IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7707
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SERGIO ANTONIO WAITE-KNIGHT and
LIANA GARCIA-VALENCIA,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR-C-93-123-1 & 2)

(June 6, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendants-Appellants Sergio Antonio Waite-Knight (Waite) and Liana Garcia-Valencia (Garcia) appeal their jury convictions for possession with intent to distribute 42 kilograms of cocaine and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

for conspiracy to possess such drugs with intent to distribute them, in violation of 21 U.S.C. § 841(a)(1), § 841(b)(1)(A), and § 846. They ground their appeal in the district court's refusal to suppress evidence. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

The appellants filed motions to suppress evidence gathered following a traffic stop of a motor vehicle. A suppression hearing was held to address the appellants' motions. At that hearing, Fidel Gonzalez, a deputy sheriff, testified that on May 11, 1993, he stopped a 1984 Ford pickup truck at 11:44 p.m. for speeding; that, after he provided the dispatcher with routine information regarding the stop, he exited his patrol car and approached the truck; and that when the passenger (Garcia) got out and walked towards the patrol car, Gonzalez asked her to get back into the truck. Gonzalez further testified that Garcia did not respond to the request that she re-enter the truck but instead put her hand into her purse, which prompted Gonzalez to shine his flashlight in Garcia's face and order her to get back into the truck, upon which she complied.

Gonzalez stated further that he then approached the driver's side of the truck and asked the driver (Waite) to get out; and at the same time Gonzalez noticed a strong odor of diesel fuel. Waite got out and walked to the rear of the truck where Gonzalez was standing. Continuing to smell diesel fumes, Gonzalez asked to see Waite's driver's license. When Waite presented a temporary

driver's permit his hands were shaking. Gonzalez then called the dispatcher to check on Waite's temporary permit. The time of that call was 11:49 p.m. While awaiting word from the dispatcher, Gonzalez filled out a citation for speeding, reflecting the time as 11:50 p.m.

As he was filling out the citation, Gonzalez questioned Waite and Garcia separately regarding their travel plans. They both told him that they were going to Houston, but Gonzalez grew more suspicious when their stories diverged. Garcia said she did not know where in Houston they were going to stay, but Waite said that they were going to stay with Garcia's friends. Gonzalez noticed that, although it was a cool evening, Garcia was perspiring and avoiding eye contact.

Gonzalez then checked beneath the truck by shining his flashlight. He observed diesel fuel dripping and noticed that the bolts on the fuel tank appeared to have been removed recently and that the top portion of the tank bore a black substance that appeared to be tar or silicone. By that time, Ruben Guajardo, another deputy who had heard the radio communications between Gonzalez and the dispatcher, arrived on the scene. Gonzalez told Guajardo that he suspected that the tank had been removed or tampered with recently, requesting that Guajardo check it too. Guajardo reported that one of the fuel lines was disconnected.

Gonzalez suspected that the fuel tank contained concealed contraband of some kind so he questioned Waite about the fuel lines. Waite denied that any work had been done on the fuel lines

or that he had had any problem with them. Waite began to appear more nervous, however, "looking around to the sides and behind him" and glancing at Gonzalez's gun. Gonzalez asked Waite if he (Gonzalez) could search the truck; Waite told Gonzalez that he could search all he wanted but refused to sign the consent-to-search form. Gonzalez called for a canine unit at 12:00 midnight to assist in the investigation.

At 12:11 a.m. the dog and handler were dispatched. By that time Waite had signed the traffic citation. The dog and handler arrived between 12:17 and 12:19 a.m., and, within minutes after Gonzalez briefed the attending officer, Lieutenant Barry Dunn, the dog alerted on the fuel tank. Waite denied ownership of the truck when questioned further about the fuel tank.[1] Gonzalez then told Waite that he suspected that some kind of narcotics were concealed in the fuel tank. When Gonzalez began to read Waite his Miranda rights, Waite pushed Gonzalez and attempted to flee. Garcia exited the truck and she too began to flee. Id. The log indicated that at 12:22 a.m. the appellants were fleeing. Both were quickly apprehended.

The appellants moved to suppress the evidence obtained as a result of the vehicle stop and search. Following the suppression hearing, the district court denied the appellants' motions to suppress. A jury subsequently found the appellants guilty of both

[1] Gonzalez testified that the dispatcher had reported that the truck was registered to Garcia and that Waite's license had no outstanding warrants. When testifying, Garcia denied owning the vehicle.

counts. Garcia was sentenced, inter alia, to concurrent terms of 151 months, and Waite was sentenced, inter alia, to concurrent terms of 178 months. The appellants timely filed notices of appeal.

II

ANALYSIS

The appellants challenge the district court's denial of their motions to suppress on Fourth Amendment grounds. In reviewing a district court's denial of a motion to suppress, we review the district court's findings of fact for clear error, and review de novo the ultimate determination whether the search or seizure was reasonable under the Fourth Amendment. United States v. Seals, 987 F.2d 1102, 1106 (5th Cir.), cert. denied, 114 S.Ct. 155 (1993). The evidence must be viewed most favorably to the party prevailing in the district court unless such a view is inconsistent with the trial court's findings or is clearly erroneous considering the evidence as a whole. United States v. Shabazz, 993 F.2d 431, 434 (5th Cir. 1993).

"A motorist's expectation of privacy yields to a routine traffic stop for such violations as speeding . . . ." United States v. Roberson, 6 F.3d 1088, 1091 (5th Cir. 1993), cert. denied, 114 S.Ct. 1322 (1994). Further detention on the suspicion that the stopped vehicle contains drugs is analyzed under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Id. "Under Terry, the judicial inquiry into the reasonableness of a search or seizure `is a dual one--whether the officer's action was

justified in its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" Shabazz, 993 F.2d at 435.

