

STATE OF VERMONT
ADDISON COUNTY

State of Vermont

v.

Oluwaseun Subair
Defendant

DISTRICT COURT
Docket No. 334-7-08 Ancr

DECISION ON MOTION TO SUPPRESS AND DISMISS

The defendant filed a motion to suppress and dismiss on October 6, 2008. The state filed a memorandum in opposition on October 21, 2008. An evidentiary hearing was held on November 25, 2008. Based on the credible evidence adduced at the hearing, and the pleadings and papers on file herein, the court issues the following decision:

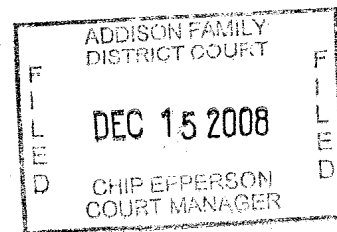
Findings of Fact

1. On July 20, 2008, at approximately 11:23 a.m., defendant Subair was a back-seat passenger in a motor vehicle being driven by David Dutton. There was a front-seat passenger, Shane Ellis, and another back-seat passenger, Bethany Cabiya, also in the car. The car was traveling southbound on the Lake Dunmore Road in the town of Leicester, Vermont. State Trooper Mark Busier was traveling northbound on the same road, at the same time. Trooper Busier's attention was drawn to the Dutton vehicle by its very loud exhaust. As the Dutton vehicle passed him, Trooper Busier also noticed that something was hanging very low underneath the car, and was almost dragging on the ground. Trooper Busier did not notice the passengers in the back seat at this time.

2. Since he understood that a faulty muffler was a violation of Vermont's motor vehicle laws, Trooper Busier turned around and stopped the Dutton vehicle. At the time of the stop the weather was overcast and raining. The stop took place in a rural area.

3. After he effectuated the stop, Trooper Busier approached the vehicle from the driver's side. At this point, the trooper noticed Ms. Cabiya and Mr. Subair in the back seat, and confirmed that there was a male passenger in front seat.

4. Trooper Busier spoke with the driver through the driver's-side window and explained why he had been stopped. The driver asked if he could take a look under the car. The trooper allowed this, and the driver confirmed that the muffler was hanging down from the bottom of his car.



5. As the driver exited the vehicle, the trooper observed a small cylindrical metal container on the console in the middle of the front seat. It was located closer to the driver's side than the passenger's side. The officer noticed that it had a screw top and a gasket-type seal. It was approximately 2 inches long and 1 inch in diameter. It appeared to be attached to a key chain. In his training and experience, Trooper Busier understood that these types of containers are used to carry narcotics. Trooper Busier was also aware, through his training, that according to Vermont law, narcotics must be carried in the container in which they are dispensed.¹ These types of containers are generally known as "pill fob keychains" and are readily available for lawful purchase over the internet.

Defendant's Ex. B.

6. Trooper Busier asked Mr. Dutton about the container. Mr. Dutton stated that he thought it was a change container, and he thought it was empty. The trooper asked Mr. Dutton if he could see it. Mr. Dutton said that he could, and handed the container to him. It was not attached to the key chain at this time. Trooper Busier opened the container and noticed a very light, or faint, white powder residue inside the cap and at the side of the bottom of the container. Based on his training, he suspected that it was some type of narcotic. However, from looking at it he could not tell if it was residue from a narcotic or residue from an over the counter medicine such as aspirin. Trooper Busier did not field test the residue at this time. At this point, Trooper Busier asked the driver to remain where he was (outside the vehicle). Trooper Busier then returned to the Dutton vehicle to identify the passengers. Ms. Cabiya produced identification, apparently from her purse, without incident. Trooper Busier spoke to the passengers through the open driver's-side window. After he identified the passengers, Trooper Busier asked the driver to accompany him into his cruiser. He then asked the driver for consent to search the vehicle, which consent was granted in writing. *State's Ex. 2.* The trooper was also able to confirm that Mr. Dutton was the owner of the vehicle.

7. After obtaining consent to search the vehicle, Trooper Busier did not immediately search it. Due to the number of passengers, state police protocol required that he contact another trooper to assist, for officer safety. The nearest trooper was Trooper Busby, and he was twenty-five to thirty minutes away. While waiting for Trooper Busby to arrive, the driver waited in the trooper's car, at the trooper's request, and the passengers remained in Mr. Dutton's car. It was continuing to rain at the time. No one was told that they could not leave at this time, nor were they told that they were free to leave. At the same time that he contacted Trooper Busby, Trooper Busier tried to obtain a drug-sniffing canine but none was available.

