IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4699

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MERRICK BILL THOMAS, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(CR6-91-52(01))

(January 19, 1993)

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:[*]

Merrick Bill Thomas, Jr. appeals the district court's denial of his motion to suppress cocaine found in search of his car. We affirm.

Thomas and others were indicted on three cocaine counts. Thomas moved to suppress evidence. The district court held a two-day suppression hearing at which Thomas and arresting officer

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[*]Local Rule 47.5 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Barry Washington testified. The district court issued a lengthy memorandum opinion denying, for the most part, Thomas's motion to suppress.

Thomas then pleaded guilty to possessing cocaine with intent to distribute and conspiracy to possess and aiding and abetting. Pursuant to Fed. R. Crim P. 11(a)(2), the plea was conditional, reserving to Thomas the right to appeal the district court's denial of his motion to suppress. The district court sentenced Thomas to serve two concurrent 120-month prison terms and one five-year term of supervised release. Thomas appeals the denial of his suppression motion.

Chain of Events.

Washington's testimony provided most of the facts of the events relating to the seizure of the evidence sought to be suppressed. Others, including Thomas, provided additional evidence. Since the chain of events and the legal consequences flowing from those events are intricate, we set them forth in some detail.

Stopping Thomas's car. On August 4, 1991, Washington was accompanied on patrol by Thomas Knight, a private citizen. Washington saw two cars travelling close together on a highway. Neither the driver of the first car nor the passenger in the second car was wearing a seat belt, as required by state law. Washington pursued them. As the first car moved onto the shoulder, Washington saw the passenger in the second car throw a small package out of the right front window of that car. The

first car came to a stop, and so did the second car. Washington called for back-up officers.

Thomas was the driver of the first car. Thomas testified that he was wearing his lap belt but not his shoulder belt.

Washington approached Thomas and told him that he was stopped for failing to wear a seat belt. Upon questioning, Thomas told Washington that he was travelling with the men in the second car. At Washington's instruction, Knight kept an eye on Thomas, whom Washington instructed to stand where Knight could see him, while Washington went to talk with the two men in the second car. Thomas did not feel free to leave.

Investigation of second car. Milton Rodriguez Valencia was the driver of the second car, and Victoriano A. Minotta was the passenger. Washington asked them about the package that he had seen thrown from their car, and both denied that anything had been thrown. Valencia and Minotta denied that they were travelling with Thomas.

Officer Mazzola, one of the back-ups, watched Valencia and Minotta while Washington searched the area in which he had seen the package thrown. Washington found a package containing marijuana and rolling papers. Washington arrested Valencia and Minotta for possession of marijuana.

Consent to search. Washington then returned to talk with Thomas. Washington attempted to confirm that Thomas had stated that he was travelling with Valencia and Minotta. Thomas denied that he was travelling with them and that he had ever said that

he was. Washington told Thomas that he had found marijuana in the second car and asked Thomas if his car contained any. Thomas answered, "No, sir, there's nothing in my car." Washington asked, "Do you have a problem with me looking inside of your car?" Thomas responded, "No, you won't find anything in my car." Thomas testified that Washington did not ask his consent to search.

Detention of Thomas. Before the search of Thomas's car, Washington told Thomas that, for Thomas's and Washington's protection, Thomas would be handcuffed. Thomas was then handcuffed while Washington searched his car.

Search of Thomas's car. Washington entered the car and looked around. In an ashtray in the rear of the passenger compartment, Washington found two marijuana cigarettes butts.

Arrest of Thomas. Thereupon, Washington arrested Thomas for possession of marijuana. Thomas remained handcuffed.

Search of Thomas. Washington frisked Thomas. He found cigarette rolling papers of the same type that he found in the package that he had just retrieved from the area where he had seen a package thrown.

Full blown search of Thomas's car. Using a certified drug dog, Washington and another officer made a full blown search of Thomas's car. The officers noticed that carpeting in the rear seating area had been altered to cover parts of the doors. The dog identified portions of the car as possibly containing drugs.

Using tools, the officers pried off panels to which the dog had alerted, revealing packages.

