IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA,	)	
	)	Criminal Action No. 7:11CR00057
v.	)	
	)	**MEMORANDUM OPINION**
HERBERT GREEN,	)	
	)	By: Hon. Glen E. Conrad
Defendant.	)	United States District Judge

This case is presently before the court on the motion to suppress filed by the defendant, Herbert Green. For the reasons set forth below, the court will deny the defendant's motion.

Background

On the morning of March 17, 2011, Trooper Darryl Johnson of the Virginia State Police observed Green driving northbound on Interstate 77, near the town of Wytheville, Virginia. The windows of Green's vehicle appeared to be excessively tinted. As Trooper Johnson moved closer to the vehicle, he also noticed that the vehicle's license plate was partially obscured. At approximately 10:07:58 a.m., Trooper Johnson activated his patrol car's blue lights, and effectuated a stop of Green's vehicle. The audio and video recording equipment in Trooper Johnson's patrol car captured the traffic stop on tape.

Prior to the stop, Trooper Johnson contacted his partner, Trooper Bryan Dillon, and advised him of his location in case he needed assistance. Trooper Johnson also reported the vehicle's license plate number and noted that he thought it had been issued in Pennsylvania.

At 10:08:35 a.m., Trooper Johnson approached Green's vehicle and identified himself as a Virginia state trooper. Johnson asked Green to provide his driver's license and the vehicle's registration. He explained that Green's license plate was partially obscured by a cover, which

was illegal in Virginia. Johnson also inquired about the vehicle's window tinting. Green told the trooper that the windows were already tinted when he purchased the vehicle.

During the suppression hearing, Trooper Johnson testified that Green appeared to be nervous, and that he seemed to question why he had been stopped. Green's traveling companion, who was seated in a reclined position in the front passenger seat, closed his eyes each time Trooper Johnson looked at him, apparently pretending to be asleep. Trooper Johnson also testified that the vehicle contained a strong odor of air freshener, and that it had a "lived in look," with clothing and other items scattered in the vehicle.

At 10:10:30 a.m., once he obtained Green's license and registration, Trooper Johnson asked Green to accompanying him to the patrol car so that he could check the license and registration on his computer. Although Green mentioned, while exiting his vehicle, that his lawyer had advised him to always remain in his vehicle, Green nonetheless walked with Trooper Johnson back to the patrol car.

As Trooper Johnson and Green sat down in the patrol car, Trooper Johnson asked Green why he had a lawyer. In response, Green indicated that he was in the entertainment business, and that the passenger in the vehicle was his artist. During their conversation, Johnson initiated a computer check of Green's license and registration.

At 10:11:20 a.m., Johnson radioed his partner, Trooper Dillon, who had parked further back along the interstate, and told Dillon to "come on up." Johnson then asked Green about his travel history. Green told Trooper Dillon that he and his passenger were driving from Atlanta, where they had performed some shows.

Seconds later, at 10:11:35 a.m., Trooper Johnson again emphasized the reasons for the stop. Johnson noted that Green's window tinting appeared to be too dark, and that he would

need to check it with his tint meter. Trooper Johnson also pointed out that information on Green's license plate was partially obscured, and that state troopers "write tickets everyday for that."

At 10:13 a.m., Trooper Johnson received information alerting to potential officer safety issues, including the existence of a concealed weapon permit and a protective order. Upon reviewing the information, Trooper Johnson discovered that the concealed weapon permit had been issued to another individual by the name of John Paul Green.

At 10:14 a.m., a dispatcher radioed Trooper Johnson and confirmed that the concealed weapon permit belonged to someone else, but that Green did have a protective order against him. Trooper Johnson and Green then had a brief discussion regarding the protective order and the underlying facts, and Johnson requested additional information regarding the protective order. Johnson testified during the suppression hearing that he had received "heat" in the past for not making further inquiries regarding a protective order and, thus, that it had become his common practice to request additional information.

