IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40073
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRUCE EDWARD MCMAHAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(93-CR-104-1)

(September 8, 1994)

Before, SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

Per curiam[1]:

Bruce Edward McMahan entered a conditional guilty plea to possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). McMahan appeals his conviction pursuant to a provision in his plea agreement which reserved the right to appellate review of the district court's denial of McMahan's motion to suppress. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published

FACTS

According to the Government's factual basis, a Texas state trooper observed McMahan, who was driving a motor home, commit a traffic violation, specifically failure to maintain a single lane. After pulling the motor home over, and making several observations which made him believe that McMahan might be engaged in illegal activity, the trooper asked McMahan for his consent to search the vehicle. McMahan consented and the subsequent search yielded 127 pounds of marijuana.

McMahan filed a motion to suppress the evidence of the marijuana. At a hearing on the motion, the trooper testified that when he pulled the vehicle over for the traffic violation, he approached the passenger's side of the vehicle because the driver's side had no door. McMahan met the trooper at the door and the trooper asked McMahan for his driver's license. As McMahan opened the door, the trooper smelled air freshener. McMahan had trouble locating his wallet, but finally produced his driver's license. The trooper observed that McMahan was nervous and confused. The trooper also noted that McMahan did not immediately pull over after he had activated his overhead lights, but pulled over when the trooper pulled alongside the vehicle and motioned to McMahan. The trooper further testified that he suspected that McMahan was possibly on drugs or alcohol.

Before the trooper could tell McMahan what he was being stopped for, McMahan asked the trooper into the vehicle to "get some tea." McMahan moved the step down for the trooper to step

in. The trooper noticed another air freshener in the middle of the motor home. Upon examining McMahan's driver's license, the trooper noticed that although the license indicated that he was from Florida, the license plate on the motor home was from South Carolina. The trooper asked McMahan whether the motor home was his, and McMahan responded that it belonged to his cousin in South Carolina and that he had borrowed it to go to San Antonio to look for work. The trooper began filling out a warning ticket for McMahan. The trooper then noticed several tools lying on the floorboard of the motor home. He also noticed that, although it was a hot day and the motor home was equipped with an air conditioner, all the windows in the vehicle were open. When he asked McMahan why, McMahan responded that it was cheaper to run the motor home without the air conditioner.

The trooper asked McMahan for his consent to search the vehicle. After McMahan completed a written consent form, the trooper asked McMahan if he would follow him to the nearest service station. The search ensued and the marijuana was found hidden behind a panel of the motor home.

McMahan testified that he was unable to read the consent-to-search form he signed because he has dyslexia. He further testified that he was unable to hear the trooper's explanation of the form because he had a "busted" eardrum. He argued, inter alia, that assuming he had been stopped for a valid traffic violation, he should not have been detained after the initial

reason for the stop had been accomplished. He also argued that he did not voluntarily consent to the search.

The district court denied McMahan's motion to suppress, concluding that the search was conducted within a reasonable time after the stop and that McMahan's consent to the search was voluntary.

STANDARD OF REVIEW

McMahan argues that the district court erred by denying his motion to suppress because his detention exceeded the scope of the initial traffic stop and because he did not voluntarily consent to the search. In reviewing a district court's ruling on a motion to suppress evidence, the evidence must be viewed in the light most favorable to the party that prevailed below and the district court's findings of fact are reviewed for clear error. *United States v. Thomas*, 12 F.3d 1350, 1366 (5th Cir.), *cert. denied*, 114 S. Ct. 2119 (1994). However, the district court's ultimate ruling on the motion is reviewed de novo. Id.

ANALYSIS

McMahan argues that a routine traffic stop is a limited seizure and that the justification for the stop ended when he signed the warning citation. He argues that his continued detention required a justification separate from the initial traffic stop, and that no such justification existed. In support of his argument, McMahan cites *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988), in which the Tenth Circuit held that an officer conducting a routine traffic stop may request a driver's

license and vehicle registration, run a computer check, and issue a citation, but once this has been accomplished, the driver may not been detained for further questioning unless the officer has a reasonable suspicion of other illegal activity. *Id*. at 1519.

In *United States v. Shabazz*, 993 F.2d 431, 435 (5th Cir. 1993), this Court noted *Guzman*, but rejected the defendant's argument that police officers exceeded the scope of their traffic stop. *Id*. at 437. Distinguishing *Guzman*, this Court concluded that the officers' questioning "did nothing to extend the duration of the initial, valid seizure." *Id*.

In the present case, McMahan acknowledged that the trooper gave him the warning form and the consent-to-search form simultaneously. The trooper testified, and the district court found, that approximately 15 minutes elapsed between the time of the initial stop and the time McMahan signed the consent form. Further, contrary to McMahan's assertion that he was detained, the trooper testified that McMahan invited him into the motor home for tea. Thus, as in *Shabazz*, McMahan cannot successfully claim that the trooper's questioning extended the duration of the initial traffic stop.

However, even assuming that the extended duration of the initial stop resulted in a Fourth Amendment violation, the search in the present case was validated by McMahan's subsequent consent. *See United States v. Kelley*, 981 F.2d 1464, 1470 (5th Cir.), *cert. denied*, 113 S. Ct. 2427 (1993). Voluntary consent can validate a search even when the consent to search is preceded

by a Fourth Amendment violation. *Id.* To be valid, the consent to search must be free and voluntary. *Id*. When the consent is preceded by an earlier Fourth Amendment violation, the Government has a heavy burden of proving, by a preponderance of the evidence, that the consent was voluntary. *Id*.

McMahan argues that his consent was not voluntary because he could not read the consent form, he had trouble hearing the trooper's explanation of its contents, he thought he was signing only a warning citation, and he believed he had no choice about allowing the search. The voluntariness of consent is a question of fact to be determined from the totality of all the circumstances. *Kelley*, 981 F.2d at 1470. When the judge bases a finding of consent on oral testimony at a suppression hearing, the clearly erroneous standard is particularly strong. *Id*.

The district court found that "both the trooper and the defendant testified that the defendant never told the trooper that he did not understand the consent form or could not read it. The Court finds, from the totality of the circumstances, that the consent was voluntarily given and the search valid." The district court's finding was not clearly erroneous.

McMahan argues that because the extended duration of the traffic stop was illegal, this Court should remand this case for further findings consistent with *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). Under *Brown*, three factors must be examined to determine whether consent was "sufficiently an act of free will to purge the primary taint" of

the illegal arrest. Brown, 422 U.S. at 602 (internal quotations and citation omitted). They are:

(1) the temporal proximity of an illegal arrest and consent, (2) intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. *Id*. at 601, 603-04.

Assuming that the detention was illegal and that the *Brown* factors apply, the district court's finding that McMahan's consent was voluntary should nevertheless be affirmed. *See Kelley*, 981 F.2d at 1471 (applying *Brown* factors without remand). First, as noted above, the court found that McMahan gave his consent approximately 15 minutes after the stop. Second, the trooper testified that he advised McMahan that he had the right to refuse the search. This Court has held that advising a defendant of his right to refuse to permit a search was a sufficient intervening occurrence to remove the influence of a prior Fourth Amendment violation. *See Kelley*, 981 F.2d at 1472 (quotations and citation omitted). Third, other than McMahan's testimony that the trooper was "getting frustrated" and was "cussing," there is no evidence that the trooper engaged in any official misconduct in eliciting the consent. The district court's finding that McMahan voluntarily consented to search is not clearly erroneous.

The judgment of the district court is therefore AFFIRMED.