UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. AARON SANTISTEVAN, Defendant.	CR 19-30017 GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

COMES NOW the United States of America, by and through Assistant United States Attorney Cameron J. Cook, and submits this Response to the Defendant's Motion to Suppress Evidence and Memorandum in Support of Motion to Suppress Evidence (Documents 19 and 20).

FACTS

On December 28, 2018, Rosebud Sioux Tribe Law Enforcement Services ("RSTLES") Officer Joshua Antman was on patrol in an unmarked patrol vehicle. He was dressed in his police uniform with his badge prominently displayed. Near 9:07 pm, Off. Antman initiated a traffic stop on a beige Lincoln MKZ, with Colorado license plate JYO378, a few hundred feet east of the junction to BIA Route 1 on U.S. Highway 18. Off. Antman stopped the car because it was speeding; his radar initially gauged the car's speed as 65 miles per hour ("mph"), but when Off. Antman "froze" the gauging speed, the radar indicated the car's speed as 59 mph. The speed limit in that zone is 45 mph.

After the Lincoln stopped, Off. Antman approached the driver and sole occupant of the vehicle, Aaron Santistevan ("the Defendant"). The Defendant claimed "there was no way" he was speeding. Off. Antman advised he would not argue with him and asked for the Defendant's driver's license. The Defendant appeared nervous and shaky as he passed his driver's license to Off. Antman. The Defendant advised the car was his, he was not a tribal member, and he was just "out for a cruise." Off. Antman also observed a beer bottle in the middle cup holder, and he asked the Defendant to hand it to him. Off. Antman returned to his patrol vehicle to verify the Defendant's information.

Upon further inspection, the beer bottle appeared to contain a plastic baggie and, based on Off. Antman's training and experience, what appeared to be marihuana residue. Accordingly, Off. Antman requested a K9 Officer through dispatch. Off. Antman also discovered the Defendant's driver's license was suspended and requested assistance from a Todd County Sheriff's Deputy.

Off. Antman returned to the Lincoln and noticed the Defendant's hand was on the gear shifter, and the vehicle appeared to be in drive. The front passenger door was locked. Off. Antman asked if the Defendant was going to take off. The Defendant then unlocked the car and Off. Antman opened the door. He asked again whether the Defendant was going to take off, and the Defendant advised he would not. Off. Antman said, "why don't you put it in park then," but the Defendant drove away with the front passenger door still open.

The Defendant led multiple law enforcement officers on a high-speed chase, reaching speeds in excess of 100 mph. RSTLES Officer Jim Scott, who was

trailing the Defendant's car, observed an unknown object strike the top of his patrol vehicle near the Rosebud Sioux Tribe Juvenile Detention Center. Officers were unable to locate anything of significance in that area during or after the chase.

RSTLES Officer Gerald Dillon deployed road spikes on U.S. Highway 18, just east of BIA Route 7. The spikes successfully disrupted the Defendant's car, which came to a stop near mile marker 181 on U.S. Highway 18. Based on Off. Antman's body camera, the Defendant drove away at 22:22:22 and law enforcement detained the Defendant around 22:39:00.

When officers caught up to the car, its interior appeared to be on fire. RSTLES officers detained the Defendant and extinguished the fire in the car. Off. Antman found a burnt item and some burning papers on the front passenger floorboard and placed them into the snow outside. The burnt item, which appeared to be some type of toy, was field tested for cocaine and methamphetamine, and the results were presumptively negative. The Defendant did not provide an explanation for how the fire started in his vehicle.

Todd County Sheriff's Deputy Andrew Red Bear arrived on scene and arrested the Defendant on state charges. Meanwhile, Off. Antman and other RSTLES officers searched the Defendant's vehicle for evidence of marihuana based on the suspected marihuana and plastic baggie in the beer bottle, the Defendant's flight, and because the Defendant threw an item from the car and burned an item during the chase. Off. Antman found forty rounds of handgun ammunition in the car's trunk. The ammunition was in two boxes in a plastic

Scheels bag, each box containing 20 rounds. Off. Antman seized the ammunition because he learned the Defendant had a felony conviction. Officers also found $16,145 in U.S. currency on the Defendant's person during a search incident to his arrest on state charges.

On January 3, 2019, RSTLES Special Agent and Northern Plains Safe Trails Drug Enforcement Task Force Officer Ben Estes obtained a federal warrant from the Honorable Mark A. Moreno to search the Defendant's car. SA Estes executed the search warrant on January 5, 2019, and discovered a number of documents belonging to the Defendant in the car.

