

ENTERED

August 21, 2018

David J. Bradley, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION****UNITED STATES OF AMERICA****VS.****NELSON REYNERO-SERNA,****Defendant.**§
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§**CRIMINAL ACTION NO. 5:18-CR-335****REPORT AND RECOMMENDATION**

Defendant Nelson Reynero-Serna is charged with unlawfully transporting four undocumented aliens in violation of 8 USC § 1324. (Dkt. No. 5). On June 4, 2018, Defendant filed a Motion to Suppress Stop, Arrest, and Evidence (Dkt. No. 28), asking the Court to suppress all evidence seized in this case. Defendant claims that the stop of his vehicle, his arrest, and all resulting evidence are fruit of an unlawful search and seizure. (*Id.*) The Government conversely claims that law enforcement only stopped Defendant's vehicle after developing reasonable suspicion that he committed a traffic violation. (Dkt. No. 33, 3).

The Court began a suppression hearing on July 10, 2018, which was recessed and continued on July 17, 2018. Sgt. David Liendo of the Webb County Sheriff's Office and United States Border Patrol Agents Mark Lugge and Juan Arteaga testified at the hearings. The Government introduced as an exhibit two dashcam videos of the traffic stop in question. (Dkt. No. 39-3). The Court has considered the evidence and the applicable law. For the reasons set forth below, the undersigned recommends that the District Court deny Defendant's motion to suppress.

I. Factual Findings

On April 11, 2018, Sgt. David Liendo of the Webb County Sheriff's Office received a radio dispatch alerting him that several subjects were seen running with backpacks near the Ponderosa Regional Landfill off of Highway 359, about fifteen miles from Laredo, Texas. (Hr'g at 1:47 p.m.). While no such subjects were seen near the landfill by law enforcement closer to the location, Sgt. Liendo did observe a gray Nissan Altima traveling low to the ground on Highway 359 while traveling south from Highway 59 shortly after the dispatch alert. (Hr'g at 1:51 p.m.). Sgt. Liendo testified that when the back part of a vehicle rides low to the ground it could indicate that there are too many occupants, undocumented aliens, or drugs in the vehicle. (Hr'g at 1:52 p.m.).

Sgt. Liendo drove ahead of the Altima, then moved to the shoulder of the highway. (Hr'g at 1:55 p.m.). As the Altima approached him from the rear, Sgt. Liendo used his vehicle's rear radar to clock the Altima's speed, which read as 30 miles per hour. (Hr'g at 1:56 p.m.). This was in a 65 mile-per-hour speed zone. (*Id.*) The rear radar then registered a second reading of 55 miles-per-hour as a red pick-up truck swung around and passed the Altima. (*Id.*) Sgt. Liendo observed the pickup truck accelerate around the slow-moving Altima by temporarily crossing the highway median into the oncoming lane. (*Id.*) Sgt. Liendo testified that gravel near the median can sometimes cause vehicles to lose control, resulting in an accident. (Hr'g at 1:57 p.m.). He thus felt that the person driving the Altima committed a traffic violation by causing the pickup truck to cross the median. (Hr'g at 1:58 p.m.). In response, Sgt. Liendo ordered Capt. Salvador Johnson to stop the Altima. (Hr'g at 1:59 p.m.).

While the preceding events are described only from Sgt. Liendo's testimony at the hearing, everything that happens subsequently is described by both Sgt. Liendo's testimony and

dashcam video recordings from both Sgt. Liendo and Capt. Johnson's patrol vehicles.¹ Video from Capt. Johnson's dashcam shows him pulling over the Altima and both his vehicle and the Altima coming to a stop at 5:53:37 p.m.² (Dkt. No. 39, Attach. 3, DVR 27253). This is the only visual recording of what transpired, but it lacks audio recording of the participants' verbal statements. At approximately the same time, video and audio from Sgt. Liendo's dashcam shows him following and pulling up behind Capt. Johnson's vehicle. (*Id.*, DVR 27240). Although this recording contains audio from Sgt. Liendo's person, the visual view of Defendant's vehicle and the interaction of the participants is blocked by Capt. Johnson's patrol vehicle. Thus, one can see the participants' actions from Capt. Johnson's vehicle and hear the communications between the participants from Sgt. Liendo's audio recording. Combining the two recordings together provides a factual record of what occurred during the stop.

