

IN CIRCUIT COURT OF THE STATE OF OREGON  
FOR MULTNOMAH COUNTY

STATE OF OREGON;

Case No. 15CR47280

Plaintiff,

OPINION AND ORDER

v.

Brian Duane Nacoste

Defendant.

2016 MAY 17 AM 10:15  
JUDGE: JACOB...  
COURT CLERK: ...

This matter comes before this court on defendant's motion to suppress. Specifically, defendant moves to suppress statements he made to officers, as well as evidence found during the search of his vehicle. The court makes the following factual findings:

On the night in question two officers in a single car, heard a dispatch report of shots fired to the south of their current location. The state elicited no evidence as to how far south the shots came from, but only that the shots came from the Freemont Area. No evidence was elicited as to a description of the suspects, a car, or any identifiers.

The officers drove from approximately Cully St., to Skidmore St., before encountering defendant. Although the state offered no evidence as to the distance

15CR47280  
OR  
Order  
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between those two locations, this court takes judicial notice of the fact that those locations are separated by approximately half a mile of urban city.

The two officers viewed defendant's vehicle traveling at a rate of speed that one officer described as "higher than normal." Neither officer testified as to what the posted speed limit was, or gave an estimation as to what speed the suspect vehicle was traveling. There was no testimony as to the presence of other cars on the street.

The officers testified that the suspect vehicle fishtailed slightly in negotiating the turn from northbound Cully St. to westbound Skidmore St. No evidence was elicited that the vehicle left its lane of travel.

The vehicle pulled over without incident when the officers initiated the traffic stop. Officer Dale approached the vehicle from the driver's side, and Officer Murphy from the passenger side. Neither officer observed any furtive movements by the occupants. Within approximately five seconds of arriving at the vehicle side windows the officers observed a handgun openly displayed on the floorboard of the passenger seat. The handgun was not covered or obscured. One officer called for backup.

It was readily visible that the handgun did not contain an ammunition clip. Neither the driver, nor the passenger, made any movements towards the weapon. Likewise neither the driver, nor the passenger, was uncooperative. Neither appeared agitated, excited, or nervous. One officer testified that he recognized the defendant, but offered no testimony as to how he recognized him.

Immediately upon seeing the weapon, the officers drew their weapons and ordered the suspects to place their hands on their heads. Within 15-20 seconds thereafter backup

officers arrived, and the occupants were ordered to exit the vehicle one at a time where they were very quickly placed in handcuffs. Defendant was placed in the back of the backup officers' patrol car and remained in that car for approximately twenty minutes. After placing the Defendant in the car, Officer Dale then ran a computer check and determined defendant had a valid license and was not prohibited from possessing a firearm.

Once in handcuffs, the officers read defendant his *Miranda* warnings. Thereupon, they began interrogating defendant as to who owned the gun, and from where defendant had been traveling. Once the firearm was seen, the entire encounter focused on the firearm. The questioning of defendant did not concern the basis for the stop—careless driving—in any manner.

Turning now to the legal arguments advanced in the motion hearing. The parties agree that this case does not involve a warrant. Warrantless searches and seizures are *per se* unreasonable unless falling within one of the few “specifically established and well-delineated exceptions” to the warrant requirement. *Katz v. United States*, 389 US 347, 357, 88 S Ct 507, 19 L Ed 2d 576 (1967); *State v. Peller*, 287 Or 255, 598 P2d 684 (1979); *State v. Matsen/Wilson*, 287 Or 581, 601 P 2d 784 (1979). The state has the burden of establishing the validity of a warrantless search or seizure. *State v. Tucker*, 330 Or 85, 89, 997 P2d 182 (2000).

The state asserts only one theory to support the stop of defendant's vehicle—probable cause of Careless Driving, ORS 811.135, a non-criminal traffic violation. This court agrees with the state, that the initial vehicle stop was lawful. The police may stop

and briefly detain motorists for investigation of noncriminal traffic violations. Police conduct during a noncriminal traffic stop does not further implicate Article I, section 9, so long as the detention is limited and the police conduct is reasonably related to the investigation of the noncriminal traffic violation. However, “a police search of an individual or a vehicle during the investigation of a noncriminal traffic violation, without probable cause and either a warrant or an exception to the warrant requirement, violates Article I, section 9.” *State v. Rodgers*, 347 Or 610, 624, 227 P 3d 695 (2010).

