UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	CRIMINAL ACTION NO. 5:18-CR-00870
	§	
VERNON D. NELSON	§	

REPORT AND RECOMMENDATIONS
OF THE UNITED STATES MAGISTRATE JUDGE

The undersigned submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. § 636(b)(3). This case has been referred for a hearing followed by a Report and Recommendation regarding Defendant's Motion to suppress. (Dkt. Nos. 22, 30.) Defendant Vernon D. Nelson is charged with one count of knowingly conspiring to possess with intent to distribute 50 kilograms and more of a mixture containing a detectable amount of marijuana, and with another count of knowing possession with intent to distribute 50 kilograms and more of a mixture containing a detectable amount of marijuana, in violation of Title 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(C) and Title 18 U.S.C. § 2.

Defendant first moved to suppress certain statements made to law enforcement, alleging that they were obtained in violation of his Fifth Amendment rights. (Dkt. No. 22.) He claims that he was in custody to the degree associated with an arrest while questioned by a Border Patrol agent on October 30, 2018. *Id*. at 5. Because Defendant was not first given the *Miranda* warnings, he argues that those statements should be suppressed. *Id*. Additionally, following the hearing held on February 12, 2019, Defendant made the new argument that the stop, which occurred several miles past a Border Patrol checkpoint, violated his Fourth Amendment rights. (Dkt. No. 30 at 6.) Specifically, Defendant argues that the Border Patrol agents acted without authority, lacked

probable cause to initiate a stop, and unlawfully prolonged it. *Id*. at 6–10. As such, Defendant moves to suppress all evidence obtained from the stop and subsequent arrest. *Id*. at 1.

Defendant and the Government appeared before the undersigned for a hearing on Defendant's Motion to suppress on February 12, 2019. Only Border Patrol Agent (BPA) Marcus Stauffiger testified. (Minute Entry dated February 12, 2019.) The Government introduced BPA Stauffiger's body cam footage as an exhibit without objection. (Gov. Exh. 1.) Having considered the evidence, testimony, and arguments, the undersigned **RECOMMENDS** that the District Court, after an independent review of the record, **DENY** the Motion to suppress. (Dkt. Nos. 22, 30.)

BACKGROUND

The uncontested facts are as follows.[1] Defendant approached the U.S. Border Patrol checkpoint on Interstate Highway 35 at approximately 9:55 P.M. on October 30, 2018, driving a red freightliner conventional tractor and hauling a white 2006 Stoughton trailer. (Dkt. No. 22 at 1–2); (Hrg. 9:18–19.) BPA Yajaira Flores asked Defendant whether he is a U.S. citizen and if he would consent to a scan of the tractor-trailer. (Dkt. No. 22 at 2.) Defendant answered affirmatively to both questions, and the tractor-trailer was scanned by the mobile Vehicle and Cargo Inspection System (VACIS). *Id*. BPA Marcus Stauffiger operated the VACIS and observed several bundle shaped objects, that he thought could be tarps, and the outline of a dolly in the otherwise empty trailer. (Hrg. 9:19–20; 10:34–35.) But BPA Stauffiger's initial assessment that the bundle shaped objects and dolly might just be personal equipment changed after noticing the seal on the back of trailer, which indicated a cargo load. (Hrg. 9:20–21.) In BPA Stauffiger's experience,[2] it would

[1] The sequence of events recited here is taken from Defendant's Motion to Suppress, the Hearing held on February 12, 2019, and the Government's Exhibit No. 1. (Dkt. No. 22); (Minute Entry dated February 12, 2019); (Gov. Exh. 1.) References to the audio recording of the hearing held before the undersigned will contain the identifier "Hrg." References to Government Exhibit No. 1 will use the identifier "Exh."

[2] BPA Stauffiger has been a Border Patrol agent for over nine years and has spent a substantial amount of time manning the checkpoints around Laredo, Texas. BPA Stauffiger was also detailed to the Drug Enforcement Administration for

be usual for a tractor-trailer to transport such a small amount of goods as a cargo load and he then suspected that the bundles contained contraband. (Hrg. 10:34–35.) However, BPA Stauffiger was unable to inform his colleagues of the anomalies before Defendant left the checkpoint due to ongoing construction. (Hrg. 9:22.) Barriers erected at the checkpoint forced truck drivers to turnout and begin exiting before the scans were completed. *Id*. Normally, Defendant would have been referred to secondary inspection. (Hrg. 9:21–22.)

BPA Stauffiger and BPA Abraham Cantu, who was acting as the checkpoint ground guide, conferred and decided to follow Defendant and perform a stop. (Hrg. 9:22–23.) The agents pursued Defendant in their marked service vehicles, catching up with his tractor-trailer near the 35-mile marker. (Hrg. 9:23.) BPA Cantu activated his emergency equipment and Defendant complied by pulling over. (Hrg. 9:23–24.) Speaking first with BPA Cantu, Defendant presented a bill of lading which indicated that he was carrying a load of five cereal pallets. (Hrg. 9:24–25.) BPA Stauffiger doubted Defendant's account because what he observed during the VACIS scan could at most have been two pallets. (Hrg. 9:25.) Additionally, irregularities on the bill of lading, including misspelling the brand name "Kellogg," the presence of two seal numbers when there is usually only one, and the typing of seal as "SeAl," caused the agents to doubt its authenticity. *Id*. The agent then requested Defendant step out of his tractor-trailer so they could speak with him. (Hrg. 9:26.)

BPA Stauffiger explained that anomalies had been detected inside the trailer during the scan, specifically bundles. (Hrg. 9:27.) BPA Stauffiger requested Defendant's consent to search the trailer, and told Defendant that he could say no, at which point they would wait for a canine to arrive. (Hrg. 9:28.) Defendant refused consent and BPA Stauffiger called for a service canine to

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two years, from 2016–18, receiving specialized narcotics training and participating in drug enforcement operations. (Hrg. 9:12–15.)

be brought to their location to perform a free-air sniff. *Id*. At this point, BPA Stauffiger activated his body cam. *Id*. While waiting approximately five minutes for a service canine to arrive from the checkpoint, BPA Stauffiger informed Defendant he was being recorded and asked what he described as "routine questions." (Hrg. 9:29–30.) The conversation is summarized as follows based on the video recording and the agent's recollections at the hearing:

BPA Stauffiger:	"How long you've been driving?"
Defendant:	"Thirty-one years."
BPA Stauffiger:	"How about for this company?"
Defendant:	"I just recently purchased this truck."
BPA Stauffiger:	"Is it registered to you?"
Defendant:	"Yeah."
BPA Stauffiger:	"How about the trailer, same thing?"
Defendant:	Nods heads in an apparent 'yes.'
BPA Stauffiger:	"How long ago did you purchase the trailer?"
Defendant:	"About a year."
BPA Stauffiger:	"Where did you get it from?"
Defendant:	"Atlanta."
BPA Stauffiger:	"Is that where you're from originally?"
Defendant:	"Nah, I'm from Houston."
BPA Stauffiger:	"Just got a better deal in Atlanta?"
Defendant:	"I saw it on Facebook. I jumped on it."
BPA Stauffiger:	"Well, how much did you get it for?"
Defendant:	Inaudible.
BPA Stauffiger:	"Did he already get your I.D.?" (pointing at BPA Cantu)
Defendant:	Shakes head in apparent 'no.'
BPA Stauffiger:	"Is it in the truck? Or do you have it on you?"
Defendant:	"It's on the dashboard."
BPA Stauffiger:	"I notice a lot of the trailers get registered out of like Oklahoma, Kentucky? Why is that? Is it just cheaper?"
Defendant:	"Yeah."
BPA Stauffiger:	"But it's still registered out of Houston?"
Defendant:	"Yeah."
BPA Stauffiger:	"I notice a lot of the major companies do it out of Oklahoma. Maine is another big one. Nebraska. It's rare that ya get a Texas-plated trailer."
Defendant:	"Right."

(Exh. 1:20–3:35); (Hrg. 9:38–10:13.) Defendant seeks to suppress this conservation, arguing that he was subjected to custodial interrogation without first being Mirandized. (Dkt. No. 22.) No further substantive questions were asked, based on the body cam footage, prior to Defendant's arrest.

Several minutes later, BPA Frederick Irizarry and his service canine arrived. (Exh. 6:00–7:00.) The canine alerted on the trailer, (Exh. 10:00–54) at which point the Border Patrol agents searched it and discovered over 80 kilograms of marijuana. (Exh. 11:00–16:10); (Dkt. No. 22 at 4.) The marijuana was packed in tightly wrapped cardboard bundles, consistent with BPA Stauffiger's assessment of the VACIS scan images. (Exh. 8:00–20; 13:00–50.) Defendant was placed under arrest. (Exh. 16:50–17:35.)

ANALYSIS

On a motion to suppress evidence derived from a warrantless search or seizure, "'the government bears the burden of proving, by a preponderance of the evidence, that the search and seizure were constitutional.'" *United States v. McKinnon*, 681 F.3d 203, 207 (5th Cir. 2012) (quoting *United States v. Guerrero-Barajas*, 240 F.3d 428, 432 (5th Cir. 2001)).

A. Were the Border Patrol Agents Authorized to Stop Defendant?

Defendant argues that the Border Patrol agents lacked authority to stop him. (Dkt. No. 30 at 6.) As Defendant's American citizenship was satisfactorily confirmed at the checkpoint, the stop's primary purpose was BPA Stauffiger's suspicion that the bundles observed in the VACIS scan contained contraband. *Id*. Defendant argues that "a roving patrol stop can only be conducted for the purpose of immigration inspections, not drug interdiction." *Id*. In support of this view, Defendant cites *United States v. Brignoni-Ponce*, for the proposition that Border Patrol may only

stop "vehicles [they reasonably suspect] contain aliens who may be illegally in the country." 422 U.S. 873, 884 (1975).

Defendant's view is incorrect and ignores controlling precedent. In *United States v. Cortez*, the Supreme Court held that Border Patrol agents may stop a vehicle if "based upon the whole picture, they, as experienced Border Patrol officers, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity." 449 U.S. 411, 421 (1981). The Fifth Circuit interprets *Cortez* as clarifying that "that the [Border Patrol] agents' suspicion need not be confined to considerations of smuggling undocumented immigrants." *United States v. Nichols*, 142 F.3d 857, 865 (5th Cir. 1998). Defense counsel also cites a district court's interpretation of *Cortez*, as not allowing Border Patrol to "investigate suspected violations of *any and all* criminal laws." *United States v. Perkins*, 166 F.Supp.2d 1116, 1125 (W.D. Tex. 2001) (a case where the agents only suspected a drug trafficking offense when initiating the stop). However, Defendant failed to mention that the district court reconsidered its decision several months later and found that "Border Patrol's narcotics law enforcement powers are separate from, and not limited by, their enforcement powers in Title 8 of the United States Code." *United States v. Perkins*, 177 F.Supp.2d 570, 577 (W.D. Tex. 2001). The Fifth Circuit Court of Appeals affirmed the district court's reconsidered opinion, holding that "Border Patrol agents may make roving stops on the basis of reasonable suspicion of any criminal activity, and are not limited to suspicion of violation of immigration laws." *United States v. Perkins*, 352 F.3d 198, 200 (5th Cir. 2003) (citations omitted).[3]

[3] Defense counsel is reminded of her "duty of candor to the court. . . . [and that] failing to cite controlling precedent while arguing a clearly inapplicable standard are not consistent with compliance with this duty." *United States v. Robinson*, 318 Fed.Appx. 280, 284 (5th Cir. 2009).

The argument that a "Border Patrol agent lacks authority to conduct a vehicle stop based on a reasonable suspicion of a non-immigration offense. . . . is foreclosed." *United States v. Martinez-Hernandez*, 141 F. App'x 334 (5th Cir. 2005) (citing *Perkins*, 352 F.3d 198); *see also United States v. Rivera-Gonzalez*, 413 Fed.Appx. 736, 737-38 (5th Cir. 2011) (a stop primarily based on erratic driving); *United States v. Rodriguez*, 564 F.3d 735, 739 (5th Cir. 2009) (a stop based on a law-enforcement announcement to lookout for the driver as a potential marijuana trafficker and his erratic driving); *United States v. Ceniceros*, 204 F.3d 581, 584 (5th Cir. 2000) (a stop based on a law-enforcement announcement to lookout for the driver as a potential drug trafficker); *United States v. Gonzalez*, 190 F.3d 668, 670 (5th Cir. 1999) (a stop based on a law-enforcement announcement to lookout for the driver as a potential contraband smuggler); *United States v. Casteneda*, 951 F.2d 44, 47 (5th Cir. 1992) (a stop based on "the faint odor of marijuana trailing the truck as . . . [the agent] followed with his window open.").

B. Was the Stop Supported by Reasonable Suspicion?

Defendant's second argument is that "the Government nonetheless failed to prove that there were sufficient articulable facts to support the roving patrol stop pursuant to the *Brignoni-Ponce* factors." (Dkt. No. 30 at 8.) Defendant's contention is that "reliance on . . . [the anomalies which appeared in the VACIS scan] alone to justify the stop of the Defendant is insufficient as the appearance of bundles could have been innocently explained away." *Id.* In contrast, the Government frames the stop as a "secondary inspection . . . continued a few miles away." (Dkt. No. 31 at 9.)

The Supreme Court has held that an officer "whose 'observations lead him reasonably to suspect' that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to 'investigate the circumstances that provoke suspicion.'"

Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (citations omitted). The Fifth Circuit, applying this principle to Border Patrol agents, has held that:

> Officers possessing reasonable articulable suspicion of a person's participation in criminal activity may seize the suspect in accord with the Fourth Amendment to conduct an investigative stop—a narrow intrusion involving limited detention accompanied by brief questioning and, if justified, a frisk for weapons. Such investigative stops do not render a person in custody for purposes of *Miranda*.

United States v. Bengivenga, 845 F.2d 593, 599 (5th Cir. 1988) (citations omitted); *see also Portillo-Aguirre*, 311 F.3d at 653–54 ("An agent at an immigration stop may investigate non-immigration matters beyond the permissible length of the immigration stop if and only if the initial, lawful stop creates reasonable suspicion warranting further investigation."); *United States v. Machuca-Barrera*, 261 F.3d 425, 434 (5th Cir. 2001) ("A Border Patrol agent may extend a stop based upon sufficient individualized suspicion.").

Reasonable suspicion requires that the agents "are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that that particular vehicle is involved in illegal activity." *United States v. Villalobos*, 161 F.3d 285, 288 (5th Cir. 1998). "Each case must be examined from the 'totality of the circumstances known to the agent, and the agent's experience in evaluating such circumstances.'" *Id*. (quoting *Casteneda*, 951 F.2d at 47). "Reasonable suspicion requires more than an inchoate and unparticularized suspicion or hunch, but the level of suspicion required is less demanding than that for probable cause and considerably less than proof of wrongdoing by a preponderance of the evidence." *Rivera-Gonzalez*, 413 Fed.Appx. at 738 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)) (internal quotation marks omitted).

In this case, Defendant voluntarily agreed to the VACIS scan at the Border Patrol checkpoint. (Dkt. No. 22 at 2; Dkt. No. 30 at 2.) It was the anomalies detected during this

consensual scan of Defendant's tractor-trailer and the presence of the seal that made BPA Stauffiger reasonably suspicious of the bundles stored in the trailer. (Hrg. 9:20–21; 9:50–52.) It did not make sense that such a small amount of material would constitute a tractor-trailer's cargo load in BPA Stauffiger's experience. (Hrg. 10:34–35.) Border Patrol has experience with narcotics:

> As they are often the only law enforcement present along the border where drug trafficking is heaviest, [and so] Border Patrol agents already are trained to identify drug smuggling when making immigration stops. The Border Patrol knows what factors amount to reasonable suspicion and probable cause enabling them to perform a search and to arrest a suspect.

Perkins, 177 F. Supp. 2d at 579. Additionally, "[i]t is common knowledge that large quantities of narcotics are smuggled across the Mexican border daily." *United States v. Poindexter*, 429 F.2d 510, 512 (5th Cir. 1970). Furthermore, the area around the I-35 checkpoint has previously been described as "notorious for drug-and alien-smuggling activity." *United States v. Munoz-Martinez*, 435 Fed.Appx. 333, 335 (5th Cir. 2011).

Each factor was "perhaps innocent in itself, but . . . taken together [they] warranted further investigation." *Terry v. Ohio*, 392 U.S. 1, 22 (1968). These facts made it reasonable for the agent to suspect the contents of bundles observed in a tractor-trailer heading north and initiate a stop. Once BPA Stauffiger noticed the anomalous bundles and other suspicious circumstances his "activity shifted from a routine checkpoint stop aimed at detecting illegal aliens to an investigation of drug smuggling." *Bengivenga*, 845 F.2d at 599. The basis of BPA Stauffiger's reasonable suspicion arose from the consented to search at the checkpoint. However, "believing that they did not possess probable cause, [the agents] engaged in further conduct more analogous to a noncustodial investigative stop than a formal arrest." *Id*. In sum, Defendant was reasonably

subjected to an ordinary investigative stop based on the reasonable suspicions which arose concerning his cargo at the checkpoint.

Alternatively, the Government's framing of the stop as a secondary inspection is persuasive. Defense counsel admits that absent construction at the checkpoint, Defendant would have been referred to secondary inspection. (Dkt. No. 22 at 2; Dkt. No. 30 at 3.) The unexpected delay, that construction prevented Defendant's immediate referral, makes the stop merely a briefly delayed secondary inspection. (Hrg. 9:22.) *Cf. United States v. Macias*, 546 F.2d 58, 62 (5th Cir. 1977) (turning car around and driving away only delayed checkpoint stop). Regardless, the stop or secondary inspection was based on reasonable suspicion given the totality of the circumstances.

C. Was the Stop Prolonged Beyond its Permissible Duration?

The last argument Defendant makes regarding the stop's Fourth Amendment constitutionality is that it was unreasonably prolonged. (Dkt. No. 30 at 10.) Defendant argues it was prolonged because "more than 15 minutes elapsed before the dog arrived at the side of the road." *Id*. In support of this view, Defendant cites the Supreme Court decision *Rodriguez v. United States*. 135 S. Ct. 1609, 1614 (2015). The Government argues that "the less than ten (10) minute wait for the service canine to arrive did not prolong the stop" and also cites *Rodriguez*. *Id*.

When conducting an investigative stop "the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer*, 468 U.S. at 439. As explained in *Rodriguez*, "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' . . . . Because addressing the infraction is the purpose of the stop, it may 'last no longer than is necessary to effectuate th[at] purpose.'" 135 S.Ct. at 1614 (internal citations omitted). Thus, how long a detainment is justified based on an agent's "reasonable suspicion is [a] fact-

intensive [determination] and [it] turns on the totality of the circumstances." *United States v. Davis*, 620 Fed.Appx. 295, 299 (5th Cir. 2015). "A stop may not exceed its permissible duration unless the officer has reasonable suspicion of criminal activity." *Portillo-Aguirre*, 311 F.3d at 653.

In this case, the Border Patrol agents sought to determine whether anomalies detected during the VACIS scan were drugs. (Dkt. No. 31 at 3.) The review of Defendant's bill of lading only heightened the agents' suspicions, as inconsistencies indicated a possible forgery. (Hrg. 9:24–25.) Most notably, the bill of lading purported that five cereal pallets were being transported, which did not match BPA Stauffiger's VACIS scan observations that there at most could have been two pallets. *Id.*; (Exh. 4:37–40.) Additionally, the name of the cereal brand Kellogg was misspelled, two seal numbers were present instead of one, and seal was typed "SeAl." (Hrg. 9:25.) These facts gave BPA Stauffiger "reasonable suspicion to justify his detainment of" Defendant until the service canine arrived. *Davis*, 620 Fed.Appx. at 298. The questions asked of Defendant and his answers, while not apparently incriminatory, did not dispel the agent's reasonable suspicion. (Exh. 1:20–3:35.)

In conclusion, the stop did not violate the Fourth Amendment because the agents acted within the scope of their authority and reasonably suspected Defendant of committing a crime. Nor was the stop prolonged beyond what was justified based on the information gathered from the bill of lading and BPA Stauffiger's previous observations. In sum, the Border Patrol agents "quickly progressed from an investigative stop to . . . [Defendant's] formal arrest." *Bengivenga*, 845 F.2d at 600.

D. Was Defendant in Custodial Interrogation During the Initial Questioning?

When a defendant is subjected to custodial interrogation, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Defendant argues that "because *Miranda* warnings were not administered in this matter prior to asking questions, the Defendant's statements should be suppressed."[4] (Dkt. No. 30 at 13.) These questions refer to those asked by BPA Stauffiger between the initial stop of Defendant's tractor-trailer and the service canine's arrival. (Exh. 1:27–3:35.) The Government counters that "Defendant was not making statements to BPA Stauffiger while he was in custody. The Defendant was merely detained." (Dkt. No. 31 at 9.)

"It must be acknowledged at the outset that a traffic stop significantly curtails the 'freedom of action' of the driver. . . . However, we decline to accord talismanic power to the phrase." *Berkemer*, 468 U.S. at 436–37. "Determining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Howes v. Fields*, 565 U.S. 499, 509 (2012). "[A] Fourth Amendment seizure does not necessarily render a person in custody for purposes of *Miranda*. For example, traffic stops—stops which constitute a Fourth Amendment seizure—do not automatically place a person in custody for purposes of *Miranda*." *Bengivenga*, 845 F.2d at 598. "Custody for *Miranda* purposes requires a greater restraint on freedom than

[4] At the hearing, Defense Counsel argued that Defendant should have been Mirandized because even if the canine had not alerted, there was arguably probable cause for the BPA agents to search the trailer. (Hrg. 10:59–11:01.) However, "the existence of probable cause to arrest is largely immaterial to the question of custody." *Bengivenga*, 845 F.2d at 596. Therefore, even if the Border Patrol officers had probable cause to arrest Defendant immediately upon stopping him, they were "not required to effectuate an arrest the moment probable cause" arose. *Id*.

seizure under the Fourth Amendment." *United States v. Cavazos*, 668 F.3d 190, 193 (5th Cir. 2012).

Custody "for *Miranda* purposes [is] when [a defendant is] placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *Bengivenga*, 845 F.2d at 596. "A determination of whether a defendant is 'in custody' for *Miranda* purposes depends on the 'totality of circumstances.'" *Cavazos*, 668 F.3d at 193 (citations omitted). The Fifth Circuit Court of Appeals has identified five factors in determining whether someone was in custody based on the totality of the circumstances:

(1) the length of the questioning;
(2) the location of the questioning;
(3) the accusatory, or non-accusatory, nature of the questioning;
(4) the amount of restraint on the individual's physical movement;
(5) statements made by officers regarding the individual's freedom to move or leave.

United States v. Wright, 777 F.3d 769, 775 (5th Cir. 2015) (citations omitted). Each of these factors is examined individually below.

