

United States Court of Appeals
Tenth Circuit

PUBLISH

August 30, 2021

UNITED STATES COURT OF APPEALS

Christopher M. Wolpert

FOR THE TENTH CIRCUIT Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 20-1183

COLT FRANCIS MALONE,

Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 1:19-CR-00339-PAB-1)

Grant R. Smith, Assistant Federal Public Defender, Office of the Federal Public Defender, Districts of Colorado and Wyoming (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant-Appellant.

Cyrus Y. Chung, Office of the United States Attorney, District of Colorado (Jason R. Dunn, United States Attorney, with him on the briefs), Denver, Colorado, for Plaintiff-Appellee.

Before **BACHARACH**, **EBEL**, and **PHILLIPS**, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal concerns a traffic stop. During the stop, law-enforcement officers ordered the passenger, Mr. Colt Francis Malone, to exit the car. He complied, and the officers found a pistol. Based on the presence of this pistol, the government charged Mr. Malone with possession of a firearm after a felony conviction. *See* 18 U.S.C. § 922(g)(1).

Mr. Malone moved to suppress evidence of the pistol, arguing that the officers had violated the Fourth Amendment by prolonging the traffic stop. The district court denied the motion to suppress, leading Mr. Malone to enter a conditional guilty plea and to appeal.

We affirm. Even if the officers had detoured from the mission of the traffic stop, the district court had made a factual finding that the officers did not prolong the stop and Mr. Malone waived any challenge to that finding. So introduction of the pistol into evidence would not have violated the Fourth Amendment.

1. When the officers ask Mr. Malone to exit the car, they discover a pistol under his seat.

While surveilling a hotel known for criminal activity, law-enforcement officers saw a car pull into the hotel's parking lot. The officers watched one of the car's occupants visit a room on the first floor and return to the car; after she returned, the car left. When it did, the officers notified Detective Adam Brewer and Officer Brook Hathaway, who spotted the car. Detective Brewer and Officer Hathaway then saw the

driver commit a traffic violation (a wide right hand turn) and pulled the car over.

While Officer Hathaway approached the passenger's side of the car, Detective Brewer went to the driver's side. Responding to Detective Brewer's questions, the driver identified herself as Ms. Darlene Tucker and provided her driver's license. Detective Brewer also asked Ms. Tucker for the car registration and proof of insurance. She couldn't immediately find these documents, so she started looking for them. The passenger, Mr. Malone, also provided his identification and mentioned that he was on parole for burglarizing a pawn shop.

With this information from Mr. Malone, Detective Brewer

- told Ms. Tucker to continue looking for her registration and proof of insurance and
- returned to the patrol car.

There Detective Brewer learned from the dispatcher that Mr. Malone was a suspected gang member. Detective Brewer decided to investigate further.

He then joined Officer Hathaway at the passenger side of the car. (Neither officer stayed with Ms. Tucker.) Officer Hathaway told Mr. Malone to get out of the car, and he did. Detective Brewer then led Mr. Malone to the back of the car and started to pat him down.

After Mr. Malone had left the car, Officer Hathaway saw a liquor bottle near Mr. Malone's seat. As Officer Hathaway went to pick up the

bottle, he saw a firearm magazine. The officers then searched the car and found a pistol under the seat.

2. Standard of Review

When we review the denial of a motion to suppress, we

- view the evidence in the light most favorable to the government,
- accept the district court’s findings of fact unless they are clearly erroneous, and
- consider de novo the ultimate question of reasonableness.

E.g., United States v. Mayville, 955 F.3d 825, 829 (10th Cir. 2020). A finding of fact is clearly erroneous only if it lacks factual support or the Court has “a definite and firm conviction that the district court erred.” *United States v. Chavez*, 734 F.3d 1247, 1250 (10th Cir. 2013) (quoting *United States v. Jarvison*, 409 F.3d 1221, 1224 (10th Cir. 2005)).

