

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WADE WILSON, JR.,

Defendant.

No. CR01 - 0067 LRR

**MEMORANDUM OPINION AND
ORDER ON OBJECTION TO
MAGISTRATE JUDGE'S
RECOMMENDATION**

This matter is before the Court on the government's objections [docket no. 116] to the Report and Recommendation of Magistrate Judge Jarvey [docket no. 102]. Judge Jarvey recommends that defendant Wade Wilson, Jr.'s¹ Motion to Suppress [docket no. 81] be granted. Pursuant to 28 U.S.C. § 636(b)(1)(C), the district court is to make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which the government objects. To that end, the Court has carefully reviewed the record, the transcript of proceeding, the report and recommendation, the briefs, and the relevant case law.

I. FACTS

On August 8, 2002, Judge Jarvey held a hearing on Wilson's motion to suppress. The Court has carefully reviewed that transcript [docket no. 101] and the government's objections to the report and recommendation. The Court finds the following facts to be relevant in this case.

On May 10, 2001, Detective Mark Fischer and Sergeant Thomas Jonker, both of the Cedar Rapids Police Department, were conducting surveillance on an apartment for which they had a search warrant. The apartment building, located at 1600 Third Avenue SE in

¹The caption indicates the defendant's name is "Wade Wilson, Jr." but he has been indicated under the names Wilson Wade, Jr. and Kenneth Johnson. For purposes of this Order, the defendant will be referred to as "Wilson."

Cedar Rapids, Iowa, has six apartments that are accessed by one door in the front of the apartment building and one door in the rear.

Detective Fischer and Sergeant Jonker were conducting surveillance of the apartment building from an alley between Second and Third Avenues. They could see the front of the apartment from the location at which they were parked. However, their observations were hindered in part by an extremely heavy rainstorm.

The warrant authorized the search of apartment A and “all vehicles registered to anyone known to reside at 1600 3rd Avenue SE apartment A.” The warrant was issued on May 3, 2001 and was based on detailed information received within 72 hours prior to the issuance of the warrant. Specifically, a confidential informant had been given money by the police and was able to purchase crack cocaine in apartment A. The search warrant also indicates that a confidential informant told Cedar Rapids Police Department Officer Melissa Henderson that several different black males were selling crack cocaine from apartment A. The search warrant application goes on to explain that the confidential informant is a trustworthy individual who had supplied information to police in the past, leading to several search warrants and arrests.

As the police prepared to execute the warrant on the evening of May 10, 2001, they did not know who resided in apartment A. The police did, however, have “intelligence” indicating that Wilson was supplying the location with crack cocaine. The intelligence information was that Wilson would periodically supply the location with crack cocaine, take the money, and then leave until the location needed to be resupplied with crack cocaine. This “intelligence” information was not contained in the affidavit in support of the search warrant.

Officer Anthony Robinson, who was involved in the execution of the search warrant and surveilling the apartment, saw more than half a dozen cars come and go from the apartment building within one hour. At approximately 7:30 p.m., Detective Fischer and Sergeant Jonker observed a light colored Lexus pull up in front of the apartment building. The driver of the vehicle, a black male, left the car, went into the apartment building for

seven to ten minutes, then returned to the car. The driver left the car lights on while entering the apartment. The car then left and went eastbound on Third Avenue.

Because of Detective Fischer's belief that the Lexus and its occupants had a connection to drug trafficking activity at the apartment, Detective Fischer and Sergeant Jonker began to follow Wilson's Lexus and observed that it made a right-hand turn onto 17th Street SE. When following right behind Wilson's vehicle, Detective Fischer and Sergeant Jonker did not see valid plates on the Lexus. Due to the weather and lighting conditions, Detective Fischer and Sergeant Jonker could not see if the vehicle had a permanent or temporary license plate affixed elsewhere to the vehicle.

Detective Fischer directed Officer Dan Jabens, a dog-handling police officer, to stop the vehicle to determine who was in it. Jabens was in a marked unit and was in the vicinity specifically to assist Detective Fischer that evening. Jabens stopped the car in the 1500 block of Bever Avenue SE. As Jabens approached the vehicle to pull it over, he observed two occupants in the vehicle. He also saw that there were no license plates on the car. Because of the heavy rain and tinting on the rear window of the car, he could not observe any registration tags on the car. He did not observe the temporary registration in the back window until he got right next to the vehicle. He then observed that it had a dark yellow or orange Illinois registration.

