

IN THE DISTRICT COURT OF CUSTER COUNTY

STATE OF OKLAHOMA

FILED
DISTRICT COURT
Custer County, Okla.

MAY 15 2015

sm
STACI HUNTER
COURT CLERK

STATE OF OKLAHOMA,)
PLAINTIFF,)

vs.)

Case No. CF-14-407

KEITH KROSNICKI,)
DEFENDANT.)

COURT ORDER

This matter came on for preliminary hearing on the 7th day of May, 2015. State appeared by Ricky McPhearson. Defendant appeared by Mark Henricksen. The Court received sworn testimony and took the matter under advisement.

FINDINGS OF FACT

1. On December 26, 2014, Defendant was driving a mini-van in Custer County on 1-40. The van had an out of state tag.
2. Custer County Deputy Dillon Mach stopped Defendant for driving 73 in a 70 mile per hour zone.
3. A video recording of the stop was admitted as State's Exhibit 1, and the Court has reviewed the recording.
4. Based on the testimony at preliminary hearing and review of the video recording, the Court determines the following facts.
5. Deputy Mach approached the van and requested insurance and registration. These were provided along with a written note giving the passenger permission to use the van.
6. The passenger was in the back of the van. All seats except the front driver seat and front passenger seat had been removed from the mini-van.
7. Deputy Mach asked Defendant to go back to the Deputy's vehicle, and Mach questioned the passenger about travel plans. The passenger indicated that they were traveling from Quartzite, Arizona, on their way to visit his son in Kansas. According to Deputy Mach, they planned to stay a day or two (this part of the conversation was inaudible on the recording). The occupants of the vehicle agree that they have known each other for ten years.

8. Deputy Mach returned to his car and visited with the Defendant who told him that they were headed to the passenger's son's house at a small town in Oklahoma. He did not know the name of the town, but he thought it was on the other side of the state. He stated that he came along to help drive. They planned to stay for the day, drop off some gifts, and return to Arizona. Defendant was off work until Monday (December 29, 2014).
9. Defendant told Deputy Mach that the van belonged to the passenger's mother who removed the seats so that she could transport goods for a farmer's market. He mentioned that it was convenient because then they could sleep back there during the long road trip. They were not staying at hotels. One would sleep while the other occupant drove the mini-van. Defendant said that they left Quartzite on 5:00 or 6:00 the day before.
10. Mach wrote Defendant a warning for speeding, returned his paperwork, and told Defendant that he was free to go. Mach then asked Defendant if he had a minute, and he proceeded to ask additional questions about travel plans. He asked if Defendant knew the son's name; Defendant was not sure. Deputy Mach then asked about drugs in the car, and then asked Defendant for permission to search
11. Defendant responded to the request for consent to search saying, "No, it's not my vehicle, so I can't give you permission".
12. Mach says on the recording that he always asks the driver for permission even if the owner is present. Mach then tells Defendant that he is going to deploy his canine because it is odd that they were going to drive from Arizona to Oklahoma for a day to visit family for only one day. Mach repeated several times that "It is just odd".
13. Deputy Mach testified at preliminary that the following factors gave him reasonable suspicion to extend the search to run the canine:
 - a. Inconsistent travel plans: Defendant said they were going to passenger's son's home in Oklahoma for one day and passenger said they were going to his son's home in Kansas for a day or two.
 - b. Long trip with a short turn around. Mach thought it odd that someone would make such a long trip to just drop off packages for a son.
 - c. No back seats in the van.
 - d. Driver refused consent to search
14. Deputy Mach testified that the Defendant's refusal to consent to search weighed in his determination of reasonable suspicion; however, he could not quantify the factors he considered.
15. The dog alerted on the vehicle, and Deputy Mach found three boxes containing heat sealed plastic bags of marijuana. The total weight was

around ten pounds. There was also some methamphetamine and THC candy.

