

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
vs.)
)
JOSEPH ALLEN BUTTS,)
)
 Defendant.)

CR No. 06-538 JH

**GOVERNMENT’S RESPONSE TO DEFENDANT BUTTS’ MOTION
TO SUPPRESS PHYSICAL EVIDENCE AND STATEMENTS**

COMES NOW the United States of America by and through DAVID C. IGLESIAS, United States Attorney for the District of New Mexico and Luis A. Martinez, Assistant United States Attorney for said District, and hereby responds to defendant Joseph Allen Butts motion to suppress and further states:

I. INTRODUCTION.

On February 13, 2006, Missouri State Highway Patrol Officer, Corporal G. C. Swartz stopped a pickup truck operated by defendant Joseph Allen Butts, pursuant to a traffic violation. Mr. Butts had been traveling eastbound on Interstate 44 at the 245 mile marker in Franklin County, Missouri. Mr. Butts was stopped after Officer Swartz observed Mr. Butts’ vehicle following a tractor trailer at a distance of approximately two car lengths. Mr. Butts failed to keep the vehicle he was driving in a single lane. Mr. Butts ran his vehicle off the right shoulder of the road as he (Butts) signaled to pass the tractor trailer.

Subsequently, pursuant to a consensual search of the vehicle operated by Mr. Butts officers, utilizing canine Yote discovered and seized approximately 338 pounds of marijuana which had been hidden in the vehicle's bed beneath a locked plastic bed cover.

II. THE INITIAL STOP

The government expects Corporal Swartz' testimony to establish the circumstances surrounding the stop. The traffic violation committed by Mr. Butts justifies the initial stop. Mr. Butts did not deny having committed the traffic violation and even admitted his violation.

The stop occurred at approximately 10:40 a.m. At approximately 10:55 a.m. Corporal Ashby arrived at the scene as backup allowing Corporal Swartz to deploy his assigned canine. The marijuana was discovered as a result.

III. CORPORAL SWARTZ HAD AN OBJECTIVELY REASONABLE AND ARTICULABLE SUSPICION THAT ILLEGAL ACTIVITY WAS OCCURRING

A. U.S. v Arvizu

The defendant cites *United States v. Arvizu* 534 U.S. 266, 273. When determining whether reasonable suspicion exists, we look to the "totality of the circumstances" to see whether the officers had a "particularized and objective basis for suspecting legal wrongdoing." Further, the high court in *Arvizu* noted, "This process allows officers to draw on their own experience and specialized training to make inferences from and make deductions about the cumulative information available to them that 'might well elude an untrained person'." *Id.* 750, 751. This analysis is to be made on a case by case basis, that is, the question of whether there exists objectively reasonable and articulable suspicion is fact specific.

The government contends that the circumstances in this case rise to an objective level of articulable and reasonable suspicion sufficient to detain Mr. Butts allowing for the discovery of marijuana.

B. U.S. v. Cervine

The defendant also sets out the following: an officer may detain a driver for reasons unrelated to the initial traffic stop if (1) the officer has “an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring or (2) if the initial stop has become a consensual encounter.” *United States v. Cervine* 347 F.3d 865, 868, 869.

The government concedes that the stop never became a consensual encounter; hence the question to be resolved by this honorable court is whether Corporal Swartz had an objectively reasonable and articulable suspicion that Mr. Butts was involved in illegal activity.

C. Corporal Swartz Acquired Objectively Reasonable and Articulable Suspicion.

Upon stopping and approaching the pickup truck driven by Mr. Butts, Corporal Swartz noticed a hard plastic cover over the pickup’s bed. The vehicle bore Arizona registration and when asked, Mr. Butts produced a California driver’s license. Mr. Butts stated he had borrowed the vehicle from his sister-in-law. As Mr. Butts handed Corporal Swartz the registration, he stated, “I did not mean to do that. I just like looking around at the scenery. I’m not trying to do anything wrong.” Corporal Swartz noted Mr. Butts seemed very nervous and that his hands were shaking and that he seemed unsure of what he was saying.

The defendant cited *United States v. Wald*, 216 F.3d 1222, 1227 for the proposition that nervousness and its signs should not be over counted in the analysis of whether

reasonable suspicion exists. The government does not dispute this, however, at the same time, his honorable court must remain mindful that it “may not evaluate and reject each [reasonable suspicion] factor in isolation.” *United States v. Gandara-Salinas*, 827 F.3d 1127 @ 1130 (citing *United States v. Arvizu*, 534 U.S. 266 274-75 (2002)). When a motorist detained for a routine traffic violation, such as speeding, shows unusual signs of nervousness, this may be considered as part of the totality of circumstances a reasonable law enforcement officer would analyze in investigating possible crimes. . . *United States v. Santos*, 403 F.3d 1120, 1127 (2005). The Tenth Circuit Court of Appeals in *United States v. Johnson*, 364 F.3d 1185, 1192 (2004) put it this way:

Conduct that may be wholly innocent may nonetheless support a finding of reasonable suspicion in certain circumstances. *United States v. Sokolow*, 490 U.S. 1, 9-10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). For that reason, we have also made clear that nervousness, even if it may be a normal reaction, is still among the pertinent factors a reasonable law enforcement officer would analyze in investigating possible crimes, and should not be completely disregarded. See *United States v. Wood*, 106 f.3D 942, 948 (10th Cir. 1997); *United States v. Williams*, 271 F.3d 1262, 1268-69 (10th Cir. 2001). “Discounting” something is not the same as “disregarding” it, as bargain hunters responding to advertisements for “discounted prices” will discover. The district court, therefore, erred in not including Johnson’s behavior in the totality of the circumstances.

