IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1672
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

KIM DALON DAVIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(CR4 92 061 A)

August 25, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Following a conditional plea of guilty, Kim Davis appeals his conviction of possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(viii). Concluding that the motion to suppress was properly denied, we affirm.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

On October 8, 1991, at 1:42 a.m., Officers Juan Smith and Blu Nicholson of the Commerce, Texas, Police Department observed a truck driven by James Haney make an illegal U-turn. The truck had no license plate and was missing a taillight. The officers pulled Haney over, thinking he might be intoxicated.

Haney voluntarily got out of the truck and walked quickly back to the police car, while two other passengers in the truck, Tommy McCary and Davis, stayed in the truck. Smith got out of the car and asked Haney for his driver's license; Haney replied that he did not have one. Smith then asked Haney to walk to the area between the truck and the car.

After moving to the front of the police car, Smith asked Haney for his name, date of birth, and the state in which he was licensed to drive. Haney told Smith that his name was "Kyle Kim Birge" and that he was from Oklahoma. Haney could not provide his driver's license number, which aroused Smith's suspicion, as Oklahoma licenses correspond to the driver's social security number.

After discovering that no Oklahoma license had been issued to someone with that name, Smith told Haney that he was unable to obtain any license information. Haney, who had returned to the truck, acted nervous and insisted that he had a license and that the Texas Highway Patrol had just stopped them. Smith became more suspicious at this point, as he knew that state troopers normally do not work that late. Smith asked Haney whether he had received a ticket, and Haney said no. Because troopers normally give

tickets for the same violations for which Smith had pulled Haney over, Smith became more suspicious. He tried to contact a trooper on the radio, but no one responded, and Smith concluded that Haney was lying.

Smith then obtained the vehicle identification number ("VIN") from the dashboard of the truck and checked to see whether the vehicle was stolen. He also had the dispatcher run the names of Davis and McCary to see whether either one had a driver's license. The vehicle had not been reported stolen but was registered to a car lot in Oklahoma. The dispatcher also reported that neither Davis nor McCary had a driver's license. Haney could not produce any paperwork proving that he owned the truck, and Smith feared that the truck may have been stolen.

Although over one-half hour had passed from the initial stop, Smith became concerned for his safety and ordered the other two occupants out of the truck. Neither man had any identification, but McCary produced two checks with his name on them. Smith then asked Haney whether he had any weapons in the truck. Haney said no and consented to a search of the truck which revealed nothing. Smith then told Haney to go to the rear of the patrol car.

Smith then asked Haney whether he had any weapons on him; Haney again said no and said that Smith could check him. Smith then proceeded to pat down Haney. According to Smith's testimony, the encounter went as follows:

> I started at the top and worked my way down to his waistline where weapons are normally kept, and I felt a large hard object. And I asked him, I said, "What is that?"

> And he said, "That's me."
>
> I told him, I said, "No. Your dick is not that big." And I told him, I said, "Don't move whatever you do. Okay?"
>
> . . . .
>
> And I was pressing against his body to keep him from sticking his hand between my hand and his body to get it. And as I went to get it, he yelled out, "He's got it! He's got it!

At this point, Haney started to wrestle and fight with Smith. On the other side of the car, fearing that Haney had a weapon, Smith drew his gun, pointed it at Haney's head, and told him not to move. Haney was then handcuffed, and Smith pulled the object from Haney's groin area. The object was a large ziplock plastic bag that contained a hard brown substance that Smith recognized as methamphetamine.

Smith yelled to Davis, who was standing at the rear of the truck, to walk slowly toward the sound of his voice. When Davis got close to Smith, he was told to lie on the ground, and he was hand-cuffed. During a patdown search of Davis, Smith found a large hard object in Davis's groin area. The object turned out to be a bag containing methamphetamine as well as a paper towel, a measuring spoon, and hypodermic needles. After handcuffing and patting down McCary, the police recovered a similar package of methamphetamine from him.

II.

Davis was indicted along with Haney and McCary on charges of possession with intent to distribute methamphetamine in violation

of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(viii) (1992). Davis pleaded not guilty and later made a motion to suppress. The district court denied Davis's motion, and he pleaded guilty, conditioned on his right to appeal the denial of the motion to suppress.

III.

Davis first contends that his Fourth Amendment rights were violated because the original traffic stop was not brief nor tailored to the purposes of the original stop; he also contends that the stop was pretextual. We review the reasonableness of the traffic stop for Fourth Amendment purposes de novo. United States v. Colin, 928 F.2d 676 (5th Cir. 1991).

