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

UNITED STATES OF AMERICA,

Plaintiff,

No. 03-cr-138

ORDER

VS.

FRANCISCO URENO GUERRERO,

Defendant.

Defendant's Motion to Suppress came on for hearing on July 22, 2003. Defendant was present with his counsel, Stuart Dornan. The Government was represented by Assistant United States Attorney Lester Paff. At the close of the hearing, the Defendant sought, with the concurrence of the Government, an extension of time to file post-hearing briefs with the availability of the transcript. The Court allowed the extension, the briefs have now been received, and the motion is now fully submitted to the Court for review.

MATERIAL FACTS

On April 19, 2003, Iowa State Trooper Jason Bardsley stopped a 2001 BMW SUV, headed eastbound on I-80, for speeding and having tinted windows. As Trooper Bardsley initially approached the vehicle, he glanced into the back of the vehicle and noticed that there was what appeared to be a hanging clothes bag. The trooper testified that the bag did not appear to be full, but it did appear to contain some articles of

clothing. Trooper Bardsley explained to the driver, Defendant Francisco Guerrero, the reason for the stop and requested a driver's license.

A communication barrier existed between the trooper and Defendant, with the trooper speaking in English and Defendant's first language being Spanish. Defendant spoke only broken English, and the trooper was only able to articulate a few simple words in Spanish. Trooper Bardsley asked Defendant if he knew how fast he was going, to which Defendant replied, "Chicago." The trooper asked Defendant if he had the vehicle's registration. Defendant apparently did not understand the request, and the trooper asked again for the registration. The registration was eventually produced. The trooper then asked Defendant to exit his vehicle and accompany him back to his patrol unit. The trooper had to repeat this request, and on the third request, the trooper motioned, at which point Defendant exited his vehicle and followed the trooper.

While back in the patrol unit with the trooper, Defendant indicated he was returning from Las Vegas and heading for Chicago. Trooper Bardsley, apparently recognizing Defendant was having problems understanding English, asked Defendant "Poquito English?", to which Defendant responded, "Poquito English." Trooper Bardsley continued to communicate to Defendant in English, which necessitated repeating most of his inquiries several times. In response to the trooper's questions, Defendant would either respond in Spanish, in extremely broken English, or repeat verbatim what the trooper

had said to him in English. The trooper asked Defendant twice, "Do you read English?", to which he received no response. He then stated, "A little?", to which Defendant responded, "A little."

Trooper Bardsley explained the traffic violations to Defendant and proceeded to run Defendant's name through the El Paso Intelligence Center ("EPIC").¹ The information returned from EPIC indicated Defendant was flagged through the INS system. In addition, the address on Defendant's driver's license came back as a location where the DEA had made a cocaine purchase in the past. Although he was given a phone number to call to obtain further information regarding why Defendant was flagged through the INS system, at no point during the traffic stop did Trooper Bardsley question Defendant about his immigration status or pursue the matter further.

Trooper Bardsley ultimately issued warnings to Defendant for the speeding and window tint violations and returned to Defendant all relevant paperwork, including his driver's license and a copy of the warnings. As Defendant started to exit the patrol vehicle, Trooper Bardsley stated, "Hey, Francisco, before you take off, I'm all done with you, do you have ... you don't have anything illegal in the car with you today, do you?", and Defendant indicated that he did not. The trooper then specifically asked Defendant

¹ The El Paso Intelligence Center is a mass intelligence center comprised of approximately 20 to 25 computer databases from the federal government, including such entities as the INS, DEA, and FBI.

if he had any knives in the car, repeating this question four times, the fifth time merely stating "Like cut?" before receiving Defendant's response indicating he had no knives. The Defendant was then asked if he had any "pistolas", which the Defendant promptly denied.

