FILED
United States Court of Appeals
Tenth Circuit

October 1, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JASON KOMSONEKEO,

Defendant - Appellant.

No. 20-6064
(D.C. No. 5:19-CR-00033-D-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ**, **PHILLIPS**, and **CARSON**, Circuit Judges.**

A law enforcement officer may not extend a traffic stop beyond the time reasonably required to carry out its purpose unless the encounter becomes consensual or the officer develops reasonable suspicion that the person lawfully detained is engaged in criminal activity. We evaluate the factors supporting reasonable suspicion separately and in the aggregate.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Defendant Jason Komsonekeo sought to suppress evidence law enforcement found in his vehicle after the officer claimed to have developed a reasonable suspicion that Defendant was engaged in criminal activity. The district court evaluated the factors supporting reasonable suspicion and denied Defendant's motion to suppress. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I.

Oklahoma Highway Patrol Trooper Brady Webb stopped Defendant for driving 76 miles per hour in a 70 mile-per-hour zone. While conducting the traffic stop, Webb observed what he believed to be suspicious items in the vehicle including a potent air freshener, numerous energy drinks, and multiple cell phones. Defendant also provided abnormal and inconsistent responses when Webb asked about his travel plans. Based on these items, Webb suspected Defendant was participating in criminal activity and asked for consent to search the vehicle. Defendant declined. Webb then requested a drug dog. The dog alerted to the passenger side of the vehicle. Webb performed a "probable cause search" of the vehicle and found two firearms and a large amount of United States currency in the trunk. A grand jury later indicted Defendant on one count of being a felon in possession of a firearm.

Defendant moved to suppress the evidence underlying the charge against him. He challenged whether Webb had developed reasonable suspicion to extend the traffic stop and conduct a free-air sniff of his vehicle. At an evidentiary hearing, Webb testified that as he conducted the stop, he began to suspect that Defendant might be engaged in criminal activity. He recalled several factors that combined led

him to this conclusion. First, Defendant had air freshener in the 2019 vehicle with an aroma so strong that it made his eyes water and throat burn. Second, Defendant had an excessive number of highly caffeinated beverages in the vehicle. Third, Defendant had multiple cell phones in sight, including an older model pre-paid flip phone. Fourth, Defendant acted overly nervous. He tightly gripped the steering wheel, his voice cracked when he said his own name, and he appeared unable to control his shaking hands when giving Webb his license. He also seemed to stall when Webb questioned him. Fifth, Defendant's travel plans appeared unusual to Webb. Defendant claimed to have flown one way from Fresno, California, to Fayetteville, Arkansas, just to drive ten hours each way to and from Chicago for an NFL game and then drive back to California. Finally, Webb testified that some of Defendant's answers about his plans were vague and inconsistent. Webb asked who went to the NFL game with him. Defendant first said some friends joined him. Later, he mentioned he went with a family member and when asked to identify the family member, he replied, "a family member" and "family is family." He then said "they" were Eagles fans. The combination of these factors led Webb to believe that he had reasonable suspicion to prolong the traffic stop and further investigate.

The district court denied the motion to suppress, observing that Defendant could probably innocently explain all the factors Webb mentioned if viewed separately. But in the aggregate, they satisfied the reasonable suspicion standard. Defendant entered a conditional guilty plea and appealed.

II.

We engage in a two-tiered review of a motion to suppress based on a claimed Fourth Amendment violation. United States v. Pettit, 785 F.3d 1374, 1378–79 (10th Cir. 2015) (citation omitted). Viewing the evidence in the light most favorable to the government, we review the district court's factual findings for clear error and review the ultimate question of reasonableness under the Fourth Amendment de novo. Id.

III.

The Fourth Amendment protects the people's right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. For Fourth Amendment purposes, a traffic stop is a seizure. Delaware v. Prouse, 440 U.S. 648, 653 (1979) (citations omitted). And "a lawful traffic stop may not extend beyond the time reasonably required to effectuate its purpose." Pettit, 785 F.3d at 1379 (citing Rodriguez v. United States, 575 U.S. 348, 354 (2015); Illinois v. Caballes, 543 U.S. 405, 407 (2005)). Indeed, "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns." Rodriguez, 575 U.S. at 354 (internal citations omitted). Authority for the seizure ends when tasks tied to the traffic infraction—i.e., the purpose of the stop—are, or reasonably should have been, completed. Id. (citation omitted).

During a routine traffic stop, however, "[a]n officer may request a driver's license and registration, run requisite computer checks, and issue citations or

warnings." Pettit, 785 F.3d at 1379 (citations omitted). We have also allowed an officer to ask about the driver's travel plans and matters unrelated to the stop. Id. (citations omitted). "Continued detention is lawful only if the encounter becomes consensual or if, during the initial lawful traffic stop, the officer develops a 'reasonable suspicion' that the detained person is engaged in criminal activity." Id. (citations omitted).

Reasonable suspicion—"a 'particularized and objective basis for suspecting' criminal conduct under a totality of the circumstances"—is not an onerous standard. Id. (quoting United States v. Cortez, 449 U.S. 411, 417–18 (1981)). An officer "need not rule out the possibility of innocent conduct, or even have evidence suggesting a fair probability of criminal activity." Id. (internal quotation marks and citation omitted). Thus "factors consistent with innocent travel may contribute to reasonable suspicion." Id. (citation omitted). So if an officer has "a particularized and objective basis for suspecting an individual may be involved in criminal activity, he may initiate an investigatory detention even if it is more likely than not that the individual is *not* involved in any illegality." Id. at 1379–80 (quoting United States v. Johnson, 364 F.3d 1185, 1194 (10th Cir. 2004)).

Like the district court, we "evaluate each of the factors supporting reasonable suspicion separately and in aggregate." Id. at 1380 (citation omitted). The following led Webb to believe Defendant might be engaged in criminal activity: (1) excessive nervousness; (2) the strong scent of air freshener; (3) the presence of multiple cell phones; (4) energy drinks and caffeinated beverages in the vehicle; (5) unusual travel

plans; and (6) inconsistent statements about where he had been. We address each factor in turn.

Generally, nervousness alone does not provide an officer with reasonable suspicion. Id. at 1380 (citation omitted). But nervousness beyond that normally anticipated during a citizen-police encounter can contribute to an officer's reasonable suspicion. See id. To support a claim of extreme nervousness an officer must provide specific indicia that Defendant exhibited extreme nervousness. Id. Here, Webb described specific indicia of Defendant's abnormal nervousness including Defendant's cracking voice, tight grip on the steering wheel, and shaking hands as he gave Webb his license. Id. (describing defendant-appellant's abnormal nervousness and how "his whole arm shook when he handed the trooper his driver's license"). And the district court observed excessive nervousness on the video. Nervousness here does not stand alone in supporting objectively reasonable suspicion. It serves as only one of several relevant considerations. Because of Webb's detailed description of Defendant's abnormal nervousness, the district court properly considered this factor alongside the other relevant factors in concluding Webb had reasonable suspicion to extend the traffic stop.

An air freshener may support reasonable suspicion that the odor is being used to mask the smell of drugs. United States v. Salzano, 158 F.3d 1107, 1114 (10th Cir. 1998) (citations omitted). Webb testified that he knew people often use air fresheners to mask the odors of drugs. And he explained that Defendant's air freshener was so strong it caused his eyes to water and his nose to burn. So the

district court properly considered this factor in concluding Webb had reasonable suspicion to extend the traffic stop. See id.

The presence of multiple cell phones can lead to reasonable suspicion where the officer's knowledge and experience give him reason to know that those engaged in criminal activity commonly use disposable and hard to trace phones. United States v. Jeter, 175 F. App'x 261, 265 (10th Cir. 2006) (unpublished) (citing United States v. Villa-Chaparro, 115 F.3d 797, 802 (10th Cir. 1997); United States v. Windrix, 405 F.3d 1146, 1153 (10th Cir. 2005); United States v. Gandara-Salinas, 327 F.3d 1127, 1130 (10th Cir. 2003)) (noting the presence of multiple cell phones combined with air freshener and tattoos reflecting possible gang affiliation provided reasonable suspicion to justify extended questioning). Webb testified that he knew the possession of multiple cell phones, including cheaper, older models, is a common indicator of possible criminal activity.

Like the district court, we do not assign any weight to Webb's assertion that the energy drink containers contributed to reasonable suspicion because an officer may find such caffeinated beverages in the vehicle of any innocent traveler. See United States v. Simpson, 609 F.3d 1140, 1152 (10th Cir. 2010) (giving no weight to the presence of energy pills).

Implausible travel plans also can contribute to reasonable suspicion. Pettit, 785 F.3d at 1381 (citations omitted). Again, Defendant's travel plans may not have been so strange or implausible as to independently suggest criminal activity, but they warranted consideration with other factors, considering his story that he flew one

way from California to Arkansas, just to drive roundtrip from Fayetteville to Chicago and then back to California from Arkansas. See id. at 1382 (citation omitted).

Finally, we have held many times that internally inconsistent statements can contribute to reasonable suspicion. United States v. Davis, 636 F.3d 1281, 1291 (10th Cir. 2011) (citations omitted). And here, Webb believed Defendant's statements about who he met in Chicago were vague and inconsistent.

Although the above factors—abnormal nervousness, strong odor of air freshener, multiple cell phones, implausible travel plans, and internally inconsistent statements—may not independently provide reasonable suspicion of criminal activity, taken as a whole they establish reasonable suspicion supporting Defendant's extended detention. See Pettit, 785 F.3d at 1383 (citation omitted) (holding that abnormal nervousness, unusual travel plans, and multiple suspended licenses, taken as a whole, establish reasonable suspicion supporting an extended detention).

AFFIRMED.

Entered for the Court

Joel M. Carson III
Circuit Judge