

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION TWO

FILED BY CLERK
KS. DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS.

2009 JUN 26 A 9 31

STATE OF KANSAS,)
) **Plaintiff,**)
))
vs.))
))
JOLENE J. GEPHART and)
NICHOLAS DEFORD KAUFMAN,)
) **Defendants.**)

Case Numbers: 08-CR-522
08-CR-525

MEMORANDUM DECISION AND ORDER

Defendants Jolene J. Gephart and Nicholas Deford Kaufman have filed Motions to Suppress claiming that they were unlawfully detained by law enforcement following a traffic stop and subjected to an illegal search. By agreement of the parties, the motions were consolidated for hearing. Because the Court finds the traffic stop was unreasonably extended and the detention was unlawful, the Motions to Suppress are granted.

FINDINGS OF FACT

On January 8, 2008 at about 3:00 p.m., Jolene Gephart and Nicholas Kaufman were traveling on Interstate-70 in Shawnee County, Kansas in a red Ford Focus with a New Mexico license plate. Gephart, the registered owner of the car, was seated in the front passenger seat. Her boyfriend, Nicholas Kaufman was driving. Shawnee County Sheriff Deputy Tracy Trammel was on routine patrol

and traveling in the same direction as Gephart and Kaufman. When Deputy Trammel entered the car's license plate number into his computer the search indicated that the plate registration had expired. Deputy Trammel initiated the car stop based on his belief that there may be a registration violation.

After Deputy Trammel activated his emergency lights, Kaufman promptly pulled the car over on the shoulder of the road along Interstate-70. As Deputy Trammel left his patrol car and approached the car he noticed that the license plate had an "08" registration sticker on it which indicated that the registration was current. Trammel did not notice any evidence of tampering with respect to the sticker.

Deputy Trammel then approached the driver's side window and asked Mr. Kaufman to furnish his driver's license and registration. Deputy Trammel asked Kaufman to get out of the car and step to the rear of the car. Deputy Trammel then explained to Kaufman that his computer showed an expired registration. Deputy Trammel began to ask Kaufman questions. Kaufman responded to Trammel's questions, stating among other things that his girlfriend Jolene Gephart was the registered owner and that the registration was current. In response to Trammel's questions, Kaufman also said that they were traveling to New York where his mother lived.

Deputy Trammel then directed Kaufman to remain at the rear of the car while he went to the passenger side window to speak to Gephart. Deputy Trammel requested identification and verified that Gephart owned the car. Trammel took Gephart's driver's license and asked Gephart a series of questions. Among other things, Gephart said she was traveling to North Carolina for a vacation. Deputy Trammel then returned to where Kaufman was waiting and informed Kaufman he was going to verify the registration information that had been provided.

The digital video recording admitted into evidence discloses that approximately three minutes had elapsed at this point in the stop. Once back in his patrol car Deputy Trammel contacted another officer to back him up. He told the officer he sensed nervousness in the driver and passenger. He reported that one person said they were traveling to New York and the other said they were going to North Carolina. The officer to whom Trammel was speaking indicated that he was involved in another traffic stop and would be unable to immediately assist.

At approximately five minutes into the traffic stop Deputy Trammel called dispatch providing information on Kaufman and Gephart for a warrant check. As Trammel waited Kaufman walked back to the deputy's car and engaged in further conversation. Deputy Trammel told Kaufman that it looked like "everything's appropriate." Trammel then showed Kaufman the computer information indicating the tag may have expired. Trammel told Kaufman he was going to give him a

warning ticket. Kaufman then left the patrol car and went back to his car to wait for Trammel. According to the digital video recording at 15:10:00 dispatch reported that both Kaufman and Gephart were negative for warrants.

The recording then shows that about five minutes later Deputy Trammel got out of his patrol car and motioned to Kaufman to return to the back of his vehicle. Deputy Trammel started to ask Kaufman additional questions. The digital recording shows that two uniformed Shawnee County Sheriff's deputies arrived and stood next to Kaufman and Trammel. Deputy Trammel then returned Kaufman's documents and handed him a warning citation.

Kaufman took several steps back toward the driver's side of the car and then Trammel called out "Nicholas". Kaufman stopped and then returned back to the location of the three uniformed officers. Deputy Trammel then asked Kaufman if he could answer a few more questions. Trammel then began asking Kaufman about various types of drugs. He asked if there were any weapons in the car. Trammel then asked Kaufman if he could search the car. Kaufman refused. Trammel asked Kaufman "why?" Kaufman responded he had done nothing wrong.

