UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

v. CASE NO: 8:04-cr-602-T-26MSS

SHANTA TORI RIVERS,

Defendant.
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AMENDED O R D E R

On February 11, 2005, this Court conducted an evidentiary hearing with regard to the issues raised in Defendant's Motion to Suppress. After considering the testimony elicited by the Government from Deputies Tuminella, Luckey, and Eagon, and following the arguments of counsel, the Court announced oral findings of fact and conclusions of law in granting Defendant's motion. The Court now issues this written order to supplement its oral ruling. In doing so, the Court is mindful of its responsibility as the finder of fact to ensure that its findings are plausible in light of the substantial deference accorded those findings on appeal, especially as those findings relate to witness credibility determinations as is solely the case here. See Stano v. Butterworth, 51 F. 3d 942, 944 (11th Cir. 1995); accord United States v. McPhee, 336 F. 3d 1269, 1275 (11th Cir. 2003).

First, the Court can come to no other conclusion than the members of the so-called "Green Team" of the Hillsborough County Sheriff's Office had embarked on a conscious and deliberate course of conduct designed to stop Defendant's vehicle for any possible traffic infraction in order to search that vehicle for evidence of contraband. The testimony establishes

that one month prior to the events of the evening of September 9, 2004, Deputy Eagon stopped Defendant while he was driving a 1993 Chevrolet suburban for a reason she could not recall, that she smelled what she believed to be the distinct odor of marijuana emanating from the vehicle, but that following a search of the vehicle in which she was assisted by Deputy Luckey, they could find no evidence of such contraband within the vehicle.[1] Consequently, she released Defendant.

Then, as the evidence shows, a mere two days before September 9th, Deputy Tuminella stopped this same vehicle driven by Defendant because of loud music. When Defendant declined to consent to a search, he was given a warning. Curiously, Deputy Tuminella did not stop Defendant because he had a loud muffler. Finally, Deputy Tuminella, while participating in another traffic stop on the evening of September 9th, pursued and stopped this vehicle as it was again being driven by Defendant because of a loud muffler. According to the testimony, six to seven other deputies responded to this "loud muffler" traffic stop and four to five participated in the subsequent search of Defendant's vehicle. Although the Court recognizes the obligation of these deputies to enforce the traffic laws, the Court would be derelict in its sworn duty to find the truth if it ignored the critical fact that these deputies were extremely motivated to stop this Defendant for any possible reason in the hopes of securing evidence to arrest him for a criminal offense, a motivation which this Court concludes colored and influenced their testimony

[1] During the Government's examination of her, Deputy Eagon attempted to minimize the thoroughness of her search of Defendant's vehicle because it was raining. The obvious inference the Government wants the Court to draw from this testimony is that if it had not been raining and a more thorough search was conducted that contraband would have been found. The Court finds no reasonable basis to draw such an inference.

regarding the events of the evening of September 9th.[2]

Second, the Court rejects the testimony of Deputy Tuminella with regard to his stated reason for pursuing and stopping Defendant's vehicle on September 9th - because of the noise of the muffler system. The Court finds it implausible that this highly trained law enforcement officer would not have noticed this same infraction when he stopped this same vehicle only two days earlier. The Court further finds Deputy Tuminella's testimony that he did not recognize Defendant or his vehicle until after he examined Defendant's driver license equally implausible. Again, he had stopped this same vehicle and interacted with Defendant only two days earlier.

Third, the Court rejects the testimony of the three testifying deputies regarding the odor of marijuana emanating from Defendant's vehicle because of internal inconsistencies. Deputy Tuminella testified it was not until he was at the partially cracked driver-side window speaking with Defendant that he smelled the odor of burnt marijuana or fresh marijuana emitting from the vehicle and not from Defendant. Deputy Luckey testified, however, that he was able to smell the strong odor of a *large quantity* of fresh marijuana, as opposed to burnt marijuana, ten to fifteen feet away from the vehicle. Significantly, he backtracked from his account in his police report that he smelled the odor of marijuana emitting from Defendant. This is significant because Special Agent Craig Kailimae, in reliance on this police report, executed an affidavit in support