The trooper subsequently asked about cocaine, marijuana, and methamphetamine. Defendant responded he had no cocaine and no marijuana, but he appeared to have trouble understanding the word methamphetamine. Trooper Bardsley then asked Defendant if he could search the car to make sure. Defendant responded, "Yeah." The trooper again asked Defendant if he could search the vehicle, to which Defendant responded by asking the trooper what he said, speaking in a mixture of Spanish and English. Defendant was then asked to sign a consent form that allowed the trooper to search the vehicle. Trooper Bardsley completed the side of the consent form that was printed in Spanish and then read the form, in English, to Defendant. The trooper asked, "Si, you comprende?", to which the Defendant replied, "yo comprende." Defendant subsequently signed the form.

Once Defendant signed the consent form, Trooper Bardsley searched the vehicle. The trooper looked at some nut covers located inside the vehicle and found some metal shavings on the floorboard that he deemed suspicious. Trooper Bardsley testified that he had experience with compartments being placed in the consoles of BMW vehicles

similar to Defendant's. No contraband was found during the roadside search of the vehicle. The trooper then asked Defendant to follow him to a nearby mechanic's shop, and Defendant complied with the trooper's request.

Once they arrived at the garage, a drug detecting K-9 officer was called to the scene, and Iowa State Trooper John Hitchcock arrived on the scene with the K-9 approximately twenty minutes later. The K-9 indicated to a narcotic odor, and narcotics were ultimately found in a compartment under the passenger seat of the vehicle. A further search revealed more drug packages surrounded by what appeared to be detergent. Defendant was subsequently placed under arrest.

Defendant asserts that all evidence should be suppressed because he was unlawfully detained without reasonable suspicion. Defendant further contends that based on the totality of the circumstances, he did not knowingly and intelligently consent to a search of the vehicle, and Trooper Bardsley did not have probable cause to search the vehicle without his consent. Defendant states that because he was unlawfully detained and did not knowingly and voluntarily consent to a vehicle search, the fruits of the search should be suppressed.

APPLICABLE LAW AND DISCUSSION

"[A] traffic violation – however minor – creates probable cause to stop the driver of a vehicle." <u>United States v. Foley</u>, 206 F.3d 802, 805 (8th Cir. 2000) (citing <u>United States v. Barry</u>, 98 F.3d 373, 376 (8th Cir. 1996)). Defendant was observed speeding

in a vehicle that appeared to have windows tinted to an unlawful degree. The initial stop of Defendant's vehicle was, therefore, valid.

After questioning Defendant about his destination and running Defendant's information through the appropriate computer checks, Trooper Bardsley issued warnings to Defendant for the violations. Once Trooper Bardsley returned Defendant's driver's license and other relevant paperwork and explained to Defendant the warnings he was being given, the purpose of the initial traffic stop was completed. See United States v. White, 81 F.3d 775, 778 (8th Cir. 1996) (explaining warning ticket and returning license and registration to driver ended the initial traffic stop). After the purpose of the traffic stop is completed, "it would be an unreasonable extension of the scope of the investigation" for Trooper Bardsley to further detain Defendant unless during the traffic stop something occurred which generated reasonable suspicion to justify a further detention. United States v. Jones, 269 F.3d 919, 925 (8th Cir. 2001); see also United States v. Johnson, 285 F.3d 744, 749 (8th Cir. 2002).

The lawfulness of the continued encounter between Defendant and Trooper Bardsley after the purpose of the traffic stop was completed "hinges on two determinations: whether [defendant] was "seized" within the meaning of the Fourth Amendment, and if so, whether the seizure was founded on a reasonable suspicion that criminal activity was afoot." Jones, 269 F.3d at 925.

"In determining whether a person has been seized for Fourth Amendment purposes, the relevant question is whether, in view of the totality of circumstances surrounding the incident, a reasonable person would have believed he was free to leave." United States v. Johnson, 326 F.3d 1018, 1021 (8th Cir. 2003).

Some circumstances that inform the determination of whether a seizure took place include: officers positioning themselves in a way that limits the person's freedom of movement, <u>United States v. White</u>, 890 F.2d 1413, 1416 (8th Cir. 1989), the presence of several officers, the display of weapons by officers, physical touching, the use of language or intonation indicating compliance is necessary, the officer's retention of the person's property, or an officer's indication that the person is the focus of a particular investigation, <u>[United States v. Ninety One Thousand Nine Hundred Sixty Dollars</u>, 897 F.2d 1457, 1461 (8th Cir. 1990)].

