

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	*	
	*	
Plaintiff,	*	4:03-cr-305
	*	
v.	*	
	*	
LARRY MICHAEL SMITH,	*	
	*	ORDER
Defendant.	*	
	*	

On December 17, 2003, Defendant Larry Michael Smith (“Defendant”) was indicted on one count of possession with intent to distribute methamphetamine and one count of possession with intent to distribute marijuana, both in violation of 21 U.S.C. § 841(a). Defendant filed a motion to suppress evidence on February 9, 2004 (Clerk’s No. 16), requesting that certain physical items and statements be suppressed. Defendant filed an addendum to his motion to suppress on March 2, 2004 (Clerk’s No. 24) wherein he requests that statements made during transport from Page County to Des Moines for his initial appearance be suppressed. The Government resists the suppression requests. A hearing was held on the issues on March 18, 2004 and the matter is fully submitted.

I. BACKGROUND

The following facts are undisputed: On November 1, 2003, Officers Greg Geist and Jesse Hitt were on patrol duty for the City of Clarinda, Iowa. Both officers began their shift at 9:00 p.m on November 1, 2003 and were scheduled to conclude the shift at 5:30 a.m. on November 2, 2003. In the early morning hours of November 2, the officers conducted a traffic stop of a Plymouth Voyager driven by the Defendant. The officers ultimately searched the vehicle, finding four paper bags

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containing freshly picked marijuana behind the driver's seat. Defendant was arrested and taken to the Page County Jail. During a search of his clothing, additional items of evidence were allegedly found. Approximately one month later, while being transported from the Page County Jail to Des Moines for his initial appearance, the Defendant made additional incriminating statements to a law enforcement officer.

Other than a broad agreement regarding the events of November 2, 2003, the parties present vastly differing accounts of the details leading up to the stop, search, and subsequent arrest of the Defendant. The Court will recount each parties version of events, as testified to at the hearing on the present matter.

A. Testimony of Officer Greg Geist

Officer Geist has been employed with the Clarinda police department for approximately two and one-half years. Prior to working for the City of Clarinda, he worked with the Bedford Police Department for three years and as a reserve police officer in Red Oak, Iowa. Officer Geist testified that he and his partner were on routine patrol in a 2003 Chevy Tahoe with Officer Hitt at the wheel. On the morning in question, he and Officer Hitt were facing southbound at the intersection of Ninth and Chestnut Streets when they observed a maroon Plymouth Voyager, approximately 20-25 yards away, heading west on Chestnut Street.¹ As the vehicle entered the intersection, the Tahoe's lights, which were on high beam at the time, shined inside the passenger window and reflected onto the face of the driver. Officer Geist claims that he recognized the driver as Larry Michael Smith, an individual that

¹ The intersection of Ninth and Chestnut Streets is an uncontrolled intersection with no traffic control devices. There is, however, a streetlight at or near the intersection.

Officer Geist suspected as lacking a valid driver's license. Though Officer Geist had never had personal contact with the Defendant, he claims to have looked at a booking photograph of the Defendant when he became aware that Defendant had recently been released on parole.² Officer Geist also testified that he believed he had seen the Defendant with his girlfriend, Penny Smith, approximately two to three weeks prior to November 2, 2003.³

In addition to his suspicion that the Defendant lacked a valid driver's license, Officer Geist also claims that the rear license plate light of the Voyager was non-operational. For these reasons, the officers initiated a traffic stop on the vehicle at the intersection of Tenth and Chestnut streets. Officer Hitt walked to the driver's side of the vehicle and Officer Geist approached the passenger side of the vehicle. While Officer Hitt was talking to the Defendant, Officer Geist circled around the rear of the vehicle and approached the position where Hitt was standing. Officer Geist did not hear the conversation between Hitt and the Defendant upon the initial approach of the vehicle, but testified that he and Officer Hitt informed the Defendant that they had stopped him because he didn't have a license and because his license plate light did not work.

Officer Hitt requested the Defendant's driver's license, registration, and insurance documentation. Defendant informed the officers that he did not have a driver's license, but provided

² . Geist claims that he looked at pictures of Smith because he knew that he had just been released on parole and because Clarinda police had received word that Defendant was involved in drug activity. Geist testified that the pictures he observed of Defendant were prior booking pictures that were at least three years old

³ On that occasion, Geist observed the Defendant driving, ran a license check and became aware that Defendant had lost his license because of a prior OWI and that he had not had his driving privileges reinstated.

the registration for the vehicle. The officers waited while the Defendant attempted to locate his insurance card. Officer Geist testified that, though he never personally saw Defendant's insurance card, Officer Hitt told him that the Defendant had produced an expired insurance document. Officer Geist testified that the Defendant had slightly bloodshot eyes and that he was moving around a lot and repeating himself. The officer suspected that the Defendant might be under the influence of methamphetamine.

Geist and Hitt returned to their vehicle to call dispatch on the information obtained. Dispatch confirmed that the Defendant did not have a valid driver's license. Officer Hitt wrote out a citation for no insurance and a warning for driving without a valid license. While in the patrol car, the officers discussed having the Defendant return to their vehicle so that they could get more information from the Defendant and "discuss a little bit further about possible methamphetamine use."⁴ The officers also discussed attempting to get consent to search the vehicle for drugs. The officers then returned to Defendant's vehicle.

Officer Geist stated that, upon returning to the Defendant's vehicle, it began to rain. The officers, therefore, asked the Defendant to come back to the patrol car so that they could obtain some more information from him. While it is conceded that the Defendant complied in going to the patrol vehicle, Officer Geist acknowledged that the Defendant had no choice in the matter and that, "We made him come back there." Defendant was escorted to the patrol car by the two armed and uniformed officers, one positioned in front of him and one behind. Defendant was patted down and

⁴ Quotations in this opinion were obtained from a Real Time transcript prepared at the suppression hearing.

placed in the back seat of the patrol car. Defendant was not handcuffed, but the Tahoe doors did not open from the inside, the windows were up, and a wire mesh screen separated the front and back seats.

Officer Geist noted that, while in the patrol vehicle, the Defendant seemed confused and continued repeating words and moving around a lot. Officer Geist asked the Defendant if he had done any methamphetamine that day. Defendant replied that he had not, so Officer Geist asked when was the last time that he had consumed methamphetamine. Defendant replied he had taken methamphetamine a few days before and also that he had been around people smoking marijuana earlier on the evening of November 1, 2003.

