FILED
United States Court of Appeals
Tenth Circuit

November 19, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

FRANCISCO ARMANDO MARTINEZ,

Defendant - Appellee.

No. 19-2010
(D.C. No. 2:18-CR-02315-KG-1)
(D.N.M.)

ORDER AND JUDGMENT*

Before **MORITZ**, **McKAY**, and **CARSON**, Circuit Judges.

The Fourth Amendment protects citizens from unreasonable seizures by law enforcement. If an inquisitive agent approaches someone who does not want to respond, all the person must do is say so. But if one voluntarily answers an agent's non-coercive questions, the conversation falls outside the scope of the Fourth Amendment even if, as is the case here, it reveals a crime. Defendant Francisco Armando Martinez ("Defendant") engaged in such a consensual encounter with law enforcement here. We exercise jurisdiction under 18 U.S.C. § 3731 and reverse the district court's order granting his motion to suppress evidence from the encounter.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I.

While driving, United States Border Patrol Agents Robert Diharce and Guillermo Ramirez (collectively, the "Agents"), passed Defendant's vehicle. Agent Diharce noticed that the back seat passengers appeared "crowded." Agent Diharce made a U-turn and followed Defendant's vehicle for further observation. The Agents trailed Defendant's vehicle for twenty-one miles or so. Defendant eventually entered a truck stop and pulled up to a gas pump. The Agents, in uniform with holstered sidearms, followed Defendant's vehicle into the gas station, parking approximately ten feet behind Defendant's vehicle in a way that did not impede its path of exit. At this time, no one was "milling around" in the immediate vicinity of Defendant's vehicle, but customers may have been walking in and out of the convenience store. One or two additional vehicles were parked at other gas pumps, but Defendant could not see the other customers from where he stood.

Upon pulling up to the pump, Defendant exited his vehicle and started walking toward the convenience store. He reversed course, however, and returned to the vehicle after Agent Diharce exited the Border Patrol truck. At this point, Agent Diharce observed "four to five" people in the back seat of the vehicle. Agent Diharce approached Defendant while Agent Ramirez stood on the rear passenger's side of the vehicle. Agent Diharce greeted Defendant with "Good morning," and identified himself as a Border Patrol agent. Agent Diharce immediately asked Defendant if he was a United States citizen. Defendant replied in the affirmative. Agent Diharce then asked Defendant if those inside the vehicle were his family. Defendant replied

that he did not know the passengers, adding that he picked them up on the side of the highway after they flagged him down. Agent Diharce used a "conversational tone" and remained approximately three feet away from Defendant throughout the exchange.

Upon hearing that Defendant did not know the individuals in the back seat of his vehicle, Agent Ramirez asked Defendant if he could speak to them. After Defendant tacitly consented by lowering the passenger window, Agent Ramirez questioned the passengers and determined that they were Mexican nationals without immigration documents. Upon hearing this—about five minutes after arriving at the gas station—Agent Diharce arrested Defendant.

A federal grand jury indicted Defendant for conspiracy to transport illegal aliens (8 U.S.C. § 1324(a)(1)(A)(v)(I)) and transporting illegal aliens (8 U.S.C. §§ 1324(a)(1)(A)(ii), (a)(1)(B)(ii), and (a)(1)(A)(v)(II)). Defendant moved to suppress all evidence that the Agents obtained on the day of his arrest. The district court held a suppression hearing and issued a thorough and thoughtful order suppressing Defendant's statements, his passengers' statements, and all other evidence relating to the gas station encounter.

The district court concluded the Agents violated Defendant's Fourth Amendment rights by subjecting him to an investigative detention without reasonable suspicion.[1] Consistent with its Fourth Amendment reasoning, the district court held

[1] The government concedes it "did not press a reasonable-suspicion argument below and does not ask the Court to consider it now." Accordingly, we will focus

that the Agents also violated Defendant's Fifth Amendment rights by subjecting Defendant to a custodial interrogation without first issuing Miranda warnings. The government now appeals.

II.

The government contends the district court erred when it granted Defendant's motion to suppress. It argues that, under the totality of the circumstances, Defendant's interaction with the Agents was a consensual encounter that does not implicate the Fourth Amendment. The government further contends the Agents did not violate Defendant's Fifth Amendment Miranda rights because they did not subject Defendant to a custodial interrogation.

"In reviewing a district court's ruling on a motion to suppress evidence, we view the evidence in the light most favorable to the prevailing party and accept the district court's findings of fact unless they are clearly erroneous." United States v. Hernandez, 847 F.3d 1257, 1263 (10th Cir. 2017). "We review de novo the relevant circumstances to determine whether an interaction between an individual and a law enforcement officer is a consensual encounter that does not implicate the Fourth Amendment." Id. at 1272 ("the ultimate determination of reasonableness under the Fourth Amendment" is a question of law that we review de novo (id. at 1271)). For the purposes of Miranda and the suppression of evidence under the Fifth Amendment, we similarly "review de novo the district court's determination that an individual is

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our Fourth Amendment analysis exclusively on whether Defendant's encounter with law enforcement was a consensual encounter or an investigative detention.

in custody, but we give deference to the district court's findings of fact and to its credibility determinations." United States v. Revels, 510 F.3d 1269, 1273 (10th Cir. 2007) (citation omitted).

A.

The Fourth Amendment protects individuals against unreasonable searches and seizures by law enforcement. See U.S. Const. amend. IV. But "[i]t does not proscribe voluntary cooperation." Florida v. Bostick, 501 U.S. 429, 439 (1991). We have identified three types of police-citizen encounters:

> (1) consensual encounters which do not implicate the Fourth Amendment; (2) investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause.