<u>Id.</u> at 1021-22. In the present case, after issuing the warnings to Defendant and returning his paperwork to him, Trooper Bardsley said, "Hey, Francisco, before you take off, I'm all done with you, do you have ... you don't have anything illegal in the car with you today, do you?" Stating "before you take off" would suggest to a reasonable, English-speaking individual that before they are free to leave, something further is required from them. The trooper's subsequent statement, "I'm all done with you", does not cure his initial indication that Defendant was not yet free to leave.

In the present case, Defendant's limited ability to understand English in all likelihood prohibited him from understanding subtle nuances in what was said to him after the trooper returned the relevant paperwork to him. That same inability to understand English would reasonably lead to Defendant's perception that since the trooper had said the simple phrase, "before you take off", and was still talking to him and asking him questions, he was not free to leave. The Court, therefore, finds that Defendant was seized for Fourth Amendment purposes.

In support of its argument that Trooper Bardsley had a reasonable suspicion to detain Defendant, the Government asserts that the trooper did not notice many clothes in the passenger side of the vehicle and thought it was odd for a person to put their clothing in some location other than the back seat, as the SUV that Defendant was driving did not have a trunk in which luggage could have been stored out of view. At hearing, Trooper Bardsley testified that he had noticed a hanging clothes bag in the vehicle that appeared to contain some clothing. Given that some clothing was observed in a bag in Defendant's vehicle, the Court is unable to conclude how the nature of the luggage or clothing Defendant traveled with was in any way suspicious, absent additional information not present here.

The Government also asserts that Defendant appeared nervous. Defendant asserts that he was nervous because Trooper Bardsley was asking him so many questions and that, while nerves are a factor in determining whether reasonable suspicion exists, the Eighth Circuit is leery of using this factor as a basis to detain a person because it is common for a person to be nervous to in police presence. "It certainly cannot be deemed unusual for a motorist to exhibit signs of nervousness when confronted by a law

enforcement officer." <u>United States v. Beck</u>, 140 F.3d 1129, 1139 (8th Cir. 1998). Where Defendant did not appear to be overly nervous, the suspicion associated with a nervous demeanor is at best minimal. Id.

The trooper also noticed Defendant had air fresheners in his vehicle, which indicated to the trooper that Defendant was trying to mask odor. Although law enforcement observes that air fresheners are typically used to mask odors emanating from illegal narcotics, they are commonly employed to mask a myriad of other odors, and the fact that Defendant had air fresheners in a 2001 BMW can be a wholly innocent fact that does not warrant the suspicion that criminal activity was afoot. As Defendant points out, it is not unusual for a person to keep air fresheners in a 2001 luxury vehicle such as a BMW.

The Government also points to the fact that when asked, Defendant incorrectly identified his brother's birthday, could not recall his children's telephone number in Las Vegas, misidentified the number of siblings he has, and incorrectly identified the purchase date of the vehicle. In order to receive a response to these requests for information, Trooper Bardsley had to repeatedly restate the questions or simplify his requests in English. The videotape of the stop demonstrates that Defendant was unable to understand much, if not most, of what Trooper Bardsley was saying to him, which could reasonably explain his inability to answer the questions with a coherent or accurate answer. The misidentification of the number of siblings was immediately corrected by

the Defendant, and it may have been a simple misstatement. It can hardly be argued that a failure to know or recall the other items infers criminal activity.

Finally, the Government asserts that in Trooper Bardsley's experience, vehicles similar to Defendant's have had a compartment for drug transportation, and that this fact contributes to a finding of reasonable suspicion. Such a factor provides minimal support at best, insomuch as a "vehicle similar to Defendant's" would implicate a large class of motor vehicles.

