

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 03-19-P-H
)	
RICHARD H. PHILLIPS,)	
)	
Defendant)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Richard H. Phillips, charged in an indictment with knowing possession of a firearm and ammunition as a convicted felon, both in violation of 18 U.S.C. §§ 922(g)(1) and 924, Indictment (Docket No. 3) at 1-2, seeks to suppress evidence seized on or about November 22, 2002 after the vehicle he was driving was stopped on the Maine Turnpike, Motion to Suppress Tangible Evidence, etc. (“Motion”) (Docket No. 12) at 1. An evidentiary hearing was held before me on September 4, 2003 at which the defendant appeared with counsel and at the conclusion of which counsel for both the defendant and the government argued orally. I now recommend that the following findings of fact be adopted and that the motion be denied.

I. Proposed Findings of Fact

Georgia Moffat, who describes herself as the defendant’s former girlfriend, owned a 1995 Saturn automobile which she had given the defendant permission to drive at times before October 2002. At that time he was also listed as a driver of the car on Moffat’s automobile insurance policy. As of October 2002 Moffat and the defendant had been together for about two years. In late October 2002 Moffat and the defendant were in Daytona Beach, Florida at a bar when they started arguing. Both had been drinking

alcohol. Moffat left the bar, leaving the keys to the car behind. When she returned, the defendant, the keys and the car were gone. She did not give the defendant permission to drive the car that day and would not have given him permission to do so because he had been drinking.

Moffat filed a stolen vehicle report with the Daytona Beach police listing the defendant as the possible thief. She made out an affidavit in support of that report on November 2, 2002, a copy of which is Government Exhibit 1. She talked with the defendant by telephone a couple of weeks later, before the arrest involved in this case, and in that conversation asked him if he had her car. He denied that he did. She did not tell the defendant during this conversation that she had reported the car as having been stolen. She would have given him permission to use the car at the time of the telephone conversation if he had said that he had the car. She never gave the defendant permission to use the car at any time thereafter. She has not spoken with the defendant much since that telephone conversation.

Jerome Carr, a Maine state trooper and K-9 handler, was working on the Maine Turnpike on November 22, 2002. He had been working on the turnpike for almost 10 years. When he saw Moffat's car heading southbound he ran a registration check for information purposes and was informed by the barracks that the car was a stolen vehicle from Florida. The car had Florida plates. There were two male occupants, later determined to be the defendant, who was driving, and his brother Ernest, who was seated in the front passenger seat. Carr requested backup from the Kittery Police Department and followed the car for three miles before stopping it by using his blue lights about three miles south of the Kittery exit. No one was in the back seat of the car during the period when Carr was following it and neither occupant made any furtive movement that he could see. Carr used the PA to order the defendant to get out of the car, which he did. The defendant was then handcuffed by a Kittery police officer.

The passenger was then directed to get out of the car and was handcuffed. The passenger asked Carr to retrieve his cane which was lying between the front passenger seat and the door. Carr did so and saw that the top of the cane was screwed in. He removed the top and found a 24-inch dagger inside the cane. Carr knew that it is illegal to possess such a weapon under Maine law.

The defendant and his brother were transported to the Kittery Police Department in separate cruisers. Carr, who remained at the scene of the stop and arrest, then searched the Saturn. When he first looked into the passenger compartment he saw clothing, a toiletry bag, a plastic shopping bag and a coarse copper scrubbing pad, which was between the front seats. Based on his training and experience, Carr recognized the pad as being consistent with the use of crack cocaine. The pad would be used as a filtering device for smoke from burning crack cocaine. Carr had recovered similar materials from cars in the past. He had seized marijuana and powder cocaine several times.

Carr's police dog, Cody, is trained to alert to the presence of illegal drugs. She entered the car through the passenger side door and indicated on the console between the front seats and on other areas inside the car. Carr looked into a plastic shopping bag on which Cody had alerted; the bag contained clothes and snack food. Carr opened a Planters peanut can that was in the bag and found rolling papers and two baggies containing what appeared to be marijuana. The dog also alerted on the glove compartment, in which Carr found a woman's credit card, an ID card and a cigarette box which contained a straw with white powder residue, which is consistent with snorting powder cocaine. Underneath the front passenger seat Carr found a Florida ID card for a black man named Anthony Roberts. Neither the defendant nor his brother is black.

