IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5600

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LUIS GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(93-CR-96-ALL)

(February 21, 1995)

Before SMITH, and BARKSDALE, Circuit Judges, and BUCHMEYER,[*] District Judge.

JERRY E. SMITH, Circuit Judge:[**]

Luis Gonzalez appeals his conviction for possession of narcotics on the grounds that the scope of a police traffic stop was unreasonable and his consent to search involuntary. Because we find the police's actions were reasonable within the meaning of the

---

[*] Chief District Judge of the Northern District of Texas, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Fourth Amendment and Gonzalez's involuntary consent claim is meritless, we affirm.

I.

On the evening of February 24, 1993, John Hearnsberger was patrolling in his marked police car in Lufkin, Texas. He noticed a gray van being driven in an erratic manner, leading him to believe the driver might be intoxicated. He called the dispatch to check to see whether the van was stolen))it was not))and then stopped the van.

After notifying the sheriff's department of his location, Hearnsberger approached the van, asked the driver for identification, and requested that he step to the rear of the vehicle. The driver, Gonzalez, complied, handing Hearnsberger his New York driver's license. Hearnsberger proceeded to question Gonzalez about his driving and quickly determined that Gonzalez was not drunk. Gonzalez claimed that his erratic driving was a result of being distracted by the woman and two children in his van.

Having determined that Gonzalez had not been drinking, Hearnsberger nonetheless continued to question Gonzalez. He asked him about his New York license and discovered that Gonzalez claimed to be a resident of Houston. Gonzalez told Hearnsberger that he had failed to get a Texas license.

Hearnsberger also asked Gonzalez where he was going. Gonzales replied that he was traveling to nearby Nacogdoches to visit his daughter at Stephen F. Austin University. Upon being asked who his

passenger was, he replied that she was a "friend."

Noticing that Gonzalez appeared nervous and hesitated when answering questions, Hearnsberger decided to make sure the occupants of the van were safe. He asked Gonzalez to stay at the back of the car and approached the passenger's side of the vehicle. He asked the woman whether she was alright and where she was going; she replied she was headed for New York. She also said Gonzalez was her uncle. Hearnsberger thought it suspicious that Gonzalez's and her stories were different.

Hearnsberger then returned to the rear of the vehicle, whereupon two drug task force police officers, with whom Hearnsberger had been working previously, pulled up. Hearnsberger talked with the other officers and took some consent search forms from his car.

Hearnsberger walked back to Gonzalez and again asked where he was going. Getting the same inconsistent answer, Hearnsberger informed Gonzalez that because of the conflicting stories, he suspected the vehicle contained contraband. Hearnsberger presented Gonzalez with a consent form and asked whether he could search the van. Gonzalez said the officer could make a search, looked over the form, and signed it.

A search of the van revealed a hidden compartment, which contained over seventy-two kilograms of cocaine. The van was impounded, and Gonzalez was arrested.

Gonzalez was charged with a violation of 21 U.S.C. § 841(a)(1) for knowingly and willingly possessing cocaine with the intent to

distribute. A pre-trial hearing was held on a motion to suppress, and the motion was denied. A jury found Gonzalez guilty.

II.

A.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST. amend. IV. There is no question that the stopping of a vehicle and the detention of its occupants is a "seizure" within the meaning of the Fourth Amendment. See Delaware v. Prouse, 440 U.S. 648, 653 (1979). The next question, therefore, is whether the stop of a vehicle was "reasonable."

The reasonableness of searches and seizures of vehicles merely suspected of criminal activity is to be analyzed under the framework established in Terry v. Ohio, 392 U.S. 1 (1968). Likewise, we examine routine stops for violating traffic laws, while not technically criminal behavior, under Terry. United States v. Shabazz, 993 F.2d 431, 434-35 (5th Cir. 1993). That judicial inquiry "is a dual one))whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 20.

This circuit has interpreted broadly the second prong of the Terry test to allow police officers much leeway. Instead of placing the great weight of our inquiry on the method of the police's investigation, we closely examine the detention to determine whether it is tailored to the purpose of the stop.

Shabazz, 993 F.2d at 436; United States v. Causey, 834 F.2d 1179, 1184-85 (5th Cir. 1987) (en banc); see also Florida v. Royer, 460 U.S. 491, 499 (1983) (plurality opinion) ("The scope of the detention must be carefully tailored to its underlying justification.").

This court, for example, has rejected the notion that "a police officer's questioning, even on a subject unrelated to the purpose of the stop, is itself a Fourth Amendment violation." Shabazz, 993 F.2d at 436. It is the stop and detention that implicates the protections of the Constitution, not the officer's investigation. Id.