On March 19, 2019, South Dakota Public Health Laboratory Chemist Lona Haas determined the substance in the beer bottle was marihuana.

LAW AND ARGUMENT

A. *Off. Antman's initial stop of the Defendant's car was lawful because the Defendant was speeding.*

"The Fourth Amendment guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" *Whren v. United States*, 517 U.S. 806, 809 (1996). A traffic stop must at least be supported by a "reasonable, articulable suspicion that criminal activity is afoot." *United States v. Jones*, 269 F.3d 919, 924 (8th Cir. 2001) (quoting *Delaware v. Prouse*, 440 U.S. 648, 663 (1979)). There must also be "some minimal level of objective justification" for making the stop under the reasonable suspicion standard of the Fourth Amendment. *INS v. Delgado*, 466 U.S. 210, 217 (1984). If an officer can legally stop a vehicle, any underlying

intent or motivation does not make the stop invalid. *United States v. Bloomfield*, 40 F.3d 910, 915 (8th Cir. 1994).

While a reasonable, articulable suspicion is the minimum standard for a traffic stop, it is not the only standard. The United States Supreme Court held "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren*, 517 U.S. at 810. In the context of traffic violations, the Eighth Circuit has held "[a]n officer has probable cause to conduct a traffic stop when he observes even a minor traffic violation." *United States v. Sallis*, 507 F.3d 646, 649 (8th Cir. 2007). Once probable cause has been established, the traffic stops becomes objectively reasonable. *United States v. Fuehrer*, 844 F.3d 767, 772 (8th Cir. 2016). "[G]rounds for a traffic stop may rest on an officer's mistake of fact or law, provided that the mistake is objectively reasonable." *United States v. Spaid*, 2017 U.S. Dist. LEXIS 178391 *1, *8 (D.S.D. Oct. 27, 2017).

The Court must, on a case-by-case basis, examine the totality of the circumstances, including the quality and quantity of the information. *Alabama v. White*, 496 U.S. 325, 330 (1990). Further,

> Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the 'totality of the circumstances—the whole picture,' (citation omitted) that must be taken into account when evaluating whether there is reasonable suspicion.

Id.

As a general rule, the burden of proof is, in the first instance, on the defendant who seeks to suppress evidence. *United States v. Phillips,* 540 F.2d 319, 325 (8th Cir. 1976). The Government, however, bears the burden of proving that the traffic stop was properly conducted. The standard of proof is reasonable suspicion. *White*, 496 U.S. at 330.

In this case, Off. Antman observed the Defendant traveling in excess of the posted speed limit of 45 mph. Off. Antman initially observed his radar read the Defendant's speed as 65 mph. After freezing the speed gauge, it showed the Defendant's speed to be 59 mph. Both numbers are well-above the 45 mph speed limit in the area the Defendant was traveling. Accordingly, Off. Antman had reasonable suspicion and probable cause to stop the Defendant's vehicle and perform a brief investigation related to the speeding offense.

The Defendant's assertion the stop was illegal because it was a "pretext stop" fails for two reasons. Defendant's Memorandum in Support of Motion to Suppress Evidence at 5. First, there is no indication Off. Antman knew the Defendant was driving the Lincoln when he initiated the traffic stop or that he stopped the Lincoln because he was targeting the Defendant. Rather, Off. Antman observed the Lincoln speeding and stopped it for the speeding violation. Second, even if Off. Antman was aware the Defendant was suspected of involvement in drug trafficking, any subjective intent of Off. Antman is irrelevant to the Fourth Amendment analysis. *United States v. Lopez*, 564 F.3d 1001, 1003-04 (8th Cir. 2009).

B. Officers had probable cause to search the Defendant's car on December 28, 2018, due to the suspected presence of marihuana and drug paraphernalia and the Defendant's erratic behavior indicating his car contained contraband.

Law enforcement may search an automobile without "a warrant so long as they have probable cause to do so." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018). The justification for the "so-called automobile exception" to the warrant requirement is two-fold: "[t]he 'ready mobility' of vehicles" and "'the pervasive regulation of vehicles capable of traveling on the public highways.'" *Id.* at 1669-70 (quoting *California v. Carney*, 471 U.S. 386, 390-92 (1985)). "'Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements.'" *Id.* at 1670 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)). Thus, the constitutionality of law enforcement's search of the Defendant's car on the night of his arrest turns on whether law enforcement possessed probable cause that the car contained contraband.

