UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v. **Case No. 2:23-cr-88-SPC-KCD**

DIOP MCKENZIE
______________________________/

MOTION TO SUPPRESS EVIDENCE
AND MEMORANDUM OF LAW

The Defendant, DIOP MCKENZIE, moves this Court pursuant to the Rule 12(b), Federal Rules of Criminal Procedure, and the Fourth Amendment to the United States Constitution, to suppress evidence and in support states as follows:

CHARGED OFFENSES

Mr. McKenzie is charged in a multi-count indictment alleging two counts of bank fraud in violation of 18 U.S.C. § 1344; two counts of wire-fraud in violation of 18 U.S.C. § 1343; and one count of aggravated identity theft in violation of 18 U.SC. § 1028A. The bank fraud counts (1-2) allege conduct occurring on May 5, 2020, and May 29, 2020, respectively. The wire fraud counts (3-4) allege conduct occurring on June 20, 2020, and July 2, 2020, respectively. The identity theft count (5) alleges that from June 2020 through September 2020 Mr. McKenzie unlawfully used the identity of an individual identified as M.D. during and in relation to a felony offense of wire fraud as charged in count 4 of the indictment.

SEPTEMBER 14, 2020, TRAFFIC STOP

On September 5, 2020, the Cape Coral Police Department responded to a domestic disturbance at Mr. McKenzie's home at 404 Cultural Parkway Blvd in Cape Coral. According to law enforcement reports, the mother of Mr. McKenzie's children made a general allegation that Mr. McKenzie was purchasing personal information on-line for fraudulent activity. Further, according to reports, Cape Coral Police Officer Gallo provided this information to Cape Coral Police Detective Lemos. Although the law enforcement reports do not specify when this occurred, Detective Lemos determined that Mr. Mckenzie was the resident agent for three Florida businesses and was associated with the disbursement of a Small Business Administration Covid-19 Loan in the amount of $99,900.

On September 14, 2020, Mr. McKenzie's vehicle was stopped by Officer Gallo, purportedly and solely for driving with a suspended license. The stop and resulting detention were captured on body cams worn by Officer Gallo and Officer Gallo's trainee, Officer Hurst.[1] Office Gallo claimed that he became aware that Mr. McKenzie had a suspended driver's license as a result of the

[1] Referred to herein as "Gallo cam" with the relevant time indications.

September 5, 2020, occurrence. Officer Gallo advised Mr. McKenzie that he had confirmed that the license remained suspended before stopping the vehicle.

After stopping the vehicle, but before making contact with Mr. McKenzie, Officer Gallo instructed Officer Hurst to advise Mr. McKenzie that he was stopped for the driver's license suspension. Mr. McKenzie acknowledged that his license remained suspended. Mr. McKenzie was then asked to exit the vehicle but to leave his phone inside. This occurred approximately two minutes into the traffic stop. Gallo cam 2:03-32. Mr. McKenzie offered to have his girlfriend pick up the car. Approximately five minutes into the traffic stop, Officer Gallo asked Officer Hurst if he had run Mr. McKenzie's driver's license. Gallo cam 4:58 Mr. McKenzie was then advised that he was not going to be arrested for driving without a license because of Covid policies. Gallo cam 5:30. It was also determined that the tag on the vehicle was not lawfully assigned.

Two other officers eventually arrived on the scene. Less than eight minutes after the stop, Officer Gallo, outside of Mr. McKenzie's presence, instructed Officer Hurst to start writing citations. However, as discussed below, it appears this was not begun until substantially later. Officer Gallo stated that he was leaning towards towing the vehicle. Gallo cam 8:10. Approximately a minute later, Officer Gallo instructed another officer that the vehicle was going to be "inventoried" and not to let Mr. McKenzie take anything out of the vehicle. Mr. McKenzie was then advised that the vehicle was going to be towed. Gallo cam 10:45.

