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

GOVERNMENT'S RESPONSE IN OPPOSITION TO THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

COMES NOW, the United States of America, by and through the undersigned Assistant United States Attorney, and in response in opposition to the defendant's Motion to Suppress Evidence (Doc. 45), states as follows:

FACTUAL BACKGROUND

On September 5, 2020, Cape Coral Police Officers responded to a domestic disturbance at the defendant's residence located in Cape Coral, Florida, involving the defendant, Diop McKenzie, and the mother of his children. During contact at McKenzie's residence, the woman reported to the officer that McKenzie had been purchasing individuals' identities on the dark web for fraudulent activity. Furthermore, through routine database checks conducted on McKenzie, the officer became aware that the defendant had a suspended license.

Subsequently, a detective with the Cape Coral Police Department conducted a search of SunBiz.org for Diop McKenzie and determined that he was the registered agent for three businesses in the State of Florida: Signature Carpentry and Tile LLC, Orlando Carpenters LLC, and McKenzie Acquisitions LLC.

In Furtherance of this investigation, the detective inquired with the Small Business Association (SBA) about the defendant's businesses, and the SBA revealed that Diop McKenzie's name, phone number, and known residential addresses in the Cape Coral, Florida area were associated with the disbursement of a SBA Covid-19 Loan in the amount of $99,000.

On September 8, 2020, and again on September 11, 2020, a victim, D.J., called the SBA to advise he did not file a loan application and that he did not own a business. D.J. completed a statement form and had it notarized by a police officer with the Kennewick Police Department, in Kennewick, Washington. D.J.'s statement reflected that he never applied for a loan with the Small Business Administration, nor did he give anyone permission to use his personal information to apply for any loans.

On September 14, 2020, Officer Gallo from the Cape Coral Police Department conducted a traffic stop on McKenzie, after the officer observed the defendant driving while his license was suspended. The defendant's vehicle was stopped at the stop sign at the busy intersection of 9th Terrace and Country Club Blvd. in Cape Coral, Florida.

Officer Gallo, the same officer that had responded to the defendant's residence just days before, approached the defendant's vehicle along with a police trainee. As the officer in training advised the defendant that he had been stopped for driving on a suspended license, and defendant acknowledged that he was aware that his license had been suspended. The defendant handed his suspended license to the officers and he advised that the address on the license was not his current address.

The defendant is asked to step from the vehicle, as he did not have a valid license that would permit him to drive. As the defendant was the sole occupant in the vehicle, there was not another licensed driver at the scene who could drive the vehicle.

The officer advised the defendant that his vehicle would have to be towed. The vehicle was impeding traffic and located on a public street. The officer explained that he would not have time to wait for the defendant to try to find a licensed driver to arrive at the scene. The officer did advise the defendant that he would not be arrested for the offense as growing Covid concerns at the jail prevented the arrest of individuals for the offense of driving while license suspended at that time.

During the routine law enforcement database checks being conducted, the police also learned that the vehicle was not registered. The officer explained to the defendant that the records reflected that at one time the vehicle had been registered to McKenzie Acquisitions, but the registration of the vehicle was not current. The officer advised the defendant that it was good that he had called the tow company, as the vehicle could not be driven on the road since it was not registered.

In preparation for the tow company, the police conducted an inventory search of the vehicle and completed an inventory form. The police recorded the property located in the vehicle to include tools, the defendant's cell phone, and cash.

The officer had the officer in training completing the citations, while the officer was either assisting with the inventory search or staying near the defendant.

When the officer reviewed the citations prepared by the officer in training, he alerted the officer in training that he had listed the defendant's name incorrectly on each citation, and the officer advised the officer in training how to correct the citations.

The officer provided the defendant with his cellphone and cash that had been located in the vehicle. The officer told the defendant to call for a ride so the defendant would not be left standing around for a while after his vehicle was towed. The defendant made a call to locate a ride from the scene.