According to Officer Geist, Officer Hitt then requested consent to search the Voyager. Defendant refused to sign a written form granting consent to search, but stated “that he would let us search because we were going to do what we wanted to do anyway.” Officer Hitt then followed up by asking, “so you don’t have a problem with us searching your vehicle?” Defendant purportedly replied, “No. You guys can go ahead.” Officer Geist stated that they did not tell the Defendant to think about it, nor did they inform him that he had the right to refuse. It is also undisputed that the Defendant had not been provided his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), at the time the request for consent to search was made.

Officer Geist stayed in the patrol vehicle with the Defendant and Officer Hitt exited the vehicle and conducted a search of the Voyager. According to Officer Geist, the search began “shortly after the citation was issued, a little after 4:50 [a.m.]” Officer Geist testified that Officer Hitt was up at the vehicle for just a few minutes, but that while he was searching, Defendant did not protest the search in

any way or attempt to revoke his consent. Officer Geist also testified that, though Defendant never requested to leave the patrol vehicle, he would not have been permitted to leave had he made such a request: “We were going to bring him in for a test for the urine sample.”

Shortly after commencing the search, Officer Hitt returned to the patrol car and informed its occupants that he had found a large amount of marijuana behind the driver’s seat. Officer Hitt asked the Defendant if there were any other drugs in the vehicle and if he knew about the marijuana in the vehicle. Defendant claimed he knew nothing about it. Defendant was then placed under arrest for possession of marijuana and Officer Geist read him his rights pursuant to *Miranda*. After being read his rights, Defendant allegedly stated that he had just picked the marijuana.

Defendant was then transported to the Page County jail and the Voyager was towed to the Public Safety Center. At the Page County jail, Officer Geist asked Defendant if he wished to waive his *Miranda* rights and Defendant replied that he did not. Defendant was booked into the jail and consented to a urine sample. Officer Hitt conducted an inventory search of the vehicle while Officer Geist recorded the contents, including syringes, a silver spoon in a black pouch, a digital scale, and four bags of marijuana that field tested positive for marijuana.

B. *Testimony of Officer Jesse Hitt*

Officer Hitt has been employed at the Clarinda police department since January 2002. Prior to his employ with the City of Clarinda, he had no prior law enforcement experience. Officer Hitt testified that he and Officer Geist were on patrol in a 2001 or 2002 Chevy Tahoe. While facing south at the intersection of Ninth and Chestnut, the officers observed a Plymouth Voyager traveling west through the intersection. Officer Geist informed Officer Hitt that the driver was Larry Smith and that he did not

have a valid driver's license and that the license plate light was not functional.⁵ A traffic stop ensued at Tenth and Chestnut. Officer Hitt approached the driver's side of the vehicle and made a visual identification, though he concedes that he had never seen the Defendant before, either personally or in photographs. Officer Hitt stated that the Defendant provided him with his name and date of birth, and an Iowa identification card, but was unable to provide proof of insurance. Officer Hitt testified that the Defendant never presented him with any insurance card whatsoever, expired or otherwise, and that no further conversation took place before he returned to the patrol car to run the information through dispatch. After approximately 10-20 seconds, dispatch informed Officer Hitt that the Defendant did not have a valid Iowa driver's license.

Upon returning to Defendant's vehicle, Defendant asked Officer Hitt if he could leave the Voyager where it was until morning. Officer Hitt told the Defendant that would be fine and informed the Defendant that he was going to write a citation for the insurance. Officer Hitt asked the Defendant to return to the patrol vehicle with him: "I asked him if he would, due to the weather conditions, I asked him if he could come back to our vehicle so I could get his correct information to write on the citation."⁶ Officer Hitt also testified that he needed Defendant to return to the patrol car so that he could obtain a

⁵ Hitt testified that Smith slowed down to approximately 5-10 miles per hour before crossing through the intersection and that Officer Geist was approximately 30 feet away when he recognized the Defendant. Hitt testified that he knew the van belonged to Penny Smith and that the Defendant had been staying with Ms. Smith.

⁶ Hitt claims that he asked Defendant back to the patrol car because of the rain, but admits that his narrative, written shortly after the events, did not make any mention of rain.

valid mailing address for purposes of writing the citations.⁷

Officer Hitt testified that he walked behind Defendant on the way to the patrol car, but was unsure where Officer Geist walked. Officer Hitt pat-searched the Defendant for weapons and placed him in the back of the patrol vehicle.⁸ Officer Hitt then wrote the Defendant a warning for his license plate light and a citation for no proof of insurance. Officer Hitt testified that he must have had the Defendant sign the tickets at the jail, because he would not have been able to sign them in the squad car due to the wire mesh screen. When asked, “Are you sure you didn’t have him sign it at the van?” Officer Hitt replied, “I do not recall.”

While in the patrol car, Defendant had nervous movements and his speech was somewhat slurred. Officer Hitt testified that, given his prior training and experience, he believed the Defendant may have been under the influence of methamphetamine. Officer Hitt recounted that Officer Geist asked the Defendant when he had last used methamphetamine and that defendant replied it had been a few days, but that he had recently been around people smoking marijuana.

Officer Hitt conceded that after he had already written the tickets, “I asked Mr. Smith if we could search his vehicle for any illegal drugs or weapons.” “He stated to us that he didn’t want to sign anything, but we could search his vehicle . . . he said, ‘yes, you can search the vehicle.’” On Cross examination, Hitt stated, “I first asked him for written consent, and he stated to us that he did not want to give written consent to search the vehicle, but you could go ahead and search it. I said it would be—I

⁷ Hitt acknowledged that Defendant’s Iowa identification card would have had an address on it and that he could have asked Defendant if such address was valid while at the window of the Voyager.

⁸ Hitt acknowledges that upon being placed in the back of the vehicle, Defendant was not free to leave.

asked him again, I repeated the question, ‘can we search your van?’ And he stated, ‘you’re gonna do what you’re gonna do anyways, but you can go ahead and search it.’” On redirect, Hitt stated, “We first offered written consent, and he refused written consent. And he says, ‘you guys are gonna do what you want to do anyways, so I don’t care.’ So I repeated the question again, I said so it would be okay if we searched the vehicle? He says, ‘that’s all right.’” Interestingly, Officer Hitt’s narrative claims the events happened in reverse order, *i.e.*, the narrative states that Officer Hitt immediately asked permission to search once Defendant was in the patrol car. After the Defendant gave consent, the officers then asked him about drugs.