Approximately twelve minutes into the stop, Mr. McKenzie was patted down for weapons and then told to sit in a police car. Officer Gallo told the officer conducting the vehicle search that Mr. McKenzie is a suspect in a "bunch of fraud cases involving stolen identities" and if you see anything like that "credit cards, id's, anything like that make sure you grab them." Gallo cam 12:54-13:04. The vehicle search, which was completed approximately twenty minutes into the stop, revealed $ 197 in cash but no evidence of a criminal offense.

Confirming its real purpose, approximately forty minutes into the stop, Officer Gallo told another officer "I was trying to get a consent to search this guy, but we're not supposed to without a 'Code 10'." [2] Further, Officer Gallo stated "all he has is a wallet and I just want to see what's in it." Gallo cam 39:50-39:58. He then asked dispatch "is there anyone 10A right now?"

A full forty-five minutes into the stop, Officer Hurst under Officer Gallo's direction began writing the citations. Mr. McKenzie was then allowed to exit the police vehicle. Gallo cam 46:48. He was then handed his phone and the

[2] Code 10 apparently refers to a back-up officer.

money from inside his car. Mr. McKenzie then made a phone call to get a ride. The citations were then presented and explained to Mr. McKenzie by Officer Hurst. Gallo cam 48:39 -49:40. Mr. McKenzie was advised that his driver's license could not be returned to him because it was suspended.

Although Mr. McKenzie was then told he was free to leave, the officers kept the following took place:

> **Gallo:** Do you have any questions?
>
> **McKenzie:** No.
>
> **Gallo**: Before you leave would you have any issues with me just making sure you don't have anything on you, nothing illegal?
>
> **Gallo**: You have no issues with that?
>
> **Mckenzie**: No.
>
> **Gallo**: Were doing some training here. Today's training is on consensual searches. So you gave me consent to search you, right? Because you have nothing on you

Officer Gallo then searched Mr. McKenzie's pants pockets and again patted him down with negative results. Gallo cam 50:10-50:44. Officer Gallo retrieved Mr. McKenzie's wallet and handed it to Officer Hurst. After completing the search of Mr. McKenzie's person, Officer Gallo retrieved the wallet from Officer Hurst. Rather than asking if Mr. McKenzie for consent to search the wallet, Officer Gallo simply asked, "nothing in your wallet?" Mr. McKenzie said no. Officer Gallo then proceeded to search the wallet which revealed two debit cards in the name of M.D.. Mr. McKenzie responded that the cards belonged to his step-father. Officer Gallo then proceeded to question Mr. McKenzie about the cards stating that he wanted to make sure there was nothing criminal here because the names don't match. Gallo cam 50:44-Doc. 51:35.

Mr. McKenzie was then read his Miranda rights by Officer Hurst but told "you're not in trouble, you're not going to jail." While Officer Hurst read Mr. McKenzie his rights, Officer Gallo photographed the two debit cards. After being read his rights and asked whether he wished to answer questions, Mr. McKenzie responded "not really." Gallo cam 52:45. Officer Gallo nonetheless continued asking who the cards belonged to. Gallo cam 52:45-47. He then asked Mr. Mckenzie to call the owner which Mr. Mckenzie declined. Gallo cam 53:14. Mr. Mckenzie then stated, "if it's that big of deal you can just keep it." Gallo cam 53:17. Officer Gallo then responded "so you're saying you don't want these anymore?" and "are you saying you're relinquishing these to the Cape Coral Police Department." Officer Gallo then retrieved a form titled Property Receipt/Evidence Recovery/Seizure form which listed the two debit cards. Officer Gallo checked a box indicating "I don't want the property." Mr. McKenzie signed but did not read the form.

EVIDENCE DERIVED FROM THE TRAFFIC STOP

M.D. is the alleged victim in the aggravated identity theft count. There is no claim that any investigating officers were aware of M.D before the debit cards were retrieved from Mr. McKenzie's wallet. One card was originated from BMO Harris Bank N.A, and the other from Acorns – Lincoln Savings Bank.

