

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

UNITED STATES OF AMERICA,))	Criminal Number 7:04CR00004
Plaintiff,))	
v.))	<u>MEMORANDUM OPINION</u>
GABINO BARRERA,))	
Defendant.))	By: Samuel G. Wilson
		Chief United States District Judge

Gabino Barrera faces charges of possession with the intent to distribute methamphetamine in violation of 21 U.S.C. § 841. Barrera moves this court to suppress both the methamphetamine seized and his statements to police, alleging that officers unlawfully detained him after the completion of a traffic stop and that he did not properly consent to a search of his car and his person.¹ For the reasons stated, however, the court finds that Barrera freely and voluntarily consented to the searches during a consensual encounter. Accordingly, the court denies the motion to suppress.

I.

Special Agent Gary R. Meredith of the Virginia State Police Criminal Interdiction stopped Barrera, a traffic stop that Barrera does not challenge, after he witnessed Barrera moving abruptly and speeding on Interstate 77. During the stop, Barrera gave Meredith an international driver's license, which indicated that Barrera was born in Mexico, and his vehicle's registration. After checking the

¹ Barrera also claims that the evidence obtained should be suppressed because officers did not notify him of his rights under the Vienna Convention on Consular Relations. Although the Vienna Convention requires officers arresting a foreign national to inform him of his right to contact his consular, suppression of evidence is not a proper remedy for violations of the treaty. United States v. Lawal, 231 F.3d 1045, 1048 (7th Cir. 2000); United States v. Lombera-Camorlinga, 206 F.3d 882, 883-84 (9th Cir. 2000). Therefore, the court rejects Barrera's claim.

information, which did not indicate that anything was amiss, Meredith issued a warning for the traffic infractions and returned Barrera's documents to him.

Over the next two minutes, Meredith asked Barrera about his travel plans and Barrera responded. Meredith also asked Barrera if he had any illegal drugs in the car, and when Barrera responded "no," Meredith asked if he could search the car. Barrera gave permission for the search, and Meredith then asked Barrera to step out of the car and if he could search Barrera's person. Barrera again gave permission. After conducting a brief pat-down, Meredith found several hundred dollars in Barrera's pocket, but nothing illegal. Meredith then requested Barrera to stand by the front of the vehicle while Meredith searched it.

During this time, but before Barrera gave permission to search the car, a K-9 unit, which Meredith requested as back-up during the initial traffic stop, arrived. Once Barrera gave permission to search the vehicle, the K-9 unit briefly sniffed the car and alerted to it. Meredith then searched the vehicle by hand, opened a speaker cover in the rear of the car, and noticed fresh tool marks and missing screws. After removing the speaker, Meredith discovered five packages of methamphetamine, and he arrested Barrera.

Barrera now moves the court to suppress all evidence seized and any statements made by Barrera, alleging that Meredith unlawfully detained him after the initial traffic stop and that he did not validly consent to any search. During a hearing on his motion to suppress, Barrera, through the aid of an interpreter, testified that he did give permission for Meredith to search his person and his car. Barrera maintains, however, that his experiences with police in his native country, Mexico, led him to believe that he was not free to leave after the completion of the initial traffic stop, that he had to comply

with Meredith's requests, and that he could not refuse consent to the searches. Further, Barrera asserts that Meredith, as an experienced interdiction officer, should have known of Barrera's beliefs.

From the evidence presented, the court makes the following finding of fact: Barrera overstated his lack of understanding of English at the suppression hearing. Barrera himself testified that he only had "a little" difficulty understanding Meredith, and Meredith indicated that it was "fairly easy" to communicate with Barrera. In addition, the court notes, Barrera's counsel asked him at least three open-ended questions during direct examination that required Barrera to recall the questions that Meredith had asked at the scene. On all occasions, Barrera responded by repeating Meredith's question. Although Barrera provided his answers at the hearing through an interpreter, he was being asked to remember questions Meredith had asked in English. Therefore, despite Barrera's claim that he has difficulty understanding English, the court finds that his claim is overstated.

II.

A. Unlawful Detention Claim

Barrera concedes that Meredith legally stopped him for traffic violations, but contends that Meredith illegally detained him following the initial stop. A law enforcement officer may request a driver's licence and registration, run a computer check and issue a warning, but any further questioning is beyond the scope of the stop and would be permissible only if the officer had a reasonable suspicion of some other crime or the encounter was consensual. United States v. Rusher, 966 F.2d 868, 876-77 (4th Cir. 1992). Meredith, as he concedes, did not have reasonable suspicion of any other crime, but the evidence shows that the encounter—Meredith's questions about Barrera's travel plans and about possible drug possession—was consensual.

The appropriate test to determine a “consensual encounter” is whether, when examining the totality of the circumstances, a “reasonable person would have felt free to decline the officers’ requests [for further information] or otherwise terminate the encounter.” Rusher, 966 F.2d at 877; see United States v. Weaver, 282 F.3d 302, 309 (4th Cir. 2002). There is no per se rule that an officer must tell a defendant that he is free to leave or that he does not have to answer any questions. United States v. Hill, 133 F.3d 1143, 1149 (10th Cir. 1999). Further, “the particular traits or subjective state of mind of the defendant are irrelevant to the objective ‘reasonable person’ test..., ‘other than to the extent that they may have been known to the officer and influenced his conduct.’” Id. (quoting United States v. Bloom, 975 F.2d 1447, 1455 n.9 (10th Cir. 1992)).

Here, the totality of the facts simply does not support the notion that a reasonable person would have felt unable to end the encounter with Meredith. After Meredith returned Barrera’s licence and registration and issued the warning, the encounter became nothing more than a consensual encounter. See United States v. White, 81 F.3d 775, 778-79 (8th Cir. 1996) (holding that a traffic stop concluded and a consensual encounter began when the officer returned the driver’s licence and registration and issued a warning). There is no evidence that Meredith displayed his weapon or that his tone was hostile. Even though a K-9 unit arrived during the encounter, the evidence does not suggest that any officer other than Meredith was anything more than a passive observer before Barrera consented to the search of the car. In addition, although Barrera alleges that his experiences in Mexico led him to believe that he was not free to leave or refuse Meredith’s requests, there is no evidence that suggests Meredith knew of Barrera’s attitude about police. Further, Meredith testified that Barrera was in fact free to leave immediately after the initial stop concluded. In short, the simple fact that Barrera was

Mexican lends no support to the allegation that Meredith knew Barrera felt compelled to remain and answer his questions. Therefore, since nothing suggests that the encounter was not consensual or that Meredith may have known Barrera's particular beliefs about the police, Meredith properly questioned Barrera during a consensual encounter.

B. Invalid Consent Claim

Since Meredith did not improperly detain Barrera after the completion of the traffic stop, he was free to ask Barrera for consent to search the car and Barrera's person, but it must be determined whether Barrera's consent was freely and voluntarily given. A routine traffic stop typically does not justify a search of an automobile. There are, however, several well-delineated exceptions. United States v. Carter, 300 F.3d 415, 421 (4th Cir. 2002).² One exception, consent, is examined using the totality of the circumstances to determine if the consent to search was freely and voluntarily given. United States v. Lattimore, 87 F.3d 647, 650 (4th Cir. 1996). In examining the totality of the circumstances, it is appropriate to consider both the characteristics of the accused and the conditions under which the consent to search was given. Id. Further, the government need not prove that the defendant knew of his right to refuse consent. Id.; see United States v. Wilson, 895 F.2d 168, 172 (4th Cir. 1990) (holding that an officer's failure to explain that one could refuse consent does not invalidate an otherwise valid consent).

² Another exception to the unreasonableness requirement is the "automobile exception," which permits a warrantless search of an automobile where probable cause exists "because of the inherent mobility of the car and the danger that contraband inside the car may disappear if police take the time to obtain a warrant." Carter, 300 F.3d at 422. Therefore, once the dog detected drugs, there was probable cause to believe that drugs were inside the vehicle. Under the automobile exception, it was then permissible for Meredith to conduct a warrantless search of the entire vehicle to locate the drugs.

In this case, other than Barrera's Mexican heritage, Barrera offers no support that his consent was not free and voluntary.³ Barrera is 28 years old and he was stopped in a non-coercive atmosphere—during daylight hours on the side of a busy interstate. Barrera, as the court found, understands English, and Meredith testified that it was “fairly easy” to communicate with him. Further, Barrera did not object, either before or after Meredith searched Barrera's person or car, and he provided separate, oral consents to both searches. Nothing suggests that Meredith attempted to misrepresent Barrera's right to refuse consent, and there are no signs of coercion or duress. Although Barrera's subjective belief about his right to refuse consent may be relevant, it is but one factor and does not overcome all other indications that his consent was freely and voluntarily given. Therefore, the court finds that Barrera freely and voluntarily consented to a search of his person and his automobile during a consensual encounter, and the court denies his motion to suppress.⁴

III.

For the reasons stated, the court denies Barrera's motion to suppress.

ENTER: This ___ day of April, 2004.

³Barrera also does not claim that Meredith exceeded the scope of the consent by removing a speaker cover in the rear of the car. See U.S. v. Jones, 356 F.3d 529, 533-34 (4th Cir. 2004). Even if he made such a claim, the court finds that the drug dog alerted to the car before Meredith removed the speaker and, therefore, that the “automobile exception” permitted that portion of the search.

⁴ In addition to the evidence seized, Barrera moves to suppress all statements and other evidence that were obtained after the search, contending that such evidence is “fruit of the poisonous tree.” Having found, however, that Barrera freely and voluntarily consented to the searches during a consensual encounter, Barrera's claim is moot. Therefore, to the extent he moves to suppress evidence as “fruit of the poisonous tree,” the motion is denied.

Chief United States District Judge

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UNITED STATES OF AMERICA,)	
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v.)	<u>ORDER</u>
)	
GABINO BARRERA,)	By: Samuel G. Wilson
Defendant.)	Chief United States District Judge

In accordance with the Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that the Barrera's motion to suppress is **DENIED**.

The Clerk of the Court is directed to send certified copies of this Order and the accompanying Memorandum Opinion to the counsel of record for Barrera and the United States.

ENTER: This ___ day of April, 2004.

Chief United States District Judge