"Although the nature of the totality of the circumstances test makes it possible for individually innocuous factors to add up to reasonable suspicion, it is "impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation."" <u>United States v. Wood,</u> 106 F.3d 942, 948 (10th Cir. 1997) (citing <u>Karnes v. Skrutski</u>, 62 F.3d 485, 496 (3rd Cir. 1993)); <u>see also Beck</u>, 140 F.3d at 1137. The record does not support the Government's assertion that Trooper Bardsley had reasonable suspicion to detain Defendant. Trooper Bardsley himself testified that he had no other reason to continue to detain Defendant and question him once the purpose of the traffic stop was completed. The record does not demonstrate facts that would support the finding of reasonable suspicion to justify the further detention of Defendant. The Court, therefore, finds the seizure that occurred was not founded on a reasonable suspicion that criminal activity was afoot.

As the Court has determined the continued encounter between Trooper Bardsley and Defendant was unlawful, it must examine the consent to search that was obtained from Defendant during the unlawful encounter. "[I]n determining whether [defendant's] consent was sufficiently voluntary to purge the taint of his illegal detention, we look at the totality of the circumstances." <u>United States v. Becker</u>, 333 F.3d 858, 861 (8th Cir. 2003). The Government bears the burden of proving by a preponderance of the evidence that Defendant knowingly and voluntarily gave his consent. <u>United States v. Yousif</u>, 308 F.3d 820, 830 (8th Cir. 2002).

The following characteristics of persons giving consent are relevant when assessing the voluntariness of their consent: (1) their age; (2) their general intelligence and education; (3) whether they were intoxicated or under the influence of drugs when consenting; (4) whether they consented after being informed of their right to withhold consent or of their Miranda rights; (5) whether, because they had been previously arrested, they were aware of the protections afforded to suspected criminals by the legal system.

<u>United States v. Chaidez</u>, 906 F.3d 377, 381 (8th Cir. 1990; see also <u>United States v. Alcantar</u>, 271 F.3d 731, 737 (8th Cir. 2001). Defendant is a 41-year old Spanish male who has illustrated little understanding to comprehend the English language. There is no evidence in the record which indicated that Defendant was either intoxicated or under the influence of drugs when he gave his consent. No evidence was presented which indicates that Defendant is familiar with the criminal justice system, let alone state and constitutional procedures or safeguards, and Defendant was not informed of his right to

withhold consent to a search. Defendant lacks a minimal understanding of the legal system and is at an disadvantage due to his inability to communicate in English.

A review of the videotape of the stop makes clear that Defendant did not have a sufficient understanding of the English language to allow him to fully understand what was being communicated to him by the officer. Although the blank consent form was printed in Spanish, with the trooper filling in the blanks using English, the Government has not demonstrated that Defendant is capable of reading Spanish. The record is silent as to the Defendant's intelligence or education. Under all of these circumstances, the Court is compelled to find that Defendant's consent was not knowingly and intelligently given.

The Government asserts that even if Defendant had not actually voluntarily consented, the Fourth Amendment requires only that an officer reasonably believe that consent to search has been made. The Government "must prove that [the defendant] consented to the ... search or that the officers reasonably so believed." <u>United States v. Sanchez</u>, 156 F.3d 875, 878 (8th Cir. 1998). "The precise question is not whether [defendant] consented subjectively, but whether his conduct would have caused a reasonable person to believe that he consented." <u>United States v. Jones</u>, 254 F.3d 692, 695 (8th Cir. 2001).

In <u>United States v. Galvan-Muro</u>, the defendant argued that he had a poor understanding of the English language and that he thought the officer's requests to search

his vehicle were actually demands. United States v. Galvan-Muro, 141 F.3d 904, 907 (8th Cir. 1998). The Eighth Circuit found the defendant's consent was voluntary, as the officer had no difficulty understanding the defendant, he perceived no difficulty in the defendant understanding him, and the videotape of the stop clearly indicated that the defendant spoke English. <u>Id. See also United States v. Mendoza-Cepeda</u>, 250 F.3d 626, 629 (8th Cir. 2001) (defendant's purported inability to speak English did not negate his voluntariness to consent where defendant appeared to understand the officer's verbal requests and gestures indicating his desire to search defendant's carry-on bag and his torso, and where the defendant spoke clearly and without an accent when stating, "I don't speak English."); Sanchez, 156 F.3d at 878 (finding defendant consented to the search or, alternatively, that law enforcement reasonably believed defendant had done so, where responses to the agents' questions evinced the defendant's grasp of the conversation and officers testified that the defendant appeared to understand the questions directed to him).