United States v. Ringold, 335 F.3d 1168, 1171 (10th Cir. 2003) (citation omitted). A seizure does not occur just because an officer "approaches an individual and asks a few questions." Bostick, 501 U.S. at 434. Instead, such an encounter will not trigger the Fourth Amendment "unless it loses its consensual nature." Id.

The dispositive issue in this case is whether the Agents' encounter with Defendant was consensual and, therefore, not a violation of the Fourth Amendment. In determining if an encounter is consensual, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." Hernandez, 847 F.3d at 1263 (internal

quotation marks omitted) (quoting Bostick, 501 U.S. at 437). This "test allows officers to make inquiries so long as they [do not] throw their official weight around unduly." Id. at 1263–64. "There are no per se rules that govern this inquiry; rather, every case turns on the totality of the circumstances presented." Id. at 1264 (internal quotation marks and citation omitted).

We have "enumerated a non-exhaustive list of factors to be considered in determining whether a reasonable person would feel free to terminate his encounter with the police." Id. Those factors are:

> the location of the encounter, particularly whether the defendant is in an open public place where he is within the view of persons other than law enforcement officers; whether the officers touch or physically restrain the defendant; whether the officers are uniformed or in plain clothes; whether their weapons are displayed; the number, demeanor and tone of voice of the officers; whether and for how long the officers retain the defendant's personal effects such as tickets or identification; and whether or not they have specifically advised defendant at any time that he had the right to terminate the encounter or refuse consent.

Id. (citation omitted). "Although no single factor is dispositive, the strong presence of two or three factors may be sufficient to support the conclusion a seizure occurred." Id. (internal quotation marks and citation omitted).

The government contends that Defendant's interaction with the Agents was a consensual encounter because: (1) it occurred in a public place, (2) the Agents did not create a coercive environment, and (3) Agent Diharce did not question Defendant in a coercive manner. We agree.

Initially, the location of the interaction weighs in favor of consensuality in this case because the encounter occurred at a public place in full view of other customers

and Defendant's passengers. While location is not determinative, "it is an important factor." United States v. Little, 18 F.3d 1499, 1510 (10th Cir. 1994) (en banc) (recognizing that "[o]n more than one occasion[,] the Supreme Court has recognized the importance of location in the seizure determination" (collecting cases)). Indeed, the Supreme Court and our Court have placed great weight on location—concluding encounters in the presence of others are more likely to be consensual than encounters where no members of the public are present. Compare United States v. Drayton, 536 U.S. 194, 204 (2002), with Hernandez, 847 F.3d at 1265.

In this case, the Agents approached Defendant in broad daylight at a gas station open to the public. Cf. Hernandez, 847 F.3d at 1265, 1270 (treating a police-citizen encounter that occurred at night along a fenced-in construction site where no other individuals or cars were present as a non-public encounter even though the location was technically accessible to the public). And, importantly, other patrons were filling up with gas and accessing the convenience store at the same time.[2] Although nobody else was "milling around" Defendant's vehicle, the presence of

[2] The record does not establish whether the other patrons—either in the store or at the pumps—actually witnessed the conversation unfold between Defendant and Agent Diharce. The absence of this information, however, does not change the analysis as the totality of the circumstances make clear the location was a public one in active use by others at the time of the encounter. The test, after all, does not turn on whether anyone at the truck stop noticed, but instead on whether others were present. See United States v. Thompson, 546 F.3d 1223, 1227 (10th Cir. 2008) (observing that a parking lot encounter occurred in a public setting because several people were present at the scene, even though those in the parking lot were otherwise engaged in their own conversations with law enforcement at the time of the defendant's encounter).

other patrons at the truck stop increases a reasonable person's readiness to decline to participate in a conversation with police. See Ringold, 335 F.3d at 1172 (finding a police-citizen encounter to be consensual, largely because the interaction occurred "in the public space outside [a] service station"). Thus, the encounter maintained a meaningful level of public exposure with other patrons in the vicinity at a public location.

The next factor also weighs in favor of the encounter being consensual because the Agents approached Defendant in a non-threatening manner, did not block his path of exit, and did not otherwise restrain him. See United States v. Easley, 911 F.3d 1074, 1080 (10th Cir. 2018) (observing that "when we speak of a coercive environment, we mean an environment that is the creation of law enforcement conduct"), cert. denied, 139 S. Ct. 1644 (2019). Of course, we recognize "the natural tendency of any person . . . to feel somewhat cowed when a law enforcement officer approaches and begins to ask questions." Ringold, 335 F.3d at 1174. This tendency, however, does not mean that the mere approach of uniformed law enforcement agents amounts "to a show of authority that would indicate to a reasonable person that he had to" answer an agent's questions. Id. at 1173. To the contrary, if agents approach an individual in a "nonthreatening" manner, a reasonable person under the circumstances is more likely to feel "free to decline the [agents'] requests or

otherwise terminate the encounter," thus supporting the consensual nature of any subsequent interaction. Id. at 1173–74 (citation omitted). Such is the case here.[3]

Additionally, "the number of officers is one of many factors to consider." Hernandez, 847 F.3d at 1266. Although "the presence of more than one officer increases the coerciveness of an encounter[,] . . . the presence of two uniformed and armed officers does not automatically transform every police-citizen encounter into a nonconsensual one." Id. (citation omitted). Instead, we look at agent conduct rather than mere presence. See United States v. Jones, 701 F.3d 1300, 1314 (10th Cir. 2012). Here, both Agents exited their vehicle upon arriving at the gas station, but only Agent Diharce approached Defendant, while Agent Ramirez remained on the

[3] Defendant asks us to infer that a reasonable person under the circumstances would recognize that the Agents were following him on the highway, given the distance for and proximity from which the Agents followed Defendant's vehicle. As Defendant conceded at oral argument, however, the district court did not make an express factual finding that Defendant knew the Agents were following him. We likewise determine that the district court did not rely on a potential inference that Defendant knew the Agents followed him at all. Accordingly, we decline to draw any inference beyond the facts found by the district court, and we independently find no evidence in the record to suggest that Defendant was aware the Agents were following him at any point before he reached the gas station. See, e.g., United States v. Vercher, 358 F.3d 1257, 1261 (10th Cir. 2004) (reiterating that factual "inferences and conclusions drawn therefrom, are matters for the trial judge").