After spending 10 to 15 minutes searching the passenger compartment, Carr opened the trunk of the car with the key that had been left in the ignition. Inside the trunk he found a red duffel bag and a black

suitcase. Inside the black suitcase Carr found more of the copper scrubbing pad material and a receipt from a Rhode Island gun dealer showing the recent sale of a 9mm. handgun by the defendant. In the red bag Carr found a receipt for a .22-caliber handgun and .22-caliber ammunition. In a corner of the trunk Carr found a Wal-Mart bag containing a box of 9 mm. ammunition and a receipt for its purchase.

Carr had the Saturn towed to the Kittery Police Department, where he searched it further. Inside the toiletry bag he found a spoon with burn marks and residue of a white powder, which he believed to be heroin. It is standard procedure to have a car towed when it is a stolen vehicle that has been stopped or when there is no one to drive it after a stop. Carr did not do an inventory search of the car that night. If there is no evidence of illegal activity connected with a towed car, it is the general practice of the state police to search the car for inventory purposes.

II. Discussion

The defendant contends that Carr's legal ability to search the car incident to his arrest of the defendant did not extend to the trunk of the car. Motion at 2-3. Specifically, he asserts that he had a reasonable expectation of privacy in the trunk of the car and that the government must show that he knew that the car had been reported stolen in order to overcome this expectation. The government responds that the defendant cannot have a reasonable expectation of privacy in a stolen car and therefore lacks standing to challenge the search, that the search of the trunk was supported by probable cause and was justified as a search incident to arrest, and that the contents of the trunk would in any event have inevitably been discovered as part of a later inventory search. Government's Objection to Defendant's Motion to Suppress Tangible Evidence (Docket No. 14) at 3-7. The first contention is dispositive.

The defendant must establish that his own constitutional rights were violated by the challenged search or seizure. *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978). "[I]t is incumbent upon the defendant

to establish not only unlawful police conduct, but that the unlawful conduct intruded upon some legitimate expectation of privacy on the part of the defendant who challenges it.” *United States v. Bouffard*, 917 F.2d 673, 675 (1st Cir. 1990). If the vehicle that was searched was stolen, and the defendant knew that it was stolen, he lacks the necessary legitimate privacy interest in the vehicle. *United States v. Tropiano*, 50 F.3d 157, 161 (2d Cir. 1995); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994). It is the defendant’s burden to show that he had a subjective expectation of privacy in the trunk and that such an expectation was “one which society is prepared to recognize as reasonable in the circumstances of the . . . case.” *Bouffard*, 917 F.2d at 677-78.

The defendant did not testify at the hearing in this case. The only evidence from which this court can draw an inference concerning his subjective expectation of privacy in the trunk of Moffat’s car is his failure at any time to inform Moffat that he had taken the car and his obviously false statement to her some two weeks after he and Moffat argued and she discovered her car missing, shortly before he was stopped while driving the car, denying that he had possession of it. The evidentiary record cannot reasonably be read to allow the conclusion that the defendant reasonably believed that he was entitled to possession of Moffat’s car at the time he was arrested. Therefore, he could not have had a reasonable expectation of privacy in the trunk of the car and he may not challenge the search of the trunk. *See United States v. Sanchez*, 635 F.2d 47, 64 (2d Cir. 1980) (defendant who demonstrated neither ownership of car nor license from owner to possess car may not challenge search of car).

The opinion in *United States v. Brown*, 261 F.Supp.2d 1, 2003 WL 21057696 (D. D.C. May 9, 2003), cited by counsel for the defendant at oral argument, is not applicable to consideration of the defendant’s expectation of privacy. The opinion in that case deals with the question whether an officer had

probable cause to search the trunk of a car driven by a defendant who was arrested for driving without a permit. *Id.* at *3-*7. The issue of ownership or rightful possession of the car was not raised.

It is not necessary to consider the government's remaining arguments.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress tangible evidence be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 8th day of September 2003.

David M. Cohen
United States Magistrate Judge

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