Trooper Johnson also inquired about Green's travel history and the identity of Green's passenger. Green indicated that the passenger was his recording artist, and that the two of them had been in Atlanta for eight days.

Between 10:15 and 10:16 a.m., Trooper Johnson informed Green that he was going to check the tint on Green's windows. Upon exiting his patrol car, Johnson spoke to Trooper Dillon, who had arrived on the scene of the stop.

When Trooper Johnson approached the front passenger window of Green's vehicle at 10:16 a.m., the passenger informed Trooper Johnson that his name was Stephen Richardson, and that he and Green had been in Atlanta for two weeks, where Richardson had performed as an

R&B singer. During his conversation with Richardson, Trooper Johnson measured the tint of the front passenger window and found it to be in violation of Virginia law. Trooper Johnson informed Richardson that the window tinting was illegal in Virginia.

At 10:17 a.m., Trooper Johnson walked back to his patrol vehicle and informed Green that the level of tinting was "bad." He subsequently asked Green whether there was any marijuana in the vehicle, to which Green responded in the negative. Green also denied having any other drugs in the vehicle. Johnson informed Green that he had one more thing to check, and that he would then permit Green to leave. At 10:17:49 a.m., Johnson called into dispatch and requested a check of Green's criminal history.

During the suppression hearing, Trooper Johnson testified that Green's demeanor changed when Johnson brought up the subject of narcotics. Johnson stated that Green began breathing more rapidly and that he appeared to be uncomfortable.

At 10:18 a.m., Trooper Johnson asked Green if he had ever been arrested for anything. Green responded that he had "beat[en] up a few people," and that he had been arrested for narcotics in the 1980s. After inquiring as to how long Green had lived in Pittsburgh, Pennsylvania, Trooper Johnson again emphasized, at 10:18:46 a.m., that Green's window tinting was illegal in Virginia.

At 10:19 a.m., Trooper Johnson exited his patrol vehicle and went to speak with Trooper Dillon. Trooper Johnson told Dillon that Green had "lawyered up" on him before Green got out of the car, that Green was "dirty," and that Green had a "history," but would not tell Johnson about it. He advised Dillon that he was checking Green's criminal history, and asked Dillon to perform an exterior sweep of Green's vehicle using Dillon's drug detection dog.

At 10:19:42 a.m., Trooper Johnson returned to his patrol vehicle and advised Green that Dillon was going to conduct a sweep of the exterior of Green's vehicle with the dog. Johnson also indicated that he was waiting to hear back from dispatch on information regarding the protective order.

While the dog circled Green's vehicle, Trooper Dillon asked Green whether he and Richardson had smoked marijuana in the vehicle. Green indicated that marijuana was often smoked in Atlanta, but that no one had smoked in the vehicle.

Trooper Dillon's dog completed the free air sniff at 10:21 a.m., approximately fourteen minutes after the initial stop. During the free air sniff, the dog alerted to the rear passenger panel. When Trooper Johnson explained that the dog had detected the presence of narcotics, Green stated that he did not want anyone to search the vehicle. Trooper Johnson advised him, however, that the alert by the dog gave the officers probable cause to search the vehicle.

At 10:21:55 a.m., immediately after the dog completed the free air sniff, dispatch informed Trooper Johnson that Green's criminal history included multiple officer safety issues, including homicide, carrying concealed weapons, robbery, kidnapping, and terroristic threats. Upon receiving this information, Trooper Johnson again noted that the officers had probable cause to search Green's vehicle. At 10:22:44 a.m., Johnson asked Green to step out of the patrol car so that Green could be searched by Trooper Dillon. Trooper Johnson then approached the passenger side of Green's vehicle and spoke to Richardson, who consented to a search of his person.

At 10:27:05 a.m., upon the arrival of Virginia State Police Sargent Tony Zyvoloski, the troopers moved Green's vehicle further away from traffic and began conducting a search of the

vehicle. During the search, the troopers found a large duffle bag containing over one kilogram of cocaine and approximately $7,000.00 in United States currency.