In addition to Mr. McKenzie's statements referencing the cards, the evidence the Government intends to offer at trial, and certainly all the evidence relating to M.D., was obtained either directly or derivatively from the results of the traffic stop. While it appears that the Government's entire investigation had its genesis in the traffic stop, what follows are examples of investigative actions taken which were triggered by the information gleaned from the stop.

According to law enforcement reports, a follow-up investigation showed no relationship between M.D. and Mr. McKenzie. This included an interview with M.D. who stated that he never applied for the accounts with BMO Harris or Acorns.

The seizure of these cards further led to a series of subpoena and warrant requests relating to M.D.. On September 15, 2020, the State Attorney's Office sent subpoena requests to BMO Harris Bank NA and Acorns Security LLC. An updated subpoena request was sent on September 29, 2020, seeking more information including account opening documents. The BMO Harris subpoena included a request for all records of Mr. McKenzie, Mckenzie Acquisitions, and M.D.. The BMO Harris response on October 23, 2020 reflected that the addresses for the account titled to M.D., associated with the debit card, were both in Cape Coral and linked to Mr. McKenzie.[3] The BMO Harris response additionally reflected the account had been established on July 6, 2020 and that the SBA loan had been deposited into the account on July 27, 2020. It also showed "micro deposits" from the Acorns account. It also showed withdrawals with the proceeds of the SBA loan, including transfers to the Acorns account and transfers to a law firm. It is the Government's contention that all the withdrawals from this account were done by Mr. McKenzie. Additionally, BMO Harris provided credit card account statements as well as a finance agreement for an automobile.

On October 20, 2020, after receiving the results of the BMO subpoena, the United States Secret Service requested that the United States Attorney's Office open a matter targeting Mr. McKenzie for Aggravated Identity Theft, Wire Fraud, Bank Fraud and False Statements to Lending Institution in violation of 18 U.S.C. § 1014.

[3] This information further caused an interview of the landlord of one address that confirmed Mr. McKenzie was the sole lessee from February 14, 2020 to July 10, 2020.

On October 30, 2020, the subpoena response was received from Acorn Security LLC which indicated that that its checking accounts are provided through a partnership with Lincoln Savings Bank. Based on this, and on the same date, the State Attorney's Office issued a subpoena to Lincoln Savings Bank. Lincoln Savings Bank response on November 24, 2020 provided information on an Acorn Spend account ending in 7971 in the name of M.D. with a mailing address and phone number associated with Mr. McKenzie. The bank records for this account further showed deposits totaling $ 55,100 from the BMO Harris account titled to M.D. These deposits were between July and October 2020.

On November 3, 2020, nearly two months after the agents learned the identity of M.D. by the seizure of the debit cards, the agents sought to obtain information with respect to any Covid-related loans associated with Mr. Mckenzie or any of his known aliases (presumably including M.D.). These records, supplied on November 25, 2020, showed a series of Paycheck Protection Program (PPP) Loan applications. Among the applications was one ostensibly submitted under M.D.'s name which was funded on July 24, 2020 (Count 4) in the amount of $96,900 and deposited into the BMO Harris account in the name of M.D.. According to investigative reports, this account was linked to one of the debit cards seized from Mr. McKenzie on September 14, 2020. Also, as a result, information was obtained as to various other applications and loans associated with Mr. McKenzie, including individually, his businesses, or submitted ostensibly on behalf of others. While this will, of course, have to be explored at an evidentiary hearing, it may well be the basis for this request originated with the information gathered directly or indirectly as a result of the traffic stop.

On November 24, 2020, United States Secret Service in conjunction with the United States Attorney's Office issued subpoenas for accounts with T-Mobile, Comcast, and AMPEX Inc. (Silver Bar). The subpoena response from AMPEX Inc. (Silver Bar) reflected an account in the name of M.D. which was set up using a phone number and address associated with Mr. McKenzie. The card seized during the traffic stop which was linked to the Acorn Spends account was used to for the purchases on the account. Other purchases were attempted using the BMO Harris Bank account in M.D's name. The Government's evidence derived from the AMPEX Inc. subpoena also includes recorded phone calls alleged to have been made by Mr. McKenzie purportedly on behalf of M.D.