The officers impounded the cars and found in both cars other concealed compartments that opened electrically. The full blown search of Thomas's car yielded $5000 in cash and 13 packages of cocaine having a combined gross weight of 30.5 pounds. No contraband was found in the second car.

Standard of Review.

In reviewing the denial of a motion to suppress, this court accepts the district court's factual findings unless they are clearly erroneous or influenced by an incorrect interpretation of the law. The evidence is viewed in the light most favorable to the prevailing party. The ultimate question of the legality of the search is a question of law and is subject to de novo review. U.S. v. Cooper, 949 F.2d 737, 744 (5th Cir. 1991), cert. denied, 112 S. Ct. 2945 (1992).

A clearly erroneous finding is one that is not plausible in light of the record viewed in its entirety. Anderson v. Bessemer City, 470 U.S. 564, 573-76 (1985). This court has "long pitched the standard of review for a motion to suppress based on live testimony at a suppression hearing at a high level." U.S. v. Randall, 887 F.2d 1262, 1265 (5th Cir. 1989).

Legality of the Search.

Thomas concedes that the initial investigative stop regarding the seat belt was permissible, and that phase of the

events leading to the seizure of the cocaine and cash is not at issue.

Investigation of second car. Thomas argues, though, that the permissible stop became an impermissible arrest when Washington went to question Valencia and Minotta and to look for the package because Thomas was not free to leave. The district court found that Thomas was detained involuntarily, which was a factor weighing against a finding that the consent to search was valid. As discussed below, however, six factors -- not just the involuntariness of Thomas's custodial status -- are considered.

As to Thomas's status when Washington investigated the second car while Knight kept his eye on Thomas, the district court found that Thomas's brief detention at that time was part of a lawful investigatory procedure. A vehicle and its occupants may be briefly detained for investigation based not upon probable cause but upon reasonable suspicion of criminal activity. The reasonableness of the stop is determined by the totality of the circumstances at the time of the stop. U.S. v. Garcia, 942 F.2d 873, 876 (5th Cir. 1991), cert. denied, 112 S. Ct. 989 (1992).

Such a stop, though, must last no longer than necessary to accomplish the purpose of the stop and should be no more intrusive than necessary to verify or dispel the officer's suspicion in a short period of time. U.S. v. Zukas, 843 F.2d 179, 182 (5th Cir. 1988), cert. denied, 490 U.S. 1019 (1989). Washington stopped the three men and two cars to investigate possible violations of the seat belt law. As the stop was

commencing, Washington saw the passenger of the second car expel a package. After Washington stopped the first car, Thomas told Washington that he was traveling with the men in the other car. In light of all of these circumstances, having Thomas stand by while Washington checked out the second car could not be said to have unreasonably extended the stop beyond the amount of time that Washington needed to verify or dispel his suspicion.

Consent to search. Thomas argues that he did not give valid consent to search the car. The district court found valid consent.

A district court's finding of consent is reviewed for clear error, taking into account six factors that indicate whether the consent was knowing and voluntary. They are

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

U.S. v. Galberth, 846 F.2d 983, 986-87 (5th Cir.), cert. denied, 488 U.S. 865 (1988). No one factor is dispositive. Id. at 987. The totality of the circumstances is considered. Id. at 986. The government must prove consent by a preponderance of the evidence. U.S. v. Hurtado, 905 F.2d 74, 76 (5th Cir. 1990) (en banc).

The district court applied the six factors. It found, first, that Thomas was being detained involuntarily pursuant to a valid investigatory stop, which could weigh against the freedom

and volition of the consent. Second, Washington's omission to cite Thomas for a seat belt violation before asking permission to search might have influenced Thomas to consent to curry favor with Washington. This influence would have been minimal, the court determined. The court found no actual coercive procedures.

Third, Thomas was found to have been entirely cooperative with Washington. Fourth, Washington did not inform Thomas that he was free to refuse consent, weighing against voluntariness of consent. Fifth, Thomas, who went through 11th grade in a high school near Houston and dropped out not because of academic difficulty but because he wanted to work, was found to be sufficiently educated and intelligent to know the significance of Washington's request. Sixth, the court found that, because the consent would not reasonably extend to concealed areas of the car, Thomas likely believed that no incriminating evidence would be found.

