UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50744

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RENE GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

(SA 94 CR 196 1)

(August 22, 1995)

Before POLITZ, JONES and PARKER, Circuit Judges:

PER CURIAM:[*]

Rene Garcia ("Garcia") challenges his conviction for possession of marijuana with intent to distribute, alleging that the district court erred in denying his motion to suppress evidence. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS

At about 8:30 a.m. on the morning of May 22, 1994, Texas State Trooper Joseph Cerney ("Trooper Cerney"), a 15-year veteran of the Texas Department of Public Safety, stopped a 1974 Ford LTD because the vehicle appeared to have a broken taillight and window tinting darker than permitted by state law. After stopping the vehicle, Trooper Cerney ran a license plate check which revealed that the plate on the vehicle belonged to a 1974 Ford and that the car was not reported stolen. Trooper Cerney then approached the vehicle and asked the driver, Garcia, to exit the vehicle and present both his driver's license and insurance papers. Garcia asked why he had been stopped. Trooper Cerney replied that he had a broken taillight and that his window tinting appeared too dark. The driver's license presented by Garcia listed a Crystal City, Texas address at which Garcia no longer lived. Garcia explained that he had moved to San Antonio, and was returning to San Antonio following a visit to his mother in Crystal City. He further explained that he did not own the car but had borrowed it the day before from a friend named Juan Contreras in San Antonio. The insurance papers reflected Juan Contreras of Eagle Pass as the owner of the car. Further, the insurance had expired and Garcia did not present Trooper Cerney with proof of current insurance as required by Texas law. Trooper Cerney testified that Garcia's story aroused his suspicion because it did not make sense to him that a person would drive from San Antonio to Crystal City on

Saturday evening to visit his mother, and get up and leave to return home on Sunday morning at 7:30 a.m. Also, Crystal City lies between Eagle Pass, where the insurance papers said Contreras lived and San Antonio, where Garcia claimed he borrowed the car. Garcia appeared nervous and uncomfortable to the officer, and grew increasingly nervous and fidgety during their conversation. A backup officer arrived, but stayed in the background and did not talk to Garcia.

Trooper Cerney tested the darkness of the window tint on Garcia's vehicle with a "window tint meter." The test revealed that the windows failed to meet the Texas Department of Public Safety's standards for window tinting. Because of his growing suspicions, Trooper Cerney asked Garcia if he was transporting contraband; Garcia replied that he was not. Cerney asked if he could look inside of the vehicle, to which Garcia replied, "Okay." Cerney asked again, "Are you sure it's okay?" Garcia answered, "Yeah, no problem. I don't have anything." At this point, approximately five minutes had passed since the initial stop of the vehicle.

Trooper Cerney turned on the ignition and tried to roll down the rear windows. Neither window would roll down. Using a high powered flashlight, he looked down into the channel between the window glass and the body and saw what he believed was a bundle of marijuana. He placed Garcia under arrest, read him his rights and made arrangements to transport the vehicle to the police station for a more thorough search. Authorities eventually discovered 297

pounds of marijuana hidden in various places in Garcia's vehicle.

Prior to trial, Garcia moved to suppress the marihuana as the fruit of an unlawful search. Garcia contended that because the Texas law covering window tinting applies only to cars manufactured after 1988,[1] Cerney's detention of Garcia from the point at which the testing of the window tinting began onward was an illegal detention in violation of the Fourth Amendment. As such, Garcia argued, the subsequent search was performed during an illegal detention and the evidence discovered was therefore inadmissible as "fruit of the poisonous tree." Garcia also argued that his consent to the search was given involuntarily under the circumstances.