Seizure warrants were additionally obtained for the bank accounts including the MD BMO account which cited the traffic stop in support of warrant. It appears that a substantial amount, if not all, of the Government's evidence was derived from the traffic stop.

MEMORANDUM OF LAW

I. Fourth Amendment Violations

A. Officer Gallo Did Not Have a Valid Consent to Search Mr. McKenzie's Wallet.

There is no doubt that valid consent is an established exception to the requirements of both a warrant and probable cause requirements *See Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S. Ct. 2041, 2043–44, 36 L.Ed.2d 854 (1973). The Supreme Court has long recognized however that "where the validity of a search rests on consent, the [prosecution] has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Florida v. Royer,* 460 U.S. 491, 497, 103 S. Ct. 1319, 1324 (1983)(citations omitted) *See also United States v. Blake* 888 F.2d 795, 798 (11th Cir. 1989)(consent must be the product of free and voluntary choice rather than the result of mere "acquiescence to a claim of lawful authority."). "Whether an individual's consent to a warrantless search was given voluntarily is a question of fact that must be decided in light of the totality of the circumstances." *United States v. Gonzalez*, 71 F.3d 819, 828 (11th Cir. 1996) (citing *Schneckloth*, 412 U.S. at 227, 93 S. Ct. at 2047), abrogated on other grounds by *Arizona v. Gant,* 556 U.S. 332, 129 S. Ct. 1710, 485 (2009).

Even when an officer has consent to conduct a search, he violates the Fourth Amendment if the search exceeds the scope of that consent. *See Florida* *v. Jimeno,* 500 U.S. 248, 251, 111 S. Ct. 1801, 1803–04, 114 L.Ed.2d 297 (1991). The standard for measuring the scope of consent is an objective one—the question is "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Id.* "The scope of a search is generally defined by its expressed object." *Id.* at 251, 111 S. Ct. at 1804.

Mr. McKenzie maintains that the purported consent to search his person and his wallet was invalid. Mr. McKenzie, who had already been subjected to a pat-down, was grossly misled as to the purpose of the search. In fact, he was led to believe he was assisting in a police training exercise. However, even had the consent to search his person been valid, there was no consent to search his wallet. Accordingly, the search of the wallet and the seizure of the two debit cards in the name of M.D. violated the Fourth Amendment.

B. Officer Gallo Failed to Act within the bounds of Rodriguez v. United States.

Even had there been a valid consent, the Government must additionally demonstrate that Mr. McKenzie's continued detention, which ultimately resulted in the seizure of evidence, was lawful.

Stopping a vehicle and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment. *See Delaware v. Prouse,* 440 U.S. 648, 653 (1979). Accordingly, both the Supreme Court and the Eleventh Circuit have expressed intolerance with the practice of using routine traffic stops to conduct criminal investigations. *See Rodriguez v. United States,* 135

S. Ct. 1609, 1616-1617(2015)(police may not extend a traffic stop to allow the use of a narcotics dog); *United States v. Perkins,* 348 F.3d 965, 971-972)(11thCir. 2003)(affirming a suppression order where vehicle search resulted from a detention which exceeded the scope of a traffic stop); and *United States v. Boyce*, 351 F.3d 1102, 1111 (11th Cir. 2003) (reversing, and ordering suppression of vehicle search results where the detention of the driver was prolonged to obtain the results of a criminal records check).

