

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No. CR 17-166 PSG

Date April 30, 2018

Present: The Honorable Philip S. Gutierrez, United States District Judge

Interpreter n/a

Wendy K. Hernandez

Not reported

Not Present

Deputy Clerk

Court Reporter

Assistant U.S. Attorney

U.S.A. v. Defendant(s):Present Cust. BondAttorneys for
Defendant(s):Present App. Ret

Omar Ernesto Hernandez NOT

x CJA Fredrico McCurry NOT x

**(In Chambers) Order DENYING Defendant's motion to suppress
Proceedings: evidence**

Before the Court is a motion to suppress evidence filed by Defendant Omar Ernesto Hernandez (“Defendant”). *See* Dkt. # 65 (“Mot.”). Plaintiff United States of America (“the Government”) opposes the motion. *See* Dkt. # 66 (“Opp.”). The Court held a hearing in this matter on April 30, 2018. Having considered the moving papers and oral arguments, the Court **DENIES** Defendant’s motion.

I. Background

On July 26, 2017, Border Patrol Agents Juan Aguayo and Richard Hagan were patrolling the Interstate-15 highway (“the I-15”) in a fully marked Ford Explorer when they received an alert from an internal system regarding a car bearing the license plate number 6CKV924. *Opp.* 2:11–19; *see also Declaration of Richard Hagan*, Dkt. # 66-1 (“Hagan Decl.”), ¶ 5.¹ The alert indicated that the car was

¹ At the hearing, Defendant’s counsel questioned whether the agents actually received this initial alert, noting correctly that it does not appear in the affidavit that accompanied the criminal complaint in this action. *See* Dkt. # 1, ¶ 6. However, the Court has not been given any reason to doubt Agent Hagan’s

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suspected of being involved in alien smuggling. *Opp.* 2:19–21; *Hagan Decl.* ¶ 5. Approximately 30 minutes later, Agents Aguayo and Hagan were parked on the shoulder of the I-15 near Murrieta Hot Springs Road when they spotted a black BMW with the license plate number 6CKV924. *Opp.* 2:24–3:1; *Hagan Decl.* ¶ 6. As the BMW passed the agents' patrol car, it "slowed down significantly," which Agent Hagan later attested was suspicious "because the motoring public in the Murrieta area generally knows that Border Patrol agents do not issue citations for traffic violations." *Opp.* 3:4–10; *Hagan Decl.* ¶ 7. Based on the alert and the reduction in speed, Agents Aguayo and Hagan decided to follow the BMW "to conduct further investigation." *Opp.* 3:10–14; *Hagan Decl.* ¶ 7.

As they followed the BMW, the agents' suspicions mounted due to two factors: the behavior of the BMW and additional information that they gleaned through their internal system. As to the BMW, the agents noticed that as they approached, the vehicle continued to travel at a reduced speed, estimated at about ten miles per hour below the posted speed limit. *Opp.* 3:17–22; *Hagan Decl.* ¶ 8. As the patrol car passed next to the BMW, Agent Hagan observed four occupants inside, including the driver. *Opp.* 3:22–24; *Hagan Decl.* ¶ 9. He noticed that "none of the occupants would look in [their] direction," which, in his experience, "was abnormal and showed they may have been trying to avoid [the agents], as most people look over when a law enforcement vehicle pulls up next to them." *Opp.* 3:24–28; *Hagan Decl.* ¶ 9. The vehicle also began veering in its lane, which suggested to Agent Hagan that "the driver may have been looking in his mirrors or over his shoulder in an attempt to monitor what [the agents] were doing." *Opp.* 6:2–5; *Hagan Decl.* ¶ 14.

Additionally, as the agents followed the BMW, Agent Hagan queried the vehicle's license plate number in the Automated Targeting System ("ATS"), which is an internal Department of Homeland Security program that was installed in the agents' patrol car. *Opp.* 4:3–6; *Hagan Decl.* ¶ 10. The ATS program provides information such as a vehicle's registered owner and its international border crossing history. *Opp.* 4:6–10; *Hagan Decl.* ¶ 10. If a vehicle has crossed an international border and entered the United States, the ATS report provides information about the date and time of crossing, the number of occupants in the car at the time of crossing, and the names of any occupants. *Opp.* 4:10–13; *Hagan Decl.* ¶ 10. The ATS program also indicates whether any travelers associated with the vehicle have a record in the Treasury Enforcement Communications System ("TECS"), which might be the result of a number of scenarios, from losing a passport to being suspected of human or narcotics smuggling. *Opp.* 4:13–19; *Hagan Decl.* ¶ 10.

Having input the BMW into the ATS, Agent Hagan learned the following:

- that Defendant was the registered owner of the BMW;
- that the BMW had crossed the international border from Mexico to the United States earlier that same day, and that at the time of crossing, Defendant was the sole occupant of the vehicle;

truthfulness, and so will consider this portion of the declaration to be accurate.

