

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING
SEP 08 2009
Stephan Harris, Clerk
Casper

United States District Court
For The District of Wyoming

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 SERGEI PAUL LUDWIG,)
)
 Defendant.)

Case No. 08-CR-224-D

ORDER DENYING DEFENDANT’S SECOND MOTION TO SUPPRESS

This matter comes before the Court on Defendant Sergei Paul Ludwig’s second motion to suppress evidence acquired during Mr. Ludwig’s August 26, 2008, traffic stop by Trooper David Chatfield. The stop occurred on Interstate 80 between Rawlins and Saratoga, Wyoming. The Court previously considered—and on December 18, 2008, denied—a motion to suppress filed by prior appointed counsel. Mr. Ludwig subsequently retained counsel who sought leave to file the instant, second motion to suppress. Troubled by allegations that certain relevant evidence was destroyed or not disclosed,¹ the Court agreed to reopen the suppression matter on a limited basis. Namely, the Court agreed to consider additional testimony and argument regarding (1) whether Trooper

¹ Specifically, the video recording taken by Trooper Regina Schulmeister’s patrol car camera, also known as an ICOP system, was not disclosed to the Defendant. The factual details surrounding the government’s failure to disclose the video, as well as the destruction or loss of the video, are discussed in the Court’s order denying Mr. Ludwig’s motion to dismiss, Docket 64, and its motion granting a second suppression hearing, Docket 63.

Chatfield in fact possessed a reasonable, articulable suspicion that the Defendant was engaged in criminal activity, which could justify his brief additional detention while Trooper Chatfield deployed a drug detection dog; and (2) the possibility that the drug detection dog involved in the search was prompted or cued to alert by Trooper Chatfield. Additional evidence elicited during the Court's second suppression potentially called into question whether Trooper Chatfield possessed probable cause to pull Mr. Ludwig over for speeding in the first place, or whether he may have failed to properly calibrate his radar gun. Having considered the motion and the government's response thereto, as well as having conducted a multi-day hearing on the matter on July 27, 2009 and August 17 and 18, 2009, and considering itself in all respects fully advised and informed, the Court hereby FINDS and ORDERS:

I. Factual Background

This case arises out of a traffic stop conducted on August 26, 2008, in which Wyoming Highway Patrol Trooper David Chatfield pulled the Defendant over for traveling ten miles per hour over the posted speed limit. At the time, Trooper Chatfield was positioned in the center median of I-80, near mile marker 254, and was engaged in fixed radar traffic enforcement operations. Trooper Chatfield measured Mr. Ludwig's speed at 85 miles per hour using his Stalker Dual DSR Moving Radar system. He additionally testified for the first time on August 18, 2009 that he simultaneously estimated Mr.

Ludwig's speed as he had been trained to at various stages of his career. Chatfield stated that his estimation of Ludwig's speed matched the radar gun's measurement.

After determining Mr. Ludwig was traveling well in excess of the speed limit, Trooper Chatfield entered the roadway and gave pursuit. Just over a minute passed between the time Trooper Chatfield initially gave pursuit, and the time he closed the gap and pulled in behind Mr. Ludwig. Mr. Ludwig quickly pulled onto the shoulder, and applied his brakes. However, Ludwig took approximately 65 seconds to come to a full and complete stop from the time Trooper Chatfield first pulled in behind him, or 44 seconds from the moment Ludwig first crossed onto the shoulder. At various times in his testimony, Trooper Chatfield suggested that the length of time it took for Ludwig to come to a stop was out of the ordinary, and was a factor in Chatfield's belief that Ludwig was engaged in criminal activity.

When he initially approached the vehicle, Trooper Chatfield stated that he noticed a strong odor of cologne or air freshener coming from the interior. He further testified during the Court's first suppression hearing that strong odorants are commonly used in vehicles smuggling illegal drugs, especially marijuana, in order to camouflage the load. He asked the Defendant to accompany him to his patrol car, where he proceeded to write the Defendant a citation for speeding. He noted that the Defendant himself did not smell of cologne, but that the smell was specific to the car. Although he testified during the first suppression hearing that he did not notice an air freshener in the car, Defendant's Exhibit

B, a photo taken of the front of the car in WyDOT's Elk Mountain shop, clearly depicts one hanging from the rear view mirror.