In *Rodriguez*, the Supreme Court explained that a traffic stop is analogous to a Terry stop. *Id.* at 1614. As such, the scope of the stop "must be carefully tailored to its underlying justification." *Id.* (*quoting Royer,* 460 U.S. at 500). Thus, in the context of a traffic stop, "the tolerable duration of police inquiries ... is determined by the seizure's mission[.]" *Rodriguez,* 135 S. Ct. at 1614 (quotation omitted). The mission of a traffic stop is "to address the traffic violation that warranted the stop ... and attend to related safety concerns[.]" *Id*. In other words, "[a]uthority for the seizure ... ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.*

While Mr. McKenzie recognizes that driving without a license is an arrestable offense, in this case it was determined that he was not going to be arrested no later than six minutes after the stop. Rather, he was going to be issued citations and a date to appear in court. Thus, Mr. McKenzie maintains the officers were required to act within the scope of *Rodriguez.*

The purposes of a traffic stop under *Rodriguez* are generally "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* at 1615. Thus, the Court specifically concluded that the use of a narcotics dog is not related to the purpose of the stop, and therefore cannot be "fairly characterized as part of the officer's traffic mission." *Id.* at 1616.

The Eleventh Circuit has held that the proper standard emanating from *Rodriguez*, is that "a stop is unlawfully prolonged when an officer, without reasonable suspicion, diverts from the stop's purpose and adds time to the stop in order to investigate other crimes." *United States v. Campbell,* 970 F.3d 1342 (11th Cir. 2020)(citing *Rodriguez* at 1614-1616).

The body cam reflects that Officer Gallo abandoned any pretense of a traffic stop, and instead immediately embarked on a criminal investigation. He acknowledged as much on the body cam, instructing the officer tasked to conduct an "inventory" search to look for any evidence of identity theft or fraud in the vehicle. It was over fifty minutes before Mr. McKenzie was presented with the citations.

As the purported consent discussed above took place during an unlawful extension of the traffic stop, the consent is invalid even had it been freely and voluntarily given. *See Royer,* 460 U.S. 507-508 (because Royer was illegally detained when he consented to the search of his luggage the consent was tainted by the illegality and was ineffective to justify the search).

II. Evidence Subject to Suppression

A. The Government cannot make use of evidence obtained directly or derivatively from a Fourth Amendment Violation.

Mr. McKenzie maintains that the results of the search of the vehicle, any statements he made, as well as any evidence subsequently seized, must be suppressed based on his unlawful detention. This is particularly true with respect to all evidence relating to M.D..

In *United States v. Bergin*, 732 F. Supp. 2d 1235, 1241 (M.D. Fla. 2010) aff'd, 455 F. App'x 908 (11th Cir. 2012) and aff'd sub nom. *United States v. Powner*, 481 F. App'x 529 (11th Cir. 2012), the court summarized the applicable principles used to determine what evidence must be suppressed as a consequence of a constitutional violation:

> In *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 40 S. Ct. 182 (1920) the Supreme Court held that the exclusionary rule applied to *knowledge obtained by violation of the Fourth Amendment,* as well as tangible materials obtained by the violation. Also included within the scope of the exclusionary rule are overheard verbal statements and testimony about matters observed during the Fourth Amendment violation. *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407 1963). Thus, "[e]vidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion." *Segura v. United States*, 468 U.S. 796, 804, 104 S. Ct. 3380 (1984). In *Silverthorne*, the Supreme Court extended the exclusionary rule to include indirect products, as well as the direct products, of a Fourth Amendment violation. *Wong Sun*, 371 U.S. at 484–85, 83 S. Ct.

> 407. *Silverthorne* precluded the government from using not only the illegally obtained evidence itself, but also barred the use of information obtained during the unlawful search to craft a subpoena to obtain the illegally viewed documents from the victims of the Fourth Amendment violation. *Wong Sun* precluded not only the use of verbal statements by a defendant after a warrantless arrest in his residence, but narcotics seized from another person who was discovered by exploiting defendant's statements. *Wong Sun* stated the now-familiar standard: We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, 371 U.S. at 487–88, 83 S. Ct. 407. "The question to be resolved when it is claimed that evidence subsequently obtained is 'tainted' or is 'fruit' of a prior illegality is whether the challenged evidence was come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Segura,* 468 U.S.at 804–05, 104 S. Ct. 3380. (internal quotation marks and citation omitted).

(emphasis added).

In the face of a constitutional violation, the Government has the burden of establishing by a preponderance that the evidence it intends to offer is nonetheless admissible. *See Nix v. Williams,* 467 U.S. 431, 443 (1984).

B. The Government cannot rely on "inevitable discovery"/"independent source"

The Supreme Court has recognized narrow and related exceptions to the exclusionary rule, neither of which apply here. Even if police engage in an illegal investigatory activity, evidence will be admissible if it is discovered through a source independent of the illegality. This “independent source doctrine” was first recognized by the Supreme Court in *Silverton Lumber Co,* 251 U.S. at 392 (“if knowledge of [such facts] is gained from an independent source they may be proven like any others”). In *Silverton Lumber,* the Court recognized the “independent source” exception to the exclusionary rule, but nonetheless held that knowledge garnered from copies of illegally seized documents could not be used to frame and indictment or secure a subpoena for the originals. *See id.* at 391. *Compare Segura* 468 U.S. at 814 (evidence was admissible because the search warrant was issued based on solely on information known before the previous illegal entry and items not seen by the officers during the prior illegal search). This “independent source doctrine” deems evidence admissible in those situations where an illegal search takes place at some point during a criminal investigation, but where a proper, independent search led to the evidence in question. *United States v. Dice*, 200 F.3d 978, 984 (6th Cir. 2000) abrogated on other grounds by *Michigan v. Hudson,* 547 U.S. 586 (2006).

However, this doctrine does not apply without evidence that the officers would have pursued additional investigation absent knowledge gained by the initial illegality. *See United States v. Mowatt*, 513 F.3d 395, 404 (4th Cir. 2008)(revolver and drugs obtained through an improper search were inadmissible despite a warrant because the officers would not have sought a warrant absent the prior illegal discovery of evidence). Here, other than perhaps the interview with the mother of Mr. McKenzie's children, there does not appear to be any other source other than what was triggered by the traffic stop.

Similarly, under the "inevitable discovery" exception, a court may admit illegally obtained evidence if the evidence would inevitably been discovered through independent lawful means. *See e.g., Nix* 467 U.S. at 433 (1984). The Eleventh Circuit has made clear, however, that inevitable discovery requires pursuit of a substantial alternative line of investigation at the time of the constitutional violation. *See United States v. Virdin*, 488 F.3d 1317, 1323 (11th Cir. 2007). This, similarly, cannot be an investigation triggered by the initial illegality.

C. The Government further cannot rely on a contention that Mr. Mckenzie "abandoned" the debit cards.

Nor can the Government rely on a claim that Mr. McKenzie "abandoned" the debit cards. Again, legal "abandonment" does not apply where the claim results result from the initial illegality, *See United States v. Nicholson,* 144 F.3d 632, 640 (10th Cir. 1998)(disclaimer of ownership of luggage is not abandonment because it resulted from illegal warrantless search of the luggage). "Owner's abandonment must be voluntary, and abandonment cannot be voluntary when it results from a violation of the Fourth Amendment."

United States v. Dye, 544 F. Supp. 3d 1138, 1159 (D. Kan. 2021)(*quoting United States v. Easley*, 911 F.3d 1074, 1083 (10th Cir. 1998)).

Here, as discussed above, Mr. McKenzie's statements concerning the debit cards as well as his signature on the form presented by Officer Gallo was prompted by the unlawful search of his wallet.

WHEREFORE, the Defendant moves this Court to grant the motion to suppress on the grounds stated herein and for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February 2024, a true copy of the foregoing filed in this court and a copy was forwarded using CM/ECF to Yolande Viacava, Office of the United States Attorney, 2110 First Street, 3-137 Fort Myers, Florida 33901.

/s/ Russell K. Rosenthal
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Assistant Federal Defender