Officer Hitt searched the Voyager and found four bags which he believed contained freshly harvested marijuana. Officer Hitt returned to the vehicle and told the occupants what he had found. He called another police officer to help secure the scene and placed Defendant under arrest. When asked if Defendant was given his *Miranda* rights, Officer Hitt replied, “Yes, I believe so.” He also stated that after receiving *Miranda*, Defendant offered that he had recently picked the marijuana. Defendant was then transported to the Page County Jail.

At the jail, Officer Hitt again pat-searched the Defendant and “went through his bigger pockets for any weapons and sat him in the booking room.” Officer Hitt was present when Defendant changed his clothes and placed them into a jail locker. Defendant placed his personal property on a desk in the booking room and consented to a urine sample. Officer Hitt then proceeded to conduct an inventory search of the vehicle, finding syringes, a black pouch and spoon, a leather Harley Davidson jacket, a knife, a digital scale, and the marijuana.

C. Testimony of Sherry O'Connell and Carla Cross

Sherry O'Connell, the chief jailer at Page County jail testified that Officer Hitt was present when Defendant changed into jail clothes. O'Connell was not present when Defendant removed his personal property from his clothes and assumed that Hitt had ensured that all personal items or contraband were out of the Defendant's clothes. Indeed, Officer Hitt was in the same room as the Defendant and it would have been normal policy for him to have searched the Defendant's clothing. O'Connell testified that she personally put the Defendant's clothing into the locker and found it odd that Defendant had removed his underwear and left them with his clothing. She stated that Defendant was acting "disjointed" with erratic thought patterns.⁹ O'Connell did not observe the Defendant signing any citations at the jail.

When Carla Cross came on duty, at 7 a.m, she followed her normal routine of going through the personal items in the lockers. When searching Defendant's clothes, she recovered a baggie of white substance from the small pocket of Defendant's jeans. Cross stopped the search and called the police. Officer Geist responded and watched Cross search the rest of the clothes. Cross removed three baggies of methamphetamine from the small pocket of Defendant's jeans and "a plastic bag wrapped up with a rubber band and a big blue chunk of—it almost looked like a bar of soap to me—and another baggie, a ziploc Baggie with some other little bags with white substance in them" from the pocket of Defendant's underwear. A few weeks before Defendant was transported to Des Moines, Cross spoke to him about the items she found and "he asked me why I just didn't get rid of it for him."

⁹ O'Connell testified that she had had occasion to interact with the Defendant on numerous prior occasions while he was in the custody of the Page County jail.

Cross didn't have a reply, but asked about the item that looked like a bar of soap . "I said what a pretty blue it was and he said that it had just been made."

D. *Testimony of Michael Mittan*

A few weeks later, Michael Mittan, a special agent with the state of Iowa Division of Narcotics Enforcement, transferred the Defendant from Page County Jail to Des Moines for his initial appearance on December 22, 2003. Mittan did not read the Defendant his *Miranda* rights. Mittan stated that as they left Clarinda, Defendant asked him several questions, such as why was he being federally indicted, what is the federal system like, and how much time was he looking at in the federal system.

I told him that the reason he was indicted federally was because of his prior criminal history charges, his prior drug conviction, and his current charge of his possession of narcotics. I indicated to him kind of an overview of how the federal system worked. I said we'd be transporting him to Des Moines for his initial appearance. At initial appearance, a motion is usually made whether or not a detention--whether or not he will be detained or whether he will be released on a signature bond. I said the possibility of being detained is either based through the U.S. attorney's office or through the--I believe I told him, and I don't have it marked here in my reports, but I believe I also told him it was through the probation office and their recommendation, but that it was ultimately up to the judge. I said that for his instance, the U.S. attorney's office was going to move for detention and that a detention hearing would be made approximately or within three days of his initial appearance. . . .

I told him that to my understanding the approximate time that he was looking at was 280 months. . . He--he kind of didn't understand, to my understanding, he didn't understand how we got to that range, so I was explaining to him that the guidelines in the federal system, the ranges can either go up or down based upon several things; based upon acceptance of responsibility, it can go down, substantial assistance, it can go down, and it can also go up if he is, you know, a leader/organizer or has other prior criminal history points, it can--the guideline range can fluctuate based upon each case.

Mittan testified that the Defendant then indicated that he was interested in cooperating with the government and proceeded to make statements implicating himself in the sale of controlled substances and identifying people that he was involved with in selling controlled substances.

According to Mittan, the Defendant began telling him of individuals from whom he had obtained methamphetamine. While Defendant was speaking, Mittan was driving and simultaneously jotting down notes of Defendant's information. Mittan told the Defendant that he would contact the U.S. Attorney's office and tell them that Defendant was interested in cooperating with the government. Mittan claims that Defendant initiated the conversation.

When asked if he affirmatively questioned the Defendant about any of his statements, Mittan replied, "If I asked questions, it was of 'Okay. Where did Mr. [so and so] live?' It was in response to statements he'd already provided to me, like—because I also wasn't familiar with [a certain individual] and I was questioning on where he lived because I didn't catch it the first time he told me." Mittan also admitted that while the Defendant talked, he may have made statements such as "Yeah, I know who he is, or I know he's involved in manufacturing methamphetamine And I may have told him that [a certain individual was a] target of ours already."

Mittan admits that at the time of the transport, he was aware that Defendant had been federally indicted. Mittan also admits that he never advised the Defendant of his *Miranda* rights, or that he might not wish to talk about such things without his attorney. Mittan claims that the interaction with the Defendant lasted for approximately 10-20 minutes of the two plus hour drive.

E. Testimony of Penny Smith

Penny Smith testified that the Plymouth Voyager was her vehicle. When she contacted the police about retrieving the vehicle, Officer Geist told her that she would need to bring valid proof of insurance. Upon arriving at the impound lot, Smith pulled the insurance card from the visor and showed it to the Officer Geist. He said, "well, that's expired" and then looked at the card and realized

that the insurance was indeed, valid. Smith also testified that she asked Officer Geist to get into the vehicle and turn on the lights. She claims that she then checked the license plate light and found it to be in working order.

F. Testimony of Defendant Larry Michael Smith

Defendant testified that he was released from Fort Des Moines Correctional Facility on September 3, 2003. Defendant has prior felony convictions for robbery in 1982, second degree theft in 1987 and 1999, possession of methamphetamine in 1991, possession of a firearm by a felon in 1999, and third degree burglary in 1999. Defendant had never met Officers Geist or Hitt prior to his contact with them on November 2, 2003 and, to the best of his knowledge, believes that the last booking photograph of him was taken in May of 1999. In that photograph, he weighed approximately 200 pounds and had hair down to the middle of his chest. He also stated that he may have had a beard and a mustache.