3. In general, a traffic stop must last no longer than needed to investigate the traffic violation.

Traffic stops constitute Fourth Amendment “seizures” and must be reasonable. *Whren v. United States*, 517 U.S. 806, 809–10 (1996). A traffic stop is reasonable only if

- it is justified from the start and
- the officers’ actions are “reasonably related in scope to the mission of the stop” (investigation of the suspected traffic violation).

United States v. Mayville, 955 F.3d 825, 829 (10th Cir. 2020) (quoting *United States v. Cone*, 868 F.3d 1150, 1152 (10th Cir. 2017)). To fulfill this mission, officers may make ordinary inquiries related to the traffic stop (like questions about registration and insurance), determine whether to issue a ticket or warning, and address “related safety concerns.”

Rodriguez v. United States, 575 U.S. 348, 354–55 (2015). But officers cannot take more time than necessary to address the traffic violation.

United States v. Cortez, 965 F.3d 827, 837 (10th Cir. 2020). So the stop becomes “‘unlawful’” if officers

- detour from the mission without reasonable suspicion and
- “‘prolong[.]’” the stop (regardless of whether the detour “occurs before or after [an] officer issues a ticket”).

Rodriguez, 575 U.S. at 356–57 (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)).

4. Mr. Malone waived any challenge to the district court’s factual finding that the exit order had not prolonged the traffic stop.

Mr. Malone does not challenge the legality of the initial traffic stop or the officers’ conduct after they saw the firearm magazine. He instead focuses on the order to exit the car, arguing that this order violated the

Fourth Amendment by creating a detour that prolonged the traffic stop. We disagree.

We assume for the sake of argument that the exit order constituted a detour. But even with this assumption, Detective Brewer’s actions would have been lawful if they hadn’t prolonged the traffic stop. *See United States v. Mayville*, 955 F.3d 825, 832–33 & n.2 (10th Cir. 2020) (rejecting a Fourth Amendment challenge to a dog sniff because officers were still completing related paperwork); *see also Rodriguez v. United States*, 575 U.S. 348, 354–55 (2015) (stating that questioning for an unrelated investigation and a dog sniff would not violate the Fourth Amendment if they had not prolonged the traffic stop).¹

¹ Five other circuits have held in published opinions that unrelated investigations—like inquiries into criminality or dog sniffs—violate the Fourth Amendment only if they prolong the traffic stop. *See United States v. Gholston*, 1 F.4th 492 (7th Cir. 2021) (rejecting a Fourth Amendment challenge to a dog sniff because the district court did not clearly err “in finding that [the officer] [had] not unlawfully prolong[ed] the stop”); *United States v. Buzzard*, 1 F.4th 198 (4th Cir. 2021) (stating that even if the law-enforcement officer’s question had “exceeded the scope of the stop’s mission,” the question would have “passe[d] constitutional muster” because it hadn’t prolonged the traffic stop); *United States v. Yusuf*, 993 F.3d 167, 182–83 (3d Cir. 2021) (rejecting a Fourth Amendment challenge because the traffic stop had not been prolonged in light of the driver’s need to continue looking for the registration and proof of insurance); *United States v. Lott*, 954 F.3d 919, 924–25 (6th Cir. 2020) (rejecting a Fourth Amendment challenge because a law-enforcement officer’s “questions about criminal activity unrelated to the traffic stop” did not prolong the traffic stop); *United States v. Fuehrer*, 844 F.3d 767, 773 (8th Cir. 2016) (rejecting a Fourth Amendment challenge to a dog sniff because the officers were still completing paperwork). In unpublished opinions, four

The critical issue is thus whether the alleged detour prolonged the traffic stop. This question is factual, not legal. *E.g.*, *United States v. Mayville*, 955 F.3d 825, 829–33 (10th Cir. 2020). For this factual question, the district court found that the officers’ actions had not prolonged the stop. This finding was arguably supported by Ms. Tucker’s inability to find her proof of insurance or the vehicle registration. R. vol. 4, at 146.