Garcia and Waite both concede that the "seizure" by Gonzalez was justified at its inception (Terry's first prong), but argue that the extended detention was not reasonably related to the circumstances which justified the stop in the first place (Terry's second prong). The appellants support their argument, in part, by contending that Gonzalez began questioning them about matters unrelated to the traffic stop.

"[D]etention, not questioning, is the evil at which Terry's second prong is aimed." Shabazz, 993 F.2d at 436. If a traffic officer has a reasonable suspicion that the vehicle contains contraband or that the defendants have committed any other serious crime, they may be detained further to permit the officer to dispel his suspicions. The officer's questioning pursuant to that aim is not alone sufficient to establish a Fourth Amendment violation. Id. In Shabazz, we held that questioning the suspects before the issuance of a traffic citation was complete did not unreasonably extend the otherwise valid speeding stop. Id. at 437-38. Moreover, there is no per se time limit for a permissible Terry stop.[2] United States v. Sharpe, 470 U.S. 675, 686, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). Rather, the inquiry is whether the officers

[2] The detention in the instant case, extending from the time of the traffic stop (11:44 p.m.) until the time that the dog alerted on the presence of contraband in the fuel tank (12:19 to 12:22 a.m.), was no more than 38 minutes.

"diligently pursued a means of investigation that was likely to confirm or dispel their suspicious quickly." Id.; see United States v. Sanders, 994 F.2d 200, 204 (5th Cir.), cert. denied, 114 S.Ct. 608 (1993).

The district court, crediting Gonzalez's testimony regarding Garcia's actions following the initial traffic stop, found that Gonzalez ordered Garcia to return to the truck because he feared for his safety. The district court ruled that Gonzalez's action was justified in light of the potential danger posed by Garcia's failure to respond and by her reaching into her purse. The district court's finding of fact was not clearly erroneous. Further, Gonzalez's actions were also reasonable in light of facts available to him at the time. See United States v. Michelletti, 13 F.3d 838, 840-42 (5th Cir.), petition for cert. filed, (Apr. 25, 1994) (No. 93-8886).

The appellants argue that the district court's ruling was based on an erroneous finding of fact because Gonzalez did nothing to search for a weapon after he ordered Garcia to return to the truck and because Gonzalez also testified that he thought Garcia was trying to prevent him from contacting Waite.

Gonzalez testified that once Garcia was in the truck and the backup officer had arrived the threat had diminished "a little bit by having her in the truck." The district court's finding was thus not clearly erroneous. That Gonzalez elected to confine Garcia to the truck rather than conduct a Terry search of her purse does not alone establish a Fourth Amendment violation. The action taken by

Garcia was at least within the range of reasonable choices to assure his own safety while completing the citation and conducting further questioning. See United States v. Rideau, 969 F.2d 1572, 1574-75 (5th Cir. 1992). That Gonzalez also thought that Garcia was trying to divert his attention from Waite provides no basis to disturb the district court's finding.

Assuming that Gonzalez's fears regarding Garcia were dispelled once she was in the truck, her continued detention at that point would violate Terry unless justified by additional suspicions reasonably held and not yet dispelled. See, e.g., Sharpe, 470 U.S. at 686; Shabazz, 993 F.2d at 436. Crediting Gonzalez's version of the incident, the district court found that when the officer approached the driver's side of the truck he smelled diesel fuel. The district court further found that this discovery led Gonzalez to observe the dripping fuel, which observation, coupled with the appellants' conflicting stories given while Gonzalez was issuing the citation, eventually led to the discovery of the modified fuel tank secured by new bolts and containing black tar or silicone on its top. The district court also found that Gonzalez's questioning of Waite regarding the fuel line did not dispel his suspicion that something was hidden in the tank. And the district court found that the investigation of the fuel tank occurred before the citation was completed. The district court's findings are not clearly erroneous.[3]

[3] The appellants contend otherwise, inter alia, pointing to inconsistencies in Gonzalez's testimony regarding when he actually saw the dripping fuel and asserting that he did not see it until

The district court concluded that the detention did not violate the Fourth Amendment and that the actions taken by Gonzalez during the traffic stop passed muster for Terry. That determination was not error. Contrary to the appellants' argument, Gonzalez's attempt to locate the source of the strong smell of fuel was objectively reasonable both initially, because of safety concerns and, subsequently, to dispel Gonzalez's mounting suspicions. In light of the information obtained by Gonzalez, there was an objective basis for a reasonable suspicion that the fuel tank had been modified to conceal contraband. See United States v. Rodriguez, 835 F.2d 1090, 1092 (5th Cir. 1988) (facts viewed from perspective of experienced officer sufficient to establish reasonable suspicion that tractor-trailer concealed contraband). As further detention unrelated to the initial stop was pursued promptly to confirm or dispel the additional suspicions, Terry's second prong was satisfied.[4] See Sharpe, 470 U.S. at 686-88; see also, United States v. Martinez, 808 F.2d 1050, 1053-54 (5th Cir. 1987) (investigative stop followed by fifteen to thirty-minute detention supported by reasonable suspicion of criminal activity). It follows that the district

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after he had questioned them. This argument is meritless. Although Gonzalez testified at one point that he saw the dripping fuel after speaking with Garcia, he corrected himself on redirect, testifying that he saw the dripping fuel after speaking to Waite and before talking to Garcia. This comports with his previous testimony.

[4] We note in passing that those actions ultimately established probable cause that the tank contained contraband, justifying the warrantless search of the tank and the discovery of the cocaine. See Seals, 987 F.2d at 1107-08.

court's denial of the appellants' motions to suppress was not error. As such, appellants' convictions are AFFIRMED.