Defendant testified that he observed the officers prior to being stopped. He stated that he was traveling northbound on Ninth street and turned left to go west onto Chestnut Street from Ninth Street. Smith observed the officers traveling southbound on tenth street. As soon as Smith saw the officers, he let off on the gas and debated on turning so that he wouldn't have to drive in front of their vehicle. The officers then turned left coming directly toward the Defendant and immediately put on their flashing lights. Defendant pulled over, took the keys from the ignition and put them in his right-hand pocket. Defendant stated that the officers could not have seen the back of his vehicle because the two vehicles were facing each other and because he never crossed the intersection in front of the patrol vehicle. Defendant testified that there are lights on the street corners, but that he was approximately 25-30

yards from the corner.

After Defendant had turned off his vehicle, the officers did a u-turn and pulled in behind him. Officer Hitt came to the door and requested his driver's license. Defendant informed Officer Hitt that he did not have a license, but presented him with an Iowa identification card. Officer Hitt went to his patrol car and, upon returning, informed the Defendant that a records check confirmed he had no valid license. Officer Hitt then asked Defendant for his insurance and registration, which Defendant retrieved from behind the visor. Officer Hitt told the Defendant that the insurance was expired. Defendant testified that he attempted to explain that the insurance card showed an expiration date of January 2004, but Officer Hitt did not seem interested in seeing the card again, so Defendant replaced it in the visor. Officer Hitt stated that he was going to write the defendant a ticket. Officer Hitt went to his vehicle to write the ticket and returned to the Voyager with a metal clipboard. Defendant removed his identification card from the clipboard and signed the ticket. Defendant handed the clipboard back to the officer and asked Officer Hitt if the van would be alright where it was because he knew they would not permit him to drive the van further that evening. Officer Hitt replied that the van would be fine.

Defendant rolled up his window, exited the vehicle, and locked and closed the door. When he turned around, Officer Hitt appeared ready to tear off a copy of the ticket, but instead, "He asked me at that point if I would be willing to step back to his vehicle, he wanted to talk to me further. I asked him about what, and he said, well, he would explain it to me when we got to his vehicle." Defendant admits that it had been raining the night before, but denies that it was raining at the time Officer Hitt asked him to go to the patrol car. Defendant testified that he didn't want to go with the officers, but that the officers approached him "like they were trying to circle me or you know, like they thought I

might try and bolt and run or something.” Defendant assumed he was going to be placed under arrest, so he told the officers that he supposed he could talk to them.

Defendant was escorted to the passenger side of the patrol vehicle. Officer Hitt asked the Defendant if he had any weapons. Defendant replied that the only possible weapon he had was a small pocket knife on his key-ring. Defendant handed the keys to Officer Hitt and was placed in the back of the patrol vehicle. As soon as Officer Hitt entered the vehicle, he asked Defendant if he would give consent to search and Defendant replied no. Officer Hitt wanted to know why the Defendant would not consent. Defendant replied: “[L]ook, I said, for the last 4 ½ years, 54 months, I’ve had people like you digging through my property, and there ain’t been nothing I could do about it, nothing I could say. And I said if you think I want you digging through it now, you’re nuts. I said you’re gonna do what you think you got to do, and that’s all fine and good, but if you’re asking for my consent, the answer is no.”

Defendant testified that both officers got out of the vehicle, stood next to the passenger side and talked for approximately five minutes, leaving the Defendant in the back seat of the patrol vehicle. Officer Geist then sat in the passenger seat and Officer Hitt, who still had Defendant’s keys proceeded to the Voyager and commenced a search. Defendant told Officer Geist that the search was illegal. Officer Hitt returned and stated that he had found paper sacks full of marijuana and that Defendant was under arrest.

Defendant testified that he does not believe he ever had the right to leave, that the officers never asked him about drugs, and that he explicitly told the officers that he would not give verbal or written consent to search. Defendant also testified that he was never patted down until arriving at the jail and that the officers never read him his *Miranda* rights. Defendant admits that approximately 10-15

minutes after entering the jail, Officer Geist came into the room and asked him to sign a waiver of *Miranda* form. Defendant refused to waive his rights and signed a form to that effect. Defendant claims that he was pat-searched upon entering the jail, asked to empty his pockets, and that the officers felt his pockets very closely. As Defendant undressed, Officer Hitt asked him to hand him the articles of clothing as they were removed. Officer Hitt then searched the clothing, folded them, and laid them in a pile on the chair. Officer Hitt took Defendant's clothes and placed them in a metal locker.

During the transport to Des Moines, Defendant testified that he was restrained with belly chains, handcuffs, and leg irons. Defendant concedes that he asked how he ended up in the federal system and that Mittan told him it was due to his prior criminal charges. Defendant also concedes that he asked Mittan how much time the present charges would carry and that Mittan first told him 5 to 40 years and later told him 10 to 80 years. Defendant then asked what Mittan knew about the sentencing guidelines, to which Mittan responded by explaining how the guidelines worked. Mittan stated that Defendant was looking at 184-224 months. Defendant asked why there was a spread of 40 months between them, and Mittan told him it depended on the specific factors of each case.

Mittan then told the Defendant that the sentence length could be reduced. Defendant asked how. Mittan told the Defendant that his sentence could be reduced through cooperation with the government. The conversation continued on and off throughout the two and one-half hour trip to Des Moines. When Mittan first began speaking about cooperation, Defendant said "that I was ready to do pretty much anything I needed to to try to minimize my time." Defendant claims that Officer Mittan asked him if he was friends with certain individuals and made it "pretty plain that was what he wanted, you know, to talk, if I was willing to talk, that that was what he wanted to hear."

II. ANALYSIS

A. *The Initial Stop*

Defendant first alleges that the initial stop of the Plymouth Voyager was unjustified and thus violated his Fourth Amendment right to be free from unreasonable searches and seizures. The Fourth Amendment guarantees the right of “the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. Amend. IV. As a general matter, a roadside traffic stop is a “seizure” within the meaning of the Fourth Amendment. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979). For purposes of constitutional analysis, a traffic stop is characterized as an investigative detention, rather than a custodial arrest and is thus governed by the standards articulated in *Terry v. Ohio*. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *Terry v. Ohio*, 392 U.S. 1 (1968). That is, once a lawful traffic stop is made, an officer may conduct investigation “reasonably related in scope to the circumstances which justified the interference in the first place.” *Terry*, 392 U.S. at 20. This means that the Fourth Amendment intrusion “must be temporary and last no longer than is necessary to effectuate the purpose of the stop” and that the officer should employ the least intrusive means available to dispel the officer’s suspicion in a timely fashion. *Florida v. Royer*, 460 U.S. 491 (1983).