When walking away from the vehicle after his initial contact with Ludwig, Trooper Chatfield noted that the Defendant was "very, very, very nervous," a comment recorded on his ICOP system. He also noticed that the vehicle had very little in the passenger compartment except for a single shirt² hanging in the window and a small cooler. Additionally, the car's registration was in another individual's name, allegedly that of Ludwig's car loan co-signer.

As he wrote the ticket, Trooper Chatfield questioned the Defendant regarding his activities. The Defendant told him he was returning to New Jersey from California, where he had been sent by his employer to work on a "server problem" for a second company, which he referred to as "CalPOP." The Defendant also told the trooper that he chose to drive in each direction because he was "scared of flying." During the questioning, Trooper Chatfield asserts that the Defendant did not make eye contact with him, took lengthy pauses and seemed to ponder his answers to Chatfield's questions before answering. Chatfield stated that Mr. Ludwig seemed reluctant to relate that he was coming from California, and stated that a lengthy pause preceded his explanation of his supposedly

² The items inventoried and preserved following the search do not include a shirt, but do include a clothes hanger. Additionally, one of the photographs taken by Wyoming Highway Patrol personnel during the search of the car in WyDOT's Elk Mountain facility depict a pile of clothes on the rear, passenger-side floorboards, below where the shirt was allegedly located. The Court places little or no weight on the existence of a shirt for the purposes of determining if Trooper Chatfield possessed reasonable, articulable, particularized suspicion of criminal activity. Mr. Ludwig asserts, however, that the lack of a shirt in the inventory indicates that Trooper Chatfield fabricated that detail of his report and testimony, and may be fabricating other portions as well.

work-related reasons for traveling. Chatfield further characterized the answers Ludwig did provide as “fragmented.” Chatfield stated that Mr. Ludwig had difficulty retrieving his wallet from his front trouser pocket because his hands were shaking badly. Chatfield later acknowledged that Mr. Ludwig may have had difficulty doing so because of his large size and the lack of space in his Nissan Altima. However, the Court notes that Chatfield first asked for Ludwig’s license and registration at 13:33:17, and had to ask again nearly a minute later at 13:34:13. Ludwig finally turned over his documents at 13:34:18.

Chatfield also asserted that it appeared as though Mr. Ludwig applied extra pressure to his pen when signing the citation in order to prevent his hands from shaking. However, the carbon copy of the ticket introduced into evidence during the Court’s suppression hearing does not fully support Chatfield’s assertion, as Ludwig’s signature actually appears somewhat lighter than Chatfield’s own. (Defendant’s Ex. AA.)

After issuing Mr. Ludwig his ticket, Trooper Chatfield told him he was free to go. A few moments later, at 13:42:48 on the ICOP recording, inquired if he could ask a few more questions. The Defendant responded “I’d like to get on my way, but I mean, if you have to” Trooper Chatfield replied that “I have a reasonable suspicion you’re hauling marijuana” and directed Ludwig to stand away from the car while he had his canine sniff the exterior of the vehicle. Based on the camera footage, the entire elapsed time from when Ludwig pulled over to when Trooper Chatfield’s dog first approached the car was

approximately eleven minutes, and less than a minute from the time Chatfield first told Ludwig he was free to go.

With Trooper Chatfield standing out of view of his patrol car's camera, Todd approached Mr. Ludwig's vehicle, focusing immediately on the driver's side doors. Early in his examination of the car's exterior, Todd began to move toward Ludwig, who was standing on the shoulder of the road, but returned to the car without prompting by Chatfield. Thereafter, Todd remained in close proximity to the car. However, Todd does not appear entirely focused on the car in the recording, and instead appears to look about, including possibly in the general direction of Trooper Chatfield and immediately across the interstate.³ A few seconds later, at 13:44:14, the patrol car's camera captured Todd clearly alerting on the exterior of the vehicle by sitting down and looking at his handler.