Even if we did agree with Defendant that we should consider the circumstances of the Agents' pursuit of Defendant, we conclude that the "earlier interaction does not convert the later meeting into a nonconsensual encounter." Ringold, 335 F.3d at 1173 (reasoning that the fact that an officer "drove past defendants on the Interstate without pulling them over, before his ensuing turnaround and approach to them at the service station, did not amount to a show of authority that would indicate to a reasonable person that he had to comply with [the officer's] inquiries" because the driver "chose to leave the highway and voluntarily stopped [his] vehicle at the service station" (id.)) Accordingly, Defendant's awareness of the Agents on the highway, or lack thereof, does not affect our analysis.

opposite side of Defendant's vehicle. The presence of two agents in this case is not particularly coercive because the Agents did not surround Defendant in a way that prevented him "from simply entering his vehicle and driving away." Ringold, 335 F.3d at 1173 (observing that "although [two officers] were standing on either side of [the defendant] and the gas pump," that did not diminish the consensual nature of the encounter because "nothing prevented [Defendant] from simply entering his vehicle and driving away").

Likewise, only Agent Diharce initiated conversation with Defendant. Where only one agent approaches an individual, even though multiple agents are present, "there [is] no threatening presence of several officers." See Easley, 911 F.3d at 1080. Indeed, a one-on-one conversation is less coercive than one in which an individual must field questions from multiple agents, which is more likely to make a reasonable person feel "outnumbered." See United States v. Bloom, 975 F.2d 1447, 1454 (10th Cir. 1992), overruled on other grounds by United States v. Simpson, 609 F.3d 1140, 1148 (10th Cir. 2010). Even though Agent Ramirez later asked to speak with Defendant's passengers, the fact that only Agent Diharce directly approached and questioned Defendant limits the coerciveness of the encounter. See Thompson, 546 F.3d at 1227 (reasoning that although "four officers were on the premises," the fact that only one directly questioned the defendant supported the consensual nature of the encounter).

Moreover, the Agents did not otherwise intimidate, touch, or restrict Defendant's movement. See Drayton, 536 U.S. at 204 (determining an encounter was

consensual because "[t]here was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice"). That the Agents were in uniform and visibly armed carries "little weight in the analysis." Drayton, 536 U.S. at 204–05. Indeed, Agent Diharce stood a respectful distance from Defendant and behaved in a "non-threatening" manner towards Defendant. The Agents also parked "approximately ten feet" behind Defendant's vehicle, which maintained an unobstructed exit path. See Ringold, 335 F.3d at 1170 (concluding that an encounter was consensual where the officers parked their patrol car "15 or 20 feet" away from the suspect's vehicle in a way that did not impede the suspect's path). Accordingly, the Agents did not create a coercive environment because the Agents did not threaten, command, or otherwise prevent Defendant from extracting himself from an otherwise consensual encounter.[4]

Finally, Agent Diharce did not question Defendant in a coercive manner because his non-threatening demeanor and conversational tone during the brief

[4] Defendant relies heavily on the Fourth Circuit's opinion in United States v. Jones, 678 F.3d 293 (4th Cir. 2012) to argue that a reasonable person in Defendant's circumstances would not feel free to end the encounter, thus making the encounter an investigative detention. 678 F.3d at 300. This case is materially different than Jones, where officers encountered a driver on private property—as opposed to at a gas station open to the public—parked in a way that blocked the driver's exit, did not dispute that the interaction was a "stop," asked the driver to lift his shirt, and then physically touched the driver during a pat down. Id. at 297–98. There, the officers' joint approach, requests for physically invasive action, and tacit characterization of the encounter as a "stop," were all "traditional hallmark[s]" of a coercive encounter, entirely absent from the case before us. See id. at 300–01. Thus, we do not find Jones persuasive for purposes of deciding this case.

inquiry outweigh whether he asked incriminating questions without requesting permission to do. Initially, "there is nothing unlawful about the practice of approaching individuals and asking them potentially incriminating questions, and there is no per se rule requiring law enforcement officials to specifically advise those individuals they do not have to answer police questions." United States v. Broomfield, 201 F.3d 1270, 1275 (10th Cir. 2000) (citations omitted). Indeed, "the mere fact that officers ask incriminating questions is not relevant to the totality-of-the-circumstances inquiry—what matters instead is *the manner* in which such questions were posed." Ringold, 335 F.3d at 1173 (internal quotation marks and citation omitted) (emphasis added). Specifically, "[a]ccusatory, persistent, and intrusive questioning can turn an otherwise voluntary encounter into a coercive one." Id. at 1174; cf. Jones, 701 F.3d at 1314 (reasoning that not every "accusatory assertion" is sufficiently coercive to make a reasonable person feel "that he was not free to discontinue the encounter and go about his business").[5]

[5] Preliminarily, Defendant argues that this determination is a factual finding subject only to clear error review, but "the presence of coercive police activity has generally been considered . . . an issue for de novo review." See Derrick v. Peterson, 924 F.2d 813, 818 (9th Cir. 1990), overruled on other grounds by United States v. Preston, 751 F.3d 1008 (9th Cir. 2014) (internal quotation marks and citation omitted)); cf. United States v. Zapata, 997 F.2d 751, 758 (10th Cir. 1993) (independently concluding that an agent subjected an individual to "fairly routine questioning" even though the district court found that the agent's manner of questioning was "accusatory and potentially incriminating"). Even if he were correct, however, his position still fails upon review for clear error because the district court's conclusion regarding the "coercive manner" of Agent Diharce's questioning is ultimately belied by the other factual findings in its order—namely, that "Agent Diharce's demeanor was non-threatening and he used a conversational tone when speaking to Defendant."