The district court denied Garcia's motion to suppress, concluding that Garcia's broken taillight justified the initial stop and that Garcia's consent to the search was voluntarily given. The district court addressed the argument that the stop was unconstitutionally prolonged by the window tint investigation in a footnote, finding that while the Texas statute applied only to vehicles manufactured in 1988 or after, the Texas Department of Public Safety administrative rules apply the same requirements to older cars.[2] The district court therefore found that Trooper Cerney's investigation of the window tint was a legal basis for both a traffic stop and subsequent investigation. Garcia was tried

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[1] *See* TEX. REV. CIV. STAT. ANN. art. 6701(d), § 134C(k) (West Supp. 1995).

[2] *See* Rule 21.1(b)(3)(A) of the Texas Department of Public Safety Administrative Rules.

at a bench trial, found guilty of possession with intent to distribute, and sentenced to 60 months imprisonment.

VOLUNTARINESS OF THE SEARCH

On appeal from the denial of a motion to suppress, based on live testimony at a suppression hearing, this Court accepts the district court's factual findings unless they are clearly erroneous or are influenced by an incorrect view of the law, but reviews questions of law *de novo*. *United States v. Coleman*, 969 F.2d 126, 129 (5th Cir. 1992).

This Court analyzes traffic stops such as the one at issue under the standards announced for investigative detention in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *United States v. Shabazz*, 993 F.2d 431, 434 (5th Cir. 1993). Under *Terry*, whether an investigatory detention or traffic stop complies with the Fourth Amendment depends upon two factors -- whether the stop was justified at its inception, and whether the officer's actions during the stop were reasonably related in scope to the circumstances that justified the interference in the first place. *United States v. Crain*, 33 F.3d 480, 485 (5th Cir. 1994), *cert. denied*, ___U.S.___, 115 S.Ct. 1142 (1995). The district court found, and Garcia concedes on appeal, that the initial stop was justified by the trooper's observation that the LTD had a defective brake light, and that Garcia verbally consented to the search. Garcia argues that the district court erred in finding that the consent was voluntarily given, and in failing to consider whether the trooper's actions, which Garcia claims exceeded the permissible

scope of the traffic stop, irreparably tainted Garcia's consent.

The voluntariness of an individual's consent to a search is a question of fact to be determined from the totality of the circumstances. *United States v. Gonzalez-Basulto*, 898 F.2d 1011, 1012-13 (5th Cir. 1990). The government bears the burden of demonstrating by a preponderance of the evidence that consent was obtained and that it was freely and voluntarily given. *United States v. Richard*, 994 F.2d 244, 250 (5th Cir. 1993). The government must show more than simply submission to a claim of lawful authority. *Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968) (invalidating consent obtained by officer's representation that they had a search warrant.)

Consent may "not be coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). In determining whether consent was obtained voluntarily, the courts look to six "primary factors":

> (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.

Gonzalez-Basulto, 898 F.2d 1011, 1013 (5th Cir.1990) (quoting *United States v. Galberth*, 846 F.2d 983, 987 (5th Cir.), *cert. denied*, 488 U.S. 865 (1988)).[3] No one of these six factors is

[3] *Galberth* cites *United States v. Ruigomez*, 702 F.2d 61 (5th Cir. 1983) as authority for the six factor test. The first factor in *Ruigomez* is "custodial status" rather than "the voluntariness of

dispositive or controlling. *Galberth*, 846 F.2d at 987.

Trooper Cerney was the only witness that testified at the suppression hearing, and the district court specifically found his testimony to be credible. The district court recited the six factor voluntariness test, and applied it to the facts developed at the suppression hearing. The district court found that, at the time consent was given, Garcia was not enticed, threatened, or coerced; no weapons were brandished; a backup officer who had arrived after the stop remained in the background and took no part in the conversation with Garcia; and Garcia was not hand-cuffed or arrested until after the suspected marijuana was discovered. Trooper Cerney estimated the time between the initial stop and the consent at no more than five minutes. There was no evidence of Garcia's educational level, and no evidence that he was told he had a right not to consent. The court found Garcia's response to Trooper Cerney indicative of an intelligent understanding of both the officer's request for consent and his motivation in making the request. The district court also noted that Garcia "may have believed no drugs would be found because the marijuana was well hidden." The district court then found "from a totality of the circumstances that [Garcia's] consent to the search of the vehicle was freely and voluntarily given."