Davis's claim that the stop was pretextual has no merit. In this circuit, as long as officers are objectively authorized and legally permitted to stop a vehicle, their motives in doing so are irrelevant and not subject to inquiry. United States v. Hernandez, 901 F.2d 1217, 1219 (5th Cir. 1990); United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987).

The officers witnessed three independent traffic violations that gave them the legal right to stop the vehicle. Even if the officer's motives were relevant, Davis cannot identify any evidence in the record that even hints that the stop was pretextual.

Davis next contends that his Fourth Amendment rights were violated because the stop was not brief, nor was it tailored to the original purposes of the stop. He argues that the duration of the stop was unreasonable and that the officers' actions went beyond

those of a normal traffic stop.

The scope of detention must be carefully tailored to its underlying justification. Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion). "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Id. Davis contends that this stop exceeded the bounds of a reasonable traffic stop.

Here, the stop was reasonable. Although what transpired went beyond the bounds of a normal traffic stop, the extended duration of the stop was because of the fact that Haney had no driver's license, lied about his name, and could not produce any documentation indicating that he owned the truck. The officers did not attempt to prolong the stop unnecessarily; they responded to suspicious circumstances as diligently as they could. Where a traffic stop leads to the revelation of other suspicious circumstances that themselves would justify a Terry stop, the stop may exceed the bounds of a normal traffic stop so long as the additional circumstances justify the actions of the police. Here, the suspicious circumstances more than justified the action taken.

Davis argues that although the suspicious circumstances may have justified the detention of Haney, they did not justify the detaining McCary and himself. We disagree. Although mere proximity to a person suspected of wrongdoing does not give the police probable cause to search that person, it is not unreasonable, under the Fourth Amendment, briefly to detain the passengers of a vehicle that has been lawfully stopped, so long as it is

reasonable to detain the driver briefly. Were this not the rule, no traffic stop would be justified where the vehicle had multiple occupants, as the police would have no justification for detaining the passengers of the car.

IV.

Davis next contends that the search of Haney was unlawful because the police waited so long to conduct a safety frisk and that any fear of the officers was objectively unreasonable. We need not address these contentions, as the district court found that Haney consented to the search of his clothing, and we affirm that finding.

We review the consent determination under the clearly erroneous standard. United States v. Piaget, 915 F.2d 138, 139 (5th Cir. 1990). We previously have noted six primary factors to consider in determining whether consent is voluntary. See United States v. Kelley, 981 F.2d 1464, 1470 (5th Cir. 1993). We see no need to address those factors here. Although they support the district court's decision, its finding rests mainly on a credibility choice between the testimony of Haney and that of Smith. The court chose to give Smith's testimony more credibility, and that decision was not clearly erroneous. We affirm the district court's conclusion that Haney consented to the search.[1]

[1] Although the government does not contest standing, it appears that Davis has no standing to contest the search of Haney. Because of our holding, we need not reach this issue.

V.

Davis also challenges the district court's conclusion that the police had probable cause to arrest him. He alleges that his proximity to Haney did not warrant his arrest. It has long been established that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (citation omitted). "[I]n order to find probable cause based on association with persons engaging in criminal activity, some additional circumstances from which it is reasonable to infer participation in the criminal enterprise must be shown." United States v. Ramirez, 963 F.2d 693, 698 (5th Cir. 1992) (quoting United States v. Hillison, 733 F.2d 692, 697 (9th Cir. 1984)).

It is not enough that Davis was riding in the truck with Haney. See United States v. Di Re, 332 U.S. 581, 587 (1948) (mere presence in a vehicle where illegal transaction occurred, without more, was not enough to establish probable cause). Because the truck was not stolen, Davis's presence in the truck, in and of itself, cannot be considered suspicious. The police did not find any contraband in the truck where Davis could have been expected to have seen it; Davis made no suspicious movements. Although Davis did not have a driver's license, this fact is not suspicious, as he was not driving.

We nevertheless hold that the police had probable cause to search Davis. When Smith located the pouch of drugs and started to

remove them, Haney yelled, "He's got it! He's got it!" Based upon this statement, a reasonable person could conclude that there was a substantial probability that Davis knew what "it" was. Haney's outburst reasonably may be interpreted as a warning to Davis and McCary that the officers had discovered the drugs.

When making a probable cause determination, "we deal with probabilities." Brinegar v. United States, 338 U.S. 160 (1949). We hold that Haney's exclamation established a fair probability that Davis and McCary somehow were involved in Haney's amphetamine enterprise, thus giving the police probable cause to arrest them. Because the defendants were lawfully arrested, the search of their persons was legal as a search incident to arrest. As a result, no Fourth Amendment violation occurred.

We AFFIRM the judgment of the district court.