Trooper Chatfield requested the vehicle's keys from the Defendant and opened the trunk. Todd alerted again when the trunk opened, though his second alert is not as obvious on the ICOP video. Chatfield then directed Todd into both the trunk and the rear passenger compartment of the vehicle in an attempt to determine the location of the contraband which caused Todd's initial alert. Todd apparently did not alert again in either

³ During his testimony, the government's expert witness, Ken Wallentine, a former dog handler and officer with the Utah Attorney General's Office, offered a number of explanations for the dog's seemingly distracted behavior. For instance, he stated that the dog could have been attempting to follow a scent trail in the turbulent air current created by obviously strong Wyoming wind passing over the car; or may possibly have been distracted by traffic noise, etc. Defendant's expert, Steven Nicely, a dog handler and trainer, disputed Wallentine's characterization and insisted that the dog's behavior was clearly indicative of intentional or unintentional prompting by Trooper Chatfield. Nicely offered little support for his theories beyond the fact that Todd appeared to look away from the car or perhaps at Trooper Chatfield moments before sitting rather than focusing intently on the side of the car, and because Todd acted in a less aggressive manner than dogs featured in video clips collected by Nicely.

the passenger compartment, or the trunk. Nonetheless, Trooper Chatfield hand searched the trunk, uncovering a few personal possessions and a "stack of twenty dollar bills." He also noted that the trunk's carpeting was uncharacteristically glued down, and that the fuel sender unit had been tampered with.

Chatfield then moved to the backseat of the vehicle. He began disassembling the seat, noting that the bolts holding it in place had tool marks on it, and that one bolt was missing entirely. Once the seat was removed, Chatfield noticed a recently welded metal patch concealing an apparent false compartment. The compartment was apparently operated by pneumatic cylinders, which could be activated by a switch concealed elsewhere in the car, though Trooper Chatfield testified that he did not find (indeed, did not look for) the switch.

Soon after Trooper Chatfield began his search, Trooper Regina Schulmeister joined him on the scene, and the troopers handcuffed Ludwig and placed him in Schulmeister's patrol vehicle. Chatfield's ICOP system recorded the lengthy conversation between Chatfield and Schulmeister, in which he related the facts and suspicions supporting his search. The troopers were later joined by Lieutenant Tom Adams, and eventually by a tow truck operator. At Lt. Adams' prompting, Trooper Chatfield again explained his reasons for initially pulling Ludwig over, for detaining him in order to conduct the exterior dog search, and for then searching Ludwig's car and arresting him. Although the government has produced, and the Court has reviewed, recordings taken by Trooper Chatfield's vehicle

and Lt. Adams' vehicle, the recording taken by Trooper Schulmeister's vehicle was not preserved.⁴

The Court notes that at approximately 14:19:10, Lt. Adams' audio recording cuts out for a period of fifteen second. The interruption is preceded by a period of increasing static, and followed by a period of decreasing static. In his second suppression memorandum, Mr. Ludwig characterizes this fifteen second gap as the product of Lt. Adams intentionally turning his microphone off in order to conduct a private conversation with Trooper Chatfield. Ludwig's hypothesis is without basis and is directly contradicted by Lt. Adams' own testimony during the July 27, 2009 portion of the Court's second suppression hearing that he did not—in fact, physically could not have—turned his microphone off without returning to the car to do so. In any event, Ludwig's hypothesis is obviously contradicted by the large amounts of static in Lt. Adams' recording before and after the gap.

At approximately 14:24:00, the tow truck summoned by Trooper Chatfield arrived and transported Mr. Ludwig's vehicle to WyDOT's Elk Mountain shop. A mechanic at the shop managed to open the false compartment, revealing 11.3 pounds of white powder sealed in eleven individual bags. The powder field tested positive for heroin, but was later determined to be Ecstasy (also known as MDMA), a drug Todd was not trained to detect.