The police trainee explained each citation to the defendant, and the defendant was asked to sign each citation to acknowledge that he had received the citations and been provided with a court date. The defendant was provided with his copies of each citation, and the police asked if he had any questions. The defendant inquired if he could have his license back, and the police officer explained that it was a criminal violation to knowingly present a canceled or revoked license to someone. The officer advised that his suspended license could not be returned, but the officer explained to the defendant that he could obtain an ID card at the DMV.

Once the defendant had been provided with the two citations, the officer told the defendant that he was free to leave. After advising the defendant that he was free to leave, the officer asked the defendant if he had any issues with the officer checking to see if the defendant had anything illegal on him. The officer told the defendant that he was training about consensual searches. The defendant walked over to the patrol vehicle and put his hands on the hood with his back to the officer. The officer again asked the defendant if he was giving consent. The officer pulled out the defendant's wallet, and the officer asked if the defendant had anything in his wallet. As the defendant stood facing the officer and watching the officer holding his wallet, the defendant spoke with the officer about his fishing license and a card for an attorney located in his wallet. When the officer pulled out two debit cards, a BMO Harris Bank N.A. and an Acorns – Lincoln Savings Bank, embossed with the name M.D., the defendant immediately stated that those cards belonged to his stepdad.

The police read the defendant his *Miranda* warnings before asking any questions concerning the cards located in the defendant's wallet. The defendant continued to tell the officers that the cards belonged to his stepdad. The officer asked the defendant if he had his stepdad's phone number so the officer could contact him to inquire whether the defendant could have the cards returned. Instead, the defendant told the officer that if it was a big deal, then the officers could keep the cards. The defendant continued to volunteer that he did not want his stepdad to call his mom, so the defendant said that he would tell his stepdad that he had lost his cards. The defendant said that he did not want to call his stepdad. The officer gave the defendant back his wallet and asked if the defendant was telling the police to keep the cards. The officer then completed a Cape Coral Police property form in which he listed the two cards. The officer then showed the form to the defendant and explained to him that the form provided that the defendant did not want the property, and the defendant signed the form.

Subsequently, bank records revealed that on September 14, 2020, Acorns card was locked and a new card was requested. The records revealed that on September 16, 2020, a new Acorns card was issued in the name M.D., and the new card was sent to McKenzie's residence located in Cape Coral, Florida.

On September 15, 2020, bank records revealed that a replacement debit card was requested for the BMO Harris Bank account, and the new card was mailed to McKenzie's residence in Cape Coral, Florida.

A detective with Cape Coral Police Department contacted the real M.D., who was found to be residing in Iowa, and the victim completed a notarized statement form reflecting that had no knowledge of McKenzie and that the victim had never applied for any cards from the issuing banks: BMO Harris Bank or Acorns- Lincoln Savings Bank.

The United States Secret Service conducted an investigation into fraudulent PPP and EIDL loan applications submitted by Diop McKenzie to the SBA that had been funded. The loan applications used fraudulent personal identifying information of other individuals, to include D.J. and M.D., without their knowledge, and falsely claimed the amount of gross income, and failed to report additional loans. Ultimately, McKenzie used those fraudulently obtained funds for his own personal expenses.

On August 23, 2023, a federal grand jury indicted the defendant, Diop Mckenzie, with two counts of bank fraud, in violation of 18 U.S.C. §§ 1344 and 2, two counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2, and one count of aggravated identity theft, in violation of 18 U.S.C. §§ 1028A(a)(1) and 2. Doc. 1.

On February 9, 2024, the defendant filed a Motion to Suppress Evidence. Doc. 45.

MEMORANDUM OF LAW

a. Valid stop

The Supreme Court has stated that "as a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810 (1996). The Cape Coral Police Officer had probable cause to believe that a traffic violation had occurred at the time that he conducted a traffic stop of the defendant's vehicle. The defendant was stopped due to driving while his license was suspended. "A traffic stop, which 'is a seizure within the meaning of the Fourth Amendment,' *United States v. Purcell*, 236 F.3d 1274, 1277 (11th Cir. 2001), 'is constitutional if it is either based upon probable cause to believe a traffic violation has occurred or justified by reasonable suspicion in accordance with *Terry [v. Ohio]*, 392 U.S. 1, 88 S.CT. 1868, 20 L.Ed.2d 889[(1968)].'" *United States v. Spoerke*, 568 F.3d 1236, 1248 (11th Cir. 2009) (citing *United States v. Harris*, 526 F.3d 1334, 1337 (11th Cir. 2008)).

Further, the Supreme Court has recognized that "States have a 'vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles [and] that licensing, registration, and vehicle inspection requirements are being observed.'" *Kansas v. Glover*, 140 S.Ct. 1183, 1188 (2020) (citing *Delaware v. Prouse*, 440 U.S. 648, 658 (1979)). Therefore, the initial stop of McKenzie's vehicle was valid, and McKenzie could have been lawfully arrested for such a criminal driving offense. As the officers walked up to McKenzie's vehicle, the defendant was advised that the reason for his stop was for driving on a suspended license. The defendant agreed that his license was still suspended and advised that he was waiting for a court date. He said he owed approximately $18,000.

Further, in *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977), the Court held that the police may order the driver of a vehicle to exit the vehicle when a lawful stop has been made, without violating the Fourth Amendment. Here, the defendant was asked to step out of the vehicle because he was driving on a suspended license, and he could not have been permitted to drive away.

During the stop, the officer explained to the defendant that his vehicle would be towed due to the location of the vehicle. Officer explained that he did not have time to wait for someone to arrive at the scene to pick up the vehicle. He advised that the tow company could quickly respond to the location and the vehicle would be moved. The officer intended to have McKenzie's vehicle towed as the vehicle was stopped at a busy intersection, and the vehicle was impeding traffic. Further, McKenzie was the sole occupant in the vehicle, so there was not another licensed driver present who would be able to drive the defendant's vehicle.

In *South Dakota v. Opperman*, 96 S.Ct. 3092, 3097 (1976), the Supreme Court stated that:

> When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct

> needs: the protection of the owner's property while it remains in police custody. . . ; the protection of the police against claims or disputes over lost or stolen property. . .; and the protection of the police from potential danger. . . .

South Dakota v. Opperman, 96 S.Ct. 3092, 3097 (1976) (citations omitted); *see United States v. Cohen*, 38 F.4th 1364, 1371 (11th Cir. 2022); *see also United States v. Isaac*, 987 F.3d 980, 988-989 (11th Cir. 2021).

Consequently, the police began an inventory search of the defendant's vehicle while waiting for the arrival of the tow truck. The police prepared an inventory form while observing the property in the defendant's vehicle.

All of the actions taken by the Cape Coral Police were in the lawful discharge of their duties. Therefore, despite the defendant's apparent assertion that the officers should have proceeded more quickly during the traffic stop, what contributed in prolonging the stop was that the defendant could not lawfully drive the vehicle away and arrangements to tow the vehicle had to be made. *See United States v. Vargas*, 848 F.3d 971, 974-975 (11th Cir. 2017).

In *United States v. Braddy*, the Eleventh Circuit stated that "[a]s we have explained, 'we measure the reasonableness of a stop's duration under the totality of the circumstances,' and '[r]igid time limitations and bright-line rules are generally inappropriate.'" *United States v. Braddy*, 11 F.4th 1298, 1310 (11th Cir. 2021) (quoting *United States v. Holt*, 777 F.3d 1234, 1256 (11th Cir. 2015)).

The police diligently pursued the investigation. Aside from checking the defendant's driver's license prior to the stop, the police conducted law enforcement database checks and learned that the defendant's vehicle was unregistered. The defendant could not legally operate the vehicle since his license was suspended. In addition to the vehicle being stopped in the roadway at a busy intersection, the unregistered vehicle could not be on the road; therefore, the police contacted a tow company to tow the vehicle from the scene. Simultaneously, the officer was conducting the inventory of the vehicle while another officer in training was preparing the two traffic citations. The defendant's phone and cash located in his vehicle was returned to him. The defendant used his phone to call for a ride, since the officer had previously explained that due to covid concerns regarding the jail that the defendant would not be arrested for the offense of driving while license suspended. Once the citations were reviewed and the corrected by the training officer, the traffic citations were explained to the defendant, and he was told that he was free to leave.

b. Consent

The defendant had received his citations and had signed his acknowledgement of them. The police had explained that they could not return his suspended license to him. All of business with the defendant was completed and he was free to leave. The officer even told the defendant that he was free to leave. From the totality of the circumstances, at that point the encounter with the police was consensual; therefore, the Fourth Amendment was not implicated. *See United States v. Ramirez*, 476 F.3d 1231, 1238 (11th Cir. 2007). The issuance of the citations and being explicitly told that he was free to leave preceded the questioning concerning anything illegal being on the defendant's person. In *United States v. Ramirez*, the Eleventh Circuit found that:

> it is appropriate to examine the "totality of the circumstances" in each case, [*United States v. Lattimore*, 87 F.3d 647, 653 (4th Cir. 1996)] weighing a range of factors, such as whether there is any coerciveness on the part of the police, whether the exchange is cooperative in nature, and whether the defendant had everything he reasonably required to proceed on his journey. [*See United States v. White*, 81 F.3d 775, 779 (8th Cir. 1996)]. As the Supreme Court has instructed, our ultimate inquiry remains whether "a reasonable person would feel free to terminate the encounter." [*United States v. Drayton*, 536 U.S. 194, 201 (2002)].

United States v. Ramirez, 476 F.3d 1231, 1240 (11th Cir. 2007).

After the defendant was given the citations, the officer advised the defendant that he was free to leave. The officer asked the defendant if he had any questions. The officer asked the defendant if he had any issues about him checking to see if the defendant had anything illegal on him. The officer said that he was training about consensual searches. The defendant voluntarily walked to the police vehicle and placed his hands on the hood. The officer asked the defendant again if he was giving his consent to the search. Officer asked the defendant if he had anything in his wallet.

The defendant made no attempt to limit the search of his person or of his wallet. The defendant was present while the officer opened his wallet, and he had ample opportunity to limit the scope of the search or to request that the search of his wallet be discontinued. *See United States v. Harris*, 928 F.2d 1113, 1117-1118 (11th Cir. 1991).

In *Ohio v. Robinette*, the Supreme Court stated:

> We think that under our recent decision in *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) . . . the subjective intentions of the officer did not make the continued detention of respondent illegal under the Fourth Amendment. As we made clear in *Whren*, " 'the fact that [an] officer does not have the state or 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.' … Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."

Ohio v. Robinette, 117 S.Ct. 417, 420-421 (1996) (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)).

The Supreme Court in *Ohio v. Robinette* has held that "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent." *Ohio v. Robinette*, 117 S.Ct. 417 at 421 (quoting *Schneckloth v. Bustomonte*, 412 U.S. 218, 231 (1973)). "And just as it 'would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning,'" *Id*. (quoting *Schneckloth v. Bustomonte*, 412 U.S. 218, 231 (1973)). "so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary." *Ohio v. Robinette*, 117 S.Ct. 417, 421 (1996).

"The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from all the circumstances.'" *Ohio v. Robinette*, 117 S.Ct. 417, 421 (1996) (quoting *Schneckloth v. Bustomonte*, 412 U.S. 218, 248-249 (1973)).

When the officer pulled out the two cards, the defendant immediately said that the two cards were his stepdad's. Although the defendant was not in custody, since the two cards were in the name of another individual, the defendant was read his *Miranda* warnings prior to the officer asking any questions about the cards that had been located in the defendant's wallet.

The officer asked the defendant if he had is stepdad's phone number. The defendant said that if it was a big deal then he told the officer that he could keep the cards. The defendant explained that his stepdad would call his mom, so he said that he would tell his stepdad that he had lost the cards. The defendant made it clear that he did not want to call his purported stepdad. The officer gave the defendant back his wallet, then he completed a property form for the Cape Coral Police Department. The officer then showed the defendant the form and asked him to sign the form if he did not want the property. The defendant signed the form.

In *United States v. Spivey*, the Eleventh Circuit stated that:

> Consent is about what the suspect knows and does, not what the police intend. "Coercion is determined from the perspective of the suspect." *Illinois v. Perkins*, 496 U.S. 292, 296, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990). Whether officers "deliberately lied" "does not matter" because the "only relevant state of mind" for voluntariness "is that of [the suspect] himself." *United States v. Farley*, 607 F.3d 1294, 1330 (11th Cir. 2010). And officers are entitled to be silent about their motivations. [*See United States v. Prudden*, 424 F.2d 1021, 1033 (5th Cir. 1970)] ("[T]he agents did not have to warn him directly that they were undertaking a criminal investigation."). The officers' subjective purpose in undertaking their investigation does not affect the voluntariness of [defendant's] consent.

United States v. Spivey, 861 F.3d 1207, 1215 (11th Cir. 2017).

The defendant understood that he faced a risk that the police would notice the two cards that were in another person's name that he carried in his wallet when he consented to the search of his person. The officer specifically asked if the defendant had an issued about the officer checking to see if the defendant had anything illegal on him. The defendant was aware that his wallet was on him at the time that he consented to the search. From consideration of the totality of the circumstances, the defendant's consent was voluntary. The defendant was not handcuffed or under arrest when he gave his consent. The encounter with the police had been polite and cooperative, and the officers had not used any signs of force, physical coercion, or threats. The officer was not required to inform the defendant that he had a right to refuse consent to search.

In fact, when the cards were located, the defendant was prepared to explain away his reason for having the two cards in someone else's name.

c. Independent source

Furthermore, the evidence in this case should be admissible pursuant to the independent source doctrine. In *Nix v. Williams*, the Supreme Court stated that'

> The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. . . . The independent source doctrine teaches us that the interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.

Nix v. Williams, 104 S.Ct. 2501, 2508 (1984). The Court explained that "[w]hen the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. *Id*. at 2509.

Here, if the Court were to find an error in the police locating the two cards bearing someone else's name in the defendant's wallet, after the defendant consented to the search of his person, then that cards themselves should be the only items of evidence that could possibly be subject to suppression. However, there are independent sources that provide sufficient evidence of the fraud committed by the defendant as charged. The SBA has records of the fraudulent PPP loan and EIDL loan applications that contain misrepresentations and false information which can be traced back to the defendant. There are bank records that identify several accounts that the defendant accessed that the fraudulently obtained funds were deposited into. There are several victims who have reported to law enforcement that they did not apply for or authorize the defendant to apply for PPP loans and EIDL loans in their names and using their personal identifying information, to include the victims' name, date of birth, and social security numbers. In fact, one such victim, D.J., had become aware of the fraudulent SBA loan obtained in his name and reported the criminal activity prior to the defendant being stopped by law enforcement. The investigation into the criminal charges involving the defendant would have proceeded. The trail of fraudulently obtained loan proceeds led to the defendant's residence.

Consequently, there should not be any exclusion of evidence in this case. The defendant's claims are without merit.

CONCLUSION

For all the reasons set forth above, the Government hereby respectfully requests that the Court deny the defendant's motion to suppress.

Respectfully submitted,

ROGER B. HANDBERG
United States Attorney

By: *s/ Yolande G. Viacava*
Yolande G. Viacava
Assistant United States Attorney
Florida Bar Number 0110310
2110 First Street, Suite 3-137
Fort Myers, Florida 33901
Phone: (239) 461-2200
Fax: (239) 461-2219
E-Mail: Yolande.viacava@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Russell K. Rosenthal
Russ_rosenthal@fd.org

s/Yolande G. Viacava
Yolande G. Viacava
Assistant United States Attorney