In determining whether the traffic stop here at issue was lawful, the Court turns to the well-accepted principal that, “[A]ny traffic violation, even a minor one, gives an officer probable cause to stop the violator. If the officer has probable cause to stop the violator, the stop is objectively reasonable and any ulterior motivation on the officer’s part is irrelevant.” *United States v. Bell*, 86 F.3d 820, 822 (8th Cir.1996) (citation omitted). Stated another way, “so long as police have probable

cause to believe that a traffic violation has occurred, the stop is valid even if the police would have ignored the traffic violation but for their suspicion that greater crimes are afoot.” *United States v. Thomas*, 93 F.3d 479, 485 (8th Cir. 1996).

In this case, Defendant claims that Officers Geist and Hitt were not in a position to see that he was the driver of the vehicle, or to see the rear license plate light of the vehicle. Officers Geist and Hitt claim that they were reasonably able to see the Defendant’s face and that they could readily see that the license plate light was non-operational. The key factor in deciding whether the traffic stop was lawful or unlawful, then, comes down to a credibility determination, *i.e.*, does the Court find more convincing the testimony of the Defendant or the testimony of Officers Geist and Hitt. *See United States v. Hernandez*, 299 F.3d 984 (8th Cir. 2002) (“[A]ssessments of credibility are the province of the fact-finder.”) (citing *United States v. Davis*, 103 F.3d 660, 674 (8th Cir. 1996)). For reasons to follow, the Court finds the testimony of the Defendant more credible in this instance.

The Court notes that the testimony of each witness at hearing was generally consistent with the overall scenario of events. That is, Officer Geist, Officer Hitt, and the Defendant each testified that a traffic stop was performed, that a search was ultimately conducted, and that Defendant was eventually arrested. The Court carefully observed the demeanor of Officers Geist and Hitt and of the Defendant during their testimony and believes that the officer testimony, particularly that of Officer Hitt is simply not credible. Indeed, the testimony of Officer Geist appeared to be, in large part, speculation as to what occurred because he was not in a position to hear or see everything that happened on the evening in question. Officer Hitt’s testimony was, at best, strained, and at times appeared to be manufactured and self-serving. The Court finds that there are simply too many inconsistencies between the overall

testimony of Officer Hitt and that of Officer Geist, Sherry O'Connell, and by Officer Hitt's own admission, his narrative of the events of November 2, 2003. Specifically, the Court notes the following inconsistencies:

1) Officer Hitt testified that the patrol vehicle was a 2001 or 2002 Chevy Tahoe. Officer Geist testified that it was a 2003 Chevy Tahoe;

2) Officer Hitt testified that Defendant slowed down substantially as he approached the intersection of 9th and Chestnut. Officer Geist indicated that Defendant made no effort to stop or slow down at the intersection;

3) Officer Hitt initially made no mention of Defendant providing him with an Iowa identification card when he first approached the vehicle. Rather, Hitt stated that Defendant provided him with his name and date of birth. Officer Hitt admitted on cross-examination, however, that Defendant had provided him with identification;

4) Officer Hitt testified that the Defendant never offered him any proof of insurance. Officer Geist, however, testified that Officer Hitt had told him that the proof of insurance provided by Defendant was expired. Additionally, Penny Smith testified that when she retrieved the Voyager from impound, a valid insurance card was in a pouch attached to the sun-visor;

5) Officer Hitt testified that he patted the Defendant down for weapons, but Officer Geist testified that he normally was the individual who conducted pat-downs. Additionally, each officer testified that he was walking immediately behind the Defendant on the way to the patrol car;

6) Officer Hitt testified that one reason he asked Defendant back to the patrol car was to obtain the Defendant's current mailing address. Officer Hitt acknowledged, however, that he had Defendant's

identification card and that he could easily have asked Defendant if the information was current while at Defendant's vehicle;

7) Officer Hitt testified that it was "pouring rain" when he asked Defendant to enter the patrol vehicle, but his own narrative makes no mention of poor weather conditions;

8) Officer Hitt and Officer Geist each testified that Geist asked Defendant questions about his recent drug use prior to requesting consent to search. Officer Hitt admitted, however, that his narrative of the morning's events claimed that he requested consent to search immediately after Defendant entered the patrol car and before Officer Geist asked any questions about drug use;

9) Officer Hitt testified that he had already written the traffic tickets before he asked the Defendant to search the Voyager. This is inconsistent, however, with Officer Hitt's narrative version of events that he immediately asked for consent to search the vehicle. Additionally, Officer Geist made no mention of when Officer Hitt wrote out the traffic citations. Indeed, Defendant testified that Hitt presented the traffic tickets at the window of the Voyager and that he signed the tickets while seated in his own vehicle. The Court finds Defendant's version of events far more plausible, particularly in light of the fact that Officer Hitt testified that Defendant must have signed the tickets at the jail, but Sherry O'Connell never observed any such action. Additionally, when asked on cross-examination whether he gave Defendant the tickets at the window of the Voyager, Officer Hitt stated that he could not recall;

10) Officer Hitt provided, during hearing, three varied versions of Defendant's alleged consent to search the vehicle. First, Officer Hitt testified, "He stated to us that he didn't want to sign anything, but we could search his vehicle . . . he said, 'yes, you can search the vehicle.'" On cross-examination,

Officer Hitt stated, “I first asked him for written consent, and he stated to us that he did not want to give written consent to search the vehicle, but you could go ahead and search it. I said it would be—I asked him again, I repeated the question, ‘can we search your van?’ And he stated, you’re gonna do what you’re gonna do anyways, but you can go ahead and search it.” Finally, on redirect, Hitt stated, “We first offered written consent, and he refused written consent. And he says, you guys are gonna do what you want to do anyways, so I don’t care. So I repeated the question again, I said so it would be okay if we searched the vehicle? He says, ‘that’s all right.’”;

11) Officer Hitt testified that he only did a pat-down of the Defendant before he changed into his jail clothes and that Defendant himself placed the clothes in a locker. Sherry O’Connell testified that officers normally search clothing as it is being removed and Defendant testified that Officer Hitt did, indeed, search his clothes as they were being removed. The Court finds it implausible that Officer Hitt performed nothing more than a cursory pat-down while Defendant was in custody at the jail.