Garcia claims that the district court's finding of voluntariness is clearly erroneous. First, he points to evidence

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the defendant's custodial status." *Id.* at 65. We find this original articulation of the factor more helpful to our analysis, as custodial status cannot logically be "voluntary."

that the consent was given while he was being involuntarily detained. Second, he characterizes the trooper's investigative activity as implicitly coercive. Garcia claims that the officer's lack of interest in the license and insurance papers, the arrival of the second officer, and the questions about contraband applied "subtle pressure to Garcia." Third, Garcia claims that his cooperation with the officer proved only his desire to end the encounter, and should not be viewed as an indication of voluntariness. Garcia urges us to weigh the lack of evidence on the fourth and fifth factors against the government, because the government bore the burden of establishing consent. Finally, Garcia claims that he had "good reason to believe that the car contained contraband, and preferred not to be found out," so that the sixth factor does not support the district court's finding of voluntariness.

We find no merit in Garcia's argument. Garcia's custodial status at the time he gave consent was nominal -- a five minute routine traffic stop. Although he was not completely free to walk away, he had not been subjected to that degree of restraint associated with formal arrest. *See United States v. Bengivenga*, 845 F.2d 593, 598 (5th Cir.), *cert. denied* 488 U.S. 924 (1988). We are not convinced that the district court clearly erred in finding no coercive police procedures and adequate understanding by Garcia. The district court's statement that Garcia may have thought that the contraband would not be found is also supported by the record. We therefore hold that the district court did not clearly err in

finding that Garcia's consent was voluntary.

FRUIT OF THE POISONOUS TREE

Next, Garcia argues that although the traffic stop was legal, Trooper Cerney improperly extended the legal stop by taking a window tint reading with his light meter. Under the "fruit of the poisonous tree" doctrine, all evidence derived from the exploitation of an illegal search or seizure must be suppressed, unless the government shows that there was a break in the chain of events sufficient to refute the inference that the evidence was a product of the Fourth Amendment violation. *Brown v. Illinois*, 422 U.S. 590, 602, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1975). This showing must be made even if voluntary consent to search was given after the Fourth Amendment violation, and is in addition to the requirement that the Government prove that consent was given voluntarily. *United States v. Cherry*, 759 F.2d 1196, 1210-1211 (5th Cir. 1985), *cert. denied*, 479 U.S. 1056 (1987). We are guided by the three-factor test for evaluating the validity of consent following an illegal detention:

> (1) the temporal proximity of an illegal arrest and consent, (2) intervening circumstances, and (3) the purpose and flagrancy of the official misconduct.

Brown v. Illinois, 422 U.S. 590, 601, 603-4, 95 S.Ct. 2254, 2260, 2261-62, 45 L.Ed.2d 416 (1975); *United States v. Kelley,* 981 F.2d 1464, 1471 (5th Cir.), *cert. denied*, ___U.S.___, 113 S.Ct. 2427 (1993).

Garcia attacks on appeal the validity of the Texas Department of Public Safety administrative rules relied on by the district

court in finding that the window tint investigation did not unconstitutionally prolong the traffic stop. Assuming, without deciding, that Trooper Cerney had no legal basis for investigating the window tint on Garcia's car, we cannot say that in this case Garcia's consent to search was tainted. As to the first two factors, Garcia consented about five minutes after the stop, Trooper Cerney took the light meter reading just prior to requesting consent to search, and the record reveals no intervening circumstances. However, the valid traffic stop, with a brief, non-coercive investigation within the scope of the purpose of the stop as initially articulated to Garcia by the officer convinces us that Garcia's consent was not the product of exploitation of the allegedly illegal tint check. We therefore find no merit in Garcia's "fruit of the poisonous tree" argument.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of Garcia's motion to suppress and Garcia's conviction.