The state concedes that the presence of a firearm obviously missing its ammunition clip, in plain view on the floorboard of a vehicle is not a crime, nor is it probable cause of a crime. The state offers only one justification for the officers’ actions in ordering defendant and his passenger out of the vehicle, placing defendant in handcuffs, reading him Miranda rights, and finally placing him in the back of a squad car— “officer safety” concerns.

The governing rule regarding searches and seizure pursuant to officer safety concerns was expressed by the Supreme Court in *State v. Bates*, 304 Or 519, 747 P2d 991 (1987):

“Article I, section 9, of the Oregon Constitution, does not forbid an officer to take reasonable steps to protect himself or others if, during the course of a lawful encounter with a citizen, the officer develops a reasonable suspicion, based upon specific and articulable facts, that the citizen might pose an immediate threat of serious physical injury to the officer or to others then present.”

The test inquires “whether the precautions taken were reasonable under the circumstances as they reasonably appeared at the time that the decision was made[,]” *id.* at 524–25, 747

P2d 991, and requires consideration of both the nature and extent of the perceived danger and the degree of intrusion resulting from the officer's conduct, *id.* at 526, 747 P2d 991.

As the Oregon Supreme Court has cautioned:

“We emphasize that the concept of reasonableness in this context is not biased in favor of the concerns of the police. Although this court is sensitive to the dangers inherent in police work and to the difficulties inherent in officer safety decisions, that does not and cannot mean that we regard those concerns as having greater weight than the constitutional right of all persons—even those who have been stopped on suspicion of criminal activity—to be free of unreasonable searches and seizures. If that constitutional right is to retain any vitality in the context of police stops, police officers must understand that the officer safety doctrine does not excuse protective measures that are disproportionate to any threat that the officers reasonably perceive.”

*State v. Rudder*, 347 Or 14, 23, 217 P3d 1064, 1069 (2009).

In this case, whatever safety concerns were present when the officers observed the firearm were dissipated through the act of separating the occupants from the vehicle.

There is no evidence to suggest the occupants were uncooperative or unwilling to voluntarily exit the vehicle while the traffic stop continued.

The duration of the detention or intensity of the officer's actions can convert an officer safety “stop into an arrest under Article I, section 9.” *State v. Medinger*, 235 Or App 88, 93, 230 P3d 76 (2010). An officer confronted with safety concerns may handcuff a person without converting the stop into an arrest, but the stop is converted into an arrest if the officer continues to use force to restrain the person after the officer's safety concerns have dissipated. *Id.*; *State v. Morgan*, 106 Or App. 138, 141-42, 806 P2d 713, *rev. den.*, 312 Or 235, 819 P2d 731 (1991).

Here, once the occupants exited the vehicle, the officers' decision at that point to handcuff, Mirandize, and place the defendant in a police car were disproportionate to the safety concern, and converted the officer safety stop to an arrest without probable cause, in violation of Article I, section 9.

Finally, the state makes no argument that the *Miranda* warnings attenuated defendant's statements from the unlawful arrest. This court finds that had such arguments been made, the factual record would have developed differently. Likewise, the state presented no evidence that defendant consented to the search of his vehicle in a manner that might attenuate the discovery of the evidence from the illegality. See *State v. Hall*, 339 Or 7, 35-36, 115 P3d 908 (2005), *overruled in part on other grounds by State v. Unger*, 356 Or 59, 333 P3d 1009 (2014).

As such, this court concludes that defendant's statements, as well as the evidence obtained from of the search of defendant's vehicle were derived through the exploitation of his unlawful arrest, and are suppressed. IT IS SO ORDERED.

5/10/14



Circuit Court Judge Bronson D. James