In addition to these factors, the Court notes that the Defendant claims that the officers were at the intersection of 10th and Chestnut streets. Defendant claims that he turned onto Chestnut Street and the officers turned onto the same street coming directly toward him. Officers Hitt and Geist assert that they were at the corner of Ninth and Chestnut Street and that Defendant crossed the intersection directly in front of them with his vehicle perpendicular to theirs. Even assuming that the officers’ recitation of the location of vehicles is accurate, the Court finds it unlikely that Officer Geist could have recognized the Defendant in a split second glance on a dark November morning. This is particularly true when one considers that Officer Geist’s only knowledge of Defendant’s physical appearance stems from looking at a booking photo of the Defendant that was no less than three years old.

With regard to the license plate light, it is the Court's opinion that the officers could not have seen the light, either from the position recounted by the Defendant or from the position recounted by the officers, at the time they initiated the traffic stop. Indeed, the Court simply does not find credible the officers' assertion that the light was burned out at all in light of the numerous inconsistencies in their testimony and in light of the lack of testimony by the officers regarding how they were able to see the light.¹⁰

With regard to the Defendant's testimony, the Court finds that it was clear, forthcoming, and internally consistent. The Court acknowledges that Defendant has multiple felony convictions, however, it found Defendant's demeanor to be respectful and honest. Indeed, Defendant's testimony overall was quite believable, particularly in those places where Officers Hitt and Geist's testimony was inconsistent. Additionally, Defendant's version of events is simply more plausible and consistent with the manner in which traffic stops are routinely conducted. The Court is aware of no extrinsic evidence that would contradict Defendant's testimony. For these reasons, the Court credits Defendant's testimony as an accurate version of events.

Accordingly, the Court concludes that the license plate light was not burned out, or if it was, it was not visible to the officers. Additionally, the Court finds that Officer Geist was at best acting on a "hunch" that the driver of the vehicle was Larry Michael Smith. This is insufficient to rise to the level needed to conduct an investigatory detention or seizure of the vehicle and the Court concludes that the traffic stop was, therefore, unlawful. All evidence seized and statements made by the Defendant after

¹⁰ Penny Smith testified that the light was working when she retrieved the vehicle from impound.

the unlawful stop are, therefore, fruit of the poisonous tree pursuant to *Wong Sun v. United States*, 371 U.S. 471 (1963).

Additionally, the Court notes that the Fourth Amendment intrusion in this case was not the least intrusive means available to confirm or dispel the officers' suspicions that Defendant was under the influence of methamphetamine. An officer conducting a traffic stop "may properly expand the scope of his investigation as reasonable suspicion dictates." *United States v. Foley*, 206 F.3d 802, 806 (8th Cir. 2000). If an officer develops a reasonable, articulable suspicion of criminal activity beyond the reason for the traffic stop, the officer may expand the scope of the inquiry and detain the occupants of an automobile for further investigation. *See United States v. Carrate*, 122 F.3d 666, 668 (8th Cir. 1997). Whether the officer had reasonable suspicion to expand the scope of the stop is determined by looking at "the totality of the circumstances, in light of the officer's experience." *See id.* (citations omitted).

In this case, the basis for the stop was the alleged burned out light and the alleged belief that the driver had no valid driver's license. Both Officer Geist and Officer Hitt testified that the Defendant was jittery, nervous, and had mildly bloodshot eyes. Each officer claimed that based on his training and experience, they believed him to be under the influence of methamphetamine. The record as to each officers training and experience in this regard, however, is minimal. Both officers have worked for the Clarinda Police Department for approximately two to three years. Officer Geist testified that he's dealt with people in the past that have been under the influence of methamphetamine and that he has talked with his sergeant who deals with a lot of drugs. Officer Hitt's offered virtually no testimony indicating his basis for believing that Defendant was under the influence of methamphetamine. Neither officer

offered testimony regarding the frequency of their interactions with methamphetamine users and neither officer had received formal training on narcotics use detection other than that they received from their sergeant

The Court cannot say that it possesses sufficient information to believe that either officer was reasonably in a position to suspect the Defendant of methamphetamine use. Indeed, the stop in this case was made at approximately 4:00 in the morning, a time when many people have bloodshot eyes due to fatigue. Additionally, a traffic stop by law enforcement may have the tendency to make an average person nervous and jittery. Finally, the officers had no other credible information tending to support a belief that the Defendant was under the influence of methamphetamine. They did not observe any contraband in the vehicle, did not smell any suspicious odors, and did not have any observations of erratic driving or behavior. Nothing Defendant said to the officers during the course of the stop invoked a heightened level of suspicion. The Court cannot find that asking a suspect to return to the patrol car so that law enforcement may question him and search his vehicle constitutes the “least intrusive” means to determine whether the Defendant was driving under the influence.¹¹

Thus, even assuming a valid initial stop, the officers kept the Defendant well past the amount of time necessary to conduct a driver’s license check, issue any citations, and to dispel any suspicions that the Defendant was under the influence of controlled substances. Indeed, Defendant had already inquired about leaving the vehicle on the side of the road because he was aware he would not be

¹¹ The Court also notes that the officers did not conduct any field sobriety tests or ask the Defendant any questions about where he was going, where he had been, or why he was acting nervous. It would seem that some affirmative measures to determine whether a suspect is under the influence must be taken to constitute the “least intrusive means” for Fourth Amendment analysis purposes.

permitted to drive the vehicle away from the scene due to having no valid driver's license. The legitimate investigative purposes of the traffic stop were complete before Officer Hitt ever asked Defendant to enter the patrol vehicle.

B. *Consent to Search*

The Eighth Circuit has found that the rule requiring that statements resulting from an illegal detention be held inadmissible is equally applicable to “physical evidence discovered during or as a result of an illegal detention.” *United States v. Ramos*, 42 F.3d 1160, 1164 (8th Cir. 1994) (citing *Wong Sun*, 371 U.S. at 471). Under this rule, any evidence discovered after the illegal stop in this case must be excluded as fruit of the illegal stop. *See id.* As the court in *Ramos* noted, however, it is possible for the causal chain between the illegal stop and the subsequent revelation of evidence to be broken. *See id.* “Even when police officers have neither probable cause nor a warrant, they may search an area if they obtain a voluntary consent from someone possessing adequate authority over the area.” *United States v. Chaidez*, 906 F.2d 377, 380 (citing *United States v. Matlock*, 415 U.S. 164, 171 & n.7 (1974); *Schneekloth v. Bustamonte*, 412 U.S. 218, 222 (1973)). In the case of an illegal stop followed by an alleged consent search, the causal chain may be broken if the consent was “sufficiently an act of free will to purge the primary taint.” *Wong Sun*, 371 U.S. at 486; *see also United States v. Kreisel*, 210 F.3d 868, 869 (8th Cir. 2000) (“Even if a consent to search is the result, in a ‘but for’ sense, of a fourth amendment violation, we will uphold a subsequent search if the consent was sufficiently an act of free will to purge the original taint.”).