On August 4, 2011, a grand jury in the Western District of Virginia returned an indictment charging Green with possession with intent to distribute 500 grams or more of a mixture or substance containing cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). Green subsequently moved to suppress the evidence found in the vehicle, contending that the traffic stop was unreasonable in its scope and duration, and that the delay was not justified by reasonable suspicion of criminal activity.[1] The court held a hearing on the motion on December 5, 2011, during which the government presented testimony from Trooper Johnson and Trooper Dillon. The matter has been fully briefed and is ripe for review.

Discussion

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. When a law enforcement officer stops a vehicle and detains the occupants briefly, the stop constitutes a seizure within the meaning of the Fourth Amendment. Whren v. United States, 517 U.S. 806, 809-810 (1996). The determination of whether a traffic stop was reasonable involves a "dual inquiry." United States v. Rusher, 966

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[1] After Green initially moved to suppress the evidence taken from his vehicle, he filed a supplemental motion arguing that he was unlawfully interrogated after he had invoked his right to counsel. During the hearing, however, Green conceded that his statement that his attorney had advised him not to exit his car during a stop did not constitute a clear and unequivocal request for counsel. See Davis v. United States, 512 U.S. 452, 459 (1994) ("[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, [the Supreme Court's] precedents do not require the cessation of questioning."). Instead, Green argued, both during the hearing and in his supplemental letter of clarification, that his reference to an attorney could not lawfully factor into the reasonable suspicion analysis.

F.2d 868, 875 (4th Cir. 1992). The court considers "'whether the officer's action was justified at its inception,'" and whether the officer's subsequent actions were "'reasonably related in scope to the circumstances which justified the interference in the first place.'" Id. (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

In this case, Green does not dispute that his window tinting and obstructed license plate justified the initial stop of his vehicle.[2] See Virginia Code § 46.2-1052(C)(1) ("No sun-shading or tinting films may be applied or affixed to the front side windows of any motor vehicle operated on the highways of the Commonwealth that reduce total light transmittance of such window to less than 50 percent[.]"); Va. Code § 46.2-716(B) ("No . . . bracket, holder, mounting, frame or any other type of covering shall be placed, mounted, or installed on, around, or over any license plate if such . . . covering in any way alters or obscures the name or abbreviated name of the state wherein the vehicle is registered . . . ."). Likewise, Green does not contest that the alert by the drug detection dog "in and of itself, provide[d] probable cause to search [his] vehicle." United States v. Branch, 537 F.3d 328, 340 n.2. (4th Cir. 2008). Green instead challenges the reasonableness of the fourteen-minute period of detention between the initial stop and the alert by the drug dog. Green cites to the United States Court of Appeals for the Fourth Circuit's recent decision in United States v. Digiovanni, 650 F.3d 498 (4th Cir. 2011), in which the Court held that a stop exceeded the permissible scope and duration of a routine traffic stop, where the officer "failed to diligently pursue the purposes of the stop and embarked on a sustained course of

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[2] Although not at issue in this case, the court notes that, "[a]s 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, 517 U.S. at 810. "Any ulterior motive a police officer may have for making the traffic stop is irrelevant." United States v. Digiovanni, 650 F.3d 498, 506 (4th Cir. 2011); see also Whren, 517 U.S. at 813.

investigation into the presence of drugs in the car that constituted the bulk of the encounter" between the officer and the defendant. Id. at 509.

As the Fourth Circuit explained in Digiovanni, a traffic stop "must be limited both in scope and duration." Id. at 507 (citing Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion)). With regard to scope, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Royer, 460 U.S. at 500. With regard to the duration component, although the reasonable duration of a traffic stop "cannot be stated with mathematical precision," Branch, 537 F.3d at 336, a stop may become "unlawful if it is prolonged beyond the time reasonably required to complete [its] mission." Illinois v. Caballes, 543 U.S. 405, 407 (2005). Accordingly, the court must consider "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." United States v. Sharpe, 470 U.S. 675, 686 (1985). "Like other reasonableness determinations, the diligence determination examines the totality of the circumstances." Digiovanni, 650 F.3d at 509. "Where a delay can be characterized as de minimis under the totality of the circumstances, it will not be recognized as a Fourth Amendment violation." Id.

It is well-established that a law enforcement officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a ticket. Id. at 507. An officer may also, in the interest of personal safety, request identification from passengers in the vehicle. See United States v. Soriano-Jarquin, 492 F.3d 495, 500 (4th Cir. 2007) ("We believe a simple request for identification from passengers falls within the purview of a lawful traffic stop and does not constitute a separate Fourth Amendment event. Assuming a

lawful stop, an officer is entitled to some chance to gain his bearings and to acquire a fair understanding of the surrounding scene."). Along the same lines, the officer may "inquire[] into matters unrelated to the justification for the traffic stop," Arizona v. Johnson, 555 U.S. 323, 333 (2009), and take other actions that do not constitute "searches" within the meaning of the Fourth Amendment, such as conducting an exterior dog-sniff of the vehicle, Caballes, 543 U.S. at 409, as long as those actions or inquiries "do not measurably extend the duration of the stop." Johnson, 555 U.S. at 333. See also United States v. Guijon-Ortiz, No. 10-4518, 2011 U.S. App. LEXIS 22661, at *21 (4th Cir. Nov. 10, 2011) (listing various inquiries and actions an officer may generally undertake during the course of a routine traffic stop).

If an officer seeks to prolong a traffic stop "beyond the scope of a routine traffic stop," the officer "must possess a justification for doing so other than the initial traffic violation that prompted the stop in the first place." Branch, 537 F.3d at 336. This requires "either the driver's consent or a 'reasonable suspicion' that illegal activity is afoot." Id.

Having reviewed the applicable legal principles and the existing case law, the court now turns to Trooper Johnson's stop of Green's vehicle. For the following reasons, the court concludes that the stop was reasonable in scope and duration, and that Green was lawfully seized for the traffic violations at the time the dog sniff occurred. While Trooper Johnson inquired into matters that were unrelated to the justifications for the initial stop, the totality of the circumstances demonstrates that Johnson "diligently pursue[d] the investigation of the justification[s] for the stop," Digiovanni, 650 F.3d at 509, and was not otherwise "dilatory in [his] investigation." Sharpe, 470 U.S. at 687.

As previously outlined, at the start of the traffic stop, Trooper Johnson asked Green for his driver's license and the vehicle's registration, explained the reasons for the stop, and "[u]nderstandably" asked Green to exit the vehicle. Digiovanni, 650 F.3d at 510; see also Pennsylvania v. Mimms, 434 U.S. 106, 111 n. 6 (1977) (holding that, "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures"). Once in the patrol car, Trooper Johnson, unlike the officer in Digiovanni, promptly initiated a check of Green's license and registration, and waited approximately three minutes for a response from dispatch. See Digiovanni, 650 F.3d at 509-510 (holding that a stop exceeded the permissible scope and duration of a routine traffic stop, where the officer waited over ten minutes to perform the driver's license check, during which the officer asked "numerous questions" regarding the defendant's travel history and embarked on a "sustained investigation into the presence of drugs"). During that time, Trooper Johnson addressed the grounds for the initial stop, again emphasizing that Green's window tinting appeared to be too dark, and that information on his license plate was obscured from view. While Trooper Johnson also inquired about topics other than the traffic infractions, such as Green's travel plans and Green's reference to his lawyer, these brief questions did not run afoul of the scope or duration component of Terry's second prong. See Johnson, 555 U.S. at 333 (holding that a law enforcement officer's "inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure," provided the questions "do not measurably extend the duration of the stop").

At approximately 10:14 a.m., dispatch advised Trooper Johnson that Green had a protective order against him, which Green confirmed. Upon receiving this report, Trooper Johnson requested additional information regarding the protective order. As Trooper Johnson noted during the suppression hearing, the existence of a protective order raises officer safety concerns, since the order can be indicative of assaultive or threatening behavior. Because there is no indication that Trooper Johnson's inquiry regarding the protective order measurably prolonged the stop, the court is persuaded that it did not alter the stop's lawful character. See Soriano-Jarquin, 492 F.3d at 500 (emphasizing that "[i]t is well established that officers performing a lawful stop are 'authorized to take such steps as [are] reasonably necessary to protect their personal safety'") (quoting United States v. Hensley, 469 U.S. 221, 235 (1985)).

During the next couple of minutes, while waiting to hear back on the protective order, Trooper Johnson walked back to Green's vehicle to check the window tinting. The check confirmed that the level of tint was in violation of Virginia law, and Trooper Johnson so advised Richardson and Green. Trooper Johnson did not proceed to issue a citation or warning at that point, however. Instead, Johnson called into dispatch and requested a check of Green's criminal history. Johnson subsequently waited approximately four minutes for dispatch to provide the criminal history information, during which Trooper Dillon's drug dog completed the exterior sniff of Green's vehicle.

Although the criminal history check extended the duration of the traffic stop by a few minutes, the court is convinced that Trooper Johnson acted diligently, and that the check did not render the stop unreasonable in scope or duration. "Many courts have recognized that knowledge of the criminal histories of a vehicle's occupants will often be relevant to [officer] safety." United States v. Purcell, 236 F.3d 1274, 1278 (11th Cir. 2001). Thus, "[s]o long as the computer

check does not prolong the traffic stop beyond a reasonable amount of time under the circumstances of the stop, the inclusion of a request for criminal histories does not constitute a Fourth Amendment violation." Id.; see also United States v. McRae, 81 F.3d 1528, 1536 n. 6 (10th Cir. 1996) ("Triple I checks are run largely to protect the officer. Considering the tragedy of the many officers who are shot during routine traffic stops each year, the almost simultaneous computer check of a person's criminal record, along with his or her license and registration, is reasonable and hardly intrusive.").

In this case, the court recognizes that the timing of the criminal history check was arguably unusual, since the trooper requested the information separately from the driver's license and registration check. However, given the particular circumstances, the court is convinced that Trooper Johnson did not unreasonably or unnecessarily prolong the detention of the defendant. It was not until Trooper Johnson performed a check of Green's license and registration that Johnson learned that Green had a protective order against him, and at the time Trooper Johnson requested Green's criminal history, he had not obtained any additional information regarding the protective order. Moreover, after interacting with Green, Trooper Johnson suspected that there was more to Green's criminal history than he had been willing to share, and Johnson's suspicions ultimately proved to be accurate, with the check revealing a history of violent and threatening behavior. Finally, the criminal history check added only four minutes to the stop. The court is convinced that such delay was de minimis given the particular circumstances. See Purcell, 236 F.3d at 1279 ("[T]he request for the criminal histories prolonged the traffic stop, at most, by approximately three minutes. We conclude that this delay was de minimis in the context of the totality of the circumstances of this traffic stop.").

In sum, the court concludes that the period of detention between the initial stop and the dog alert was reasonable in scope and duration and, thus, that Green was lawfully seized at the time the free air sniff occurred. Having reached this decision, the court need not decide whether reasonable suspicion of unlawful activity arose during the stop sufficient to justify any delay. Nor need the court resolve the issue of whether Green's reference to his attorney, following the initial stop, could lawfully factor into the reasonable suspicion calculus. Nonetheless, the court notes that Green cites no case law suggesting that the trooper's reliance on Green's statement rendered the seizure or the subsequent search of Green's vehicle unconstitutional, and the court has been unable to find any such authority in its own research.

Conclusion

For the reasons stated, the defendant's motion to suppress will be denied. The Clerk is directed to send certified copies of this memorandum opinion and the accompanying order to all counsel of record.

ENTER: This 21st day of December, 2011.

/s/ Glen E. Conrad
Chief United States District Judge