In the video, Capt. Johnson approaches the passenger side of the Altima at 5:54:12 p.m. and appears to question the vehicle's occupants. (*Id.*, DVR 27253). Approximately fifteen seconds later, Sgt. Liendo approaches the driver's side of the Altima to question Defendant. (*Id.*) Before Sgt. Liendo can question Defendant, however, the video shows Capt. Johnson making a flicking motion with his hand. (*Id.*) Sgt. Liendo testified that when he approached the Altima, he immediately became suspicious because all of the passengers were looking down and avoiding eye contact with him. (July 10 Hr'g at 2:01 p.m.). Sgt. Liendo also testified that Capt. Johnson gave him a thumbs up and said, "They're undocumented." (Hr'g at 2:48 p.m.). Sgt.

¹ The videos were admitted into evidence in their entirety by the Government without objection from Defendant. (July 17 Hr'g at 2:26 p.m.).

² Sgt. Liendo testified that he and Capt. Johnson stopped Defendant's vehicle at approximately 7:54 p.m. (July 17 Hr'g at 2:14 p.m.). The video recording, however, proves that the stop actually occurred two hours earlier. Because the timestamp uses a 24-hour clock, it is possible that Sgt. Liendo misread "17:54" as "7:54." And while this inaccuracy does give the Court reservations, it is overall not enough to discredit the rest Sgt. Liendo's testimony for purposes of Defendant's motion.

Liendo testified that he had observed Capt. Johnson speaking with the passengers, but did not overhear what was exchanged.³ (July 10 Hr’g at 2:47 p.m.).

At 5:54:45 p.m., the Defendant exits the Altima, and both Capt. Johnson and Sgt. Liendo begin to question him at the rear of the Altima. (Dkt. No. 39, Attach. 3, DVR 27253). Approximately thirty seconds later, Sgt. Liendo radios dispatch with the directive, “BP to my location.” (*Id.*, DVR 27240). Sgt. Liendo can be heard asking Defendant questions in Spanish⁴ shortly before the officers receive word that “Border Patrol has been advised.” (*Id.*, DVRs 27253, 27240). Sgt. Liendo continues to question Defendant over the next several minutes, alternating between Spanish and English. (*Id.*, DVR 27240). Sgt. Liendo asks in English to identify himself, to explain both why he has a firearm in the vehicle and why he was traveling so slowly on the highway. (Dkt. No. 39, Attach. 3, DVR 27240). Defendant can be heard answering in English that they were all travelling to go shooting at a ranch. (*Id.*) Sgt. Liendo then expresses skepticism to Defendant as to why a car full of passengers would be taking one firearm to a ranch to go shooting. (*Id.*) Sgt. Liendo also asks Defendant whether he has a key to enter the ranch, and Defendant responds that he does not need a key. (*Id.*). At 5:59:19 p.m., the video shows Sgt. Liendo greeting a U.S. Border Patrol (BP) agent and explaining that he stopped Defendant for a traffic violation. (*Id.*, DVRs 27253, 27240). One minute later, Sgt. Liendo tells the BP agent that he is going to ask the passengers what their plans were because they are “possibly illegal.” Sgt. Liendo then moves back to the Altima and speaks in Spanish with the passengers inside the Altima. At 6:01:49 p.m., Sgt. Liendo approaches Defendant and tells him that he is lying and that the passengers do not know Defendant. (*Id.*, DVR 27240). Sgt. Liendo tells Defendant that “they’re saying you went to pick them up on the side of the river” and then

³ Testimony from Capt. Johnson was not received, as the Government represented to the Court that he was unavailable due to being on a three-month medical leave. (July 17 Hr’g at 1:39 p.m.).

⁴ Neither party has provided the Court with an English translation of the audio.

informs him that he is “under arrest right now for smuggling of persons.” (*Id.*) After handcuffing Defendant at 6:01:54 p.m., Sgt. Liendo escorts Defendant to the back of his patrol vehicle. (*Id.*, 27253). The total elapsed time between when Capt. Johnson first approached the Altima and when Sgt. Liendo arrested Defendant is seven minutes and thirty-seven seconds, from 5:54:12 p.m. to 6:01:49 p.m. (*Id.*, DVRs 27253, 27240).

II. Analysis

The Fourth Amendment proscribes “unreasonable searches and seizures.” U.S. Const. amend. IV. A vehicle stop is a seizure within the meaning of the Fourth Amendment. *See Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005). For a traffic stop to be constitutional, an officer must have an objectively reasonable suspicion that some sort of illegal activity, such as a traffic violation, occurred or is about to occur, before stopping the vehicle. *See United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir.2005); *see also Whren v. United States*, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). “This rule provides law enforcement officers broad leeway to conduct searches and seizures regardless of whether their subjective intent corresponds to the legal justifications for their actions.” *United States v. Lopez-Valdez*, 178 F.3d 282, 288 (5th Cir.1999). Supreme Court and Fifth Circuit precedent make clear that an officer's subjective intentions have no impact on analyzing reasonable suspicion or probable cause because both are based on an objective test. *See Lopez-Moreno*, 420 F.3d at 432. Thus, “[s]o long as a traffic law infraction that would have objectively justified the stop had taken place, the fact that the police officer may have made the stop for a reason other than the occurrence of the traffic infraction is irrelevant for purposes of the Fourth Amendment.” *Id.* (quoting *Goodwin v. Johnson*, 132 F.3d 162, 173 (5th Cir.1997)); *see also Whren*, 517 U.S. at 813, 116 S.Ct. 1769

(concluding that pretextual traffic stop for minor traffic infraction was constitutional because “the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action”).

A court analyzes the legality of a vehicle stop under the two-pronged framework articulated in *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968). First, a court asks whether an officer’s action was justified at its inception. *Id.* Second, a court considers whether an officer’s actions were reasonably related in scope to the circumstances that justified the seizure. *Id.*

A. Validity of the Stop at Its Inception

A vehicle stop is justified at its inception when, before an officer stops a vehicle, he has “an objectively reasonable suspicion that some sort of illegal activity . . . occurred, or is about to occur.” *Lopez-Moreno*, 420 F.3d at 430. Reasonable suspicion exists when an officer “can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the search and seizure.” *Id.* (citing *United States v. Santiago*, 310 F.3d 336, 340 (5th Cir. 2002)).

By his motion, Defendant contends that Sgt. Liendo's traffic stop was a pretextual traffic stop. Defendant argues that Sgt. Liendo did not have reasonable suspicion that Defendant violated of the minimum-speed regulations in Texas Transportation Code § 545.363(a). Defendant bases his argument in part on the general assertion that people often enter Highway 359 at slow speeds. (July 17 Hr’g at 2:39 p.m.).

The Government responds that Defendant’s slow speed dangerously impeded traffic, as demonstrated by the red truck’s attempt to pass the Altima on the highway by crossing the median to switch lanes. (Dkt. No. 33 at 4). The Government further asserts that “[t]here was no

inclement weather at the time to justify the defendant's slow driving for safety reasons.” (*Id.* at 5). Sgt. Liendo testified that the sun was out and the weather “clear and hot” before he conducted the traffic stop. (July 10 Hr’g at 1:48 p.m.).⁵

Texas Transportation Code § 545.363(a) provides that “[a]n operator may not drive so slowly as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law.” “Slow driving, in and of itself, is not a violation of the statute; a violation only occurs when the normal and reasonable movement of traffic is impeded.” *Tex. Dep’t of Pub. Safety v. Gonzales*, 276 S.W.3d 88, 93 (Tex. App.—San Antonio 2008, no pet.).

Defendant argues that the purpose of section 545.363(a) is to prevent drivers from blocking or backing up traffic. (July 17 Hr’g at 2:29 p.m.). He argues that since the incident at issue involved only one vehicle—the red truck—that merely wanted to pull into the other lane to pass the other vehicle, it cannot be said that Defendant impeded “traffic.” *Id.*

The Court finds that based on the evidence presented, Sgt. Liendo had an objectively reasonable suspicion that the Defendant's Altima was in violation of the Texas's minimum-speed regulations to justify the stop of the vehicle. In determining whether law enforcement developed reasonable suspicion for a stop, the Court considers the totality of the circumstances. “Reasonableness, measured ‘in objective terms by examining the totality of the circumstances’ ‘eschew[s] bright-line rules, instead emphasizing the fact-specific nature of the . . . inquiry.’” *United States v. Brigham*, 382 F.3d 500, 507 (5th Cir. 2004) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)). This approach “allows officers to draw on their own experience and

⁵ The Government's reference to the clear weather conditions is apparently intended to counter any suggestion that Defendant's slow driving was justified by poor weather conditions. *See e.g. United States v. Ross*, 400 F. Supp. 2d 939, 946 (W.D. Tex. 2005) (finding no reasonable suspicion where a vehicle was traveling fifteen miles below the speed limit through a construction zone in light rain). However, Defendant does not raise this argument.

specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’” *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

Sgt. Liendo testified that he received radar training four years ago prior to the date of the stop and that he had calibrated the radar’s tuning fork the morning of the incident at issue. (July 10 Hr’g at 2:05 p.m.). Sgt. Liendo also testified that the radar on the rear of his patrol vehicle registered the Altima travelling at 30 miles per hour in a 65 mile-per-hour speed zone, or less than half the speed limit. (Hr’g at 1:56 p.m.). The rear radar then registered a second reading of 55 miles-per-hour as a red pick-up truck swung around the Altima and passed it. (*Id.*). Sgt. Liendo observed the pickup truck accelerate around the slow-moving Altima by temporarily crossing the highway median into the oncoming lane. (*Id.*) Sgt. Liendo testified that gravel near the median can sometimes cause vehicles to lose control, resulting in an accident. (Hr’g at 1:57 p.m.). Sgt. Liendo was consistent in his testimony that the second radar reading of 55 miles-per-hour was of the red truck as it passed the Altima. (Hr’g at 1:58 p.m.).

The facts of this present case are distinguishable from those in *Richardson v. State*, 39 S.W.3d 634 (Tex. App.—Amarillo 2000, no pet.). The court in *Richardson* found there was no reasonable suspicion of a violation of section 545.363(a) because the vehicle in that case was stopped for driving just 10 miles per hour less than the allowable speed limit in a construction zone. *Id.* at 639. In the present case, however, the evidence establishes that Defendant’s vehicle was travelling at less than half the posted speed limit and that it impeded the normal and reasonable movement of traffic, requiring the red truck to pass it in a sudden and potentially unsafe manner. (July 10 Hr’g at 1:57 p.m.).

In sum, Sgt. Liendo had an objectively reasonable suspicion that Defendant violated Texas Transportation Code § 545.363(a). The Court finds that the initial stop of the Defendant, under the first *Terry* prong, was not in violation of Defendant's Fourth Amendment rights.

B. The Scope of the Stop

The second *Terry* prong inquires whether an officer's actions were reasonably related in scope to the circumstances that justified the stop. *Terry*, 392 U.S. at 19-20. A seizure of a person that is justified solely by an interest in issuing a traffic citation "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission of issuing a ticket for the violation." *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015) (internal quotations omitted). However, police may extend a stop justified solely by an interest in issuing a traffic citation if "reasonable suspicion, supported by articulable facts, emerges" during the stop. *United States v. Brigham*, 382 F.3d 500, 507 (5th Cir. 2004).

The Fifth Circuit has identified the following factors in determining whether there is reasonable suspicion that a vehicle is transporting undocumented aliens: (1) the area's proximity to the border; (2) characteristics of the area; (3) usual traffic patterns; (4) the agents' experience in detecting illegal activity; (5) behavior of the driver; (6) particular aspects or characteristics of the vehicle; (7) information about recent illegal trafficking of aliens or narcotics in the area; and (8) the number of passengers and their appearance and behavior. *U.S. v. Soto*, 649 F.3d 406, 409 (5th Cir. 2011)⁶ (citing *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975)); *see also U.S. v. Cervantes*, 797 F.3d 326, 330 (5th Cir. 2015) (border patrol agents had reasonable suspicion to stop a vehicle 200 miles from the Mexican border where the vehicle was full of occupants, the area was well known for alien smuggling, the driver pulled behind a semi-truck travelling 10-15 mph

⁶ Although the Court enumerated these factors for finding reasonable suspicion to stop a vehicle, they are also applicable for developing reasonable suspicion after a stop.

below the speed limit, and the passengers wore heavy clothing and appeared dirty). The Court looks to the totality of the circumstances, and not every factor must weigh in favor of reasonable suspicion for it to be present. *Cervantes*, 797 F.3d at 329. Also, “[t]he Supreme Court has rejected the proposition that if behavior was ‘itself readily susceptible to an innocent explanation [the behavior] was entitled to no weight.’” *Id.* (quoting *U.S. v. Arvizu*, 534 U.S. 266, 274 (2002) (internal quotations omitted)).

In *Brigham*, a driver and three passengers were pulled over for following too closely behind a vehicle in front. *Brigham*, 382 F.3d at 504. The trooper asked the driver to step out of the vehicle and provide license and insurance papers. *Id.* The driver complied and produced a rental agreement identifying as lessee a woman who did not appear among the occupants. *Id.* This made the trooper suspicious, and he decided to question all the car’s occupants as to their identity and travel plans. *Id.* Ten minutes into the stop, a registration check on the vehicle revealed that the plates matched the vehicle, and it was not reported stolen. *Id.* at 505. However, the trooper remained suspicious based in part on the occupants’ nervous demeanor. *Id.* Twenty-one minutes into the stop, the trooper received permission to search the vehicle, resulting in the discovery of a cache of liquid codeine. *Id.* The en banc Fifth Circuit found no infringement of the Fourth Amendment, stating that “correct analysis requires district courts to consider the facts and circumstances of each case, giving due regard to the experience and training of the law enforcement officers, to determine whether the actions taken by the officers, including the length of the detention, were reasonable under the circumstances.” *Id.* at 507.

In this case, the stop occurred in Webb County, a county abutting the international border. *See Cervantes*, 797 F.3d 326 at 329-30 (“proximity to the border is ‘a paramount factor in determining reasonable suspicion’”) (quoting *U.S. v. Garza*, 727 F.3d 436, 441 (5th Cir.

2013)). When Sgt. Liendo went to speak to the driver, he noticed all of the passengers staring down and avoiding eye contact. (July 10 Hr'g at 2:01 p.m.). Sgt. Liendo proceeded to question the driver as to where he was going and why there was a firearm in the vehicle. (Dkt. No. 39, Attach. 3, DVR 27240). Officers conducting a routine traffic stop may question occupants on matters unrelated to the traffic violation without violating the Fourth Amendment. *See U.S. v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993) (“[W]e reject any notion that a police officer's questioning, even on a subject unrelated to the purpose of the stop, is itself a Fourth Amendment violation.”). Sgt. Liendo also made Border Patrol aware of the situation, and agents arrived in a matter of minutes. In that short period when BP agents were en route, the video evidence shows Sgt. Liendo becoming increasingly unconvinced of Defendant's explanation that all of the vehicle's occupants were taking one firearm to a ranch to go shooting. (Dkt. No. 39, Attach. 3, DVR 27240). He then went to speak with the passengers, who quickly and voluntarily informed him that the Defendant had picked them all up by a river. (*Id.*) At that point, Sgt. Liendo arrested Defendant for transporting undocumented aliens. (*Id.*) The video evidence establishes that all of these events occurred in a period of just seven minutes and thirty-seven seconds. (*Id.*, DVRs 27253, 27240).

The Court finds that articulable facts emerged during the relatively brief time of the stop for the law enforcement officers on the scene to have a reasonable suspicion that the Defendant was transporting undocumented aliens. The audio recording of the conversation between Sgt. Liendo and Defendant establishes that Sgt. Liendo doubted Defendant's story that he and the vehicle occupants were travelling to a ranch to shoot a gun. (*Id.*, DVR 27240). The evidence reflects that Sgt. Liendo's skepticism was based on the fact that Defendant admitted to not having a key to enter the ranch, and that Defendant claimed he and the passengers would all

share one firearm. (*Id.*). Sgt. Liendo was justified in his further questioning of the vehicle's occupants as to where they came from and where they were going, which resulted in an admission from the occupants that they were aliens being transported by Defendant. (*Id.*).

In summary, based on the evidence presented showing the facts that developed and emerged during the stop, the Court finds: (1) that the stop was not unreasonably extended in violation of the Fourth Amendment; (2) that the law enforcement officers present at the scene had an objectively reasonable suspicion that the Defendant was transporting undocumented aliens; and (3) that the entirety of the stop was based on and supported by reasonable suspicion and therefore was not in violation of the Defendant's Fourth Amendment rights.

III. Recommendation

For these reasons, the undersigned recommends that Defendant's Motion to Suppress Stop, Arrest, and Evidence (Dkt. No. 28) be **DENIED**.

IV. Notice of Right to Object

The parties may file written objections to this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1). If a party objects within fourteen days after receiving service of this Report, the District Court will review *de novo* the findings or recommendations to which the party objects. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150–53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996). The District Court need not consider frivolous, conclusive, or general objections. *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). If a party does not object within fourteen days, the party forfeits its right to District Court review. *Thomas*, 474 U.S. at 150. Furthermore, if a party does not object and then the District Court accepts this Report's findings and legal conclusions, on appeal such findings and conclusions will be reviewed only for plain error. *Douglass*, 79 F.3d at 1428.

SIGNED on August 21, 2018.


JOHN A. KAZEN
United States Magistrate Judge