Officer Jabens, followed by Detective Fischer, approached the driver's side of the vehicle and determined that the defendant, Wade Wilson, was the driver and Tamika Burks was the passenger. Sergeant Jonker approached the passenger side. Wilson was asked to get out of his car and Officer Jabens explained that he was stopped because his license tag was not visible. He also explained that Detective Fischer wanted to talk to him about the search warrant that they were about to execute. Wilson was asked whether he had any weapons and Wilson responded that there was a gun underneath the passenger seat of the vehicle near Ms. Burks. He said that Ms. Burks had just purchased it.

Officer Jabens went around to the passenger side of the vehicle where Ms. Burks was sitting. She reached for the gun and was told by Detective Fischer to get her hands where

he could see them. Officer Jabens then retrieved a loaded 9 mm semi-automatic handgun from beneath the front passenger seat. Officers also seized \$926 in cash from Wilson. Wilson and Ms. Burks were taken into custody and transported to the police station. At the police station, Wilson was advised of his *Miranda* rights and he executed a written waiver of those rights. He also executed a cooperation agreement.

Wilson spoke with the police that evening about a Phil Parker in Chicago who had allegedly attempted to kill Wilson and who allegedly had Wilson shot seven times in 1999. Wilson testified in the trial of Parker for attempted murder in Chicago a month earlier.

Detective Fischer and Officer Robinson met with Wilson on May 23, 2001 at a Burger King restaurant on Mt. Vernon Road SE in Cedar Rapids, Iowa. Wilson provided information concerning a drug trafficking connection between Chicago and Cedar Rapids.

On June 15, 2001, Detective Fischer and Officer Robinson were in the 3300 block of Pioneer Avenue SE in Cedar Rapids, Iowa where Wilson and Ms. Burks resided. This neighborhood was known to have a lot of drug activity and officers would drive through the area about twice each week. Detective Fischer and Officer Robinson saw Wilson in his automobile with Ms. Burks as the passenger. Detective Fischer pulled up beside Wilson, motioned for him to pull over to the side of the road, and through his rolled-down window, told Wilson that he wanted to speak with him. Detective Fischer wanted to speak with Wilson because he had been cooperating with law enforcement regarding the Chicago and Cedar Rapids drug trafficking connection, but Detective Fischer had not spoken with Wilson since May 23, 2001. Wilson pulled into an apartment complex parking lot and Ms. Burks got out of the car and walked away. After Wilson got out of his car, Detective Fischer patted Wilson down. Detective Fischer found a large wad of money in Wilson's pocket. Detective Fischer seized the money believing it to be proceeds of drug dealing. Detective Fischer took \$543 in cash from Wilson, gave him a receipt for the cash, and told him that the money would be tested for drugs. The money later tested positive for cocaine. Detective Fischer told Wilson that he had made Detective Fischer look bad by not cooperating with the Chicago

Police Department. Detective Fischer then told Wilson that if he did not cooperate at that time, the next time Wilson would be talking to him, Wilson would be behind bars.

Wilson is charged with: (1) possession with intent to distribute crack cocaine on March 10, 2001 within 1000 feet of a school, after having been previously convicted of a drug felony in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 851 and 860; (2) possession of the 9 mm pistol and .380 caliber ammunition between about September 2000 and May 10, 2001 in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1); (3) possession with intent to deliver crack cocaine on May 10, 2001 within 1000 feet of a school, after having been previously convicted of a felony drug offense in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 851 and 860; (4) possessing a firearm on July 31, 2001 after having been previously convicted of one or more crimes punishable by imprisonment for a term exceeding one year in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1); (5) distribution of crack cocaine on July 31, 2001 in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 851 and 860; and (6) possession of 45 rounds of .32-20 caliber ammunition on October 8, 2001, after having been previously convicted of one or more crimes punishable by imprisonment for a term exceeding one year in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1).

Wilson filed a motion to suppress evidence seized from the defendant by law enforcement on May 10, 2001 and June 15, 2001 on the grounds that any such evidence is the result of an improper vehicle stop. In addition to seeking to exclude all evidence that was seized during the May 10, 2001 and June 15, 2001 searches and seizures, he also seeks to suppress any statements he made to law enforcement that resulted from the allegedly illegal searches as “fruits of the poisonous tree.”

In response, the government maintains that its authority for the stop of the vehicle on May 10, 2001 emanated from four sources: (1) the search warrant to determine whether the occupants were residents of the apartment; (2) probable cause to stop the vehicle to determine if it was properly registered; (3) reasonable suspicion that Wilson was involved in drug trafficking based on his arrival and quick departure from a suspected crack house

which was the subject of a search warrant; and (4) Wilson's consent. The government further contends that evidence seized during the June 15, 2001 search was the result of a consensual encounter.