CONCLUSIONS OF LAW

Although it is not dispositive of Defendant's case, the Court is concerned by Deputy Mach's statement that he always asks the driver for consent, even if the owner is present. This is contrary to case law:

Where a person with equal or superior property interest is present and able to object to a search, and the officer knows of the property interest, that person should be asked for consent to search.

Johnson v. State, 1995 OK CR 43.

The real question before the Court today is whether or not Deputy Mach articulated reasonable suspicion of criminal activity which would justify detaining Defendant beyond the completion of the traffic infraction investigation. *Rodriguez v. United States*, 575 U.S. ____ (2015). Reasonable suspicion is not absolute certainty, but more than an inchoate and unparticularized hunch or suspicion. Would a reasonably prudent person in the circumstances be warranted in the belief that Defendant was engaged in criminal activity? *Terry v. Ohio*, 392 U.S. 1 (1968). Can the officer articulate particular facts to support the suspicion that criminal activity was afoot? The observed conduct does not itself have to be illegal, and may in fact be consistent with innocent travel. The question is how much suspicion attaches to particular types of noncriminal acts *United States v. Sokolow*, 490 U.S. 1 (1989).

Deputy Mach articulated four factors he says gave rise to his suspicion that there were drugs in the car:

1. Inconsistent travel plans: Defendant said they were going to passenger's son's home in Oklahoma for one day and passenger said they were going to his son's home in Kansas for a day or two.
2. Long trip with a short turn around. Mach thought it odd that someone would make such a long trip to just drop off packages for a son.
3. No back seats in the van.
4. Driver refused consent to search.

Both occupants agreed that they were going to see the passenger's son, but they disagreed as to how long they would stay and as to where the son was located. It is conceivable that the Defendant, who was basically along for the ride and to help drive, may not be clear on the destination and duration of the trip. He had a firm deadline of being back at work on Monday, December 29, 2014. That is consistent with a one or two day stay at the destination.

Deputy Mach did not believe that anyone would travel at Christmas across four states to deliver a package and leave when the package could be shipped. He stated that he would expect family to visit for longer than a day or two after such a long trip. The Tenth Circuit has been reluctant to find uneconomical or unusual travel plans (plans that a typical person or the arresting officer wouldn't make) constitute reasonable suspicion. However, implausible or bizarre travel plans along with other factors, may be deserving of some weight. *U.S. v. Simpson*, 609 F.3d 1140 (2010). While not economical, these travel plans are not bizarre.


Modification of vehicles to hide or transport drugs can be a basis for reasonable suspicion. For instance, the Court has heard testimony in other cases about panels that have obviously been removed in order to hide CDS or modifications to make hidden compartments. The removal of seats would convert the mini-van to a cargo van. It is obvious that Deputy Mach could see into the back of the van to speak with the passenger. He did not testify that he saw anything suspicious in the van other than the removal of the seats. Defendant gave a plausible explanation for the removal of the seats, and Deputy Mach did not articulate a basis to believe that removal of the seats indicated criminal activity.

The final basis for Deputy Mach's reasonable suspicion is of the most concern. He testified that he relied in part on Defendant's refusal to consent to search as a basis for reasonable suspicion. Consideration of refusal to consent to search of a car for reasonable suspicion violates the Fourth Amendment. *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997). "We recognize that "[t]he failure to consent to a search cannot form any part of the basis for reasonable suspicion." *U.S. v. Dozal*, 173 F.3d 787 (10th Cir. 1999). This alone is a basis to suppress the evidence, but even if the

Court ignores this violation of Defendant's Fourth Amendment rights, the Court finds that, considering the totality of the circumstances, Deputy Mach did not articulate reasonable suspicion to detain Defendant in order to run his drug dog on the vehicle.

IT IS THEREFORE ORDERED THAT the Court grants Defendant's Motion to Suppress, and sustains the demurrer.

Signed this ___ day of May, 2015.



JUDGE OF THE DISTRICT COURT

I, Staci Hunter, Court Clerk for Custer County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the Court Clerk's Office of Custer County, Okla. This 18th day of May, 2015
Staci Hunter
Court Clerk, Custer County
By Nicholas Moore Deputy