Corporal Swartz asked Mr. Butts to accompany him back to the patrol vehicle. Once in the vehicle Corporal Swartz asked Mr. Butts where he was headed. Mr. Butts stated St. Louis, paused a moment and added, “Um, going to St. Louis. Looking for work is what I’m actually doing.” When asked what kind of work he did, Mr. Butts stated he was a welder but that he was also looking for antiques. Swartz asked Butts if he lived in California, to which Butts replied that he lived in Pima, Arizona. And added that he moved there about a month ago. When asked where in St. Louis he would look for work, Butts stated he

would look wherever he could find it. Butts then tried to change the focus of his trip from looking for work to collecting antiques.

Mr. Butts' attempt to change the focus of inquiry is understandable under the circumstances. Mr. Butts, after all, had approximately 338 pounds of marijuana in the bed of his pickup he had just moments earlier been operating. Certainly a cross country trip to Missouri from Arizona to an unspecified locale in St. Louis in search of random employment sounded as suspicious to Butts as it did to Swartz. Implausible travel plans can contribute to reasonable suspicion. *United States v. Santos*, 403 F.3d 1120, 1129 (10th Cir. 2005).

The situation continued to worsen for Mr. Butts as the suspicious nature of his trip escalated.

Upon examining the vehicle's registration Corporal Swartz noted the registration indicated the vehicle belonged to Humberto Obezo Parra of Nogales, Arizona. Additionally, the registration indicated the vehicle was registered on December 21, 2005 by a third party. Corporal Swartz' suspicions heightened, now inquired as to the ownership of the vehicle. "My sister bought it she said," Butts replied. Butts then attempted to change the subject of the conversation as Swartz began to run a computer check on Butts' driving status and on the vehicle. One should recall that Butts had earlier told Corporal Swartz that the vehicle belonged to his "sister-in-law".

The government contends that even at this juncture Officer Swartz had reasonable suspicion to detain Mr. Butts. Indeed, "the likelihood of a criminal activity need not rise to the level required for probable cause and it falls considerably short of satisfying a preponderance of the evidence standard." *Arvizu* 534 U.S. at 274, 122 S.Ct. 744.

Mr. Butts stated he took a bus all the way from California. Butts then laughed, what seemed to Corporal Swartz, a nervous or forced laugh. When asked how long he planned on being in St. Louis, Mr. Butts stated it would depend on whether he found work or not. Butts added that if he found any antiques he would take them back to California with him. This statement conflicts with Butts' previous statement in which he said he had moved to Arizona about a month ago. The defendant contends the statements are "not inconsistent at all." And that Butts told Corporal Swartz that he had recently moved to Arizona from California where he had an antique business. (Defendant's Motion, p. 5).

At 10:44 a.m., four minutes after the stop on that morning, 13 February, 2006, Corporal Swartz asked for a criminal history check on Butts via radio. As Swartz was waiting for a response to his inquiry, Butts stated, "Like I said, if I swerved, I did not mean to, it's kind of windy." It should be noted Mr. Butts had earlier stated, "I did not mean to do that. I just like looking around at the scenery." Swartz asked Butts if there was any work in Arizona. Butts stated he could not find any because Pima is a small town. Butts then tried to change the subject and stated he owned an antique business in California for 33 years.

This immediate exchange resulted in even more fuel to the already roaring fire of objective reasonable suspicion ignited by Mr. Butts' words and deeds. The statement regarding the antique business can be taken to mean Mr. Butts had an antique business in California for 33 years until moving to Arizona a month before the stop. It can also be taken that the business had been unattended and still exists or is operated by someone else. The first interpretation renders it contradictory, and coupled with the other suspicious circumstances and contradictory statements reasonable suspicion was palatable in the air.

But even more damaging to Mr. Butts' attempt to avoid the detection of his criminal adventure was the fact that he again tried to change the subject. The idea that a welder must travel to St. Louis, Missouri on the hope of employment from Pima, Arizona by-passing Phoenix or Tucson, Arizona, is ludicrous and highly suspicious. Considering that the states of Arizona, New Mexico and Texas have no antiques nor welding jobs to be found within their borders necessitating a trip to Missouri, one need not be an experienced officer like Corporal Swartz to sense possible wrong doing afoot.