In this case, the deciding question is not whether consent was given freely and voluntarily, but rather, whether consent was given at all. For the reasons stated *supra*, the Court has determined that

Defendant's version of events is more credible and plausible than the testimony offered by Officers Hitt and Geist. The Court found particularly compelling Defendant's testimony that he understood that the officers would do whatever they wanted, but that, after several years of being required to consent to searches while in custody, he would not willingly give consent to search the Voyager. Because the Court finds that the officers' testimony is simply too inconsistent to be believed, it must conclude that the Government has not proved by a preponderance of the evidence that Defendant consented to a search of his vehicle or that any alleged consent was voluntary.

There is no dispute that the officers lacked probable cause to search Defendant's vehicle absent voluntary consent. Indeed, testimony revealed that Defendant would not have been arrested were it not for the marijuana discovered in his vehicle as a result of the unlawful search. Because there was no consent in this case, the Court finds that the search of the Voyager was illegally conducted and all evidence seized from the vehicle must be suppressed. Additionally, any statements made by Defendant after the seizure of the evidence must be suppressed as fruit of the poisonous tree.

C. Defendant's Statements

The record in this case also supports the independent suppression of Defendant's alleged statements in the patrol vehicle that he had recently used methamphetamine and marijuana. There is no dispute that Defendant was not formally placed under arrest at the time he was placed in the back of the patrol vehicle. However, formal arrest is not the only circumstance where *Miranda* warnings must be given. *Miranda* requires that any time a person is subject to custodial interrogation, a law enforcement officer must, prior to commencing questioning, advise the person of his right to be free from compulsory self-incrimination and of his right to have the assistance of counsel. *Miranda*, 384

U.S. at 444, 86 S. Ct. at 1612.

A determination of whether an individual is in custody requires a careful evaluation of the totality of the circumstances. *United States v. Hanson*, 237 F.3d 961, 963 (8th Cir. 2001). A suspect is deemed “in custody” and entitled to *Miranda* warnings only when he has been formally arrested or when he is “deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612; *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984). To make this determination, the Court examines the physical and psychological restraints placed on the Defendant during the interrogation in light of whether a reasonable person in the suspect’s position would have understood the situation to be custodial. *Griffin*, 922 F.2d 1343, 1349 (8th Cir. 1990) (citing *Berkemer*, 468 U.S. at 442). The Court must also examine “the place, purpose and length of the interrogation, the suspect’s freedom to leave the scene, and other indicia of custody.” *Griffin*, 922 F.2d at 1349. “The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.” *Stansbury v. California*, 511 U.S. 318, 323 (1994).

While not an exhaustive list, the Eighth Circuit Court of Appeals has identified relevant mitigating and aggravating factors to be considered in determining whether, under the totality of the circumstances, a suspect is in custody. *Griffin*, 922 F.2d at 1349. These factors are:

- (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest;
- (2) whether the suspect possessed

unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning.

Id. The first three *Griffin* factors, if answered affirmatively, weigh against a finding of custody, while the last three factors weigh in favor of a finding of custody.

In this case, Defendant was not informed that the questioning by police, while in the back of the patrol vehicle, was voluntary. Likewise, he was not informed that he was not under arrest or that he was free to leave at any time. Additionally, Defendant's freedom of movement was substantially restrained. He was placed in the back of a patrol vehicle, with no way to get out other than with officer assistance and Officer Hitt maintained possession of the Defendant's keys.

Defendant did not argue about entering the patrol car, nor does it appear that the police "strong-armed" him into compliance. It does appear from the record, however, that the police employed a deceptive strategy in this matter, in that they intended to ask him back to the patrol car despite the fact that citations were already issued and Defendant should have been free to leave. With regard to police domination, the Court does not believe that the situation was a particularly "dominating" one, however, it does note that both officers were fully uniformed and armed. Finally, Defendant was arrested after the questioning, however, it appears that the arrest was more likely the result of the marijuana find than as a result of Defendant's responses. Viewing each of the *Griffin*

factors and the overall circumstances of this case, the Court believes that a reasonable person in Defendant's position would not have felt free to leave. Defendant was, therefore, in custody for purposes of determining whether *Miranda* warnings should have been given.

With regard to Defendant's alleged statement that the marijuana had recently been "picked," the Court finds, again, that the issue comes down to a determination of credibility. Officers Hitt and Geist aver that they read Defendant his rights prior to him making the statement, but Defendant argues that he was not read his rights and that he didn't make the statement at all. Again, the Court refers to its analysis, *supra*, to find that the Defendant's testimony was more credible than that of the officers. Accordingly, the Court concludes that Defendant was not provided with *Miranda* warnings prior to making the alleged statement and that the statement is inadmissible as a result.¹²

D. *Statements Made During Transport*

Massiah v. United States, 377 U.S. 201 (1964) holds that the Sixth Amendment rights of a defendant are violated "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206. To constitute a violation of the strictures of *Massiah*, a government agent must deliberately elicit information from the Defendant. *See generally Michigan v. Jackson*, 475 U.S. 625, 632, n. 5 (1986) ("[T]he Sixth Amendment provides a right to counsel . . .

¹² There is no question that Defendant was under arrest and in formal custody at this time, as he had been handcuffed and informed that he was under arrest.

even when there is no interrogation and no Fifth Amendment applicability”).

Unlike many cases, where a jailhouse or undercover informant is used to elicit information from a defendant, there is no dispute in this case that Agent Mittan was a government agent for purposes of *Massiah*. See generally *United States v. Johnson*, 338 F.3d 918, 920-21 (8th Cir. 2003) (discussing the circumstances where a jailhouse *informant* will be considered a governmental agent for purposes of *Massiah*: “[A]n informant becomes a government agent . . . only when the informant has been instructed by the police to get information about the particular defendant.”) (citing *Moore v. United States*, 178 F.3d 994 (8th Cir. 1999); *United States v. Birbal*, 113 F.3d 342, 346 (2d Cir. 1997)). At the time of the transport, he was employed as a special agent with the Iowa Division of Narcotics Enforcement. Part of Agent Mittan’s job was to assist federal and local agencies in the handling of narcotics based trafficking cases. There is similarly no dispute that Defendant had been indicted and did not have counsel present during his discussion with Agent Mittan. At best, Defendant was provided with his *Miranda* rights twice on the night of his arrest and consistently refused to waive those rights. Agent Mittan did not offer Defendant *Miranda* rights, nor did he request a waiver of those rights or of Defendant’s Sixth Amendment right to counsel. Thus, the issue turns on the determination of whether Agent Mittan “deliberately elicited” information from the Defendant. If so, the statements are inadmissible independent of the Court’s other rulings in this opinion.

