

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION II

STATE OF WEST VIRGINIA

v.

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FELONY NO. 17-F-186
Judge Russell M. Clawges, Jr.

GORDON WADE SWIGER,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

On the 27th day of June 2017, the 7th and 8th days of August 2017, and the 24th Day of August, 2017, this matter came before the Court on the Defendant, John Skidmore and Nickolas Velez's Motions to Suppress Evidence," filed June 21, 2017. Defendant Velez filed his Motion to Join Co-Defendants' Motions to Suppress on August 25, 2017. During these pre-trial suppression hearings the Court heard the testimony of Granville Police Department Officer Aaron Huyett, Morgantown City Police Department Detective Daniel Trejo, Morgantown City Police Department Officer Robert Meador, Morgantown City Police Department Officer Dean Cantis, and co-Defendant John Russell Skidmore.

The Defendant appeared in person and was represented by counsel, Ryan J. Umina. Co-Defendant Nickolas Velez appeared in person and ands was represented by counsel, J. Tyler Slavey and Brandon Shumaker. Co-Defendant John Russell Skidmore appeared in person and was represented by counsel, J. Michael Benninger. The State of West Virginia was represented by W. Chad Noel, Assistant Prosecuting Attorney for Monongalia County.

Defendant filed "Defendant Gordon W. Swiger's Joining in Co-Defendants' Memorandums in Support of Motions to Suppress" on September 5, 2017. The State filed its

"Response in Opposition to the Defendants' Various Motions to Suppress" on September 11, 2017.

Defendant Swiger asks the Court to suppress all of the evidence, including tangible evidence, items, and exhibits in the State's possession and Defendant's statements, admissions, and confessions made to law enforcement and which are known to the State. Defendant Swiger contends the stop of Co-Defendant Skidmore's vehicle by the Granville Police Department on Interstate 79 was an unlawful traffic stop. Defendant Swiger also contends that the search warrant issued and executed upon Co-Defendant Skidmore's vehicle was unlawful.

FACTS

On Sunday March, 5, 2017, at approximately 7:25 p.m., an alleged armed robbery took place at 221 Willey Street, Morgantown, Monongalia County, West Virginia. The victim, Brett McIntyre, reported the alleged crime to MECCA 911 at 9:32 p.m. The victim reported that three white males had forced entry into his apartment and were armed. The victim further reported to the officer who responded to the scene that the three males had masks on and were wearing black sweatshirts. The victim later reported that his cell phone and a jar of marijuana were stolen. At 9:40 p.m. the first "be on the lookout" or BOLO was issued. Specifically, the BOLO notice was:

All units stand by for BOLO regarding suspects in a burglary that occurred at 221 Willey Street. All units be on the lookout for three white males wearing masks wearing black sweatshirts. One male armed with a rifle involved in a burglary at 221 Willey Street. Unknown direction of travel. Occurred about five minutes ago, end of BOLO.

While reviewing surveillance footage from cameras near the crime location, one of the investigating officers obtained additional identifying information regarding the suspect's vehicle. Specifically, Officer Dean Cantis determined the vehicle was possibly a white four door Audi. MECCA then re-broadcast the BOLO with the new information at 10:24 p.m.

All units stand-by for updated previous BOLO burglary Willey Street. All units be on the lookout for possible suspect vehicle white Audi A4 model.

At approximately 10:45 p.m., Granville Police Department Patrolman Aaron Huyett was on routine road patrol, observing traffic on Dents Run Boulevard in Granville at the Riverside Apostolic Church. While observing traffic flow, Officer Huyett observed a white Audi sedan with occupants in the vehicle wearing dark clothing pass by his location. Officer Huyett pulled out and began following the white vehicle on Dents Run Road to Fairmont Road and observed that it was an Audi A4. He observed at least three occupants in the vehicle. Officer Huyett radioed for his sergeant, Joshua Slagle, to come to his location. Sgt. Slagle radioed for any available county unit to respond to the location, as well as to notify Morgantown Police.

The subject vehicle then turned onto Interstate 79, south bound. When Sgt. Slagle advised he was close, Officer Huyett initiated a felony stop of the vehicle at mile marker 151.5. At that point, Officer Huyett was between two and two and one-half miles out of his jurisdiction. Officer Huyett testified that he initiated a felony traffic stop. He did so because the BOLO indicated a felony was committed involving a firearm. Officer Huyett was questioned about the details of the stop.

Mr. Benninger: Okay. Did you also radio your sergeant?
Officer Huyett: Yes, sir.
Mr. Benninger: Okay. Did your sergeant provide you any information?
Officer Huyett: No, sir.
Mr. Benninger: Just that he agreed to come with other officers to back you up as you made the stop?
Officer Huyett: Yes, sir.
Mr. Benninger: Had they arrived behind you? Were they immediately there at the time of the stop or did they come up on your stop out on 79?
Officer Huyett: Sergeant Slagle approached my stop, roughly, five seconds after me initiating my overhead lights.
Mr. Benninger: So he wasn't far behind then?
Officer Huyett: No, sir.
Mr. Benninger: And was there just Sergeant Slagle in - well, did he have any

other officers or any other vehicles come in support of the stop?

Officer Huyett: There were several vehicles that did come to support the stop.

Mr. Benninger: How many? And you can refer to your report if you want.

Officer Huyett: There would be three additional vehicles to support the stop.

Mr. Benninger: How many officers total?

Officer Huyett: There'd be Sergeant Slagle, his canine, two Monongalia County deputies and one patrolman from Star City.

Mr. Benninger: What was the purpose of the K-9 unit?

Officer Huyett: The K-9 unit is Sergeant Slagle's detail.

Mr. Benninger: I see. Was the canine deployed to search for drugs?

Officer Huyett: No, sir.

Mr. Benninger: Well, didn't -- didn't circle the vehicle?

Officer Huyett: No, sir.

Mr. Benninger: Okay. So at the time, had the occupants of the vehicle exited the vehicle by the time Sergeant Slagle arrived and the other officers arrived?

Officer Huyett: No, sir.

Mr. Benninger: Okay. So had you just made the stop, lights on, vehicles are off the road along I-79 South, right hand lane berm; yes?

Officer Huyett: Yes, sir.

Mr. Benninger: And you were sitting there with -- and you had not verbalized over the megaphone in your cruiser yet to direct the occupants and the driver what to do; yes?

Officer Huyett: No, sir, I'd not begun that.

Mr. Benninger: Okay. You waited for Slagle and the other officers who were coming in support to arrive before you did so?

Officer Huyett: Yes, sir.

Sgt. Slagle provided cover while Officer Huyett began to order all persons out of the vehicle. There were four individuals in the vehicle: John Skidmore, Gordon Swiger, Nickolas Velez, and Anthony Jimenez. At this time, Sgt. Thomas and Sgt. McRobie of the Monongalia County Sheriff's Department were also on scene. After the driver and the driver-side rear passenger exited the vehicle, Patrolman Nick Junkins of the Star City Police Department assisted in securing the two other passengers. While securing the driver and passengers, Officer Huyett inquired if any of them had weapons or if there were weapons inside the car. The driver and owner of the vehicle, Co-Defendant Skidmore, stated there was a black airsoft rifle in the trunk and

there was a handgun under the passenger seat. Co-Defendant Skidmore was not sure if the handgun was loaded. These were the only questions asked of the suspects.

Each of the four individuals were handcuffed and placed in the back seat of a police cruiser. Officer Huyett testified that after they were cuffed and placed in a cruiser, he did not speak with them, question them, or even ask for identification. Officer Huyett detained the suspects until Morgantown Police came to the scene; they were not under arrest, but were not free to leave.

Officer Huyett testified that while standing on the roadway there were four items he could see in plain view in the vehicle – a dark hat, a black bandana, a small plastic baggie with what looked like marijuana inside, and a 30-round airsoft rifle magazine. However, Officer Huyett testified that he did not enter the vehicle, nor did he secure any evidence from the vehicle. Officer Huyett also testified that he did not smell the odor of marijuana coming from the vehicle or from any of the occupants.

Officer Huyett further testified that Officer Troy Webber of the Morgantown Police Department arrived approximately twenty minutes after the individuals were secured in police cruisers. It was decided to have the suspect's vehicle towed and the Morgantown Police Department would obtain a search warrant for the vehicle. Officer Huyett believed that Sgt. Thomas and Sgt. McRobie of the Monongalia County Sheriff's Department, along with Officer Junkins transported Defendant Velez and the other three individuals to the Morgantown Police Department. Sgt. Slagle remained on scene and waited for the tow service.

Detective Daniel Trejo of the Morgantown Police Department was the on-call detective on the evening of March 5, 2017. He testified that he was notified of the reported armed robbery at approximately 9:52 p.m. After going to the station to retrieve a camera, Det. Trejo went to 221 Willey Street and began processing the crime scene. He arrived on scene at 10:26 p.m. When

Det. Trejo learned of the traffic stop of the possible suspect vehicle with individuals that matched the descriptions from the video surveillance, he instructed Officer Webber to secure the vehicle and have it towed to the station to be processed. He further instructed Officer Webber to obtain a search warrant for the vehicle and to detain the individuals and transport them for questioning. A blue/white star bandana, a Bersa .380 handgun, .380 Winchester ball ammunition, a Valken tactical battle machine airsoft rifle, a black magazine for an airsoft rifle, a jar of marijuana, and several cell phones were recovered from the vehicle, pursuant to the search warrant.

The four suspects were placed in separate questioning rooms at the Morgantown Police Station and interviewed individually. Det. Trejo and Detective Benjamin Forsythe conducted the interviews. Defendant Swiger was questioned first, beginning at 12:17 a.m. on March 6, 2017. Defendant Swiger gave a statement but did not provide any substantive information during his interview. At the conclusion of his interview Defendant Swiger was advised that he was under arrest for the crime of robbery in the first degree.

Anthony Jimenez was interviewed next, starting at 12:59 a.m. Following questioning, Jimenez was not charged with a crime and was released. Co-Defendant Skidmore was questioned starting at 1:37 a.m. Co-Defendant Skidmore gave a statement and confessed to the robbery. Det. Trejo testified that Co-Defendant Skidmore stated that Co-Defendant Velez carried a firearm owned by Mr. Swiger during the commission of the crime. Co-Defendant Nickolas Velez was interviewed beginning at 2:27 a.m. Co-Defendant Velez also gave a statement and confessed to the robbery.

Det. Trejo further testified that once all four interviews were completed, the three Defendants -- Skidmore, Swiger, and Velez -- were transported to the basement of the police station for prisoner processing, which involves fingerprints, photographs, and entering

information into the computer system. The Defendants were then transported for county processing and arraignment before a Magistrate Judge. Det. Trejo estimated that Defendant Swiger was arraigned between 8:00 and 9:00 a.m. on March 6, 2017.

Officer Robert Meador testified that he and Officer Troy Webber went to the stop on I79 to assist the Granville police. They arrived between 11:30 p.m. and midnight. The Granville officers pointed out to him the items in plain view in the vehicle. Officer Meador then helped with the transportation of the suspects to the Morgantown police station. He testified that the suspects were first detained by Granville police, then by one or more county Sheriff's officers, then by the Morgantown police. He believes all four were transported to the Morgantown police station by Morgantown officers.

Officer Meador testified that he then participated in the preparation of an affidavit and application for a search warrant of the suspect's vehicle. He was the affiant of the search warrant. Shortly after the suspects were brought to the station, Meador and Webber began working on the search warrant affidavit while Trejo and Forsythe interviewed the suspects. No information from the suspects' interviews was used in obtaining the search warrant. Officers Meador and Webber met Monongalia County Magistrate James Nabors in the Cheat Lake area of Monongalia County. Magistrate Nabors signed the search warrant at approximately 1:30 a.m. Officer Meador further testified that he, along with Officer Webber, and Detectives Trejo and Forsythe participated in searching the suspect's vehicle. Officer Meador helped document what was found while Forsythe and Webber performed the search. He stated that items were removed from the vehicle between 4:44 a.m. and 5:26 a.m. March 6, 2017.

On May 5, 2017, the Monongalia County Grand Jury indicted the Defendant on one count of Robbery in the First Degree and one count of Conspiracy.

DISCUSSION

The stop of Defendant John Skidmore's vehicle outside the jurisdiction of the Town of Granville was not illegal

A. Jurisdiction

Defendant Swiger argues that the stop of Co-Defendant Skidmore's vehicle by Officer Huyett outside the Town of Granville was illegal. Defendant Swiger further argues that Officer Huyett did not have a factual or legal basis upon which he could have objectively developed any reasonable grounds to believe the occupants of the white Audi had committed a felony. The Court disagrees. The Court FINDS that, based on the BOLOs and his observations, Officer Huyett properly initiated an investigatory stop. All law enforcement personnel were advised to be on the lookout for three white males wearing dark clothing who were involved in an armed burglary and traveling in a white Audi A4 vehicle, but no known direction of travel. Officer Huyett observed a white Audi A4 vehicle with three or four individuals inside, wearing dark clothing approximately one hour after the first BOLO was issued and approximately twenty minutes after the second BOLO was issued.