Butts then said, "Yea, I figured I did something wrong, but I was not going to pass that truck and get a ticket for it." Butts then explained that he had his cruise set and the truck had slowed down. Mr. Butts at this point had three different excuses for his traffic violation: 1) the scenery; 2) the wind; 3) the cruise control coupled with the slowing of the vehicle he was following.

At 10:46 a.m. Corporal Swartz was informed that Butts had a criminal history. This too is a factor which enters into the mix when considering the totality of the circumstances. *Cervine* at 872. Corporal Swartz then asked Mr. Butts if there was anything illegal in the vehicle. Butts replied, "No sir." Mr. Butts was then asked if there was any marijuana, cocaine or anything like that in the vehicle. Butts answered, "I don't look like that do I?" Butts became very nervous, stating that he does antiques and that he was a welder for nine (9) years.

At 10:47 a.m. Butts was asked for consent to search the vehicle. Butts said, "No, it's my sister's car and she doesn't like people in their vehicles." Corporal Swartz asked for back up. As Swartz waited for back up, he told Mr. Butts that as soon as Corporal Ashby arrived a canine sniff would be performed on the pickup. Mr. Butts' demeanor

changed, he became very serious and defensive. Mr. Butts' breathing became more rapid and he appeared even more fidgety. Butts asked why Corporal Swartz wanted to search his vehicle. Swartz engaged Butts in casual conversation in an attempt to calm Butts down. Swartz asked, "So when's the growing season down there?" Butts replied, "What do you mean?" Swartz indicated he was referring to legitimate agricultural crops.

Butts inquired as to how long it would take. He was told just a couple of minutes. Butts then reminded Swartz that he had just borrowed the vehicle. Corporal Swartz asked Butts if he had anything illegal in the vehicle. Butts replied, "Not in my area, that's for damn sure." When asked what in the vehicle was his, Butts said he only had the duffle bag and cigarettes. Corporal Swartz asked Butts if there was anything illegal under the cover in the bed of the vehicle. Butts responded, "I really don't believe that." Butts was then asked if he had been in the rear of the vehicle since he borrowed it, to which he answered, "Yes sir, no I have not." Butts then laughed and asked if he could get some water out of the truck because he was dehydrating.

D. Marijuana Found

At 10:55 a.m. Corporal Ashley arrived and Yote, Corporal Swartz' assigned canine, was deployed. The wind was out of the west and very strong. Yote alerted to the vehicle and the marijuana was found underneath the plastic bed cover.

At 11:02 a.m. Mr. Butts was handcuffed; at 11:04 a.m. Mr. Butts was arrested. Mr. Butts stated the marijuana was for his church and that it was a hate crime to arrest him.

Subsequently the vehicle was searched and a certificate indicating Butts' affiliation with the Church of the Cognizance was found.

III. CONCLUSION

It bears underscoring that it is unnecessary for these facts to independently give rise to reasonable suspicion. See *Santos*, 403 F.3d at 1133 (citing *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). Instead, they must be viewed together, in context, because “the ultimate assessment of reasonable suspicion depends on the totality of the circumstances.” E.g. *Gandara-Salinas*, 327 F.3d at 1130 (“law enforcement officer may assess these factors in light of his experience and specialized training.”)

Taking into account “the totality of the circumstances and information available” to Corporal Swartz, the officer had “reasonable suspicion” to believe that criminal activity was afoot. See *id.* Accordingly, the officer’s routine questioning of Mr. Butts did not undermine the *Terry* stop legality. See *Santos*, 403 F.3d at 1133; *Johnson*, 364 F.3d at 1188. See also *United States vs. Mendez*, No. 04-2279, slip. op. at 12 (unpublished) (10th Cir. Jun. 14, 2006) (“While any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel, . . . taken together they amount to reasonable suspicion.”) (internal quotation marks and citation omitted).

No violation of Butts’ *Miranda* rights occurred. [T]wo requirements must be met before *Miranda* is applicable; the suspect must be “in custody,” and the questioning must meet the legal definition of “interrogation.” *United States v. Bennett*, 329 F.3d 769, 774 (10th Cir. 2003) (citation omitted). Undoubtedly, the first requirement is satisfied: Mr. Butts was in custody when he stated the marijuana was for his church and that it was a hate crime to arrest him.

But the second *Miranda* requirement is not satisfied: Mr. Butts was not subject to police interrogation when he made the incriminating statements. See *id.* Indeed, Butts - of his own accord - incriminated himself.

Because *Miranda* provides no protection to defendants who are not subject to interrogation, *Miranda* is inapplicable. See *id.*; see also *Arizona v. Mauro*, 481 U.S. 520, 529 (1987) (“Officers do not interrogate a suspect simply by hoping that he will incriminate himself”).

For all the foregoing reasons, Defendant Butts’ Motion to Suppress should be denied.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing response was mailed to Bernadette Sedillo, counsel for Defendant, on this 1st day of August, 2006.

/s/ Luis A. Martinez
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