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- and that both Defendant and the BMW had TECS alerts, with the BMW’s TECS record stating that the vehicle was involved in a “possible smuggling conveyance” and Defendant’s TECS record stating that he was the subject of a current human trafficking investigation.

Opp. 4:20–5:10; Hagan Decl. ¶¶ 11–13, Ex. 1.

Based on these circumstances—“[D]efendant’s irregular driving behavior, his border crossing history, the increas[ed] number of people in [D]efendant’s [vehicle] compared to when he crossed into the United States earlier that day, and the fact that both [D]efendant and his vehicle had TECS alerts indicating they might be involved in human smuggling”—Agents Aguayo and Hagan “decided to conduct a traffic stop of the BMW to investigate whether [D]efendant was presently attempting to smuggle humans into the United States.” *Opp. 6:8–15; Hagan Decl. ¶ 15.* The three passengers in the BMW eventually admitted that they were being smuggled by Defendant, who was placed under arrest. *Opp. 6:18–7:2; Hagan Decl. ¶ 16.*

Defendant now moves to suppress all evidence derived from the agents’ stop of the BMW, arguing that “the stop of the vehicle without a warrant was unlawful.” *Mot. 6:26–27.*

II. Legal Standard

The judicially created “exclusionary rule . . . forbids the use of improperly obtained evidence at trial.” *Herring v. United States*, 555 U.S. 135, 139 (2009). The “rule is ‘designed to safeguard Fourth Amendment rights generally through its deterrent effect.’” *Id.* at 139–40 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). “[T]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.” *United States v. Caymen*, 404 F.3d 1196, 1199 (9th Cir. 2005) (quoting *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978)).

The Fourth Amendment’s prohibition against unreasonable searches and seizures includes the investigatory stop of a car, which requires that an officer have reasonable suspicion. *See Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014). Reasonable suspicion is “a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014). The standard “takes into account the totality of the circumstances—the whole picture,” *id.* (internal quotation marks omitted), and “allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.” *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotation marks omitted). “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), and it “does not deal with hard certainties, but with probabilities.” *United States v. Cortez*, 449 U.S. 411, 418 (1981).

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III. Discussion

In the context of stops by border patrol agents, the factors to be considered in assessing whether reasonable suspicion justified a traffic stop include “1) characteristics of the area; 2) proximity to the border; 3) usual patterns of traffic and time of day; 4) previous alien or drug smuggling in the area; 5) behavior of the driver, including obvious attempts to evade officers; 6) appearance or behavior of passengers; 7) model and appearance of the vehicle; and, 8) officer experience.” *United States v. Garcia-Barron*, 116 F.3d 1305, 1307 (9th Cir. 1997) (internal quotation marks omitted). With these factors in mind, the Court concludes that the stop of Defendant’s vehicle was supported by the agents’ reasonable suspicion.

At the outset, the Court notes that it is not particularly persuaded by the agents’ observations of the BMW’s activity and the behavior of the occupants inside. Any motorist on the I-15, whether she be a potential criminal or a perfectly law-abiding citizen, might be prone to slowing down upon seeing the telltale signs of a patrol vehicle parked alongside the highway. Furthermore, that neither Defendant nor the other occupants made eye contact with the agents after they pulled alongside the BMW does not necessarily signify an attempt at evasion; indeed, it might have been *more* suspicious had the passengers engaged with the agents in some way. *See Arvizu*, 534 U.S. at 276–77 (noting that passengers’ odd waving was entitled to consideration as part of the reasonable suspicion analysis).

Accordingly, this motion ultimately comes down to the weight that should be afforded to the TECS alerts that the ATS report revealed. The Ninth Circuit has generally accepted the accuracy of such reports and found them to be particularly persuasive in similar contexts. *See, e.g., United States v. Perez*, 603 F. App’x 620, 621–22 (9th Cir. 2015) (determining that a TECS alert “is relevant and highly probative to the reasonable suspicion calculus”); *United States v. Cotterman*, 709 F.3d 952, 968–69 (9th Cir. 2013) (en banc) (finding that the existence of a TECS alert indicating defendant’s prior criminal activities and potential involvement with “child sex tourism” was a factor giving rise to reasonable suspicion). Affording a similar degree of weight here, the Court concludes that the TECS alerts were compelling grounds for a finding of reasonable suspicion. Defendant’s alert did not merely suggest a *past* history of criminal conduct, but that he was the subject of a *current* criminal investigation. In addition, the BMW itself was flagged for possible involvement with human smuggling. These alerts, combined with other relevant considerations—the location of the I-15 corridor, the level of smuggling activity generally observed there, and the fact that more occupants were in the BMW at the time of the stop than when it crossed the border earlier that day—suggest that, when “filtered through the lens of the agents’ training and experience,” they “had a reasonable, particularized basis” for stopping the BMW. *Valdes-Vega*, 738 F.3d at 1079–80.²

² The Court notes that the factors here are comparable to those in *United States v. Durazo*, No. 17-10116, 2018 WL 1192172 (9th Cir. Mar. 8, 2018), in which the Ninth Circuit affirmed the district court’s denial of a motion to suppress. *See id.* at *1 (finding reasonable suspicion where (1) the

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IV. Conclusion

Because the Court concludes that the agents' stop of Defendant's vehicle was supported by reasonable suspicion, it **DENIES** Defendant's motion to suppress evidence.

IT IS SO ORDERED.

Initials of Deputy
Clerk

cc:

defendant "was driving along a known smuggling route while the Border Patrol checkpoint along that route was temporarily closed"; (2) the defendant "had placed upon him a [TECS] alert due to his arrest three months prior for alien smuggling"; (3) the defendant appeared to be driving in tandem with another car that also had a TECS alert for drug smuggling and that had crossed the border just one hour earlier; (4) "both vehicles were recently registered, which is often the case with vehicles involved in smuggling"; and (5) both cars were coming from a border town).

784 Fed.Appx. 525 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

Omar Ernesto **HERNANDEZ**,
Defendant-Appellant.

No. 18-50305

Argued and Submitted October
23, 2019 Pasadena, California

FILED November 12, 2019

Attorneys and Law Firms

Carolyn Small, Bram Alden, L. Ashley Aull, Assistant U.S. Attorney, DOJ - Office of the U.S. Attorney, Los Angeles, CA, for Plaintiff-Appellee

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Appeal from the United States District Court for the Central District of California, **Phillip S. Gutierrez**, District Judge, Presiding, D.C. No. 5:17-cr-00166-PSG-1

Before: **KLEINFELD** and **CALLAHAN**, Circuit Judges, and **RESTANI**,* Judge.

MEMORANDUM **

Omar Ernesto **Hernandez** ("Hernandez"), a citizen of the United States, was convicted on three counts of transporting or moving three unlawfully-present Mexican nationals, in contravention of **8 U.S.C. § 1324(a)(1)(A)(ii)**. He was arrested after two U.S. Border Patrol agents stopped his ***526** vehicle approximately 70 miles north of the U.S.-Mexico border near Murrieta, California. Hernandez appeals the district court's denial of his motion to suppress the stop for lack of reasonable suspicion. We affirm.

The Court reviews the denial of a motion to suppress *de novo*. *United States v. Valdes-Vega*, 738 F.3d 1074, 1077 (9th Cir. 2013) (*en banc*). Reasonable suspicion determinations present mixed questions of law and fact, which the Court also reviews *de novo*. *United States v. Burkett*, 612 F.3d 1103, 1106 (9th Cir. 2010). Border Patrol agents may perform "brief investigatory stops" near an international border if they have a "reasonable suspicion to believe that criminal activity may be afoot." *United States v. Raygoza-Garcia*, 902 F.3d 994, 999 (9th Cir. 2018) (citing *United States v. Arvizu*, 534 U.S. 266, 278, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) (Scalia, J., concurring)). "Reasonable suspicion is defined as a particularized and objective basis for suspecting the particular person stopped of a criminal activity." *Id.* at 999–1000 (citation and quotation omitted). We evaluate "the totality of the circumstances" known to the Border Patrol agents at the time of the stop. *See Valdes-Vega*, 738 F.3d at 1079.

Preliminarily, we conclude that Hernandez preserved his legal arguments for our review, and the district court did not clearly err as to its factual findings. In making the stop, the Border Patrol agents relied in part upon a text-based alert from an internal Border Patrol system, which advised them that Hernandez's vehicle was suspected of involvement in human smuggling. The agents then entered two queries in the TECS Alert System, an internal Customs & Border Protection database that includes certain information about, *inter alia*, suspicious persons and property who enter the United States. The queries revealed that the vehicle at issue, which was registered to Hernandez, crossed into the United States 100 miles away and five hours earlier, that Hernandez was alone at the time (although now he had three passengers), and that Hernandez and the vehicle were the subject of ongoing human smuggling investigations.

We have held previously that the existence of an active TECS alert at a port of entry, coupled with other indicia of criminality, may give rise to a reasonable suspicion that warrants referral to secondary inspection. *See United States v. Cotterman*, 709 F.3d 952, 968–69 (9th Cir. 2013) (*en banc*). While the TECS reports here revealed only ongoing investigations, not convictions, they also revealed facts about the time of entry and occupancy of the vehicle. Combined with the extended time taken to reach the point of interception on the interstate highway, a known route for smuggling, and abnormally slow and slightly weaving driving behavior, the reasonable suspicion standard was met. In reviewing reasonable suspicion determinations, courts do not "nitpick

the factors in isolation.” *Id.* at 970. Instead, courts defer to the officers’ sound, reasoned inferences based upon the cumulative, reliable information available to them at the time of the stop. *Valdes-Vega*, 738 F.3d at 1078.

AFFIRMED.

All Citations

784 Fed.Appx. 525 (Mem)

Footnotes

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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