⁴ The Court previously addressed the Wyoming Highway Patrol's failure to preserve Trooper Schulmeister's patrol car footage in its order denying Defendant's motion to dismiss, entered on May 14, 2009. The Court denied Defendant's motion in part because the second suppression hearing afforded him an opportunity to examine those witnesses present at the scene on August 26, 2008. It concluded that the ability to examine the three troopers rendered the unpreserved evidence constitutionally immaterial because Mr. Ludwig's counsel would have an opportunity to examine all three responding troopers during the second suppression hearing.

II. Legal Issues

Defendant's Second Motion to Suppress, and his arguments during the suppression hearing, raise three distinct legal issues. First, the Court must determine whether Trooper Chatfield possessed probable cause to initiate the stop of Mr. Ludwig. Second, it must determine whether Trooper Chatfield possessed a reasonable, articulable suspicion that Mr. Ludwig was engaged in criminal activity so as to warrant the brief additional detention necessary to allow him to deploy his drug detection dog, Todd. Third, the Court must determine whether Todd properly alerted, giving Trooper Chatfield probable cause to further search Mr. Ludwig's vehicle, or whether Todd was somehow prompted to alert.

III. Standard of Review

The Fourth Amendment of the United States Constitution prohibits "unreasonable searches and seizures." Evidence obtained in violation of the Fourth Amendment must ordinarily be excluded from admission at trial in a federal court. *Weeks v. United States*, 232 U.S. 383 (1914); *United States v. Muldrow*, 19 F.3d 1332, 1335 (10th Cir. 1994). "The proponent of a motion to suppress evidence has the burden of establishing that his Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois*, 439 U.S. 128, 131 n.1 (1978); *United States v. Moore*, 22 F.3d 241, 243 (10th Cir. 1994).

IV. Analysis

A. Trooper Chatfield's Probable Cause to Initially Stop the Defendant

A routine traffic stop constitutes an investigative detention or seizure, and invokes the Fourth Amendment's protections against unreasonable searches and seizures. *United States v. Williams*, 403 F.3d 1203, 1206 (10th Cir. 2005). A traffic stop is reasonable at its inception if the officer has either (1) probable cause to believe a traffic violation has occurred or (2) a reasonable articulable suspicion that an individual violated a traffic regulation. *United States v. Degasso*, 369 F.3d 1139, 1143 (10th Cir. 2004).

Defendant raised the issue of whether Trooper Chatfield possessed probable cause to justify his initial stop for the first time during the Court's second suppression hearing. At no time, either in the Court's first suppression hearing, or in his briefing for either hearing, did Mr. Ludwig contest whether he was in fact speeding when Trooper Chatfield pulled him over. Indeed, Mr. Ludwig did not even contest Trooper Chatfield's probable cause to stop him during the stop itself. Instead he essentially conceded that he was speeding. At 13:33:17 in the audio recording of the stop, Trooper Chatfield can be heard to remark that he initiated the stop because of Mr. Ludwig's excessive speed. Chatfield specifically states "Clocked you doing eighty-five in a seventy-five. Need a driver's license and registration." Mr. Ludwig did not protest at that time, and a few minutes later, at 13:36:38, can be heard to ask if it might be possible for Trooper Chatfield to issue him a warning for speeding rather than a citation. Only during the Court's second suppression hearing did Mr. Ludwig finally raise an objection to the stop, testifying under oath on August 18, 2009, that he was confident that he was not speeding on the day in question, because he had set

his cruise control a legal speed at the time in question. He further insisted that he had previously gone so far as to enlist a mechanic to check the accuracy of his speedometer.