Officer Huyett did not stop the vehicle because of any known or observed traffic violation. He followed and stopped the vehicle because it and the occupants matched the descriptions given in the BOLOs. Officer Huyett testified that he was uncertain as to whether there were 3 or 4 males in the car but otherwise the descriptions matched. Therefore, he had reasonable cause to make the stop. Officer Huyett immediately notified his Sergeant that he was following the possible suspect vehicle. Sergeant Slagle then radioed for County officers and for the Morgantown Police to be notified. Officer Huyett was justified in performing a "felony stop" in which all occupants of the vehicle were cautiously and methodically removed for officer safety,

due to the report of a rifle being used in the burglary.

Defendant Swiger contends that because the stop was made outside the jurisdiction of Granville, Officer Huyett was limited in his power to stop, search, and arrest a person. Based on State ex rel. Gutske, 205 W.Va. 72 (1999) and State v. Horn, 232 W.Va. 32 (2013), the Defendant argues that Huyett was limited to the same authority to arrest as that of a private citizen. Defendant Swiger goes on to argue that Officer Huyett could not have been acting as a private citizen when he made the stop because he used the indicia of his office to facilitate the stop. This is referred to as the "color of office" doctrine. The "under the color of office" doctrine prohibits a law enforcement officer from using the indicia of his or her official position to collect evidence that a private citizen would be unable to gather. When officers unlawfully assert official authority in order to gain access to evidence, that evidence must be suppressed. Gutske at 81-81.

But Horn holds that a police officer who has reasonable grounds to believe a person has committed a crime, can act beyond his territorial jurisdiction and affect a stop and arrest. Looking at the facts in this case in light of the facts and circumstances in the Gutske and Horn cases, the factual basis for Officer Huyett's stop in this case is as strong as or stronger than that in Gutske and Horn.

Additionally, Officer Huyett and Officer Junkins performed this stop and detainer in the presence of Monongalia County Sheriff deputies. Thus, the investigatory stop was performed in concert with officers who were within their territorial jurisdiction. The holdings in Gutske and Horn are not applicable under the set of facts in this case. The Court FINDS that the stop of Co-Defendant Skidmore's vehicle was not illegal.

B. Standing

When a defendant, as a passenger in a vehicle, has no property or possessory interest in the vehicle or the items seized from the vehicle, the defendant has suffered no invasion of a legitimate expectation of privacy. State v. Tadder, 173 W.Va. 187 (1984).

During questioning, Co-Defendant Velez told Detectives Trejo and Forsythe that when he and Co-Defendant Skidmore entered Mr. McIntyre's apartment he carried a pistol that belonged to Defendant Swiger. After they left the apartment and returned to the vehicle, Co-Defendant Velez returned the pistol back to Co-Defendant Swiger.

Defendant Swiger has asserted no claim of ownership in any of the items seized, including the pistol. In other words, Defendant Swiger, as a passenger, had no property or possessory interest in the vehicle or any of the items seized. Therefore, Defendant Swiger has suffered no invasion of a legitimate expectation of privacy. The Court FINDS that Defendant Swiger lacks standing to assert a violation of his constitutional right against unreasonable search and seizure.

SUMMARY

Defendant Swiger argues that all information relied upon by the Morgantown Police to obtain the search warrant was derived from information and evidence learned and secured from an illegal traffic stop of Defendant's vehicle. Defendant Swiger urges the Court to suppress all evidence secured from the traffic stop, from the search of Co-Defendant Skidmore's vehicle, and to suppress any inculpatory statements he may have made. The Court has determined that the stop was not illegal and the statements made were voluntary; therefore, the information and evidence gained need not be suppressed.

ORDER

After hearing the evidence offered and the arguments of counsel, for the reasons stated above, the Court has concluded that the Defendant's Motion to Suppress Evidence is DENIED.


It is so ORDERED.

The Circuit Clerk is directed to send certified copies of this Order to the following:

The Office of the Prosecuting Attorney
Monongalia County Justice Center
75 High Street, Suite 11
Morgantown, WV 26505

Ryan J. Umina, Esq.
CRANSTON & EDWARDS, PLLC
1200 Dorsey Avenue, Suite II
Morgantown, WV 26505

ENTER: December 15, 2017



Russell M. Clawges, Jr., Chief Judge
17th Judicial Circuit, Division II

11 ENTERED: Dec 15, 2017
DOCKET LINE 41, Jeani Friend, Clerk