Upon introducing himself and Agent Ramirez as Border Patrol agents, Agent Diharce asked Defendant, "Are you a United States citizen?," and then "if the people in the [vehicle] were his family." Even assuming Agent Diharce's questions were "incriminating" in nature, his "demeanor was non-threatening and he used a conversational tone when speaking to Defendant," which mitigates any coerciveness inherent in the question. See Ringold, 335 F.3d 1172–74 (concluding that an officer's "non[-]threatening manner" and "friendly" tone makes a reasonable person feel free to decline to answer even an officer's "incriminating questions").[6] The subject matter of Agent Diharce's initial question—immigration status—was also not so intrusive as to disrupt the consensual nature of the encounter. See I.N.S. v. Delgado, 466 U.S. 210, 216 (1984) (concluding that "interrogation relating to one's identity . . . does not, by itself, constitute a Fourth Amendment seizure"). Agent Diharce's inquiry consisted of only two short questions, and he did not retain any of Defendant's effects, which further decreases the level of intrusion. See Thompson, 546 F.3d at 1226 (listing "whether and for how long the officers retain the defendant's personal effects such as tickets or identification" as another relevant factor).

[6] Defendant asserts that that the officer in Ringold did not immediately approach the suspect and initiated the conversation with small talk before asking "incriminating" questions "about illegal drugs and guns." Ringold, 335 F.3d at 1174. Even though Agent Diharce did not delay in approaching or questioning Defendant here, those distinctions appear slight given the commonalities in officer demeanor, tone, and nature of questions.

That Agent Diharce did not request permission to speak with Defendant or advise Defendant of his right to terminate the encounter also carries "little weight in our analysis." Thompson, 546 F.3d at 1228; see also Ringold, 335 F.3d at 1174 (concluding that a reasonable person need not receive such a notification to understand that he retains the right to terminate an encounter). The Supreme Court has "expressly rejected [a] rule which made all police encounters non-consensual where officers failed to advise individuals of their right not to comply with their requests." Thompson, 546 F.3d at 1228 (citing Drayton, 536 U.S. at 203). As the Supreme Court reasoned, an agent does not suggest to a reasonable person that he cannot terminate an encounter when the agent speaks "in a polite, quiet voice" and does "not brandish a weapon or make any intimidating movements." Drayton, 536 U.S. at 203–04. Agent Diharce's conversational tone without brandishing his weapon or making any other intimidating movement demonstrates that Defendant should have reasonably felt free to terminate the encounter. Thus, the manner—rather than the substance—of Agent Diharce's questions to Defendant does not outweigh the other factors that support the conclusion that the Agents encounter with Defendant was consensual, rather than an investigative detention.

Under the totality of the circumstances, we hold that the Agents' conduct should not have conveyed to a reasonable person that he "was not free to decline the [Agents'] requests or otherwise terminate the encounter." Bostick, 501 U.S. at 439. Thus, the encounter "falls clearly within the lines of a consensual encounter as drawn by Supreme Court precedent and our own prior rulings." Ringold, 335 F.3d at 1174.

Accordingly, we reverse the district court's order granting Defendant's motion to suppress under the Fourth Amendment.

B.

The government further contends that the Agents did not violate Defendant's Fifth Amendment Miranda rights because a consensual encounter does not amount to a custodial investigation. Under the circumstances, we agree the Agents were not required to provide Defendant with Miranda warnings.

The Fifth Amendment provides a "privilege against self-incrimination during 'custodial interrogation.'" United States v. Rodriguez-Garcia, 983 F.2d 1563, 1568 (10th Cir. 1993) (Miranda warnings require that officers inform a suspect of the right to remain silent and to an attorney before initiating a custodial interrogation); accord Miranda v. Arizona, 384 U.S. 436 (1966). Thus, "Miranda [warnings] need only be given to a suspect at the moment that suspect is *in custody* and the questioning meets the legal definition of *interrogation*." United States v. Jones, 523 F.3d 1235, 1239 (10th Cir. 2008) (internal quotation marks and citation omitted) (emphasis added).

Generally, assessing whether a Fourth Amendment seizure and a custodial interrogation under Miranda occurred are "analytically distinct inquiries." Revels, 510 F.3d at 1273. Our law, however, is well-settled that a consensual encounter with law enforcement is not subject to the strictures of Miranda. See, e.g., Jones, 523 F.3d at 1244 (concluding that a consensual encounter is not "enough to trigger the Miranda requirements"). Defendant engaged in a consensual encounter with law enforcement, so we conclude that the Agents did not subject Defendant to a custodial

interrogation. See supra Part II(A). Thus, the encounter was not subject to the strictures of Miranda. See Jones, 523 F.3d at 1244. Accordingly, we reverse the district court's holding that the Agents violated Defendant's Fifth Amendment rights.

III.

For the foregoing reasons, we REVERSE the district court's order granting Defendant's motion to suppress and remand for further proceedings consistent with this order and judgment.

Entered for the Court

Joel M. Carson III
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

January 16, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

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v.

FRANCISCO ARMANDO MARTINEZ,

Defendant - Appellee.