Hearing on Wilson's motion to suppress was held before Magistrate Judge Jarvey on August 8, 2002. Defendant was personally present with his attorney Raphael M. Scheetz, III. The United States of America was represented by Assistant United States Attorney Patrick Reinert. Judge Jarvey found that as to the May 10, 2001 traffic stop, the government's first two arguments failed, warranting suppression of the evidence. Judge Jarvey did not address the government's additional arguments, that reasonable suspicion supported the stop of the vehicle and that Wilson consented by telling law enforcement that there was a gun in the vehicle. Judge Jarvey further found that the June 15, 2001 encounter was not consensual, warranting suppression of the money seized from Wilson's person.

II. LEGAL ANALYSIS

The Court has conducted an independent and *de novo* review of the applicable case law as well as the record, including the transcript of the evidentiary hearing held on December 12, 2002. See 28 U.S.C. § 636(b)(1)(C) (a district court must make an independent, *de novo* determination of those portions of a report and recommendation to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendation made by the magistrate judge).

A. May 10, 2001 Traffic Stop

1. The Search Warrant

The Court finds that the report and recommendation is thorough, well-reasoned, and exhaustively assesses the parties' claims and the applicable law. The Court concurs with Judge Jarvey's legal analysis and finds it to be fully supported by the record and the law with

respect to the government's argument that the officers had to stop and detain Wilson's vehicle to determine who owned the vehicle.

A search warrant must describe with particularity the item to be seized. The description of the property to be seized must be so specific that it leaves nothing to the discretion of the officers executing the warrant. *Marvin v. United States*, 732 F.2d 669, 674 (8th Cir. 1984). Furthermore, the warrant must not allow the officers to seize more than is reasonable under the circumstances. *Id.* A warrant is unconstitutional for its lack of particularity if it authorizes a search in terms so ambiguous as to allow the executing officers to pick and choose among an individual's possessions to find which items to seize. This will result in the general "rummaging" banned by the fourth amendment. *See Marron v. United States*, 275 U.S. 192, 195, (1927).

In this situation, the warrant does not describe with particularity the place to be searched and is therefore unconstitutional. The search warrant in this case authorized the search of "all vehicles registered to anyone known to reside at 1600 3rd Avenue SE apartment A." This language leaves to the officer's discretion the determination of whether an automobile is registered to a resident of one particular apartment in a multi-apartment building.

2. Probable Cause

The Court finds, for the same reasons explicated by Judge Jarvey, that because the officers could not see the temporary registration sticker through tinted windows, the officers had reasonable suspicion to believe Wilson was committing a traffic violation. *See United States v. Peltier*, 217 F.3d 608, 610 (8th Cir. 2000). The initial stop of Wilson's vehicle was therefore justified.

Courts have held that if an officer's suspicions are aroused, officers are justified in expanding the scope of a traffic stop to investigate further. In *Peltier*, a police officer, who lawfully stopped a driver to investigate a possible motor vehicle registration violation, could properly detain and ticket the driver for a seat belt violation that the officer observed while

verifying that the driver had valid and properly displayed registration sticker. *Peltier*, 217 F.3d at 610. While ticketing the defendant for the seat belt violation, the officer smelled an odor of burnt marijuana coming from the cab of the truck. *Id.* Probable cause therefore existed for the officer to search defendant's truck for drugs. *Id.* See also *United States v. Allegree*, 175 F.3d 648, 650 (8th Cir. 1999); *United States v. Dumas*, 94 F.3d 286 (7th Cir. 1996) (finding stop and detention justified where officer could not read registration certificate, even after approaching the vehicle); *United States v. Dexter*, 165 F.3d 1120 (7th Cir. 1999).

However, in this case, Officer Jabens dispelled his suspicion about a lack of license plates as he approached the car. See *United States v. McSwain*, 29 F.3d 558 (10th Cir. 1994) (finding that once an officer observes the temporary registration sticker, the purpose of the stop had been satisfied and without further indication that illegal activity was occurring, the extension of the traffic stop was unlawful). Upon approaching Wilson's vehicle, the officers did not discover any new facts that created a reasonable articulable suspicion of criminal activity. Authority for the traffic stop had therefore dissipated prior to the questioning of Wilson. As a result, the continued detention of Wilson was not warranted. The Court therefore adopts Judge Jarvey's legal analysis finding that the officers' detention of Wilson was unlawful.

