

Appendix

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JORGE GUERRERO, AKA Benji, AKA
Dreamer, AKA Ricardo Guerrero,
AKA Lil Dreamer,
Defendant-Appellant.

No. 17-50384

D.C. No.
2:16-cr-00681-
FMO-1

OPINION

Appeal from the United States District Court
for the Central District of California
Fernando M. Olguin, District Judge, Presiding

Argued and Submitted January 10, 2019
Pasadena, California

Filed April 22, 2019

Before: A. Wallace Tashima and Paul J. Watford, Circuit
Judges, and Eduardo C. Robreno,* District Judge.

Per Curiam Opinion

* The Honorable Eduardo C. Robreno, United States District Judge
for the Eastern District of Pennsylvania, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed the district court's denial of a motion to suppress a gun and ammunition found during a traffic stop.

The panel held that in the wake of the 2014 amendments to Fed. R. Crim. P. 12, the good-cause standard in Fed. R. Crim. P. 12(c)(3), rather than plain error review, continues to apply when a defendant attempts to raise new theories on appeal in support of a motion to suppress. The panel held that the defendant did not show good cause for failing to present in his pre-trial motion the new theory he raised in this appeal.

COUNSEL

Gia Kim (argued), Deputy Federal Public Defender; Hilary Potashner, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Defendant-Appellant.

Michael Gregory Freedman (argued), Assistant United States Attorney; Lawrence S. Middleton, Chief, Criminal Division; Nicola T. Hanna, United States Attorney; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellee.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

OPINION

PER CURIAM:

Jorge Guerrero challenges the denial of his motion to suppress a gun and ammunition found during a traffic stop. Guerrero was a passenger in a car that the police pulled over after they allegedly observed the driver fail to signal before making a left turn. In the district court, Guerrero raised a single argument in support of his motion: that the officers lacked reasonable suspicion to make the stop because the driver had in fact signaled in advance of her turn. The district court held an evidentiary hearing at which Guerrero, the driver, and the officers testified. The court found the officers' testimony more credible and held that the driver's failure to signal provided a lawful basis for the stop. Following the denial of his motion to suppress, Guerrero entered a conditional guilty plea to being a felon in possession of a firearm and ammunition. 18 U.S.C. § 922(g)(1).

On appeal, Guerrero presents a new theory in support of his motion to suppress. He notes that California law requires a driver to signal before making a turn only if another vehicle on the road "may be affected by the movement." Cal. Vehicle Code § 22107; *see People v. Carmona*, 124 Cal. Rptr. 3d 819, 823–25 (Ct. App. 2011). He asserts that the government introduced insufficient evidence that the driver's alleged failure to signal could have impacted another car on the road. *See United States v. Caseres*, 533 F.3d 1064, 1069 (9th Cir. 2008). Thus, he concludes, even if the driver did not signal before turning, the officers lacked a lawful basis for making the stop. The crucial fact for our purposes is that Guerrero never requested suppression on this ground in the district court.

We have decided to publish in this case to clarify the standard of review that governs in the wake of the 2014 amendments to Federal Rule of Criminal Procedure 12. That rule requires certain “defenses, objections, and requests”—including a request for suppression of evidence—to be raised by pre-trial motion. Fed. R. Crim. P. 12(b)(3)(C). Before 2014, Rule 12 directed that a party “waives” any Rule 12(b)(3) defense, objection, or request not asserted in a pre-trial motion, but also provided that, “[f]or good cause, the court may grant relief from the waiver.” Fed. R. Crim. P. 12(e) (2003). We interpreted this provision to mean that “[a] theory for suppression not advanced in district court cannot be raised for the first time on appeal” absent a showing of good cause. *United States v. Keese*, 358 F.3d 1217, 1220 (9th Cir. 2004); *see also United States v. Restrepo-Rua*, 815 F.2d 1327, 1329 (9th Cir. 1987) (per curiam). We thus construed Rule 12’s good-cause standard as displacing the plain-error standard under Federal Rule of Criminal Procedure 52(b), which ordinarily applies when a party presents an issue for the first time on appeal. *See United States v. Wright*, 215 F.3d 1020, 1026–27 (9th Cir. 2000).

In 2014, the text of Rule 12(e) was amended and moved to subsection (c)(3). Rule 12 now specifies the consequences of failing to make a timely motion in these terms:

(3) *Consequences of Not Making a Timely Motion Under Rule 12(b)(3).* If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

Fed. R. Crim. P. 12(c)(3).

Since the 2014 amendments, our sister circuits have reached conflicting conclusions on the standard of review that should apply in this context. Three circuits have held that untimely Rule 12(b)(3) defenses, objections, and requests raised for the first time on appeal should be reviewed for plain error under Rule 52(b). *United States v. Vasquez*, 899 F.3d 363, 372–73 (5th Cir. 2018); *United States v. Sperrazza*, 804 F.3d 1113, 1119 (11th Cir. 2015); *United States v. Soto*, 794 F.3d 635, 654–55 (6th Cir. 2015). The other circuits to decide the issue continue to apply Rule 12(c)(3)’s good-cause standard instead. *United States v. Vance*, 893 F.3d 763, 769–70 & n.5 (10th Cir. 2018); *United States v. Walker-Couvertier*, 860 F.3d 1, 9 & n.1 (1st Cir. 2017); *United States v. Fattah*, 858 F.3d 801, 807 (3d Cir. 2017); *United States v. McMillian*, 786 F.3d 630, 636 & n.3 (7th Cir. 2015); *United States v. Anderson*, 783 F.3d 727, 741 (8th Cir. 2015); *see also United States v. Burroughs*, 810 F.3d 833, 838 (D.C. Cir. 2016) (acknowledging the split without choosing a side).

Guerrero contends that we should align ourselves with the circuits that review untimely defenses, objections, and requests for plain error. Were we writing on a blank slate, we might have been inclined to follow their lead. Plain-error review under Rule 52(b) is the default standard governing our consideration of issues not properly raised in the district court, and the Supreme Court has set a high bar for creating exceptions to that standard. *See Puckett v. United States*, 556 U.S. 129, 135–36 (2009); *Johnson v. United States*, 520 U.S. 461, 466 (1997). Appellate courts are also familiar with the elements required to show plain error under Rule 52(b), as we are called upon to apply that standard in a wide range of settings. In contrast, we are less well-versed

in applying Rule 12's good-cause standard, which "often requires developing and analyzing facts to determine whether a defendant has shown good cause for the late filing." *Soto*, 794 F.3d at 655.

Nevertheless, as a three-judge panel, we may not forge our own path unless our prior precedent "is clearly irreconcilable with the text and history of subsequent legislation" or rulemaking. *United States v. Pepe*, 895 F.3d 679, 686 (9th Cir. 2018). That demanding standard has not been met here. As Guerrero points out, Rule 12 no longer labels untimely defenses, objections, and requests as "waived." But the 2014 amendments to Rule 12 did not eliminate the good-cause standard. Nor did they clarify that appellate courts should apply Rule 52(b)'s plain-error standard instead of the good-cause standard. In fact, the rulemaking history indicates that the Advisory Committee chose not to take a position on which of the two standards should apply, leaving that matter for the circuit courts to decide: "The amended rule, like the current one, continues to make no reference to Rule 52 (providing for plain error review of defaulted claims), thereby permitting the Courts of Appeals to decide if and how to apply Rules 12 and 52 when arguments that should have been the subject of required Rule 12(b)(3) motions are raised for the first time on appeal." Report of the Advisory Committee on Federal Rules of Criminal Procedure to the Standing Committee on Rules of Practice and Procedure 5–6 (May 2013). Accordingly, we cannot say that our prior precedent is clearly irreconcilable with the amended version of Rule 12.

Rule 12(c)(3)'s good-cause standard continues to apply when, as in this case, the defendant attempts to raise new theories on appeal in support of a motion to suppress. Guerrero has not shown good cause for failing to present in

his pre-trial motion the new theory for suppression he raises in this appeal. Nor has he challenged the district court's rejection of the one theory that he did raise below. We therefore affirm the district court's denial of his motion to suppress.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 1 2019

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U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JORGE GUERRERO, AKA Benji, AKA
Dreamer, AKA Ricardo Guerrero, AKA Lil
Dreamer,

Defendant-Appellant.

No. 17-50384

D.C. No.

2:16-cr-00681-FMO-1

Central District of California,
Los Angeles

ORDER

Before: TASHIMA and WATFORD, Circuit Judges, and ROBRENO,* District Judge.

The panel unanimously votes to deny appellant's petition for panel rehearing. Judge Watford votes to deny appellant's petition for rehearing en banc, and Judges Tashima and Robreno so recommend. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed June 5, 2019, is DENIED.

* The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

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September 13, 2019

Clerk
United States Court of Appeals for the Ninth
Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Jorge Guerrero
v. United States
Application No. 19A293
(Your No. 17-50384)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kagan, who on September 13, 2019, extended the time to and including November 28, 2019.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Clayton Higgins
Case Analyst

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No. **CR 16-0681 FMO**Date **June 13, 2017**Present: The Honorable **Fernando M. Olguin, United States District Judge**Interpreter **None Present**

Vanessa Figueroa

None

Michael G. Freedman, Not Present

*Deputy Clerk**Court Reporter/Recorder**Assistant U.S. Attorney*U.S.A. v. Defendant(s):Present Cust. BondAttorneys for Defendants:Present App. Ret.

JORGE GUERRERO

NOT

X

Craig Harbaugh, DFPD

NOT

X

Proceedings: (In Chambers) Order Re: Motion to Suppress

Having reviewed and considered all the briefing filed with respect to defendant Jorge Guerrero's ("defendant" or "Guerrero") Motion to Suppress Evidence (Dkt. 19, "Motion"), and the testimony and evidence presented during the evidentiary hearing held on April 21, 2017, the court concludes as follows.

BACKGROUND

On September 27, 2016, a federal grand jury returned a single-count Indictment against defendant, charging him with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). (See Dkt. 1, Indictment). Guerrero was previously convicted of a felony in Colorado state court, (see id.; Dkt. 42, Hearing Transcript of April 21, 2017, ("Hearing Transcript") at 37), and the instant charge stems from a traffic stop during which defendant admitted to police officers that he possessed a firearm. (See Dkt. 20, Government's Opposition to Defendant's Motion to Suppress Evidence ("Government's Opposition") at 3-4).

At approximately 8:30 p.m. on September 10, 2016, Alyssa Gonzales Romero ("Romero") picked up defendant from his home on Winton Avenue in West Covina, California. (See Dkt. 42, Hearing Transcript at 40; Dkt. 44, Defendant's Post-Hearing Brief at 2). As the two left defendant's home in Romero's black Kia Soul, Romero was driving and Guerrero was riding in the front passenger seat. (See Dkt. 42, Hearing Transcript at 41; Dkt. 44, Defendant's Post-Hearing Brief at 3). Romero drove north on Winton Avenue and made a left turn onto the westbound lane of Gemini Avenue. (See Dkt. 42, Hearing Transcript at 41). Officers Ian Paparro ("Paparro") and Steven Spagon ("Spagon") of the West Covina Police Department were stopped in their patrol car at the intersection of Gemini Avenue and Zenith Avenue, just west of Winton Avenue. (See id. at 15 & 41-42). As Romero drove through the intersection of Gemini Avenue and Zenith Avenue, Spagon and Paparro shined their patrol car's spotlight onto the Kia, and began following the vehicle west on Gemini Avenue toward the intersection at Azusa Avenue. (See id. at 18, 20 & 42-43; Dkt. 44, Defendant's Post-Hearing Brief at 3). At the intersection, Romero made a left turn off of Gemini Avenue and onto the southbound lane of Azusa Avenue, (see Dkt. 42, Hearing Transcript at 43), and the officers, claiming that Romero failed to use her left turn signal, stopped the vehicle. (See Dkt. 20-1, Government's Opposition, Exh. A ("Paparro Decl.") at ¶ 2; Dkt. 20-3,

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Government's Opposition, Exh. B ("Spagon Decl.") at ¶¶ 2-3).¹

Defendant disputes the officers' reason for the stop, and both he and Romero testified at the evidentiary hearing that Romero used her turn signal. (See Dkt. 42, Hearing Transcript at 35 & 43). Specifically, Guerrero testified that he told Romero "to drive right" because he was worried that the officers, who were following the Kia, "were going to pull [them] over for no reason[.]" (Id. at 38). Romero testified to the same effect. (See id. at 44) ("Q. What did Mr. Guerrero tell you when he told you how to drive? A. I just remember him telling me, 'Don't be stupid. Put your blinker on. Drive right.'"). According to defendant, he and Romero had reason to avoid attracting the attention of the police. Guerrero had outstanding warrants for his arrest, and Romero, who was convicted of felony forgery in 2012, was driving without a license. (See id. at 37 & 44; Dkt. 44, Defendant's Post-Hearing Brief at 3).

After the Kia was stopped, Spagon approached the passenger side of the vehicle and spoke with defendant. (See Dkt. 20-3, Spagon Decl. at ¶¶ 3-4). Defendant provided a false name and date of birth. (See id. at 4). When Spagon then asked for his age, defendant responded with an age that was inconsistent with the date of birth he provided to Spagon. (See id.) ("defendant told me that his name was Ricardo Guerrero, and that his birthday was March 3, 1992, but that he was 26 years old, which I knew was an incorrect age for someone born in 1992."). Spagon confronted Guerrero about the inconsistency, and defendant admitted that he lied about his name because he had outstanding arrest warrants. (See id.; Dkt. 42, Hearing Transcript at 37).

Paparro and Spagon each prepared incident reports describing the stop and defendant's arrest. (See Dkt. 19-2, Motion, Exhibit B (Police Reports)). Paparro's report noted that the Kia "failed to use any turning signals before conducting a left turn onto southbound Azusa Avenue[.]" (Id. at ECF 62). Spagon's report made no mention of Romero's turn signal, and instead referred to Paparro's "original report for details" regarding the stop. (Id. at ECF 66). Both officers provided declarations asserting that Romero did not use her turn signal. (See Dkt. 20-1, Paparro Decl.; Dkt. 20-3, Spagon Decl.). Paparro states that he saw Romero turn left without a signal and that he "remarked on this to Officer Spagon, who looked up and agreed[.]" (Dkt. 20-1, Paparro Decl. at ¶ 2). Both officers testified at the evidentiary hearing that Romero did not use her turn signal. (See Dkt. 42, Hearing Transcript at 22 & 32).

DISCUSSION

The parties generally agree that the resolution of defendant's Motion depends on a single issue: whether the vehicle in which Guerrero was a passenger failed to use its left turn signal, thereby justifying the traffic stop that preceded his admission. (See Dkt. 19, Motion at 2; Dkt. 20, Government's Opposition at 3-5). Guerrero argues that the officers are either lying or are mistaken about whether Romero used her turn signal, rendering the stop unlawful under the Fourth Amendment. (See Dkt. 19, Motion at 2-4).

The Fourth Amendment protects individuals from "unreasonable searches and seizures[.]" U.S. Const., amend. IV. Temporary detention of individuals during the stop of an automobile, "even though the purpose of the stop is limited and the resulting detention quite brief[.]" constitutes a "seizure" within

¹ Declarations submitted by witnesses were entered into the record as direct testimony at the evidentiary hearing. (See Dkt. 42, Hearing Transcript at 4).

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the meaning of the Fourth Amendment. Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396 (1979). However, “the Fourth Amendment requires only reasonable suspicion in the context of investigative traffic stops.” United States v. Lopez-Soto, 205 F.3d 1101, 1105 (9th Cir. 2000); United States v. Trengali, 2006 WL 1050170, *4 (N.D. Cal. 2006) (same). “Reasonable suspicion is formed by specific articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity.” Lopez-Soto, 205 F.3d at 1105 (internal quotations marks omitted); United States v. Twilley, 222 F.3d 1092, 1095 (9th Cir. 2000) (same). The reasonable suspicion standard “is not a particularly high threshold to reach.” United States v. Valdes-Vega, 738 F.3d 1074, 1078 (9th Cir. 2013) (*en banc*), *cert. denied*, 134 S.Ct. 2743 (2014).

Under California law, “[n]o person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal[.]” Cal. Veh. Code § 22107. “Any signal of intention to turn right or left shall be given continuously during the last 100 feet traveled by the vehicle before turning.” Cal. Veh. Code § 22108. An appropriate signal “shall be given by signal lamp,” unless the “signal lamps become inoperable while driving,” in which case “hand and arm signals shall be used[.]” Cal. Veh. Code § 22110(a) & (b).

The government bears the burden to establish, by a preponderance of the evidence, that the warrantless stop of Romero’s car was based on reasonable suspicion. *See United States v. Hawkins*, 249 F.3d 867, 872 (9th Cir. 2001) (“The burden is on the Government to persuade the district court that a seizure comes under one of a few specifically established exceptions to the warrant requirement.”) (internal quotation marks omitted); United States v. Alvarez, 2016 WL 3163005, *2 (N.D. Cal. 2016) (“The Government must prove, by a preponderance of the evidence, that the warrantless search falls into one of these exceptions.”). The government may meet its burden through credible testimony from the officers about whether Romero failed to use her turn signal in violation of the California Vehicle Code. *See, e.g., United States v. White*, 2014 WL 5522072, *1 & 5 (N.D. Cal. 2014), *aff’d*, 654 F.App’x 319 (9th Cir. 2016) (denying defendant’s motion to suppress evidence resulting from traffic stop because officer’s testimony regarding illegal headlamp was consistent and credible); Trengali, 2006 WL 1050170, at *6 (denying defendant’s motion to suppress resulting from traffic stop for driver’s failure to use turn signal because officer’s statements were consistent and credible throughout the incident, in his report, and during his testimony at the evidentiary hearing); United States v. Kennedy, 2014 WL 6090409, *8 (W.D. Pa. 2014) (“In this Court’s estimation, the traffic stop was sufficiently supported with credible testimony that the [vehicle] was speeding. Observation of a traffic violation is plainly sufficient to support a traffic stop.”) (internal citation omitted); United States v. Sellers, 897 F.Supp.2d 754, 762 (N.D. Ind. 2012) (“[T]he court finds credible Cpl. Smith’s testimony that he observed defendant switch lanes in an unsafe manner . . . Thus, the government has demonstrated by a preponderance of the evidence that the stop was supported by probable cause[.]”).

Here, Paparro wrote in his report that the Kia “failed to use any turning signals before conducting a left turn onto southbound Azusa Avenue[.]” (Dkt. 19-2, Police Reports at ECF 62). He later submitted a sworn declaration asserting that he “noticed that the black Kia Soul [] at the intersection was turning left without a turn signal.” (Dkt. 20-1, Paparro Decl. at ¶ 2). At the evidentiary hearing, Paparro testified that he and Spagon were only “a few feet away from the Kia Soul” when it failed to use its turn signal and sitting at “eye level” with the Kia’s rear lights. (Dkt. 42, Hearing Transcript at 12-13). Paparro testified that Romero “did not use a turn signal while driving southbound, making a left turn onto Azusa.” (Dkt.

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42, Hearing Transcript at 22). While Spagon's incident report did not directly address the reason for the stop, (see, generally, Dkt. 19-2, Police Reports at ECF 66), his declaration, (see Dkt. 20-3, Spagon Decl. at ¶ 2), and testimony at the evidentiary hearing, (see Dkt. 42, Hearing Transcript at 32), corroborate Paparro's assertions that Romero failed to use her turn signal. In general, the officers' "testimony has been consistent, [their] credibility was not undermined at the hearing, and the defense did not present any evidence to undermine [their] first-hand observations[.]" White, 2014 WL 5522072, at *5.

Defendant's arguments to the contrary are unavailing. First, defendant argues that Paparro was "uncertain" about whether he witnessed Romero fail to use her turn signal because he asked Spagon for confirmation. (See Dkt. 44, Defendant's Post-Hearing Brief at 4). However, the court is not persuaded by defendant's characterization of Paparro's testimony. Paparro testified, consistent with his declaration, that the driver of the car "did not use a turn signal while driving southbound, making a left turn onto Azusa." (Dkt. 42, Hearing Transcript at 22; see Dkt. 20-1, Paparro Decl. at ¶ 2). Spagon's subsequent confirmation that he, too, did not see a turn signal, corroborated Paparro's initial observation at the time of the incident and throughout the proceedings. (See Dkt. 20-3, Spagon Decl. at ¶ 2; Dkt. 42, Hearing Transcript at 32).

Defendant also argues, in effect, that his and Romero's testimony is more credible than the officers' testimony. (See Dkt. 44, Defendant's Post-Hearing Brief at 4). With respect to Romero, defendant asserts that Romero "has no incentive to lie" and that "common sense and human nature dictate" that motorists being followed by law enforcement will "strictly adhere to the traffic laws." (*Id.*). However, "[t]o the extent that" Romero "contradicted [the officers], the Court finds the officer[s]' testimony to be more credible." Kennedy, 2014 WL 6090409, at *1. Further, Romero's credibility is undermined by her previous felony conviction for forgery. (See Dkt. 42, Hearing Transcript at 44); United States v. Steiner, 2014 WL 688796, *1 (W.D. Pa. 2014) ("[A] conviction for forgery and theft by deception is the kind of crime that is highly probative of truthfulness[.]"); Fed. R. Evid. 609(a)(2) (requiring the admission of evidence for any crime which includes as an essential element a "dishonest act or false statement"). With respect to defendant, his testimony is hampered by the fact that he was caught lying to Spagon during the traffic stop about his name and date of birth. (See Dkt. 20-3, Spagon Decl. at ¶ 4; Dkt. 42, Hearing Transcript at 37).

In short, Paparro and Spagon's credibility does not "suffer[]" from their "demeanor on the stand." United States v. Ruiz, 832 F.Supp.2d 903, 914 (M.D. Tenn. 2011). "Overall," neither officer's "demeanor [or] testimony gave the impression that he had an unusually large personal stake in the hearing." *Id.* Thus, the "Court credits [the] Officer[s]' testimony as reliable and finds that there was reasonable suspicion for the traffic stop on the basis of the turn signal violation." Trengali, 2006 WL 1050170, at *6.

CONCLUSION

This Order is not intended for publication.

Based on the foregoing, IT IS ORDERED THAT defendant Jorge Guerrero's Motion to Suppress Evidence (**Document No. 19**) is **denied**.

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