No. 19-2010

ORDER

Before **MORITZ**, **McKAY**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Cr. No. 18-2315 KG

FRANCISCO ARMANDO MARTINEZ,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court upon Defendant's Motion to Suppress, filed September 5, 2018. (Doc. 41). The United States filed a response on September 18, 2018, and Defendant filed a reply on October 9, 2018. (Docs. 44 and 51). On October 17, 2018, the Court held an evidentiary hearing on Defendant's Motion to Suppress. Andrew Covington and Luis Martinez represented the United States, and case agent Roberto Morales was present. Rachel Nathanson and Barbara Mandel represented Defendant, who was present as well. Having considered Defendant's Motion to Suppress, the accompanying briefing, the evidence admitted at the October 17, 2018, hearing, and the argument of counsel at that hearing, the Court grants Defendant's Motion to Suppress.

I. Findings of Fact[1]

On April 10, 2018, United States Border Patrol Agent Robert Diharce partnered with Border Patrol Agent Guillermo Ramirez. They began their shift at 6:00 a.m. Usually between about 7:30 a.m. or 7:45 a.m., other Border Patrol agents return to the Border Patrol station after finishing their shifts. Agent Diharce testified that "quite a few cases" of narcotics or illegal alien smuggling have occurred during this time. Tr. at 8.[2]

On the morning of April 10, 2018, Agents Diharce and Ramirez were in a marked Border Patrol pickup truck. Agent Diharce was driving the pickup truck while Agent Ramirez was in the passenger seat. At 7:45 a.m. the Agents were traveling southbound on Highway 113, a two-lane highway. Highway 113 is a route commonly used for smuggling, because there is no Border Patrol checkpoint located on this roadway. Aside from this case, Agent Diharce had no recent involvement with a smuggling case on that highway while Agent Ramirez was personally involved in other one smuggling case on Highway 113 in the preceding year.

As they traveled south, the Agents observed a white Monte Carlo sedan traveling northbound on Highway 113. Agent Diharce "noticed that the passengers in the rear seat were crowded. They didn't seem to have enough space for each individual on one seat." Tr. at 10. Agent Diharce thought it was "a little odd" to have "three or more" persons in the back seat. *Id.* Consequently, a few seconds (or maybe a minute) after passing the Monte Carlo, Agent Diharce

[1] In deciding a motion to suppress, the Court views the evidence in the light most favorable to the United States. *See, e.g., United States v. Turner*, 2013 WL 5727404, at *9 (D. Kan.) ("While the Court is cognizant that it must view the facts in the light most favorable to the Government, it may not draw inferences that are not supported by the record, nor accept facts that are contrary to the record."); *United States v. Ortega*, 2012 WL 12894242, at *4 (S.D. Fla.) ("viewing the facts adduced at the suppression hearing in the light most favorable to the government....").

[2]The Court's citation to the hearing transcript refers to the court reporter's original unedited version. Any final transcript may contain slightly different page and/or line numbers.

made a U-turn to follow the Monte Carlo so he could get a better look at the passengers. Tr. 11, 74.

The posted speed limit on Highway 113 is 55 miles per hour, and the Agents estimated the Monte Carlo was traveling 75-80 miles per hour. The Agents followed the Monte Carlo a mile or two behind it and kept the vehicle in view. The Agents were traveling about 70-75 miles per hour.

When the Monte Carlo approached Interstate 10 (I-10), about 10-11 miles from where the Agents began following it, the Monte Carlo entered the westbound lane of the interstate. The Agents continued to follow the Monte Carlo on the interstate but still could not get a good look at the passengers. Agent Diharce did not consider stopping the Monte Carlo while it traveled on I-10. Agent Ramirez testified that he and Agent Diharce did not have reasonable suspicion to stop the Monte Carlo as it traveled on either Highway 113 or I-10. Tr. 62 ("We were still trying to develop our you know reasonable suspicion, you know.").

The Agents followed the Monte Carlo as it traveled ten miles and exited I-10 in Lordsburg, New Mexico, and then proceeded to a Pilot Truck Stop. By that point, the Agents had been following the Monte Carlo a total of 20-21 miles. At no point did the Agents activate their emergency lights. The Monte Carlo stopped at the truck stop, parking at the last gas pump island on the far west end and adjacent to the gas pump. There were no other cars parked at this island, nor were there any people "milling around" in the vicinity of the Monte Carlo, Tr. 45, though Agent Ramirez recalled there may have been one or two vehicles at other gas pumps at the truck stop. He also said there may have been people walking in and out of the Pilot Truck Stop store. The parking lot of the Pilot Truck Stop has two vehicle entrances.

The Agents drove to the same gas pump island and parked approximately ten feet behind the Monte Carlo. Agent Diharce noticed the driver, later identified as Defendant, get out of the vehicle. After Defendant walked three to four steps towards the Pilot Truck Stop store, he turned around to walk back to the driver's side of the vehicle just as Agent Diharce approached him. Agent Diharce testified he did not know why Defendant turned back toward the Monte Carlo. Agent Ramirez testified that Defendant turned back towards the Monte Carlo because he noticed that Agent Diharce and himself had parked behind the Monte Carlo. Tr. at 81-82. Agent Ramirez suggested that Defendant heard the doors of the pickup truck open behind him. *Id.* at 82.

Defendant walked toward the rear of the Monte Carlos, stopping at the rear of the Monte Carlos between it and the gas pump. Agent Diharce approached and stood approximately three feet (or no more than five feet) from Defendant next to the gas pump. Tr. 23, 66. At that point, Agent Diharce observed four to five people in the back seat of the Monte Carlo. Agent Ramirez exited the pickup truck at the same time as Agent Diharce and walked to the rear passenger's side of the Monte Carlo. Both Agents were in uniform, including badges, and were armed. Tr. at 38.

Agent Diharce said, "Good morning," to Defendant and introduced himself and Agent Ramirez as Border Patrol agents. Tr. at 21. Agent Diharce then asked Defendant if he was a United States citizen. Defendant answered that he was. Agent Diharce then asked Defendant if the people in the Monte Carlo were his family. Defendant replied that he did not know them; that he picked them up on the side of the highway after they had flagged him down.

Agent Ramirez asked Defendant if he could speak with the passengers. Defendant then opened the driver's door of the Monte Carlo and, from there, rolled down the passenger's side

window. Agent Ramirez leaned into the vehicle, questioned the passengers, and determined they were Mexican citizens and that they did not have immigration documents to be in the United States legally. Consequently, Agent Ramirez indicated to Agent Diharce that the passengers did not have proper documentation.

As a result, Agent Diharce patted down Defendant to place him under arrest. Agent Diharce was asking Defendant to put his hands behind his back when Border Patrol Agent Amado Camacho arrived. Agent Diharce asked Defendant if he had any weapons on him, and Defendant responded that there was a pistol in the Monte Carlo. Agent Camacho subsequently located the pistol and ammunition inside the Monte Carlo.

Agent Diharce testified that from the time he and Agent Ramirez arrived at the Pilot Truck Stop until the time Agent Diharce arrested Defendant, about five minutes elapsed. Tr. at 26.

II. Conclusions of Law

Defendant argues that both his Fourth Amendment right to be free from an unreasonable seizure and his Fifth Amendment right to have his *Miranda* rights read to him prior to a custodial interrogation were violated. He moves to suppress the statements by the passengers, the pistol, and the ammunition. The United States opposes Defendant's Motion to Suppress in its entirety.

A. Whether the Fourth Amendment was Violated

Defendant claims that his initial encounter with Agents Diharce and Ramirez was an investigatory detention, a *Terry* stop, subject to the Fourth Amendment's reasonable suspicion requirement. The United States argues that the encounter was consensual and, therefore, not subject to the Fourth Amendment.

The Court recognizes that Defendant has the burden of proving whether the Fourth Amendment is implicated. *United States v. Hernandez*, 847 F.3d 1257, 1263 (10th Cir. 2017). The United States, on the other hand, bears the burden of proof by the preponderance of the evidence to show that the challenged action did not violate the defendant's Fourth Amendment rights. *United States v. Matlock*, 415 U.S. 164, 177 (1974). The Court will first address whether the encounter was consensual.

1. Whether the Encounter with Agents Diharce and Ramirez was Consensual

In determining whether an encounter between a police officer and a citizen is consensual, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)). The Court examines the following non-exhaustive list of factors to determine whether a reasonable person would feel free to terminate a police encounter:

- the location of the encounter, particularly whether the defendant was in an open public place where he was within the view of persons other than police officers (Tenth Circuit cases "view police-citizen interactions in nonpublic places and police-citizen interactions in the absence of other members of the public similarly");
- whether the police officers touched or physically restrained the defendant;
- whether the police officers were uniformed or in plain clothes;
- whether the police officers' weapons were displayed;
- the number, demeanor and tone of voice of the police officers;

- whether and for how long the police officers retained the defendant's personal effects like tickets or identification; and
- whether or not the police officers specifically advised the defendant that he had the right to terminate the encounter or to refuse consent to the encounter.

Hernandez, 847 F.3d at 1264-65 (citation omitted). "Although no single factor is dispositive, the 'strong presence of two or three factors' may be sufficient to support the conclusion a seizure occurred." *Id.* at 1264 (citation omitted). Viewing all the circumstances surrounding this encounter and considering the non-exhaustive list of factors, the Court concludes this encounter was non-consensual.

In this case, the parking lot of the Pilot Truck Stop, although public, had only one or two vehicles at the gas pumps, and some people were parked at the store. Defendant's vehicle, meanwhile, was parked at the far western gas pump, at the end of a row of four gas pump islands. Defendant's vehicle was not directly in front of the entrance to the store. The gas pumps also blocked the view of Defendant and Agent Diharce from the other gas pumps and, presumably, from any other patrons pumping gas. No one was milling about near Defendant's vehicle. Agents Diharce and Ramirez's marked vehicle was parked 10 feet behind Defendant's vehicle. The parking lot has two entrances and the encounter occurred during day light hours.

Viewing these facts in the light most favorable to the United States, the Court finds that although the Pilot Truck Stop is a public place, the location of the interaction between Defendant and Agents Diharce and Ramirez occurred in an out-of-the way part of the parking lot, not readily in view of any patrons. *Cf United States v. Thompson*, 546 F.3d 1223,1227 (10th Cir. 2008) (finding consensual encounter "occurred in a public place—the parking lot of a 7–11 store—in view of other patrons."). On the other hand, the Court finds that Defendant's vehicle

was not blocked in such a manner that Defendant could not drive away. *See United States v. Ringold*, 335 F.3d 1168, 1173 (10th Cir. 2003) (noting that although two officers "were standing on either side of [the defendant] and the gas pump, nothing prevented [the defendant] from simply entering his vehicle and driving away."). Considering this situation, the Court determines that the factor relating to location is not determinative one way or the other.

The Court further finds that although Agents Diharce and Ramirez did not touch or physically restrain Defendant, they were uniformed and had holstered weapons. In addition, the encounter initially involved two Border Patrol agents. *Hernandez*, 847 F.3d at 1266 ("Although the presence of two uniformed and armed officers does not automatically transform every police-citizen encounter into a nonconsensual one, it is a relevant factor.").

Agent Diharce's demeanor was non-threatening and he used a conversational tone when speaking to Defendant. Even so, after Agent Diharce introduced himself to Defendant, he did not preface his conversation by asking Defendant if he would answer some questions. Instead, Agent Diharce immediately asked, "Are you a United States citizen?," a question intended to elicit an incriminating response. When Defendant responded, "Yes," Agent Diharce then questioned Defendant about the people in the back seat of the car. These questions are clearly incriminating/investigatory in nature and asked in a coercive manner.

The Tenth Circuit, in *Ringold*, held that "the mere fact that officers *ask* incriminating questions is not relevant to the totality-of-the-circumstances inquiry—what matters instead is 'the manner' in which such questions were posed." 335 F.3d at 1173. The Tenth Circuit further noted that, "Accusatory, persistent, and intrusive questioning can turn an otherwise voluntary encounter into a coercive one." *Id.* at 1174 (quoting *United States v. Little*, 18 F.3d 1499, 1504 (10th Cir. 1994)). The Tenth Circuit in *United States v. Glass* also recognized that an "officer's

particularized interest in an individual may so change the nature of a consensual encounter that a reasonable person would not feel free to leave when asked to consent to a search." 128 F.3d 1398, 1406–07 (10th Cir. 1997). For example, in *United States v. Jones*, a detective in a high crime area immediately asked the defendant to lift his shirt to see if there was a weapon and then asked the defendant to consent to a pat down when the detective did not see a weapon. 678 F.3d 293, 303–05 (4th Cir. 2012). The Fourth Circuit stated that "[a] request certainly is not an order, but a request—two back-to-back requests in this case—that conveys the requisite show of authority 'may be enough to make a reasonable person feel that he would not be free to leave.'" *Id.* at 303 (citation omitted). The Fourth Circuit then held that

> under the circumstances of this case, we conclude that a reasonable person would not have felt free to walk away and ignore Det. Aeschlimann's nearly immediate "requests" that the person first lift his shirt and then submit to a pat down search. By making such intrusive "requests" almost immediately upon approaching Jones and his companion, Det. Aeschlimann communicated, through his conduct, that this was not just a routine encounter with the police.

Id. at 303-04. Consequently, the Fourth Circuit concluded that a reasonable person in the defendant's position would believe "that the officers suspected him of some sort of illegal activity in a 'high crime area,' which, in turn, would convey that he was a target of a criminal investigation and thus not free to leave or terminate the encounter." *Id.* at 304.

In sum, the following evidence is relevant to the issue of whether the encounter was consensual: the area of this encounter is in close proximity to the border where illegal entries occur; the number of passengers in the vehicle; the manner of the Agents' stop behind Defendant's vehicle at the truck stop; Agent Diharce's direct approach to Defendant at the gas pump; the fact that Agents Diharce and Ramirez were uniformed and armed; Agent Diharce's immediate questioning of Defendant as to his citizenship and, within moments, Agent Diharce's

questioning of Defendant about the passengers; and Agent Diharce's failure to advise Defendant that he had the right to terminate the encounter or to refuse to consent to the encounter.

Viewing the totality of that evidence, even in a light most favorable to the United States, the Court concludes a reasonable person in Defendant's shoes would believe that he was not at liberty to ignore the police presence and go about his business. Defendant, therefore, has carried his burden of demonstrating that the encounter was not consensual and that he was seized by the Agents for investigatory purposes, thereby, implicating the Fourth Amendment.

2. Whether Agents Diharce and Ramirez had Reasonable Suspicion to Conduct an Investigatory Detention

Because the seizure of Defendant constituted an investigatory detention, i.e., a *Terry* stop, the United States has the burden of proving that "the officers had specific and articulable facts and rational inferences drawn from [the totality of the circumstances to] giv[e] rise to a reasonable suspicion that [the defendant] was involved in criminal activity." *Hernandez*, 847 F.3d at 1268. "[C]ommon sense and ordinary experience are to be employed and deference is to be accorded to a law enforcement officer's ability to distinguish between innocent and suspicious actions." *Id.* at 1269 (citation omitted). However, "[a] police officer cannot legally detain a person simply because criminal activity is afoot. The particular person that is stopped must be suspected of criminal activity." *Id.* at 1268 (citation omitted). "Inchoate suspicions and unparticularized hunches ... do not provide reasonable suspicion."[3] *Id.* at 1270 (citation omitted).

Defendant argues the Agents did not have reasonable suspicion to detain him. The relevant circumstances known to Agents Diharce and Ramirez prior to Agent Diharce's questioning of Defendant consist of the following: (1) the Monte Carlo sedan driven by

[3] Counsel agree that the *Brignoni-Ponce* factors for determining reasonable suspicion in border areas do not apply here. *See United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

Defendant had three or more people in the back seat; and (2) Defendant was driving the car in an area known for alien smuggling, although Agent Ramirez only encountered one other alien smuggling case in the last year while Agent Diharce had only encountered this case recently.

Significantly, Agent Ramirez admitted, and Agent Diharce implicitly agreed, that they had no reasonable suspicion to stop Defendant during the time they followed the Monte Carlo to the Pilot Truck Stop. The Court agrees. Upon arriving at the Pilot Truck Stop, no new facts presented themselves to the Agents to give rise to reasonable suspicion. The Agents still had the same facts before them, specifically: a car with more than three persons seated in the back seat that happened to be traveling through an area where illegal alien smuggling has occurred. Viewing the totality of these circumstances in the light most favorable to the United States, these facts do not constitute specific and articulable facts, nor can one draw rational inferences from those facts, to reasonably suspect Defendant was involved in any criminal activity.

Even if there was somehow reasonable suspicion for the initial detention, once Defendant responded, "Yes," to Agent Diharce's question as to United States citizenship, Agents Diharce and Ramirez still did not have a specific and articulable reason, or a rational inference, to suggest Defendant was involved in criminal activity. At most, Agents Diharce and Ramirez had a hunch Defendant was involved in transporting illegal aliens. The United States, thus, has failed to carry its burden of proving by a preponderance of the evidence that the Agents' suspicion for detaining Defendant for investigatory purposes was reasonable. Consequently, Agents Diharce and Ramirez violated Defendant's Fourth Amendment right to be free from an unreasonable seizure.