3. Reasonable Suspicion

The government nevertheless argues that, even if the traffic stop was improper to determine whether the occupants were residents of the apartment or to determine if the vehicle was properly registered, the totality of the circumstances observed by the officers prior to the stop of Wilson's vehicle sufficed to create reasonable suspicion, thereby rendering the stop in this particular case constitutionally permissible.

According to *Terry v. Ohio*, a law enforcement officer may “stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot’.” *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The officer may ask the detainee questions in order to dispel or confirm his suspicions, but questioning is limited in scope to the circumstances that justified the stop. *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir.1990), *cert. denied*, 502 U.S. 962 (1991). Reasonable suspicion is based on the totality of the circumstances, *United States v. Cortez*, 449 U.S. 411, 417 (1981), which are viewed in light of the officer’s experience and familiarity with drug trafficking. *United States v. Condelee*, 915 F.2d 1206, 1209 (8th Cir. 1990).

Here, Wilson stopped briefly at the apartment house and left his lights on, an obvious indication that he did not intend to stay long. The police did not know who was driving the car or which of the six apartments he had visited. These factors do not equate to reasonable suspicion that Wilson was engaged in criminal activity. Giving due regard to the general expertise and specific knowledge of the law enforcement officers involved, the Court nevertheless finds that the totality of the circumstances cited by the government did not support a reasonable suspicion, prior to the stop, that Wilson was engaged in criminal activity.

4. Consent

The government argues, in its objections to the report and recommendation, that even if Wilson was illegally detained, his voluntary consent provided an independent basis for the search. However, in neither its memorandum in support of its resistance to defendant’s motion to suppress nor in its supplemental memorandum in support of its resistance to defendant’s motion to suppress, did the government contend that Wilson voluntarily

consented to a search on May 10, 2001. The consent argument was not raised until briefing on the objections to the report and recommendation. As the argument was not raised before Judge Jarvey, the Court will not find error in the resulting report and recommendation. See *Lang v. Shalala*, 1995 WL 444408, *2 (N.D.Ill.).

Even if the government had raised the consent argument, the Court would nevertheless find that in this case, the challenged evidence should be suppressed. The unlawful detention occurred before Wilson consented to the seizure of the 9 mm handgun and to the search of his home. Evidence seized in those searches is inadmissible unless the connection between the unlawful detention and the discovery of the challenged evidence was so attenuated by Wilson's consent as to remove the taint. Where, as here, the consent itself was tainted by the government's unlawful conduct, it is ineffective to justify the search. See *Florida v. Royer*, 460 U.S. 491, 507-08 (1983) (plurality op.). The consent in this case was given shortly after the detention became unlawful. Nothing intervened that would break the causal connection between the two. There can be no conclusion other than that Wilson's consent was obtained through exploitation of the unlawful seizure. See *Dunaway v. New York*, 442 U.S. 200, 218-19 (1979). Accordingly, the evidence seized pursuant to his consent should be suppressed.

B. June 15, 2001 Search and Seizure

The government objects to Judge Jarvey's conclusion that the June 15, 2001 search and seizure of Wilson was not a consensual encounter. The greater weight of the evidence is in accordance with the findings of fact by Judge Jarvey and the Court finds that Judge Jarvey's legal analysis is correct. The government cites no cases in support of its proposition that a traffic stop of a previously cooperating individual is somehow not a seizure of that individual. The Court finds, as did Judge Jarvey, that Wilson pulled his vehicle over at Detective Fischer's direction, that Detective Fischer patted him down, that Detective Fischer told him that he made Detective Fischer look bad by not cooperating in Chicago, and that Detective Fischer then threatened Wilson with being sent to jail. The Court therefore

agrees with Judge Jarvey that the June 15, 2001 stop, pat-down, and seizure of money from Wilson was not a consensual encounter.

III. CONCLUSION

For the same reasons stated in Judge Jarvey's conclusions of law, the Court concludes that defendant's motion to suppress should be granted and that the Report and Recommendation of Judge Jarvey should be adopted.

Based upon the foregoing, and all of the files, records, and proceedings herein, the Court ADOPTS, as amended by the foregoing, the Report and Recommendation of Judge Jarvey as to defendant's Motion to Suppress [docket no. 81].

Accordingly, IT IS HEREBY ORDERED that defendant's Motion to Suppress [docket no. 81] is GRANTED. Suppressed as evidence are the handgun and cash seized on May 10, 2001 and the cash seized on June 15, 2001. Also suppressed as evidence are Wilson's statements made during the May 10, 2001 and June 15, 2001 traffic stops as fruits of the poisonous tree.

Dated this _____ day of February, 2003.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA