UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

-vs- **Case No. 6:05-cr-109-Orl-22JGG**

FELICIA ROSSER

ORDER

I. BACKGROUND

This cause comes before the Court on Defendant Felicia Rosser's Motion to Suppress Evidence (Doc. No. 62), filed on July 17, 2005, and the United States' Response in Opposition to Motion to Suppress Physical Evidence (Doc. No. 75), filed on August 11, 2005.

Felicia Rosser, a black woman, is 37 years old and has a 10th grade education.[1] Rosser "is charged with conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. § 846 and 841(a)(1)."[2] Agents with Immigration and Customs Enforcement ("ICE") were using a court-authorized wire tap "to investigate Christopher Malcom's involvement in controlled substance violations" when conversations between Malcom and Rosser were intercepted.[3]

Malcom, who lived in Orlando, Florida at the time, had recently agreed to assist Rohan Taylor, who lived in Scottsdale, Arizona at the time, with a shipment of what authorities believed

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[1] *See* Response in Opposition to Motion to Suppress Physical Evidence ("Response") (Doc. No. 68) at 2.

[2] *Id.* at 1; *see also* Criminal Complaint (Doc. No. 1) at 1.

[3] Response (Doc. No. 68) at 1-2.

would be marijuana to the east coast.[4] Taylor asked Malcom to provide him with a delivery address via fax.[5] On February 28, 2005, Malcom called Rosser, who was in Newman, Georgia at the time, wanting Rosser to fax him an address.[6] On March 2, 2005, Rosser provided the following address to Malcom: "Mail-N-Copy, Merchant Crossing and 44F Bullsboro Drive, Newnan, GA 30363."[7] Rosser "reminded Malcom to put her name on the package."[8] "Based on those telephone intercepts, ICE agents notified sheriff's deputies in Coweta County, Georgia about the shipment to Rosser that was to be delivered to Mail-N-Copy, located at 44F Bullsboro Drive, Newnan, Georgia."[9] ICE intercepted a phone call at 6:51 p.m. on March 2, 2005 during which Taylor told Malcom that he should expect a shipment early the next morning.

Based on evidence adduced at the hearing on Defendant's Motion to Suppress held before this Court on August 12, 2005, the sheriff's deputies in Coweta County, Georgia set up surveillance so they could monitor any package pick-ups at the Mail-N-Copy on March 3, 2005. At some point the deputies were given a tracking number for the package. The deputies also learned that the package would have a label indicating that it came from Springfield, Massachusetts, be addressed to Delicia Rosses [sic], and weigh approximately 20 pounds. The

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[4] *Id.* at 3; *see also* Affidavit in Support of Application ("Affidavit") (Doc. No. 1), ¶ 9 at 5.

[5] Response (Doc. No. 68) at 1.

[6] Affidavit (Doc. No. 1), ¶ 11 at 6.

[7] *Id.*, ¶ 13 at 6.

[8] *Id.*

[9] Response (Doc. No. 68) at 2.

officers were also told by ICE that it was believed that a black female would be picking up the package, but the ICE agents were "never completely sure" of Rosser's race. An officer entered the Mail-N-Copy and, without examining packing slips, observed two boxes that could have fit the description previously given to them by ICE. The officers' strategy, according to Captain Tony Brown, was to watch and wait for someone to pick up the boxes and to "check out whoever picked them up."

After approximately six hours, two female customers in different vehicles arrived at the Mail-N-Copy simultaneously. Although Rosser was one of the two female customers, the officers were not sure which of the two she was. The officers observed both women retrieve packages. The officers pursued both vehicles and stopped both females. The race of the second female customer is unknown.

"[Corporal] Brian Hutchins, who is also a canine handler,"and Captain Brown are the officers who stopped Rosser.[10] Corporal Hutchins estimated that they followed Rosser for less than half a mile before stopping her. Corporal Hutchins approached the driver's side of Rosser's vehicle and asked Rosser for her license and other car related papers. Captain Brown testified that at that point Rosser was under investigation and she was not free to go. When Rosser could not immediately find her license, Hutchins asked her to step outside and to the rear of her vehicle. This placed Rosser between her vehicle and Corporal Hutchins's vehicle. Hutchins's police dog, who was inside Hutchins's vehicle, barked almost continuously throughout the stop. Captain Brown was able to view the package in Rosser's vehicle and saw that it came from Massachusetts,

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[10] Response (Doc. No. 68) at 2.

thus corroborating the information given to Coweta County law enforcement by ICE. Captain Brown then used his radio to alert other law enforcement that he and Corporal Hutchins had detained the right person and that they could release the other vehicle.

Captain Brown told Rosser that she was stopped because a drug dog had "alerted" on her package earlier that day.[11] At the hearing on Rosser's Motion to Suppress, it became clear that there were never any drug dogs employed in this case. At some point, "Rosser told Corporal Hutchins that she was asked to pick up the package."[12] Captain Brown asked Rosser if she knew what was in the box, and Rosser said no. Brown then said, "well, I got a good idea there's drugs in the box." Rosser did not reply. Brown asked Rosser if she would mind if he and Corporal Hutchins searched the box, and Rosser said "go ahead." Rosser was not *Mirandized* at the scene, nor was she told that she could refuse to consent to the search.[13] "After finding marijuana inside the package, Corporal Hutchins arrested Rosser."[14] The officers' weapons were in their holsters throughout the entire stop, the officers spoke to Rosser in an even tone, and no physical force was used in effecting the arrest.

In her Motion, Defendant Rosser requests the suppression of "any and all evidence of contraband found as a result of the stop and search of the Defendant or the vehicle which she was

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[11] Captain Brown testified that just as he began speaking with Rosser, a third officer, Sergeant Finegar, arrived at the scene. The entire stop was captured on tape by the video camera in Corporal Hutchins's car, and at no point does Sergeant Finegar appear on camera.

[12] *Id.*

[13] Captain Brown testified that the officers had consent forms and *Miranda* forms that they could have given to Rosser for her to sign, but they did not do so.

[14] Response (Doc. No. 68) at 2.

driving, more specifically, any marijuana allegedly found and stolen/seized by the government."[15] Rosser argues in her Motion that the "alert" of a drug dog provided insufficient probable cause to search Rosser's package because such dogs are inherently unreliable. Because there were no drug dogs involved, Rosser presented additional arguments in favor of the suppression of any evidence seized at the August 12, 2005 hearing.

First, the Government argued at the hearing that the stop and search of Rosser's vehicle were proper under the automobile exception to the Fourth Amendment's warrant requirement. *See United States v. Watts*, 329 F.3d 1282 (11th Cir. 2003). The Government further asserts that suppression of any physical evidence seized pursuant to the search would be improper given that Rosser voluntarily consented to the search. *See United States v. Espinosa-Orlando*, 704 F.2d 507 (11th Cir. 1983).

The Defense countered that the automobile exception is inapplicable because the officers allowed Rosser to enter her vehicle with the package rather than immediately stopping her when she exited the Mail-N-Copy. The Defense further argued that the officers had no reasonable suspicion to stop Rosser whereas there was no drug dog on the scene and the officers were not aware of the substance of the package, the appearance of the package, or Ms. Rosser's appearance. According to the Defense, the fact that the officers stopped both females who exited the Mail-N-Copy with packages at the same time demonstrates that the officers knew that one of the females was the wrong person, even after the officers had conducted six hours of surveillance. The Defense also contended that a black person carrying a package should not be indicative of criminal

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[15] Motion to Suppress Evidence ("Motion to Suppress") (Doc. No. 62) at 1.

activity. Regarding the consent issue, the Defense argued that Rosser's consent was vitiated by the officers' lie that a drug dog had previously alerted on her package. Circumstances that weigh against the voluntariness of Rosser's consent include, according to the Defense, that Rosser was stopped on a busy road in a dangerous location, her license was taken away from her immediately, and she was told that she was not free to go. Without reasonable suspicion or probable cause or valid consent from Rosser, the Defense argues that the fruit of the poisonous tree doctrine should provide for the suppression of any evidence seized from the package and any evidence or statements that followed after the allegedly illegal search and seizure.

II. DISCUSSION

"The Fourth Amendment applies to seizures of the person, including brief investigatory stops such as the stop of the vehicle here." *United States v. Cortez*, 449 U.S. 411, 418 (1981) (citations omitted). "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Id.* (citations omitted). Law enforcement officers are justified in stopping and briefly detaining "a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). The Supreme Court in *Sokolow* went on to state:

> The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'" [*Terry*, 392 U.S. at 27]. The Fourth Amendment requires "some minimal level of objective justification" for making the stop. *INS v. Delgado*, 466 U.S. 210, 217 (1984). That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a

> crime will be found," *Illinois v. Gates*, 462 U.S. 213, 238 (1983), and the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause, *see United States v. Montoya de Hernandez*, 473 U.S. 531, 541, 544 (1985).

490 U.S. at 7. The Court "must consider 'the totality of the circumstances'–the whole picture" in examining the validity of Rosser's stop. *Id.* at 8; *see also United States v. Yuknavich*, 419 F.3d 1302, 1311 (11th Cir. 2005). It is imperative, then, to take into account the information possessed by the officers before they stopped Rosser. *See Yuknavich*, 419 F.3d at 1311 ("[t]o determine whether the officers had reasonable suspicion . . . , we must take stock of everything they knew before searching").

The officers knew to expect that the package at issue would likely be delivered to the Mail-N-Copy on March 3, 2005. The officers believed that one of two packages inside the Mail-N-Copy fit the description given by ICE, but failed to ascertain whether either of them was the package they were looking for prior to stopping Rosser. Before stopping Rosser, the officers possessed no details about Rosser's physical description aside from the ICE agents' suspicion that she might be black. Moreover, none of the officers testified as to any pre-stop observations of Rosser. There was no testimony that Rosser behaved suspiciously or that her actions otherwise indicated that she was engaged in criminal activity. Six hours of surveillance revealed very little information. In essence, the officers stopped Rosser because she was one of two female customers who may or may not have been Rosser who picked up a box that may or may not have been the package at issue. Those facts, even under the totality of the circumstances, are insufficient to justify a finding that the officers had reasonable suspicion when they stopped Rosser. As such, the stop was violative of Rosser's Fourth Amendment right to be free from an unreasonable seizure.

The evidence at issue need not be suppressed, however, if Rosser voluntarily consented to the search of the package. "In order to eliminate any taint from an involuntary seizure or arrest, there must be proof both that the consent was voluntary and that it was not the product of the illegal detention." *United States v. Berry*, 670 F.2d 583, 605 (5th Cir. 1982) (citations omitted). "Voluntariness is a question of fact to be determined from all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973).

The Defense argues that Rosser's consent is vitiated by Captain Brown's false statement that a police dog alerted the officers that Rosser's package contained illegal drugs. "A consent search is unreasonable under the Fourth Amendment if the consent was induced by deceit, trickery, or misrepresentation by police." *United States v. Harth*, 652 F. Supp. 1463, 1467 (S.D. Fla. 1987), *aff'd* 842 F.2d 337 (11th Cir. 1988). Here, it is clear that Captain Brown intended to deceive Rosser. It is plausible that Rosser would not have consented to the search of the package as readily as she did had Captain Brown not misled Rosser into thinking that law enforcement knew that the package contained drugs. Therefore, Captain Brown's false statement is one factor that weighs against a finding of voluntary consent.

Other factors relevant to a voluntariness analysis include whether the defendant was effectively advised of his or her "right to remain silent or of his [or her] right respecting counsel at the outset of interrogation, as is . . . required by *Miranda*," *Davis v. North Carolina*, 384 U.S. 737, 740 (1966), the defendant's "knowledge of a right to refuse" consent, *Schneckloth*, 412 U.S. at 249, "the temporal proximity of an illegal arrest and confession, intervening circumstances, and the purpose and flagrancy of the official misconduct." *Berry*, 670 F.2d at 605.

Here, there was very little time and no intervening circumstances between the commencement of the stop and Rosser's consent to search the package. The Eleventh Circuit in *United States v. Miller*, 821 F.2d 546, 549 (11th Cir. 1987) applied the *Berry* standard "in assessing the issue of whether there existed a voluntary consent to search following an illegal traffic stop." *United States v. Valdez*, 931 F.2d 1448, 1452 (11th Cir. 1991). In *Miller*, an "officer requested the defendant's consent to search the vehicle almost immediately upon the stop." *Id.* The defendant in *Miller* signed a consent form authorizing the officer to search his vehicle; however, the court "noted that the extent to which the officer emphasized Miller's right to withhold consent was unclear." *Id.* Relying on "the Supreme Court's recognition that 'a traffic stop is an "unsettling show of authority" that may "create substantial anxiety,"' *Delaware v. Prouse*, 440 U.S. 648, 657 (1979), [the court] concluded in *Miller* that 'there were insufficient intervening circumstances that might have reduced the coercive nature of the stop and permitted [Miller] to make a voluntary decision about the consent to search.'" *Valdez*, 931 F.2d at 1452. Likewise, in *Valdez* the Eleventh Circuit held that the defendant's "consent was tainted by [an] illegal pretextual stop and detention." *Id.* In that case, "immediately after requesting to see Valdez's driver's license and then asking whether Valdez was aware of why he had been stopped, [the officer] asked Valdez for . . . consent to search [his vehicle], informing Valdez that Valdez did not have so to consent." *Id.* Because "Valdez was not afforded an opportunity to consult with an attorney" or given "any appreciable time in which to reflect upon whether to give or not to give his consent to search the vehicle," the court found that Valdez's consent to search was not voluntary. *Id.* In the case at hand, Rosser was removed from her vehicle almost immediately after she was stopped. She was positioned between her vehicle and a police vehicle that had a dog continuously barking

inside. By the officers' own admission, Rosser was under investigation as soon as she was asked for her driver's license; however, Rosser was not given her *Miranda* rights at the scene. Additionally, Rosser was told a lie to induce her consent and she was never told that she could refuse to consent. There is no evidence in the record that Rosser knew that she had a right to refuse to consent. Although "a defendant's knowledge of his [or her] right to refuse consent is a factor but not a requirement in determining voluntariness," *United States v. Espinosa-Orlando*, 704 F.2d 507, 512 (11th Cir. 1983), the circumstances surrounding Rosser's consent, when taken together, show that her consent was not voluntary.

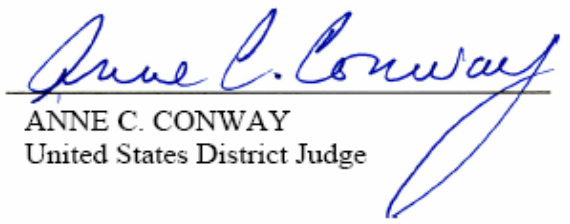
The Government argues that even if the Court finds that Rosser's consent was not voluntary, then the evidence should not be suppressed because the evidence seized falls within the automobile exception to the Fourth Amendment. The automobile exception to the warrant requirement allows for warrantless searches of automobiles where: (1) an automobile is readily mobile, that is, operational, and (2) probable cause exists. *United States v. Watts*, 329 F.3d 1282, 1286 (11th Cir. 2003). The first prong of the test is easily met in that Rosser's vehicle was readily mobile. However, for the aforementioned reasons, the contents of the package and any statements Rosser made about them were the product of an illegal detention and therefore must be ignored in determining whether the officers had probable cause. *See United States v. Thompson*, 712 F.2d 1356, 1362 (11th Cir. 1983) (the contents seized during the search of a passenger compartment of a vehicle could not provide a basis for establishing probable cause for purposes of the automobile exception where the evidence obtained was "the fruit of an illegal detention"). Without the evidence pertaining to the package, the officers lacked the requisite probable cause under the automobile exception. *See id.*

III. CONCLUSION

Based on the foregoing, it is ordered as follows:

1. Defendant's Motion to Suppress Evidence (Doc. No. 62) is GRANTED. The evidence seized during the search of the package and any statements made by Rosser prior to the advisement of her *Miranda* rights are hereby suppressed and therefore inadmissable at trial.

DONE and **ORDERED** in Chambers, Orlando, Florida on September 27, 2005.



ANNE C. CONWAY
United States District Judge

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