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[2] Although not central to the Court's resolution of Defendant's motion, one could make a plausible argument that other considerations may have motivated these Deputies to single out Defendant for what their testimony clearly demonstrates is selective enforcement of the law. Defendant, from this Court's personal observation of him in court, is African-American. The Deputies, from this Court's personal observation of them in court, are caucasians. And, even though the Supreme Court in Whren v. United States, 517 U.S. 806, 813, 116 S. Ct. 1769, 1774, 135 L. Ed. 2d 89 (1996), removed a law enforcement officer's "subjective intentions" from the probable cause analysis of the Fourth Amendment, it nevertheless agreed, with Justice Scalia writing for a unanimous Court, that the Constitution through the Equal Protection Clause "prohibits selective enforcement of the law based on considerations such as race."

of a criminal complaint presented to United States Magistrate Judge Thomas B. McCoun, III, in which he represented in part that Deputies Tuminella and Luckey "noticed a strong odor of marijuana emitting from [Defendant] . . ."[3] Finally, Deputy Eagon related that she was able to smell the strong odor of fresh marijuana, as opposed to burnt marijuana, a few feet from the vehicle.

Although the Government urged that these inconsistencies demonstrated a ring of truth, in the Court's view, they manifest the hollow sounds of deception. The Court finds it extremely troubling that these three highly trained police officers would relate such markedly differing accounts of what they supposedly perceived with respect to the odor of marijuana emanating from Defendant and his vehicle.

Fourth, the Court's preceding finding is bolstered by the fact that the only quantity of marijuana found in the vehicle was residue capable of fitting on the head of a dime or quarter,[4] residue which was discovered by Deputy Tuminella only *after* Deputy Eagon had conducted what she admitted was a diligent search of the same area, a search so diligent and thorough that she even resorted to an instrument to open compartments within Defendant's vehicle. To accept the Deputies' collective testimony regarding a strong odor of burnt or a large quantity of fresh marijuana which could be detected up to more than fifteen feet from the vehicle (if Deputy Luckey is to be believed), coupled with the ultimate result of the search - a minute quantity of marijuana - would be preposterous, would defy logic and good common sense, and would border on the absurd. Furthermore, the Court finds it troubling that, as just noted, Deputy Eagon during

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[3] See docket 1.

[4] Upon inquiry from the Court, the Government attorney advised that the marijuana weighed slightly more than two grams.

the course of her diligent search failed to find the marijuana, but Deputy Tuminella was able to do so during the course of his subsequent search. This fact causes the Court great concern with regard to the true source of the marijuana, a reasonable inference being that Defendant was not that source. To echo the words of Deputy Tuminella and Deputy Luckey respectively, "it doesn't add up"and "it doesn't make sense."

Fifth, in assessing the credibility of these officers, the Court has also taken into account the fact that they were required to undergo polygraph examinations as a consequence of Defendant's complaint that more than $600 was unaccounted for after his arrest on September 9th. And, although they passed the examinations, as did Defendant, in the Court's view nothing could be more demeaning to a law enforcement officer than being accused of committing a crime while on duty, an accusation that would reasonably have a tendency to taint that officer's testimony in subsequent criminal proceedings involving the accusing defendant.

Finally, based on the Court's personal observation of the deputies while testifying, including their facial expressions, coupled with hearing their tone of voices while answering questions, the Court can only describe their demeanor and attitude while testifying as nothing short of arrogant and smug indifference to the importance of the hearing on Defendant's motion to suppress. They feigned misunderstanding simple questions in an effort to disrupt defense counsel's examination by having counsel have to repeat the question. They intentionally displayed selective memories, as evidenced by Deputy Eagon's numerous responses of "I don't recall" or "I don't remember" to questions designed to elicit critical facts favorable to Defendant's position whereas her memory was excellent with regard to facts favorable to the Government's position. Finally, when asked a direct question, they frequently attempted to evade giving a direct answer.