Questioning or the length of detention may become unjustified under Terry, however, if the original basis for the stop dissipates. When an officer no longer has a basis for the reasonable suspicion that justified detention in the first place, continued detention is no longer reasonable under the Fourth Amendment. As we explained in Shabazz:

> When a police officer reasonably suspects only that someone is carrying a gun and stops and frisks that person, the officer, after finding nothing in a pat down, may not thereafter further detain the person merely to question him about a fraud offense. This is not because the questioning itself is unlawful, but because at that point suspicion of weapons possession has evaporated and no longer justifies further detention. When the officer is satisfied that the individual is not carrying a gun, the officer may not detain him longer to investigate a charge lacking reasonable suspicion. At that point, continuation of the detention is no longer supported by the facts that justified its initiation. Thus, detention, not questioning, is the evil at which Terry's second prong is aimed.

Id.

Finally, on appeal from denial of a motion to suppress, this court reviews the district court's factual findings under the clearly erroneous standard and its conclusions of law de novo. United States v. Tellez, 11 F.3d 530, 532 (5th Cir. 1993), cert. denied, 114 S. Ct. 1630 (1994). Where the district court makes no factual findings, however, "we must independently review the record to determine whether any reasonable view of the evidence supports admissibility." United States v. Yeagin, 927 F.2d 798, 800 (5th Cir. 1991). In that case, the ruling must be upheld. Tellez, 11 F.3d at 532.

Here, Gonzalez argues that the district court erred in denying his motion to suppress, because he believes that Hearnsberger prolonged the detention beyond the time necessary to conduct a routine traffic stop. The thrust of his argument is that once the officer had determined that Gonzalez was not drunk, his car not stolen, and he had a license and registration, there was no further reason to justify holding him. At that time, the officer should have let Gonzalez go, rather than trying to obtain consent to a search. The government, on the other hand, argues that Gonzalez is wrong, as a factual matter, that the traffic stop was completed.

As the district court here did not make specific factual findings, we must make an independent inspection of the record, reviewing the evidence in the government's favor. See United States v. Simmons, 918 F.2d 476, 479 (5th Cir. 1990) (holding that evidence must be reviewed in the light most favorable to the prevailing party after motion to suppress). After reviewing the

record, we find as a factual matter that the traffic stop was not completed, and no independent basis need be proved to justify the continued detention.

Hearnsberger had not yet issued a citation; nor had he checked with the dispatcher to see whether Gonzalez's license and registration were valid. Only three to five minutes passed from the beginning of the stop to Gonzalez's signing of the consent form. Under these circumstances, the scope of the stop was reasonable.

Moreover, the fact that Hearnsberger had determined that Gonzalez was not drunk did not dissipate the original justification for the stop, Gonzalez's erratic driving. This fact only led Hearnsberger to conclude that Gonzalez was not guilty of the added offense of driving under the influence. He was justified in making further brief inquiries to determine whether there was some other suspect cause for Gonzalez's erratic driving.

B.

Gonzalez also raises the issue of the validity of his consent to the search. Consent to search is a fact issue, and the district court's determination that consent was voluntary will not be overturned absent clear error. United States v. Fierro, 38 F.3d 761, 771 (5th Cir. 1994). The government has the burden of proving consent by a preponderance of the evidence, United States v. Hurtado, 905 F.2d 74, 76 (5th Cir. 1990) (en banc), and the reviewing court must take into account the totality of the

circumstances surrounding the consent, United States v. Gonzalez-Basulto, 898 F.2d 1011, 1012-13 (5th Cir. 1990); see United States v. Olivier-Becerril, 861 F.2d 424, 426 (5th Cir. 1988) (noting six factors relevant to voluntariness).

Gonzalez argues that the district court erred in denying his motion to suppress, as his consent to search followed an illegal detention and was not given voluntarily. In the alternative, he argues that because the district court made no specific factual findings on this issue, we must remand in order to create a reviewable record. The government counters by arguing that Gonzalez did not raise this issue in the district court, so it is waived on appeal.

Gonzalez admits that he did not raise this issue. Our research, however, reveals no precedent that holds that failure to raise the factual issue of voluntariness waives the right to object on appeal. Accordingly, without deciding whether waiver bars this issue, we review for plain error. See FED. R. CRIM. P. 52(b). In order for the plain error doctrine to be applicable, we must find that (1) there was error, (2) the error was plain, and (3) it affects substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc). Only upon findings these elements may we, in our discretion, correct the error. Id. at 164. In making that determination, we ask whether the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Id. (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

Here, Gonzalez signed a consent form after Hearnsberger asked whether he could search the van. We have reviewed the record and have found no facts that would undercut what appears to have been a simple, voluntary waiver. Gonzalez points us to no distinctive details that in any way suggest that the consent was not given freely. Nor do we have to determine whether there was a causal connection between an illegal detention and the consent; as we have discussed above, there was no illegal detention. Accordingly, there was no error, much less plain error, in the court's deciding implicitly that consent was not an issue.

AFFIRMED.