Weighing the applicable factors, the court found the consent to have been voluntary. Viewing the totality of the factors in light of the events leading up to the consent, the district court's findings are plausible. They are not clearly erroneous.

The district court applied the correct legal standard to findings that are not clearly erroneous. The consent was, therefore, valid.

Detention of Thomas. Thomas argues that the handcuffing prevented him from revoking the consent. The district court held that the handcuffing of Thomas after the consent was improper.

The court, however, emphasized that a valid consent had already been given, noting that the handcuffing would likely have vitiated the consent had the handcuffing preceded the consent.

When an officer detains a suspect illegally, the government has a heavy burden to prove subsequent valid consent. U.S. v. Ruigomez, 702 F.2d 61, 65 (5th Cir. 1983). That is not the situation in the instant case. Thomas gave his consent and then he was handcuffed.

Thomas testified that he did not attempt to prevent Washington from searching his car because, "Nothing I can do handcuffed." The court found this testimony unconvincing. The court found that Thomas made no attempt to revoke his consent and that "Thomas was not placed in a position where a change of heart was impossible to communicate to the officer."

Thomas's testimony that he could not have uttered a protest of the search while he was handcuffed is unconvincing. The district court's finding that Thomas was not prevented from revoking consent is not clearly erroneous, belying Thomas's argument that the handcuffing prevented revocation.

Search of Thomas's car. The district court found that Thomas consented to the initial search of his car. The standard for measuring the scope of consent is objective reasonableness. In other words, what would a reasonable person have understood by the exchange between the officer and the suspect? Florida v. Jimeno, --- U.S. ---, 111 S. Ct. 1801, 1803-04 (1991). Looking

in the ashtray is reasonably within the scope of a request to look inside the car.

Arrest of Thomas. The district court held that Thomas's arrest for marijuana possession was invalid because the links between Thomas and the marijuana butts were weak and no good faith exception applied. This holding is not contested.

Search of Thomas. The district court held that the seizure of the rolling papers was the product of a search incident to an unlawful arrest. The court held the evidence of the rolling papers inadmissible. This holding is not contested.

Full blown search of Thomas's car. Thomas argues that the full blown search of the car was unlawful because he had not consented to such an extensive search. For support, he points to this court's decision in United States v. Ibarra, 965 F.2d 1354 (5th Cir. 1992) (en banc), in which an evenly divided court affirmed a district court's decision to suppress evidence found by forcing open boards covering a passage into the attic of a residence where the defendant had consented to a search of the residence. Thomas's case is distinguishable from Ibarra, however, in two key respects:

(1) Thomas's case involves the search of a car, as distinguished from a residence; and

(2) Thomas's consent was preceded by the discovery of the marijuana discarded by someone with whom Thomas said he was travelling and followed by the discovery of the

marijuana butts in the ashtray of the car, together creating probable cause to believe that the car contained contraband. Focusing on the fact that Thomas's case involves the acquisition, subsequent to the original consent, of probable cause to search a car, we note that the Supreme Court in Carroll v. United States, 267 U.S. 132 (1925), found reasonable under the Fourth Amendment a search by prohibition agents, with probable cause, which consisted of slashing the upholstery of an automobile. Following Carroll, the Court held in United States v. Ross, 456 U.S. 798, 823 (1982), that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." Under circumstances similar to those that obtain here, the Court of Appeals for the Seventh Circuit, in United States v. Garcia, 897 F.2d 1413, 1419-20 (7th Cir. 1990), held that even if the search of door panels of a truck extended beyond the consent given, where the officer conducting the consensual visual search obtained probable cause to believe that the truck contained contraband, the search of the door panels was valid.

Focusing on the chain of events at issue here, the visual search of the automobile pursuant to a valid consent produced the marijuana cigarette butts which, together with the marijuana discarded by someone with whom Thomas said he was travelling, resulted in probable cause to search the vehicle. Such a search may include areas beyond the scope of the consent. See also California v. Acevedo, ___ U.S. ___, 111 S. Ct. 1982 (1991). The

district court correctly concluded, therefore, that the search that revealed the packages of cocaine and cash was valid.

AFFIRMED.