The Court can only surmise that this arrogant and smug indifference had its genesis in the Deputies' assumption that this Court would accept their testimony without question and scrutiny because they are law enforcement officers incapable of telling anything but the truth. This Court is aware, however, from its own personal experiences in presiding over cases involving police corruption,[5] as well as its knowledge of other cases involving corruption and fabrication of evidence by law enforcement officers arising in the Tampa Division of the Middle District of Florida,[6] that such an assumption is flawed because law enforcement officers are just as capable as anyone else of telling untruths and fabricating evidence during the course of their official duties.

In the Court's view, these findings and conclusions do not conflict with the holding of Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), in which the Supreme Court eschewed the use of a police officer's subjective intent within the framework of Fourth Amendment jurisprudence. As the Supreme Court observed "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." 517 U.S. at 813, 116 S. Ct. at 1774. Instead, a court must focus only on the objective facts known to the police officer in assessing whether probable cause exists to justify a stop of a vehicle. See United States v. Jones, 377 F. 3d 1313 (11th Cir. 2004). In making that determination, however, a court must be convinced that the police officer's testimony establishing those objective facts is credible. In this case, the Court concludes that the testimony offered by the Deputies in support of probable

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[5] See United States v. Carpenter, case number 8:00-cr-121; United States v Corgan, case number 8:00-cr-311; United States v. Cotnoir, 8:02-cr-56.

[6] See United States v. Wycoff, case number 8:99-cr-362; United States v. Maas, case number 8:99-cr-363; United States v. Wooten, case number 8:00-cr-1; United States v. Dixon, case number 01-cr-411; United States v. Aisenberg, 247 F. Supp. 2d 1272 (M.D. Fla. 2003) (and attachment), *rev'd and vacated in part and remanded*, 358 F. 3d 1327 (11th Cir. 2004).

cause is not credible.

The Court is well aware that Defendant offered no testimony or evidence contradicting the Deputies' testimony. Under the law of this Circuit, however, a court is charged with basing its findings on testimony it believes to be true, "rejecting after due consideration that which it believes is false." Boyette v. Comm'n of Internal Revenue, 204 F. 2d 205, 208 (5th Cir. 1953).[7] More important, as the Boyette court further observed, "[a]lthough positive and uncontradicted testimony as to a particular fact will ordinarily be accepted, a court may reject testimony which, as here, is *inherently unreliable*, even though no contradictory testimony is offered." Id. (emphasis added); see also Geigy Chemical Corp. v. Allen, 224 F. 2d 110, 114 (5th Cir. 1955) (explaining that "[c]ourts are not required to believe testimony which is *inherently incredible* or which is contrary to the laws of nature and of human experience, or which they judicially know to be unbelievable.") (emphasis added). Such is the case here. Even though the Deputies' testimony is technically uncontradicted, for the reasons explained, the Court finds this testimony *inherently unreliable and incredible*.

The Court announces these findings and conclusions with deep regret because they demonstrate that those who have sworn to uphold the law have themselves deviated from the rule of law. Such conduct, however, cannot be tolerated in a free and democratic society because, as one court has so poignantly observed, "our bondage to law is the price of our freedom." Johnson v. Johnson, 284 So. 2d 231 (Fla. Dist. Ct. App. 1973).

Accordingly, for the reasons expressed orally on the record and in this order, it is ordered and adjudged as follows:

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[7] In Bonner v. City of Prichard, 661 F. 2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit declared that all Fifth Circuit decisions handed down on or before September 30, 1981 are binding precedent in the Eleventh Circuit.

1) Defendant's Motion to Suppress (Dkt. 28) is granted.

2) The Taurus .40 caliber firearm and marijuana discovered during the search of Defendant's vehicle on September 9, 2004, which form the basis respectively of counts one and two of the indictment, are suppressed as evidence in this case.

3) This case will remain on the Court's March trial calendar as to counts three and four.

DONE AND ORDERED at Tampa, Florida, on February 16, 2005.

s/
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record