8. Trooper Busby arrived twenty-five to thirty minutes later. When he arrived it was still raining. Trooper Busier asked the driver if he wanted to remain in the trooper's car – he did. The troopers then had the passengers exit Mr. Dutton's car and directed them to stand in front of the car and to face away from it. After getting the passengers out of the vehicle, Trooper Busier patted them down for weapons. As he was about to pat defendant Subair down, Mr. Subair told the trooper that he did not have any weapons, but

¹ However, there is an exception for the possession of lawfully prescribed regulated drugs of not more than two days' prescribed dosage. 18 V.S.A. § 4216.

he did pull out a bag of marijuana from his pocket. Trooper Busier then patted him down and placed him in front of the car, with the other passengers. Trooper Busier then searched the vehicle and Trooper Busby watched the passengers.

9. The search took two to three minutes and did not reveal any illegal substances. Trooper Busier noted a (closed) ladies' purse and another closed bag in the back seat. He did not open or otherwise search these items. He then re-seated the front seat passenger and Ms. Cabiya into the car. Defendant Subair remained outside the vehicle. As he was re-seating Ms. Cabiya Trooper Busier asked her if he could search her purse. She did not respond, however, she started going through her purse and intentionally blocked the trooper's view of her purse with her body. Trooper Busier twice asked her what she was doing, and she refused to respond. Trooper Busier suspected that she was trying to conceal something that was inside her purse. Trooper Busier grabbed her by the shoulder and pulled her towards him so that he could effectively look over her shoulder to see what was in her purse.² He saw a clear plastic bag with a white powdery substance packaged inside which he suspected was illegal drugs. Ms. Cabiya then handed the clear bag to him and stated something to the effect that "he made me put it in there." She was upset and emotional as she said this. The white substance in the bag was later field tested and proved positive for heroin.

10. When Ms. Cabiya handed him the bag, Trooper Busier told Trooper Busby to "1095 him," meaning that he wanted Trooper Busby to take defendant Subair (who was still outside the vehicle) into custody. At this point, defendant Subair took off running. He was later apprehended.

11. Ms. Cabiya and Mr. Subair have been charged with heroin trafficking and possession as a result of the heroin found in Ms. Cabiya's purse. Defendant Subair has also been charged with marijuana possession and resisting arrest.

Conclusions of Law

1. The defendant's first argument is that the initial stop was unlawful as it was as a result of "racial profiling," as defendant Subair is African-American. However, there is no evidence in support of this claim and, therefore, this claim is denied.

2. The initial stop was justified. In order for the stop to be lawful under the Fourth Amendment of the U.S. Constitution and Article 11 of the Vermont Constitution, the officer must have had an "articulable and reasonable" suspicion of wrongdoing regarding the vehicle or its occupant. *State v. Emilo*, 144 Vt. 477, 481 (1984), citing

² Trooper Busier testified under cross-examination that he was concerned the Ms. Cabiya may have been going through her purse to obtain a weapon, however, the court does not find this statement to be credible. Earlier, Ms. Cabiya had, apparently, reached into her purse to obtain her identification, and the trooper was not concerned that she was reaching for a weapon. At no time during the entire incident did Ms. Cabiya act in a threatening manner. The court finds that the trooper was concerned that Ms. Cabiya was trying to hide something from him in her purse, not pull out a weapon.

Delaware v. Prouse, 440 U.S. 648 (1979). A mere “suspicion” or “hunch” on the part of the officer without more is not enough. *Id.* However, a reasonable and articulable suspicion of a violation of Vermont’s motor vehicle laws, including that a vehicle is not in good mechanical condition, does justify an investigative detention. *State v. Beaugard*, 175 Vt. 472, 473 (2003) (mem.). In our case, the trooper did have a reasonable and articulable suspicion that the defendant was operating a motor vehicle with a defective muffler. This is sufficient to justify a stop. *U.S. v. Hephner*, 260 F.Supp.2d 763, 771 (N.D. Iowa 2003).

3. When the vehicle halted on the side of the road the driver and each of the passengers were seized by the trooper. *Brendlin v. California*, ___ U.S. ___, 127 S.Ct. 2400, 2407, 168 L.Ed.2d 132 (2007). The passengers in the Dutton automobile have the same federal Fourth Amendment rights and State Article 11 rights as does the driver. As the United States First Circuit Court of Appeals held in *U.S. v. Kimball*:

Fourth Amendment rights are personal, and a proponent of a motion to suppress must prove that the challenged governmental action infringed upon his own Fourth Amendment rights. A police officer’s act of stopping a vehicle and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment. Such a stop affects an occupant’s interest in freedom from random, unauthorized, investigatory seizures. An occupant’s interest in avoiding the substantial anxiety that such stops may create is also affected.

When a police officer effects an investigatory stop of a vehicle, *all* occupants of that vehicle are subjected to a seizure, as defined by the Fourth Amendment. The fact that a defendant is a passenger in a vehicle as opposed to the driver is a distinction of no consequence in this context. The interest in freedom of movement and the interest in being free from fear and surprise are personal to all occupants of the vehicle, and an individual’s interest is not diminished simply because he is a passenger as opposed to the driver when the stop occurred. Both driver and passenger: have their travel interrupted by the sight of a state patrol cruiser or police car looming large in the rear view mirror, are detained on the side of the road, have their identifying documents inspected by the trooper or policeman, and may even be asked to leave their vehicles for the duration of the questioning.... Moreover, once a car is stopped, a passenger may feel no more free to leave the scene than the driver, without first being allowed to do so by the police officer. Rather, the passenger is subjected to the demands and control of the police officer, just as the driver is.

U.S. v. Kimball, 25 F.3d 1, 5 (1st Cir. 1994) (internal citations omitted).

4. After the initial stop, any subsequent investigation must be reasonably related in scope to the circumstances which justified the interference in the first place. *State v. Cunningham*, 2008 VT 43, ¶ 15, citing *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). An investigative stop, based at its inception on a reasonable suspicion, may reveal further information that justifies greater restrictions on a suspect's liberty, up to and including arrest. *Id.* Since the initial traffic stop was justified, the trooper could have detained the driver and passengers for long enough to "effectuate the purpose of the stop," *id.* at ¶ 19, which was to write a citation, or issue a warning, for defective equipment.

5. The trooper's expansion of the stop into a drug investigation required a reasonable, articulable suspicion that the driver, or passengers, was committing a drug-related crime. *Id.* Having a reasonable, articulable suspicion means "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *State v. Paquette*, 151 Vt. 631, 634 (1989) quoting *State v. Kettlewell*, 149 Vt. 331, 334 (1987) which quoted *Terry v. Ohio*, 392 U.S. at 21.

6. After the driver voluntarily exited the vehicle, the trooper noticed a small metallic, cylindrical container with a screw top on the console, attached to a key chain. According to his training and experience these containers are used to carry narcotics. Of course, they can also be used to carry anything that will fit into such a container, including "over the counter" medication. There was no evidence that such containers are promoted for use or designed for use in containing any regulated drug. The container was sealed and the trooper did not know what, if anything, was in it. In Vermont, a closed container in a vehicle cannot be searched in the absence of consent or a warrant. *State v. Savva*, 159 Vt. 75, 90 (1992). Here, the trooper had consent. The trooper asked the driver if he could look at it and the driver said that he could and handed it to him. The driver's affirmative response and his handing the container to the trooper in response to the trooper's question "Can I see it?" was a valid consent to seize and search the contents of the container. *Mosley v. State*, 425 A.2d 1039, 1044 (Md. 1981) (Affirmative response after officer's question "Can I look at it?" was a valid consent.) The consent to search equates to consent to open a readily-opened container. *United States v. Snow*, 44 F.3d 133, 135 (2nd Cir. 1995).

7. The trooper opened the container and found a faint white powdery residue in the cap and at the bottom edge in the container. The powder was consistent with narcotics, as well as any white over the counter medication, such as aspirin. The residue was not tested. There was nothing in the container that the trooper could say was an illegal substance by looking at it. A faint white residue in a pill fob keychain container, without more, is not sufficient to support a reasonable, articulable suspicion that the driver, or passengers, of the car were committing a drug-related crime. *State v. Griffin*, 2004 MT 331, ¶ 24 (Pipe found on defendant's person with untested white residue on it insufficient to warrant a reasonable person to believe vehicle would contain evidence of

an offense.) Since the apparent purpose of a pill fob container is to hold pills, it would not be unusual for it to contain a faint white residue, since so many over the counter pills are white.

8. Based on his above-described observations, the trooper then detained the driver and passengers of the car for another twenty-five to thirty minutes so that another trooper could be present to watch the passengers while he searched the vehicle, and to determine whether a drug-sniffing canine was available. The canine was not available and the second officer arrived after twenty-five to thirty minutes. The totality of the circumstances known to Trooper Busier at the time of the stop (before discovering the marijuana), including his knowledge regarding the pill container, are insufficient to support a reasonable suspicion of present illegal drug activity. See *State v. Cunningham* at ¶ 27. Thus, the faint white residue in the pill fob container is a sufficient justification for neither a full scale search nor the detention of the driver and passengers for another twenty-five to thirty minutes to allow a full scale search of the vehicle for illegal drugs. As a consequence, the evidence seized subsequent to and resulting from the search and initiation of the unlawful detention is suppressed. *State v. Cunningham* at ¶ 21 (“majority” opinion) and ¶ 39 (concurring opinion).

9. When trooper Busby arrived, Trooper Busier ordered the passengers out of the car and directed them to stand in front of the car, facing away from the car. Had the expansion of the stop into a drug investigation and the continued detention been valid, this exit order would have been a valid exercise of the trooper’s authority. *Knowles v. Iowa*, 525 U.S. 113, 117, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998). Because the expansion of the stop into a drug investigation and the continued detention were unjustified, the exit order was a further intrusion that was also unjustified as it would not have been necessary in the absence of the trooper’s decision to conduct a full scale search. After ordering the passengers out of the car, the troopers patted them down, and during this process, defendant Subair handed Trooper Busier a baggie of marijuana.³ The troopers directed the passengers to stand in front of the Dutton vehicle and to look away. The passengers stood in the rain for two to three minutes while the car was searched, and defendant Subair stood in the rain for a longer time while the other passengers were re-seated.

10. Although the unlawful detention will result in the suppression of all evidence obtained as a result thereof, the parties have also briefed and argued the validity of the subsequent “search” of Ms. Cabiya’s purse, therefore, the court will also address this issue, although it does not affect the court’s ruling.

11. The defendant finds constitutional fault with the “search” of Ms. Cabiya’s purse. The Vermont Supreme court has held that an individual has an Article 11 expectation of privacy in a closed container in an automobile. See *State v. Savva*, 159 Vt. At 91. The court has found in the companion case, *State v. Cabiya*, docket no. 335-7-08 Ancr, that the search was unlawful *vis-à-vis* co-defendant Bethany Cabiya. However, that does not end our inquiry in this case. The purse in question was owned and in the possession of Ms. Cabiya at the time that it was searched. In our case, defendant Subair


³ Defendant Subair has not raised the issue of the lawfulness of the pat-down search itself.

has not asserted a possessory, proprietary or participatory interest in purse or items seized within the purse. In order to establish standing to assert his Article 11 claim, defendant Subair must assert a possessory, proprietary or participatory interest in the item seized and object which was searched. *State v. Wood*, 148 Vt. 489-90 (1987). Defendant Subair's claim also fails under a 4th Amendment analysis. Under the 4th Amendment, defendant Subair bears the burden of showing that he had a legitimate expectation of privacy in the purse and the items seized. *Rawlings v. Kentucky*, 448 U.S. 98, 103 (1980), 100 S.Ct. 2556, 65 L.Ed. 2d 633. Defendant Subair has not demonstrated an expectation of privacy in Ms. Cabiya's purse. Factors that the court considers in determining if a person has a reasonable expectation of privacy in property held by another includes whether that person claims an ownership or possessory interest in the property, and whether he has established a right or taken precautions to exclude others from the property. *U.S. v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992). Defendant Subair has not asserted a sufficient Article 11 or 4th Amendment interest in co-defendant Cabiya's purse or contents.

Order

The prolonged detention of the passengers in the Dutton vehicle was unlawful and as a result, all evidence obtained as a result of the detention, including the evidence of marijuana and heroin must be suppressed.

Dated at Middlebury this 15th day of December, 2008.



Cortland Corsones
District Court Judge