Trammel then ordered Kaufman to stand to the side and said he would ask Gephart. Trammel questioned Gephart through the passenger side window. Trammel asked Gephart if there was anything illegal in the car. Trammel asked Gephart if he could search the car. Apparently unsure of a response or attempting

to get an audible response, Trammel asked Gephart again if he could search the car. Gephart's voice is not clear on the recording but Trammel repeated "yes" indicating that Gephart answered in the affirmative with respect to the question about a search. Trammel then ordered Gephart out of the car. Gephart joined Kaufman and the two stood by the two deputies at the rear of the car.

Trammel informed everyone that Kaufman had refused to consent to a search but Gephart had consented. Trammel ordered the deputies to pat down Gephart and Kaufman. Deputy Trammel then retrieved his canine partner, Budkis, from his patrol car and directed the dog to sniff around the car's perimeter. According to Deputy Trammel, the dog alerted on the back of the car. Trammel distinguished between an alert and an indication. When his dog alerts, he is aware of an odor but may not be able to pinpoint the precise location. An indication is apparently a stronger signal from the dog. In any event, Trammel indicated Budkis alerted on the rear of the car. The video shows the dog sat at the rear of the car.

Thereafter, Deputy Trammel entered the car, searched the interior and opened the trunk and searched the luggage inside the trunk. Deputy Trammel located luggage, opened one bag and found marijuana. Kaufman and Gephart were arrested for possession of marijuana and the car and its contents were seized as evidence.

DEFENDANTS' POSITIONS

Ms. Gephart asserts her continued detention and questioning by Deputy Trammel was illegal, that her purported consent to search was obtained during the illegal detention and was involuntary and that the marijuana which was the fruit of the illegal detention must be suppressed.

Mr. Kaufman argues that the traffic stop conducted by Deputy Trammel went beyond the scope and duration necessary to complete his investigation of a possible traffic violation. He argues that the deputy illegally expanded the scope of the traffic stop without a reasonable and articulable suspicion that the driver was engaged in illegal activity.

CONCLUSION OF LAW

The State has the burden of proving that the search and seizure was lawful. K.S.A. 22-3216 (2); *State v Anderson*, 281 Kan. 896, 901, 136, P.3d 406 (2006). A routine traffic stop is a seizure under the Fourth Amendment to the United States Constitution and is generally analyzed as an investigatory detention. *State v McKeown*, 249 Kan. 506, 510, 819 P.2d 644 (1991). The traffic stop investigation must be minimally intrusive, diligently pursued, and reasonably related in scope to the circumstances which justified the initial stop. A law enforcement officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check and issue a citation. When the driver has

produced a valid license and proof that he or she is entitled to operate a car, the driver must be allowed to proceed on his or her way, without being subjected to further delay by the officer for additional questioning. *State v Mitchell*, 265 Kan. 238, 960 P.2d 200 (1998).

The law in Kansas is well settled. When the original purpose of a traffic stop has been completed, further questioning is permitted only if (1) the encounter between the officer and the driver ceases to be a detention, but becomes consensual, and the driver voluntarily consents to additional questioning, or (2) during the traffic stop the officer gains a reasonable and articulable suspicion that the driver is engaged in illegal activity. *State v DeMarco*, 263 Kan. 727, 734, 952 P.2d 1276 (1998). During a routine traffic stop, a law enforcement officer may question the driver about his or her travel plans provided that the questioning is reasonably related to the traffic stop and the questioning does not unreasonably alter the nature or duration of the stop. Generally, this is limited to questioning concerning the driver's place of departure or destination. *State v Moore*, 283 Kan. 344, 355, 154 P.3d 1 (2007); *State v DeMarco*, 263 Kan. 727, 739; and *State v Chapman*, 23 Kan App. 2d 999, 1010, 939 P.2d 950 (1997).

The reasonable scope of law enforcement investigation during a routine traffic stop differs as it relates to the driver of the vehicle as compared to the passenger. While a law officer may demand that the driver produce his or her

driver's license and vehicle registration in order to run a warrant check on the driver, a law enforcement officer exceeds the reasonable scope and duration of a traffic stop by running a warrant check on the passenger in the absence of reasonable suspicion of criminal activity. Reasonable suspicion requires a particularized and objective basis for suspecting the person stopped of criminal activity. Something more than an unparticularized suspicion or hunch must be articulated. *State v Damm*, 246 Kan. 220, 224-25, 787 P.2d 1185 (1990).

Similarly, the reasonable scope of the law enforcement investigation during a routine traffic stop differs as it relates to the driver and the passenger regarding questions about travel plans. Questioning of the passenger about such plans may be more restrictive. *State v Smith*, 286 Kan. 402, 184 P.3d 890 (2008). In these circumstances, Deputy Trammel questioned passenger Gephart about her travel plans while he was obtaining her identification in his investigation of the vehicle registration. He later extended the detention of Kaufman and Gephart to ask Gephart for consent to search the automobile.