Prior to the second hearing, Defendant submitted a motion to compel seeking, among other things, production of the manual corresponding to Trooper Chatfield's radar gun. The government produced the manual in time for the July 27, 2009, suppression hearing; at that time, Defendant for the first time raised the issue of whether the radar gun was properly calibrated. Trooper Chatfield testified at that time, as well as during the Court's August 18, 2009, hearing, that he conducted an electronic test of his radar equipment on a daily basis, but only rarely conducted any other tests. Pursuant to a second motion to compel, the Wyoming Highway Patrol subsequently disclosed additional information relating to the agency's traffic radar operations in the form of an "operational memorandum" entitled "RADAR/LIDAR OPERATIONS," and diary entries from Trooper Chatfield's records showing instances in which he calibrated his radar. (See Defendant's Exhibit NN and OO.)

The Wyoming Highway Patrol Operational Memorandum explicitly requires that troopers "shall" conduct "at a minimum, at the beginning and end" of the Trooper's shift a) a light segment test, b) an internal calibration test, c) an external tuning fork calibration test in multiple modes and with multiple tuning forks, and d) a known speed check against a fixed object. Chatfield admitted during his testimony that he did not routinely calibrate his radar system, except by running an internal calibration test. He further testified that he

believed the internal calibration test served the same purpose and was more accurate than other methods. The government elicited testimony from Wyoming Highway Patrol Trooper John O'Connor, who has served as a radar instructor for the agency since 2002.

O'Connor testified that the internal calibration test fully verified the functionality of the radar in all aspects. His testimony left some doubt, however, as to whether the internal calibration test was capable of determining if a radar system was calibrated and could accurately rendered a target's speed, or merely tested its internal systems' functionality.

Both Trooper O'Connor and Trooper Chatfield testified, however, that Trooper Chatfield's radar system was fully calibrated in both the spring and late summer of 2008 at Wyoming Highway Patrol in-service training days, using additional equipment and software not discussed in the agency's operational memo. The testing conducted, which occurred in March and either July or August, 2008, resulted in the certification of Trooper Chatfield's radar system as accurate. Trooper Chatfield's diaries relevant portions of which were disclosed to the Defendant and admitted into evidence as Defendant's Exhibit OO, also reflect that Chatfield performed tuning fork calibrations on his radar system on July 26, 28, and 29, 2008, and also on August 1, 2, 7, 8, 10, and 11, 2008.

Both Trooper O'Connor and Trooper Chatfield also testified that troopers receive significant training regarding estimating vehicle speeds in the field. Chatfield further testified that he habitually estimated the speed of vehicles he targeted with his radar, and had in fact done so with Mr. Ludwig's vehicle. He testified that his estimate that Mr.

Ludwig's Nissan Altima was traveling at 85 miles per hour when he observed it was confirmed by his radar system. Defendant attempted to call into question Trooper Chatfield's veracity as to his practice of estimating vehicle speeds, pointing out that Chatfield had never previously discussed his practice of estimating vehicle speeds. Defendant's complaints are misplaced, however, given that the issue of whether Chatfield had probable cause to stop Ludwig was delinquently raised.

The Court is admittedly disappointed in Trooper Chatfield's failure to adhere to published operating procedures of the Wyoming Highway Patrol regarding radar operations. However, considering the totality of the evidence presented during the second suppression hearing regarding Ludwig's alleged traffic violation, the Court concludes that Trooper Chatfield possessed probable cause to believe Ludwig was exceeding the speed limit at the time of his stop. The testimony of Troopers Chatfield and O'Connor regarding troopers' training in the estimation of vehicle speed; the fact that Trooper Chatfield had properly confirmed his radar system's calibration on a number of occasions leading up to Mr. Ludwig's stop; and the fact that his radar system was thoroughly assessed and certified as accurate at an in-service training period just weeks before the stop, leave little question that Trooper Chatfield was capable of accurately determining Mr. Ludwig's speed on August 26, 2008. Indeed, such evidence far outweighs the self-serving and partially implausible testimony of the Defendant himself that he could not possibly have been speeding since he had his cruise control set within legal limits and had even had his

speedometer checked for accuracy, especially in light of the Defendant's tacit admission during the stop that he had been speeding.