Given the factual nature of this issue, we could disturb the finding only if it were clearly erroneous. *Mayville*, 955 F.3d at 829–33; *see* p. 4, above. But we can’t consider the possibility of clear error because Mr. Malone expressly waived any challenges to the district court’s factual findings. In his opening brief, Mr. Malone stated that he “[wa]s not challenging any of the district court’s factual findings.” Appellant’s Opening Br. at 12. In response, the government pointed out that Mr. Malone had not argued clear error. Gov’t’s Resp. Br. at 12–13.

other circuits have reached the same conclusion. *See Negrito v. Buonaugurio*, 836 F. App’x 36, 39 (2d Cir. 2020) (rejecting a Fourth Amendment challenge because the defendant had not adequately alleged extension of the traffic stop from unrelated inquiries); *United States v. Gladney*, 809 F. App’x 220, 226 (5th Cir. 2020) (rejecting a Fourth Amendment challenge to unrelated questions because the officer was waiting for resolution of safety concerns); *United States v. Kash*, 751 F. App’x 1007, 1010 (9th Cir. 2018) (rejecting a Fourth Amendment challenge to unrelated questions because related checks were ongoing); *United States v. Rivas*, 746 F. App’x 826, 828–29 (11th Cir. 2018) (rejecting a Fourth Amendment challenge to a dog sniff, reasoning that the officer had ongoing inquiries relating to a traffic violation).

Mr. Malone did not reply. And even if he had, the Court ordinarily does not allow the use of a reply brief to withdraw a concession. *See United States v. Mullikin*, 758 F.3d 1209, 1210 n.2 (10th Cir. 2014); *see also Hasan v. AIG Prop. Cas. Co.*, 935 F.3d 1092, 1099 (10th Cir. 2019) (“When an appellee advances an alternative ground” to affirm and “the appellant does not respond” to the alternative argument in the reply brief, the appellant “waives, as a practical matter . . . , any objections not obvious to the court to specific points urged by the appellee.”) (quoting *Hardy v. City Optical Inc.*, 39 F.3d 765, 771 (7th Cir. 1994)).

Only in response to questions at oral argument did Mr. Malone urge clear error. Oral Arg. at 3:40–12:30. But “issues may not be raised for the first time at oral argument.” *United States v. Abdenbi*, 361 F.3d 1282, 1289 (10th Cir. 2004). So Mr. Malone waived his new argument of clear error.

Mr. Malone nonetheless argues that the detour added time to the stop, stating that

- the district court incorrectly assumed that a detour couldn’t add time if the mission were incomplete and
- the exit order added time because no one was attending to Ms. Tucker.

Neither argument is persuasive.

The district court recognized the possibility for a detour to add time to the middle of a traffic stop. *See R. vol. 4*, at 144 (recognizing that an

exit order had added time to the traffic stop); *see also* Part 3, above. Given this possibility, the court properly considered whether the exit order had added time to the traffic stop. On this factual question, the court answered “no” and Mr. Malone didn’t challenge this factual finding until he responded to our questions at oral argument.

Mr. Malone also points out that both officers were focusing on him, with neither officer attending to Ms. Tucker. But if she were still looking for the registration and proof of insurance, the officers could have investigated Mr. Malone while they were waiting. *See United States v. Yusuf*, 993 F.3d 167, 183 (3d Cir. 2021) (holding that the traffic stop was not prolonged because “the search for the insurance card and registration was a plainly valid reason to continue the stop”). So the officers’ focus on Mr. Malone didn’t necessarily add time to the traffic stop.

* * *

We affirm. The district court found that the exit order hadn’t prolonged the traffic stop, and Mr. Malone waived a challenge to this finding. This factual finding established the reasonableness of the traffic stop even if the officers’ actions had constituted a “detour.”