In the present case, a review of the videotape of the stop demonstrates that Defendant was having significant difficulty understanding what Trooper Bardsley was saying to him, and Defendant clearly did not speak much English. Defendant did not appear to understand the questions directed to him, as evidenced by the fact Trooper Bardsley had to repeat nearly every question several times while he was attempting to communicate with Defendant. Many times, Defendant would simply verbatim repeat back to the

trooper what the trooper had said to him.² In other instances where Defendant appeared to understand what was being said to him, the English words used are of a nature that readily translate to Spanish.³

Further, the record demonstrates that the trooper clearly perceived a difficulty in Defendant understanding him and was aware that Defendant could not understand English. Not only did Defendant indicate such, but the trooper would often use single Spanish words in order to communicate, such as saying "Pistola?" when attempting to determine if Defendant had any weapons with him, or stating "Poquito English?" in determining whether Defendant spoke any English. The trooper would also simplify his English in a manner that demonstrated he knew he was speaking to someone that had

² After reading the consent form in English to Defendant, Trooper Bardsley stated, "Ok? Sí, you comprende?", to which Defendant responded, "Yo comprende." The correct and common subject and verb conjugation in Spanish is "yo comprendo", not "yo comprende". See José A. Blanco & Mary Ann Dellinger, Panorama Introducción a la lengua española, § 3.3 (2002); Christopher Kendris, 201 Spanish Verbs, p. 45 (1963). Although it is unlikely any non-Spanish speaking individual would be aware of such subtle distinctions in the Spanish language, this exchange falls short of demonstrating consent.

³ Defendant quickly responded when he was asked whether any cocaine or marijuana was located in the vehicle. In the Spanish language, "cocaine" is "cocaína" and "marijuana" is "marihuana".

trouble understanding English.⁴ Trooper Bardsley utilized the side of the consent form which was written in Spanish.

Based on a review of the videotape and the exchange that took place between Trooper Bardsley and Defendant, it appears clear to the Court that Defendant did not fully understand what was being communicated to him and that Trooper Bardsley recognized this communication barrier existed. Based on the fact that Trooper Bardsley had to repeat his questions several times and the fact that the trooper reverted to speaking in very limited Spanish in order to communicate with Defendant, the Court cannot find that the trooper reasonably believed Defendant had a sufficient understanding of what was being said to him in English or that he voluntarily consented to a search of the vehicle.

As the Court finds Defendant's consent was not voluntary, the Court must next determine whether, absent Defendant's consent, Trooper Bardsley had probable cause to justify a search of the vehicle. Probable cause is a "fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). The Government asserts that based on the totality of the circumstances, the trooper did have probable cause to search the vehicle. "[R]easonable suspicion is a less demanding standard than probable cause." Illinois v. Wardlow, 528

⁴ For example, the trooper stated, "No pay", in explaining the warnings to Defendant.

U.S. 119 (2000). The Court has found that the trooper did not have a reasonable suspicion to further detain Defendant, and there is no indication that any additional facts developed after the unlawful seizure would support a finding of probable cause. There is insufficient evidence which would demonstrate a fair probability that contraband or evidence of a crime would have been found in Defendant's vehicle, and, therefore, the Court finds that Trooper Bardsley did not have probable cause to search the vehicle.

CONCLUSION

Defendant was seized for Fourth Amendment purposes, and the facts demonstrate that Trooper Bardsley did not have a reasonable suspicion to justify a further detention of Defendant. The Government has failed to prove Defendant's consent to a search of the vehicle was voluntary and an act of free will sufficient to purge the primary taint of the unlawful seizure of Defendant. Finally, the record does not demonstrate that Trooper Bardsley had probable cause to search the vehicle. Defendant's motion to suppress must, therefore, be **granted**.

IT IS SO ORDERED.

Dated this 14th day of August, 2003.

TAMES E. CRITZNER, TUDGE/ UNITED STATES DISTRICT COURT