On factor one, the length of the questioning, the starting point is the video recording of the encounter, which was admitted at the hearing on February 12, 2019. The recording begins several minutes into the stop, after Defendant denied the Border Patrol agent consent to search his trailer. (Exh. 0:30–45.) BPA Stauffiger told Defendant that they would wait for the arrival of the service canine, and that if it did not alert that he would be free to go. *Id*. BPA Stauffiger then asked Defendant for how long he had been a trucker, beginning the questioning. (Exh. 1:27–28.) The conversation between Defendant and BPA Stauffiger lasted approximately two minutes and five seconds, ending with BPA Stauffiger's observation that it is unusual for him to encounter a tractor-

trailer with a Texas license plate. (Exh. 3:32.) After this conversation, no more questions were asked of Defendant until his arrest based on the body cam footage. (Exh. 3:35–16:50.)

In *United States v. Harrell*, the Fifth Circuit found "that a detention of approximately an hour raises considerable suspicion" that the defendant was in custody for *Miranda* purposes. 894 F.2d 120, 124 n. 1 (5th Cir. 1990). However, the Appellate Court held in *United States v. Ortiz* that a twenty-minute interview tended to show the defendant was not in custody. 781 F.3d 221, 233 (5th Cir. 2015). Even though the stop began several minutes before the body cam's activation, the approximately two-minute conversation tends to show Defendant was not in custodial interrogation.

Considering factor two, the location of the questioning, the stop was conducted on the side of the highway. (Exh. 5:40–6:00.) The Supreme Court has found that:

> Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability. *In short, the atmosphere surrounding an ordinary traffic stop is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in Miranda itself.*

Berkemer, 468 U.S. at 438–39 (citation omitted) (emphasis added). As summarized by the Fifth Circuit, "traffic stops do not ordinarily place a motorist in custody." *Bengivenga*, 845 F.2d at 596 (citing *Berkemer*).

In the instant case, Defendant and the Border Patrol agents were visible to passersby. (Exh. 5:40–6:00.) At the time of questioning, only BPA Stauffiger and BPA Cantu were present, although several other Border Patrol agents arrived shortly thereafter with the service canine. (Hrg. 9:28.) *Compare Ortiz*, 781 F.3d at 232–33 (noting that the presence of only two officers was

similar to an ordinary traffic stop). In summary, the stop's location on the side of the highway indicates Defendant was not in custody.

The third factor is the nature of the questioning and whether it is the accusatory, or non-accusatory. Defendant argues "that the purpose of questioning the Defendant was to elicit incriminating statements." (Dkt. No. 30 at 12.) Specifically, Defendant objects the questions related to the custody, care and control of the tractor-trailer. (Hrg. 10:56–58.) BPA Stauffiger instead described the questions as those routinely asked of truckers. (Hrg. 9:29–30.) The issue is whether these questions were "reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980). However, "[t]he question is an objective one—the subjective intent of the questioners and the subjective fear of the questioned person are irrelevant." *United States v. Melancon*, 662 F.3d 708, 711 (5th Cir. 2011).

The questions, reproduced on page 4, are non-accusatory in nature. (Exh. 1:20–3:35.) Instead, the tone appears to be cooperative throughout the video recording. *Id*. The final thirty-seven seconds of the exchange appear to be only related to BPA Stauffiger's curiosity on truck registration practices. (Exh. 2:58–3:35.) None of these questions accuse Defendant of drug smuggling. *Id*. In contrast, the questions found to be accusatory by the Fifth Circuit in *United States v. Chavira* were different in tone, with the agents demanding that the defendant "tell them the truth." 614 F.3d 127, 130 (5th Cir. 2010). While there is some discussion of the tractor-trailer's purchase and ownership, Defendant initiated this part of the conversation by his response to BPA Stauffiger's question on how long he had driven for his employer. (Exh. 1:32–34); (Hrg. 9:43.) It is important to remember that a conversation can be as much an opportunity for a suspect to tell his side of the story as it is for the officers to gather information. *Wright*, 777 F.3d at 777.

The non-accusatory nature of the questions tends to show Defendant was not subjected to custodial interrogation.

Factor four is the amount of restraint on Defendant's physical movement. Based on the video, Defendant was physically unrestrained while questioned. (Exh. 0:00–3:30.) Defendant answers BPA Stauffiger's questions with his arms folded across his chest while leaning against the hood of the agent's service vehicle. *Id*. Defense counsel's only argument on this issue is that "Defendant was clearly not free to leave." (Dkt. No. 30 at 11.)

The Fifth Circuit has held that "[n]or does temporary detention by itself automatically rise to the level of custodial interrogation. Even if . . . [defendant] were not 'free to leave,' that does not mean that he was effectively under arrest for the purposes of *Miranda*." *United States v. Salinas*, 543 Fed.Appx. 458, 465 (5th Cir. 2013) (citation omitted). Instead, "custodial interrogation requires some combination of isolation, restriction of movement, physical restraint, and coercive technique." *Id*. at 463. The Appellate Court's decision in *United States v. Carter* is illustrative:

> [Defendant] was told to exit the car and sit on a bench while the car was searched, but there is nothing to indicate that she was restrained in the sense of an arrest; she was not handcuffed or placed under formal arrest when her car was sent to secondary inspection, nor was she placed in a cell or interview room, and only one agent was present.

516 Fed.Appx. 344, 346, (5th Cir. 2013). In the present case, Defendant was not restrained in the sense of an arrest, which tends to show he was not in custodial interrogation.

Lastly, the fifth factor is what statements officers made regarding the individual's freedom to move or leave. Defense counsel argues that "BPA Stauffiger's [statement] implied that an arrest was imminent if the dog did in fact alert." (Dkt. No. 30 at 11.) However, it is unclear what Defense counsel is referring to. BPA Stauffiger did tell the Defendant he would be free to go if the service canine *did not* alert. (Exh. 0:38–44.) However, this statement does not indicate automatic arrest

if the canine did alert. *Id*. Instead, an alert would only be grounds for the agents to search the trailer despite Defendant's denial of consent.

In fact, Defendant was only arrested after the canine alerted and the agents searched the trailer, discovering bundles apparently filled with marijuana. (Exh. 17:10–35.) It is possible that Defendant feared his arrest was imminent when he heard BPA Stauffiger's statement that he would be free to leave if the canine did not alert. But "the subjective fear of the questioned person . . . [is] irrelevant." *Melancon*, 662 F.3d at 711. From the standpoint of a reasonable person "neutral to the environment and to the purposes of the investigation" the statements made by BPA Stauffiger would not imply imminent arrest. *Bengivenga*, 845 F.2d at 596.

Having considered the five factors identified by the Fifth Circuit as especially relevant to the determination of whether someone was in custodial interrogation, and the totality of the circumstances, the undersigned concludes that it was "not [a] greater restraint on freedom than [a] seizure under the Fourth Amendment" and that it did not rise to the level of custodial interrogation. *Cavazos*, 668 F.3d at 193.

CONCLUSION

The Government has met its burden of proving, by a preponderance of the evidence, that the Border Patrol agents had reasonable suspicion that criminal activity was afoot to justify a *Terry* stop of Defendant's tractor-trailer and that they did not prolong the stop beyond its permissible duration. Alternatively, the stop could also be treated as a continuation of the secondary inspection which would have normally occurred at the checkpoint, but for a short delay caused by construction. Additionally, based on the totality of the circumstances, Defendant was not in custodial interrogation when he made the statements that he now seeks to suppress. The Magistrate

Court therefore **RECOMMENDS** that the District Court, after an independent review of the record, **DENY** Defendant's Motion to suppress and supplemental briefing. (Dkt. Nos. 22, 30.)

NOTICE OF RIGHT TO OBJECT

Within 14 days of being served a copy of this report, a party may serve and file specific, written objections to the proposed recommendations. A party may respond to another party's objections within 14 days after being served with a copy thereof. The district judge to whom this case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen days after service shall bar an aggrieved party from *de novo* review by the District Court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the District Court, except on grounds of plain error or manifest injustice.

Signed on March 13, 2019, at Laredo, Texas.

Diana Song Quiroga

DIANA SONG QUIROGA
UNITED STATES MAGISTRATE JUDGE