Under these circumstances, Trammel concluded his investigation of the registration violation and warrant check within approximately ten minutes of the stop. An additional five minute delay to write the warning ticket and to wait for back officers to arrive unreasonably extended the duration of the stop. Since the registration was valid, there was no reason to warn the driver with any ticket.

Trammel explained he wrote the ticket for his own agency's record-keeping requirements.

When Trammel concluded his traffic investigation he did not have a reasonable and articulable suspicion that the driver or the passenger were engaged in illegal activity. He observed nervousness and perceived an apparent inconsistency in travel plans. Kaufman said Trammel intended to visit his mother in New York. Gephart reported they were going to vacation in North Carolina. Both destinations may have been in the travelers' plans. At the conclusion of the traffic investigation Trammel had an unparticularized suspicion and hunch but no objective basis for suspecting the defendants were transporting illegal drugs. Nevertheless, Trammel waited for the back officers to pursue additional questioning and to seek to obtain consent to search the vehicle.

When Trammel returned Kaufman's license and documentation, he attempted to engage Kaufman in additional questioning and obtain consent to search. Kaufman declined to give his consent to search the automobile but Trammel persisted with questions asking him "why"? Kaufman then was detained so that Trammel could make inquiry of Gephart and determine whether she would give her consent to search. At this point, the detention of both Kaufman and Gephart was unreasonably extended without a reasonable and articulable suspicion of illegal activity for the purpose of obtaining passenger Gephart's consent to a

search that was completely unrelated to the reason for the stop. *State v Smith* 286 Kan. @ Syl. ¶ 2.

The State argues that even if the detention was impermissible Gephart's consent to search removed the taint. On the contrary, there was no causal break in these circumstances allowing a dissipation of the taint. When Kaufman refused to consent he was detained while Gephart was detained to be interviewed further. At no time during these circumstances were Kaufman or Gephart free to leave with three uniformed officers standing by. Thus, any consent to search was not voluntarily given.

Finally, the State argues that the dog detected illegal drugs. The evidence indicates that the dog alerted on the trunk area. An alert indicates an odor of illegal drug, according to Trammel. The odor could be a residual odor with no drugs present or may indicate presence of narcotics. In these circumstances, however, the drug dog was not deployed until after the scope of the original investigation was unnecessarily and unreasonably extended without the voluntary consent of either the driver or the passenger. Deputy Trammel testified that the delay in deploying the dog occurred because he did not have back officers during the time he was conducting the traffic investigation.

Defendant Kaufman questions the reliability of the dog sniff evidence. Apparently Budkis, according to Sheriff Department records, detected an odor

22% of the time when no drugs were found. These facts are clearly distinguishable from the facts in *Illinois v Caballes*, 543 U.S. 405, 160 L. Ed. 2d 842, 125 S. Ct. 834 (2005). In *Caballes*, while the first trooper was writing a warning ticket the second trooper walked the dog around the vehicle and the dog alerted at the trunk. The United States Supreme Court found that the initial seizure was lawful and the duration of the stop was entirely justified by the traffic offense and the ordinary inquiry incident of such stop. Here, the dog was deployed after the traffic investigation was concluded, followed the refusal of Kaufman to consent to a search, and followed the involuntary consent of Gephart regarding the search. Here, Deputy Trammel testified he did not know whether he would actually have searched the vehicle based on Gephart's consent had the dog not alerted.

In summary, the Court concludes that the traffic stop conducted by Deputy Trammel went beyond the scope and duration necessary to complete the investigation of a possible traffic violation. The scope of the investigation was unlawfully extended without a reasonable and articulable suspicion that the driver was engaged in illegal activity. The driver refused consent to search and his detention was unreasonably extended while Deputy Trammel continued detaining Gephart to obtain consent from her to search the vehicle. Neither Kaufman nor Gephart voluntarily consented to additional questioning or the search. Nevertheless, Deputy Trammel extended his investigation on a hunch and without

a reasonable and articulable suspicion that the driver and passenger were engaged in illegal drug activity. He relied solely on what he believed to be nervousness and apparent inconsistencies in travel plans. Trammel's hunch was ultimately supported and confirmed by Budkis's sniff. However, because the detention was unreasonably prolonged without reasonable and articulable suspicion, and because there was no casual break allowing dissipation of the taint, the consent was invalid. The Defendants' Motions to Suppress are granted.

This Memorandum Decision and Order shall be filed with the Clerk of the District Court. No further Journal Entry is required.



Richard D. Anderson
District Judge, Division Two


CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing **Memorandum Decision and Order** was filed with the Clerk of the District Court and a copy mailed via first class mail, hand delivered, or placed in pick-up bin this 26th day of June, 2009 to the following:

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