Probable cause is a "'practical and common-sensical standard' based on 'the totality of the circumstances.'" *United States v. Guevara*, 731 F.3d 824, 830 (8th Cir. 2013) (quoting *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013)). Probable cause does not require an officer "to witness actual criminal activity or have collected enough evidence so as to justify a conviction[.]" *United States v. Winarske*, 715 F.3d 1063, 1067 (8th Cir. 2013). "Instead, the mere 'probability or substantial chance of criminal activity, rather than an actual showing of

criminal activity,' is all that is required." *Id.* (quoting *United States v. Mendoza*, 421 F.3d 663, 667 (8th Cir. 2005)).

The evidence supporting probable cause falls into two categories: the seeming presence of marihuana and drug paraphernalia and the Defendant's actions indicating the presence of contraband. "It is…well-established in the Eighth Circuit Court of Appeals that the odor of marijuana emanating from a vehicle provides probable cause to search the vehicle for evidence of criminal activity." *United States v. Mayfield*, 2015 WL 10580288 *1, *3 (D.N.D. June 10, 2015) (citing *United States v. Brown*, 634 F.3d 435, 438 (8th Cir. 2011) (strongly implying the mere odor of marihuana is sufficient to create probable cause to search a vehicle for evidence of criminal activity)); *see United States v. Nuemann*, 183 F.3d 753, 756 (8th Cir. 1999) (finding that "detection of the smell of burnt marijuana…gave [the officer] probable cause to search the entire vehicle for drugs"). The odor of marihuana suggests its presence, and a similar indicator that marihuana is present is sufficient to create probable cause to search a vehicle. *See United States v. Briscoe*, 317 F.3d 906, 908-09 (8th Cir. 2003) (holding the presence of marihuana seeds and stems in garbage outside a home was sufficient stand-alone evidence to establish probable cause to search the home for marihuana).

Off. Antman observed what appeared to be marihuana, a Schedule I controlled substance, and a plastic baggie consistent with drug packaging in a beer bottle in the Defendant's car. Thus, the presence of marihuana and drug paraphernalia in the Defendant's car supports a finding of probable cause to

search the entire vehicle for evidence of marihuana possession or drug trafficking. It is also notable that the Defendant's car bore license plates from the State of Colorado, a known source for marihuana distribution.

The Defendant's actions, viewed in the totality of the circumstances, bolster the probable cause that the Defendant's vehicle contained contraband. "[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion" or probable cause. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000); *see United States v. Lacey*, 170 Fed. Appx. 994 (8th Cir. 2006) (holding that fleeing behavior is relevant in finding probable cause to search a home). Critically, "unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite." *Wardlow*, 528 U.S. at 125.

During Off. Antman's initial interaction with the Defendant, the Defendant appeared nervous and contested that he was speeding. Upon Off. Antman's return to the Defendant's vehicle, the Defendant had locked his car door and had his hand on his gear shifter. Upon being asked whether he was going to "take off," the Defendant advised he would not. But he then led law enforcement on a ten-minute high-speed chase, traveling faster than 100 mph at night, during winter. And the Defendant was only stopped when officers successfully spiked his tires. This behavior created a strong inference that the Defendant's car contained narcotics or other contraband, which he did not want law enforcement to uncover.

Further, the Defendant's flight involved several attempts to destroy or hide evidence. It appears the Defendant threw an item from his car during the chase due to an unknown item striking Off. Scott's patrol vehicle. It also appears the Defendant lit an item on fire in his car. RSTLES officers had to extinguish the flames and the Defendant provided no explanation as to how or why the fire started. Notably, there was no fire in the car during Off. Antman's initial stop of the Defendant. Therefore, in the ten or so minutes of driving over 100 mph at night while fleeing the police, the Defendant somehow managed to ignite a controlled burn in his vehicle. The Defendant succeeded in charring several papers and an unidentified item. The only plausible explanation for the Defendant's actions is that he was attempting to stop law enforcement from seizing certain items in his car. This obstructionist behavior supports a strong inference that the Defendant's car contained evidence of criminal activity.