The definition of “deliberate elicitation” has evolved substantially in the progeny of *Massiah*. In *United States v. Henry*, 447 U.S. 264, 275 (1980), the Supreme Court defined the term as “intentionally creating a situation likely to induce [the defendant] to make incriminating statements

without the assistance of counsel.” *Id.* at 275; accord *Brewer v. Williams*, 430 U.S. 387, 400-01 (1977) (deliberate elicitation defined as occurring when government agent purposely sought to isolate the defendant from his lawyers to obtain as much incriminating information as possible, such that circumstances were “tantamount to an interrogation.”).

The Government argues that the Defendant here initiated the conversation with Agent Mittan and that Mittan was nothing more than a “passive listener.” In *Kuhlman v. Wilson*, 477 U.S. 436, 459 (1986), the Supreme Court found no *Massiah* violation where there was no evidence that the government “took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.” *Id.* at 459. A crucial determining factor in *Kuhlman*, however, was the fact that the government informer “at no time asked any questions” concerning the pending charges, and that he “only listened” to respondent’s “spontaneous and unsolicited” statements. *Id.* at 459-61. Relying on *Kuhlman*, the Third Circuit has stated that the government may secure incriminating post-indictment information from a defendant without counsel “only if the government does no more than listen.” *Bey v. Morton*, 124 F.3d 524 (3d Cir. 1997). In other words, the government “cannot use the information if the police or their informants question or otherwise encourage or facilitate the defendant’s discussion of the crime, and this is true even if the Defendant initiates the discussion of the criminal conduct.” *Id.* at 530; see *Henry*, 447 U.S. at 271-72.

In this case, the Court finds it unlikely that a reasonable person in the Defendant’s shoes would not have felt compelled to provide information to Agent Mittan. Specifically, the Court notes that Agent Mittan informed the Defendant that he would be looking at substantial time in federal prison and

that one way to get the sentence reduced would be to cooperate with the government by providing information about his associates. The Court finds that Defendant's statements in such a situation simply cannot be deemed "spontaneous" or "unsolicited." Additionally, and substantially more troubling, is the fact that Agent Mittan did more than just listen. Indeed, he admitted during his testimony that he asked follow-up questions and asked the Defendant to repeat certain information for clarity. This clearly constitutes deliberate elicitation in violation of *Massiah* and Defendant's Sixth Amendment rights. As a government agent, Mittan had an "affirmative obligation . . . not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Maine v. Moulton*, 474 U.S. 159, 171 (1985). Mittan did not comply with this obligation when he made statements and asked questions that amounted to a deliberate elicitation of incriminating information from the Defendant. For these reasons, the Court finds Defendant's statements during transport inadmissible.

E. *Inevitable Discovery*

Finally, the Government argues that the items seized in Defendant's vehicle and clothing were subject to inevitable discovery. Specifically, the Government claims that the Defendant was without a valid license and appeared to be under the influence of drugs. "For both of these reasons, it is probable that even without the consent search, he would have not been permitted to drive the vehicle, he would have probably been arrested, and both the vehicle and he would have been subject to the same searches." Gov't Resistance Br. at 11. The Government cites *United States v. Alvarez-Gonzalez*, 319 F.3d 1070, 1072 (8th Cir. 2003) in support of its position.

In *Alvarez-Gonzalez*, a Defendant driving down the highway was stopped by law enforcement

for having a rosary dangling from his rearview mirror, in violation of South Dakota law. *Id.* at 1071.

The Court of Appeals affirmed the district court's finding that a weapon found in the Defendant's vehicle would inevitably have been discovered because there was a reasonable probability that the Defendant would have been detained and that his vehicle would have been impounded and subjected to an inventory search which would have revealed the gun. *Id.*

The inevitable-discovery doctrine states that the exclusionary rule does not apply if the prosecution can establish by a preponderance of the evidence that the information, otherwise to be suppressed under the exclusionary rule, ultimately or inevitably would have been discovered by lawful means. *Nix v. Williams*, 467 U.S. 431, 444 (1984). In making a demonstration of inevitable discovery, case law requires the prosecution to show that: "(1) there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation." *United States v. James*, 353 F.3d 606, 616-17 (8th Cir. 2003) (citing *United States v. Conner*, 127 F.3d 663, 667 (8th Cir.1997)).

In this case, as in *James*, there is absolutely no evidence of an alternative line of investigation by the police. Were it not for the unlawful stop, there would have been no stop, no search, and no arrest of the Defendant. Additionally, the Government's reliance on *Alvarez-Gonzalez* is misplaced. Defendant here was within city limits only a few blocks from his destination, unlike *Alvarez-Gonzalez* who was on an interstate highway and who "had no apparent means of leaving the scene without driving his vehicle and thus perpetuating the offense." *Id.* Additionally, Defendant's vehicle here was legally

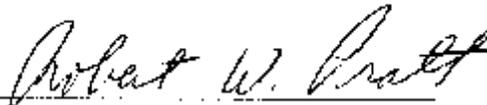
parked on a city street and would not have required towing and a subsequent inventory search. Finally, in *Alvarez-Gonzalez*, there was no dispute that the initial stop and detention of the Defendant was legal. Here, there is no reasonable indication that absent the illegal stop, the officers would have stopped the Defendant for driving under the influence. Indeed, there was absolutely no testimony indicating that Defendant was driving in an unsafe or erratic manner. The Government's position that the evidence here at issue would inevitably have been discovered is simply unsupported by the record and amounts to nothing more than speculation. Accordingly, the Court rejects the argument and maintains that the evidence be suppressed as articulated in this order.

III. CONCLUSION

For the reasons stated herein, Defendant's Motion to Suppress Evidence (Clerk's No. 16) and his Addendum to Motion to Suppress Evidence (Clerk's No. 24) are GRANTED.

IT IS SO ORDERED.

Dated this ___1st___ day of April, 2004.



ROBERT W. PRATT
U.S. DISTRICT JUDGE