed. *United States v. Erwin*, 155 F.3d 818, 823 (6th Cir. 1998).

The voluntariness of consent is a question of fact, to be proved by the government, *id.*, and determined from the totality of all the circumstances, *id.* at 227. The Sixth Circuit described the analysis for determining the validity of a consent to search in *United States v. Riascos-Suarez*, 73 F.3d 616 (6th Cir. 1996), as follows:

A search may be conducted without a warrant if a person with a privacy interest in the item to be searched gives free and voluntary consent. A court will determine whether consent is free and voluntary by examining the totality of the circumstances. It is the Government's burden, by a preponderance of the evidence, to show through "clear and positive" testimony that valid consent was obtained. Several factors should be examined to determine whether consent is valid, including the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her

constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police.

Riascos-Suarez, 73 F.3d at 625 (internal citations omitted).

After considering the totality of the circumstances, this court concludes defendant's consent to search was freely and voluntarily given. Clayborn's age and intelligence indicated the ability to freely consent. His detention during the investigation had been very brief, as evidenced by the time-stamped signature on the Rights Waiver Form. Clayborn's prior conviction suggests a familiarity with his constitutional rights and with criminal procedure, and there was no evidence of coercion or intimidation by the officers. Thus, it is submitted that the frisk was valid and evidence seized from the frisk should be admitted.

C. Statements to Law Enforcement Officers

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 do not dispute that Clayborn was in custody when he was handcuffed and restrained at the scene, see *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (noting that "[t]he ultimate inquiry is simply whether there

is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest'") (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)), nor do they disagree that Clayborn was interrogated when he was expressly questioned, see, e.g., *United States v. Knox*, 839 F.2d 285, 295 (6th Cir. 1988) (Jones, J., concurring) (noting that express questioning is questioning for purposes of *Miranda*) (citing *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

The inquiry regarding statements by Clayborn in response to interrogation is whether Clayborn was advised of his rights. This court has found as fact that Officer Tarena, following the Rights Waiver Form, administered *Miranda* warnings prior to substantive questioning. Officer Tarena also presented Clayborn with the form, which Clayborn signed without protest and after orally affirming that he had been treated fairly and that his statements were voluntary. As discussed above, his age, experience, and education all indicate ability to give knowing and voluntary consent. Clayborn did not request an attorney at any time. Based on the foregoing facts, the court submits that the interrogation was lawful and that Clayborn's statements should not be suppressed.

D. Rule 16 of the Federal Rules of Criminal Procedure

Clayborn contends that his oral statement granting permission to search should be excluded because the government failed to

reveal the statement in response to Clayborn's discovery request for all discoverable items.

Rule 16 provides that

[u]pon request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

Fed. R. Crim. P. 16(a)(1). If a party fails to comply with Rule 16, the court may, among other sanctions, prohibit that party from introducing the undisclosed evidence or enter any other order that is just under the circumstances.

Here, there was no violation of Rule 16. Clayborn's initial responses of "no" and "sure" were not elicited by interrogation. Nor does the government intend to use these statements at trial. Accordingly, sanctions are not warranted.

RECOMMENDATION

Based on the foregoing, it is submitted the officers' frisk of Clayborn was justified under the totality of the circumstances by a reasonable suspicion that Clayborn was armed and dangerous and also independently justified by Clayborn's voluntary consent to a frisk. In addition, it is submitted that Clayborn's signature and representations on the Rights Waiver Form indicate that he was adequately advised of his rights prior to custodial interrogation.

Accordingly, this court submits that none of the officers' actions violated Clayborn's Fourth or Fifth Amendment rights or Rule 16 of the Federal Rules of Criminal Procedure and recommends that Clayborn's motion to suppress be denied and that Clayborn's request for a second evidentiary hearing should be denied.

Respectfully submitted this 21st day of August, 2003.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE