11-915

To be argued by BRENDA K. SANNES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-915

UNITED STATES OF AMERICA,
Appellant,

v.

ERIC C. WILSON, aka Eric Wilson,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT UNITED STATES OF AMERICA

RICHARD S. HARTUNIAN
United States Attorney
Northern District of New York
100 South Clinton Street
Syracuse, NY 13261-7198
Tel.: 315-448-0672
E-mail: Brenda.Sannes@usdoj.gov

ELIZABETH HORSMAN
BRENDA K. SANNES
Assistant United States Attorneys
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

PAGE

PAGE

PAGE

PAGE

FEDERAL STATUTES, RULES AND OTHER AUTHORITIES:

STATE STATUTES:

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 11-915

UNITED STATES OF AMERICA,
Appellant,

– v. –

ERIC C. WILSON, aka Eric Wilson,
Defendant-Appellee.

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

PRELIMINARY STATEMENT

The government has appealed from the district court's order suppressing 124 pounds of marijuana seized from a vehicle shortly after it had entered the United States from Canada. Tribal Police Officers found the marijuana after conducting a lawful stop that ripened into probable cause to search the vehicle. The district court's decision that the evidence should be suppressed for non-compliance with internal agency approval requirements and a New York statute setting the officers' jurisdictional limits is contrary to the Supreme Court's decision in *Virginia v. Moore*, 553 U.S. 164 (2008), and should be reversed.

ARGUMENT

The District Court Erred In Relying On A State Statute Setting The Jurisdictional Limitations Of Tribal Police Officers And An Internal Memorandum Of Understanding Between ICE And The Tribal Police As A Basis For Suppressing Evidence Obtained Following A Lawful Vehicle Stop.

Wilson does not challenge the fact that the Tribal Police Officers had probable cause to stop his vehicle for a traffic violation. The officers' observation that his rear license plate was obstructed by snow and road debris, in violation of N.Y. Veh. & Traf. Law § 402(1)(b), (A. 216-17), constituted probable cause that he committed a traffic violation, and was a lawful basis for the stop. *See, e.g., United States v. Harrison*, 606 F.3d 42, 45 (2d Cir. 2010); *United States v. Stewart*, 551 F.3d 187, 191 (2d Cir. 2009).[1]

---

[1] Although the standard of review of the facts is not of import here since the facts are not in dispute, the correct standard appears to be clear error, with the facts viewed in the light most favorable to the prevailing party. *See United States v. Moran Vargas*, 376 F.3d 112, 114 (2d Cir. 2004); *United States v. Harrell*, 268 F.3d 141, 145 (2d Cir. 2001); *but see United States v. Howard*, 489 F.3d 484, 490-91 (2d Cir. 2007) (stating that facts are viewed in the light most favorable *to the*

Nor does Wilson dispute the fact that the officers had reasonable suspicion that he had entered the country illegally, i.e., not at a port of entry, in violation of 19 U.S.C. § 1433(b), and that he was bringing in merchandise contrary to law, in violation of 18 U.S.C. § 545 and 19 U.S.C. § 1433(b)(2)(B). *See United States v. Doyle*, 129 F.3d 1372, 1376 (10th Cir. 1997) ("Since an intrusion into the United States at a location other than an authorized checkpoint is unlawful regardless of its underlying purpose, [the agent] did not need to suspect that [the defendant] was transporting illegal aliens in order to justify the investigatory stop of his car.")

Finally, Wilson has not challenged the fact that the probable cause to stop his vehicle ripened into probable cause to search it under the automobile exception to the warrant requirement. *See*, *e.g.*, *United States v. Navas*, 597 F.3d 492, 497 (2d Cir. 2010), *cert. denied*, __ U.S. __, 131 S. Ct. 320 (2010) and __ U.S. __, 131 S. Ct. 330 (2010).[2] In addition to Wilson's

---

government on appeal from the grant of a motion to suppress). (The government cited to the standard of review in *Howard* in its opening brief. Opening Br. at 19).

[2] While Wilson has not disputed the otherwise lawfulness of the stop and seizure on the above-described theories, he does argue that the stop was not conducted at the functional equivalent of the border.

admission that he had traveled to Canada "to score" a little marijuana and had a marijuana pipe, the registered owner of the vehicle had recently been arrested with 20 pounds of marijuana.

Wilson argues that the seizure violated the Fourth Amendment because the officers did not have authority as police officers to make the stop, since their jurisdiction is limited to the Reservation, under N.Y. Indian Law § 114(8), or authority as a Customs Officer, because Sgt. Rourke failed to comply with the approval requirements in an internal agency memorandum of understanding. Br. at 5-9, 12-14. Wilson has, however, failed to cite any authority in support of his claim that this transformed an otherwise lawful stop into an unreasonable seizure that violated Wilson's Fourth Amendment rights. As set forth in the Government's Opening Brief, it did not. *See* Opening Br. at 28-31; *Moore*, 553 U.S. at 171-76.

Br. at 15-17. Since the district court did not address this issue or make factual findings related to it, the government has not addressed the issue. *See* Opening Br. at 5 n. 3; *United States v. Hill*, 939 F.2d 934, 937 (11th Cir. 1991) (holding that functional equivalent of the border requires: "1) reasonable certainty that the border was crossed; 2) no opportunity for the object of the search to have changed materially since the crossing; and 3) the search must have occurred at the earliest practicable point after the border crossing").

Wilson attempts to distinguish *Moore* by arguing that a state statute limiting a police officer's *jurisdiction*, such as §114(8), is "vastly distinguishable" from the Virginia state statute in *Moore* that limited the officers' authority to arrest for certain arrestable offenses. Br. at 9. This, however, is contrary to the broad language in *Moore* and its thorough rejection of the principle that state law may be incorporated into the Fourth Amendment. *Moore*, 553 U.S. at 168-76.

Wilson's argument is also contrary to the circuit courts that have considered the legality of extra-territorial acts by law enforcement officers and found no Fourth Amendment violation. *See*, *e.g.*, *United States v. Sed*, 601 F.3d 224, 227-29 (3d Cir.) (holding that stop and arrest by Pennsylvania State Police in Ohio, outside of their territorial jurisdiction and in violation of Ohio law, did not violate Fourth Amendment; "[i]n light of *Moore,* [the defendant] is plainly wrong" when he argues that the extraterritorial arrest was *per se* unreasonable under the Fourth Amendment), *cert. denied*, __ U.S. __, 131 S. Ct. 230 (2010); *United States v. Goings*, 573 F.3d 1141, 1143 (11th Cir. 2009) (upholding arrest over the defendant's claim that Georgia law enforcement officers did not have the authority to arrest him in Florida; "under the Supreme Court's decision in *Moore*, it was irrelevant for purposes of the Fourth Amendment whether [the defendant's] arrest violated state law, so long as it was supported by probable cause"); *Rose v. City of*

Mulberry, 533 F.3d 678, 680 (8th Cir. 2008) (upholding arrest by city police officer that was made outside of his jurisdiction and without authority under state law; "because he had probable cause to arrest . . . no Fourth Amendment violation occurred"); *United States v. Gonzales*, 535 F.3d 1174, 1182-83 (10th Cir. 2008) (upholding traffic stop by police officers for a traffic infraction that was outside of their jurisdiction and beyond their authority under Colorado law; there was no Fourth Amendment violation because the stop was based on an observed traffic violation); *United States v. Benitez*, 531 F.3d 711, 715 (8th Cir. 2008) (noting that even if police officer did not have the authority to pursue, and ultimately stop, a speeding vehicle beyond his territorial jurisdiction, *Moore* forecloses his challenge to the stop).

Wilson has failed to cite to any rationale or support for his claim that there is a constitutional significance in the distinctions he draws between these cases, i.e. that the Pennsylvania Officers in *Sed thought* they had remained in Pennsylvania; that Florida law referenced in *Goings* has permitted extra-jurisdictional arrests, and that under Colorado law the police officers in *Gonzales* who stopped a vehicle beyond their jurisdiction were "authorized Police Officers within their state." Br. at 10.[3]

---

[3] Wilson's suggestion that *Moore* only applies to probable-cause-based arrests and not lawful vehicle stops, Br. at 11-12, is contrary to the Fourth

Wilson has not cited to any authority supporting the district court's order. The only federal case he relies on in his brief, an unreported Report and Recommendation by a magistrate judge in *United States v. McCall*, 2007 WL 1845584 (W.D.N.Y. 2007) is inapposite. While the magistrate judge in *McCall* found that evidence should be suppressed because the housing authority officers did not have the authority to stop the defendant for a traffic infraction they had observed beyond their geographical area of employment, he did not consider the impact of *Moore* on that determination. Moreover, in *McCall*, suppression was also warranted because there was "no credible finding . . . of the existence of a traffic infraction." *Id.* at *9.

Wilson argues that a traffic stop by tribal police officers beyond the geographical limits in N.Y. Indian Law § 114(2) is not a valid citizen's arrest under New York law. Br. at 6-7; *see* N.Y. Crim. Proc. Law §§ 140.35, 140.40; *People v. Williams*, 4 N.Y.3d 535 (2005). Again, however, New York law is irrelevant to the question presented here – whether Wilson was subjected to an unreasonable search and seizure in violation of the Fourth Amendment.

The state cases that Wilson cites do not consider whether an extraterritorial stop that is otherwise valid

---

Amendment analysis in *Moore*, and without any support or rationale.

violates the Fourth Amendment. In *Williams*, the New York Court of Appeals affirmed the suppression of evidence from a traffic stop that housing authority officers had conducted beyond their geographical jurisdiction. The court, however, did not consider whether a violation of a statute defining the officers' geographic jurisdiction warranted the remedy of suppression because the People had failed to preserve that issue for review. *Williams*, 4 N.Y.3d at 539.[4] The case of *People v. LaFontaine*, 92 N.Y.2d 470 (1998) does not, as Wilson claims, stand for the proposition that any evidence obtained from an ultra vires arrest by a police officer must be suppressed. Br. at 7. In *LaFontaine*, the only issue before the Court of Appeals

---

[4] It is well settled in New York that the exclusionary rule only applies to a violation of a statute "where the purpose of the statute is to effectuate a constitutionally protected right." *People v. Liggan*, 62 A.D.3d 523, 524-25 (2009) (affirming denial of motion to suppress letter that prison officials had intercepted in violation of Department of Correctional Services regulations when "the interception met constitutional standards"); *see People v. Patterson*, 78 N.Y.2d 711 (1991) (holding that police officer's use of a defendant's prior arrest photograph from a dismissed charge, in violation of state statute requiring that the photo be returned to the defendant, "did not infringe upon any constitutional right of the defendant sufficient to warrant invocation of the exclusionary rule").

was whether New Jersey police officers were authorized to execute a federal arrest warrant in New York State. 92 N.Y.2d at 475. The Court of Appeals could not consider the issue of whether the exclusionary rule should be applied even if the arrest was unauthorized because the People had failed to preserve the issue. 92 N.Y.2d at 473-74.

Nor do the other state cases Wilson cites shed light on the issue here. *See, e.g., McKinley v. Commonwealth*, 564 Pa. 565, 583 (2001) (finding that stop and arrest of motorist occurred beyond the airport police officer's territorial jurisdiction and remanding for the lower court to determine the consequences, including "whether the extraterritorial aspect warrants the remedy of suppression"); *People v. Lahr*, 147 Ill.2d 379, 383 (1992) (deciding "the sole issue" of whether an extraterritorial arrest was a valid citizen's arrest under Illinois state law).

Moreover, Wilson acknowledges that Sgt. Rourke was a designated Customs Officer with the United States Immigration and Customs Enforcement (ICE). Br. at 1; A. 46-47. Although Wilson argues that Sgt. Rourke failed to comply with the ICE approval requirements for the stop, Br. at 12-14, he never addresses the caselaw establishing that any such failure does not violate the Fourth Amendment. *See Moore*, 553 U.S. at 172 ("We thought it obvious that the Fourth Amendment's meaning did not change with local law enforcement practices–even practices set by

rule. While those practices 'vary from place to place and from time to time,' Fourth Amendment protections are not 'so variable' and cannot 'be made to turn upon such trivialities.'") (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)); *see, e.g.*, *Whren,* 517 U.S. at 815 (upholding a traffic stop based upon a traffic violation, in a case where the stop violated police regulations limiting the authority of plainclothes officers in unmarked cars to enforce traffic laws); *United States v. Guzman-Padilla*, 573 F.3d 865, 890 (9th Cir. 2009) ("It is well-settled that the scope of the Fourth Amendment's protections is not to be measured by reference to agency guidelines and other extra-constitutional matter."), *cert. denied*, __ U.S. __, 131 S. Ct. 67 (2010); *United States v. Felipe*, 148 F.3d 101, 109 (2d Cir. 1998) (upholding admissibility of inmate's mail intercepted at prison; even if the prison violated Postal Service regulations regarding mail covers, "suppression is not an available remedy for violations of agency regulations that fail to raise constitutional questions").[5]

---

[5] Wilson's complaint about the timing of the discovery of the memorandum of understanding is similarly without merit. *See, e.g.*, *Guzman-Padilla*, 573 F.3d at 890 (upholding the district court's refusal to direct the government to produce Border Patrol's policy on the use of controlled tire deflation devices because, *inter alia*, "the policy would not have been material to the district court's determination . . . the government's violation of its own rules does not

Since the government has, for the purposes of this appeal, assumed that the stop occurred outside the St. Regis Reservation, Wilson's discussion regarding the land claims litigation and the New York State Legislature's intent in limiting tribal officers' authority to "the boundary of the St. Regis reservation" (N.Y. Indian Law § 114(8)) is irrelevant. *See* Opening Br. at 11-13; Br. at 7-9.[6]

---

provide a basis for the suppression of evidence in a criminal action").

[6] In any event, Wilson's argument that "the boundary of the St. Regis reservation" in § 114(8) should be interpreted to mean the "*state-recognized* boundary," when the legislature did not so limit it, is without merit. The State legislature chose this broad language in 2005, during the pendency of the land claim litigation. Moreover, the legislature is presumed to know the law, and to have legislated with it in mind. *See, e.g., Albernaz v. United States*, 450 U.S. 333, 341-42 (1981). As set forth in the Government's opening brief, under settled caselaw, only Congress can diminish a reservation, and the disputed triangle is within the Tribe's original 1796 reservation. Opening Br. at 12 n. 8; *see Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (reservation "retains its reservation status until Congress explicitly indicates otherwise)."

Since this appeal challenges the district court's determination that there was a Fourth Amendment violation, the government has not addressed Wilson's argument that the district court properly applied the exclusionary rule as a remedy.[7]

Finally, the government's motion for reconsideration was not untimely, as Wilson argues for the first time on appeal. The local rules of the Northern District of New York require that a motion for reconsideration be filed within fourteen days. L.R.

---

[7] The government does take issue with Wilson's argument regarding the officers' culpability and Wilson's suggestion that Sgt. Rourke was intentionally evasive regarding the Reservation boundary. Sgt. Rourke's testimony reflects the dispute over the boundary. A. 131-35, 142-43. Contrary to Wilson's suggestion that the officers were knowingly overstepping their jurisdictional limits, the St. Regis Mohawk Tribal Police police the area where the stop occurred with the consent of the New York State Police. A. 137. With respect to the approval procedures, Sgt. Rourke called the ICE resident agent in charge within minutes of the stop and received approval to proceed. A. 121, 217. This was consistent with the local practice. A. 82.

7.1(g).[8] The government filed its motion for reconsideration on December 21, 2010, within fourteen days of the district court's ruling on December 8, 2010. A. 4, Docket Nos. 29, 31.

[8] A prior version of Local Rule 7.1(g) did require that motions for reconsideration be filed within ten days. This was, however, interpreted to mean ten business days. *See United States v. Gagnon*, 250 F.Supp.2d 15, 18 (N.D.N.Y. 2003), *rv'd on other grounds*, 373 F.3d 230 (2d Cir. 2004).

CONCLUSION

The district court's order suppressing the marijuana seized from Wilson's vehicle should be reversed, and the case should be remanded for trial.

Dated: Syracuse, New York
September 13, 2011

Respectfully submitted,

RICHARD S. HARTUNIAN
United States Attorney
Northern District of New York
Attorney for Appellee

By: /s/ *Brenda K. Sannes*
BRENDA K. SANNES
Assistant United States Attorney

ELIZABETH HORSMAN
Assistant United States Attorney
Of Counsel

CERTIFICATE OF SERVICE BY CM/ECF

United States of America
v.
WILSON
Docket No. 11-915

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of New York, and is a person of such age and discretion as to be competent to serve papers.

She further certifies that on September 13, 2011, she served a copy of the appellant's Reply Brief on the United States Court of Appeals for the Second Circuit and counsel for appellee, Michael Rhodes-Devey, Esq., by uploading to the Second Circuit's ECF system a Portable Document Format (PDF) version of the Brief.

/s/ *Deanna Lieberman*
Deanna Lieberman