Due to the presence of marihuana and drug paraphernalia, the fact that Defendant's vehicle was licensed in Colorado, and the Defendant's flight and obstructionist behavior, there was a "'fair probability that contraband or evidence of a crime'" would have been found in the Defendant's car on December 28, 2018. *United States v. Brown*, 634 F.3d 435, 438 (8th Cir. 2011) (quoting *United States v. Donnelly*, 475 F.3d 946, 954 (8th Cir. 2007)). Thus, law enforcement had probable cause to search Defendant's car for marihuana and evidence of criminal activity.

Although law enforcement could have sought a warrant before searching the Defendant's car, they were not required to do so. "Faulting the police for

failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution." *Kentucky v. King*, 563 U.S. 452, 467 (2011). Due to the automobile exception, the officers were entitled to continue their investigation of the Defendant by searching his car for the presence of narcotics or other contraband.

Additionally, the fact that the Defendant is a non-tribal member and the officers who searched the car were tribal officers is irrelevant to the Fourth Amendment analysis. "The Supreme Court has recognized that tribal law enforcement authorities possess 'traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands,' and therefore have 'the power to restrain those who disturb public order on the reservation, and if necessary to eject them.'" *United States v. Terry*, 400 F.3d 575, 579 (8th Cir. 2005) (quoting *Duro v. Reina*, 495 U.S. 676, 696-97 (1990)). Because such power "would be meaningless if tribal police were not empowered to investigate such violations, tribal police must have such power." *Id.* at 579-80. Thus, tribal law enforcement may detain and search non-Indians and their property insofar as they have the requisite reasonable suspicion or probable cause. *Id.* at 580.

Finally, even if the officers lacked probable cause to search the Defendant's vehicle on December 28, 2018, the evidence of the search should not be suppressed due to the inevitable discovery exception to the exclusionary rule. *Nix v. Williams*, 467 U.S. 431, 443-44 (1984). The inevitable discovery doctrine applies when the Government proves "by a preponderance of the

evidence: (1) there is a reasonable probability the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation." *United States v. Thomas*, 524 F.3d 855, 858 (8th Cir. 2008).

Shortly after the search of the vehicle, Off. Antman and Todd County Sheriff's Deputy Red Bear searched the Defendant incident to arrest for driving with a suspended license and found $16,145 in U.S. currency on his person. Off. Antman also learned the Defendant was a convicted felon. The large amount of cash found on the Defendant's person and the Defendant's criminal history amplify the previously discussed evidence of probable cause. Together, these factors would have supported probable cause to either search the car for drugs or, inevitably, to obtain a search warrant for the same. Indeed, SA Estes sought and executed a search warrant shortly thereafter. The presence of ammunition in the Defendant's car would not have been necessary to establish probable cause.

C. The items seized from the search of the Defendant's car on January 5, 2019, should not be suppressed because the December 28, 2018, search was legal and the ammunition was superfluous to the probable cause in the search warrant affidavit.

The search of the Defendant's car on January 5, 2019, was constitutional and the evidence obtained from it should not be suppressed. As articulated above, the search of the Defendant's car on December 28, 2018, was legal. *See Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (explaining the exclusionary rule

only applies to illegally obtained evidence). Further, even if the search of the car on December 28 was unlawful, the other evidence of probable criminal activity was overwhelming. Law enforcement would have sought a search warrant notwithstanding the ammunition, and the same affidavit, minus the reference to ammunition, would support probable cause for a search warrant. Thus, the search warrant is a sufficiently independent and inevitable source to escape suppression. *See United States v. Swope*, 542 F.3d 609, 614 (8th Cir. 2008) (stating the independent source exception to the exclusionary rule requires positive answers to two questions: "would the police have applied for the warrant had they not acquired the tainted information; and second, do the application affidavits support probable cause after the tainted information has been redacted from them"); *Thomas*, 524 F.3d at 858 (explaining the inevitable discovery doctrine).

CONCLUSION

It is the position of the United States that there is no basis for suppressing any evidence found during the seizure and searches of the Defendant and his car on December 28, 2018, and January 5, 2019. Off. Antman's initial stop of the Defendant for speeding was lawful and any imagined motive for the stop does not defeat the established probable cause. Further, law enforcement possessed probable cause to search the Defendant's car after the discovery of marihuana and the Defendant's unprovoked flight and attempts to destroy evidence. Finally, even without the evidence of unlawful possession of ammunition, the search warrant was supported by probable cause, and it would have

independently and inevitably been obtained. For the foregoing reasons, the United States respectfully requests that the Court deny the Defendant's Motion to Suppress Evidence in all respects.

Dated this 22nd day of March, 2019.

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