B. Whether the Fifth Amendment was Violated

Defendant also argues that Agent Diharce violated the Fifth Amendment by interrogating him at the Pilot Truck Stop without giving a *Miranda* warning first. The United States argues

that the Fifth Amendment was not implicated because Defendant was not in custody when Agent Diharce questioned Defendant at the Pilot Truck Stop.

Under *Miranda*, the United States is barred from using at trial statements obtained during a custodial interrogation before the defendant is given the *Miranda* warning, unless the defendant waived those rights. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "*Miranda* thus established a two-part analysis for determining when the prescribed procedural safeguards must be provided: (1) the individual must be in custody, and (2) the individual must be subjected to questioning that meets the legal definition of interrogation." *United States v. Revels*, 510 F.3d 1269, 1273 (10th Cir. 2007). The burden initially falls on the defendant to demonstrate that he was subject to custodial interrogation, and then the burden shifts to the United States to prove, by a preponderance of the evidence, that its police officers acted legally. *See, e.g., United States v. Broughton*, 983 F. Supp. 2d 224, 228–29 (E.D.N.Y. 2013), *aff'd*, 600 Fed. Appx. 780 (2d Cir. 2015). *See also* 23 *C.J.S. Criminal Procedure and Rights of Accused* § 1315 ("The burden is initially on the defendant to show that a statement was obtained through custodial interrogation…."); *id.* at § 1312 ("It is the state's burden to demonstrate by the federal standard of proof by a preponderance of the evidence that preliminary factors of a custodial interrogation were not present to trigger the need for *Miranda* warnings….").

A person is "in custody" for *Miranda* purposes when under the totality of the circumstances "a reasonable [person] in the suspect's position would have understood his situation . . . as the functional equivalent of formal arrest." *Id.* at 1273. Whether police subject a defendant to a lawful investigative detention under the Fourth Amendment is not dispositive of whether the police officer should have advised the defendant of his *Miranda* rights under the Fifth Amendment. *Id.* at 1274. Courts look to the following non-exhaustive list of factors to

determine the *Miranda* custody issue: (1) whether the circumstances showed a "police-dominated atmosphere;" (2) whether the nature and length of the police officer's questioning was accusatory or coercive; and (3) whether the police officer made the defendant aware that he was free not to answer questions, or to terminate the interview. *Id.* at 1275.

In this case, the evidence shows that there was a police-dominated atmosphere. First, Agents Diharce and Ramirez were in uniform with holstered weapons and driving a marked vehicle. Second, the marked vehicle was parked ten feet behind the Monte Carlo. Finally, the questioning occurred in an area of the parking lot which was blocked to some extent from public view by the gas pumps and which did not have any members of the public at that time.

In addition, although the length of the questioning was less than five minutes and Agent Diharce introduced himself to Defendant, Agent Diharce immediately asked Defendant an incriminating question about his citizenship. A reasonable person could interpret that question as accusing Defendant of being an illegal alien. Agent Diharce's follow up question about the passengers in the Monte Carlo would also communicate to a reasonable person that Agent Diharce was accusing Defendant of transporting illegal aliens. Moreover, neither Agents Diharce nor Ramirez informed Defendant that he was free not to answer questions or to otherwise end the interview.

Viewing the totality of the circumstances in the light most favorable to the United States, the above three factors support a determination that a reasonable person in Defendant's position would have understood his situation as the functional equivalent of a formal arrest. Therefore, Defendant has carried his burden of showing that he was in custody when Agent Diharce questioned him.

The Court must next determine whether Agent Diharce's questioning of Defendant was an "interrogation." "[T]he term 'interrogation' ... refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v Innis*, 446 U.S. 291, 301 (1980). The Court asks whether the officers "should have known that their words or actions—whether framed as a question or not—were reasonably likely to elicit an incriminating statement." *United States v. Cash*, 733 F.3d 1264, 1277 (10th Cir. 2013). This is an "objective [inquiry,] ... and [the court] focus[es] on the perceptions of a reasonable person in the suspect's position rather than the intent of the investigating officer." *Id.* (internal quotation marks omitted).

In this case, Agent Diharce's immediate opening question, "Are you a United States citizen?" would relay to a reasonable person that Agent Diharce was seeking an incriminating statement in an effort to establish that Defendant was not legally in the United States. Agent Diharce's follow up question regarding the passengers, likewise, would relay to a reasonable person that Agent Diharce was seeking incriminating statements from Defendant related to illegal alien smuggling. Even viewing the totality of the evidence in the light most favorable to the United States, the Court determines Defendant has demonstrated that Agent Diharce subjected him to an interrogation during the initial encounter at the Pilot Truck Stop.

To summarize, Defendant has shown that Agent Diharce conducted a custodial interrogation of Defendant without first reading *Miranda* warnings to him. The United States, meanwhile, has failed to show by a preponderance of the evidence that Agent Diharce, otherwise, acted lawfully in questioning Defendant. Agent Diharce's questioning, consequently, constitutes a violation of Defendant's rights under the Fifth Amendment.

III. *Conclusion*

Having determined that Defendant's Fourth and Fifth Amendment rights were violated, the Court grants Defendant's Motion to Suppress. Consequently, all evidence obtained as a result of Defendant's detention and interrogation by Agent Diharce, including any of Defendant's statements, statements by the passengers in the Monte Carlo, the pistol, and the ammunition, are suppressed. *See United States v. Olivares-Rangel*, 458 F.3d 1104, 1108–09 (10th Cir. 2006) ("a defendant may also suppress any other evidence deemed to be 'fruit of the poisonous tree,' (*i.e.*, evidence discovered as a direct result of the unlawful activity), by showing the requisite factual nexus between the illegality and the challenged evidence").

IT IS ORDERED that Defendant's Motion to Suppress (Doc. 41) is granted.

UNITED STATES DISTRICT JUDGE