B. Trooper Chatfield's Reasonable, Articulable Suspicion to Detain Ludwig for the Time Necessary to Deploy a Drug Detection Dog

When an officer initiates a routine stop for an observed traffic violation, the constitutionality of the seizure under the Fourth Amendment is analyzed pursuant to the two-prong test provided by *Terry v. Ohio*, 392 U.S. 1 (1968). See, e.g., *United States v. Holt*, 264 F.3d 1215, 1230 (10th Cir.2001) (en banc) (per curiam) (“[E]ven if an officer's initial traffic stop [is] objectively justified by the officer's observation of a minor traffic violation . . . his investigation nevertheless will be circumscribed by *Terry's* scope requirement.” (quotation omitted)).

A law enforcement officer's detention of an individual must be limited in scope in relationship to the reason for the initial stop. See *United States v. Sanchez*, 519 F.3d 1208, 1213 (10th Cir.2008). The traffic stop may only “be expanded beyond its original purpose . . . if during the initial stop the detaining officer acquires reasonable suspicion of criminal activity, that is to say the officer must acquire a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *United States v. Villa-Chaparro*, 115 F.3d 797, 801-02 (10th Cir.1997) (quotations omitted). A court must consider the “totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing,” *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quotations omitted), while simultaneously “accord[ing]

appropriate deference to the ability of a trained law enforcement officer to distinguish between innocent and suspicious actions.” *United States v. Alvarez*, 68 F.3d 1242, 1244 (10th Cir.1995) (citation omitted). A reasonable suspicion cannot, however, be based on an “inchoate and unparticularized suspicion or ‘hunch,’” *Terry*, 392 U.S. at 27.

In this case, the government asserts that Trooper Chatfield was justified in briefly detaining Mr. Ludwig while his drug detection dog, Todd, sniffed the exterior of Ludwig’s vehicle because Chatfield possessed a reasonable, articulable suspicion that Ludwig was engaged in drug trafficking. As discussed above, Chatfield set forth a number of factors in his Incident/Arrest Report Form (Defendant’s Exhibit HH) and in his later testimony on which he based Ludwig’s brief additional detention. These include Ludwig’s supposed extreme nervousness during the stop; his inability to make eye contact with Trooper Chatfield, even when subjected to direct questioning; Ludwig’s seemingly implausible story regarding his reasons for traveling; an unusually strong odor of perfume or air freshener specific to the car; the fact that he slept in his vehicle overnight; and the fact that his car was registered to a third party.

Factors such as an individual’s nervousness may be considered by the officer, albeit in a limited manner. *United States v. Williams*, 271 F.3d 1262, 1268 (10th Cir. 2001) (suggesting that while nervousness of an individual is generally of “limited significance” in a reasonable suspicion analysis but that “[e]xtreme and continued nervousness” is deserving of more weight); *but c.f.*, *United States v. Johnson*, 364 F.3d 1185, 1192 (10th

Cir. 2004) (“nervousness alone cannot support reasonable suspicion of criminal activity”) (internal quotations and citations omitted). Other relevant factors may include an unusually strong odor of perfume, *United States v. Rojas-Millian*, 234 F.3d 464, 470 (10th Cir. 2000), or an implausible travel story, *United States v. Kopp*, 45 F.3d 1450, 1454 (10th Cir. 1995). The Tenth Circuit has also given weight to the fact that a suspect is driving a rental car rented by a third party, or the fact that the suspect’s vehicle may not belong him. See *United States v. Contreras*, 506 F.3d 1031, 1036 (10th Cir. 2007) (“drug couriers often use third-party rental cars.”); *United States v. Guerrero*, 472 F.3d 784, 788 (10th Cir. 2007) (a key ring with a single ignition key, among other factors, indicated that the vehicle driven by the suspect was not one she ordinarily drove, which, combined with other more suspicious factors, indicated that the suspect was involved in drug trafficking).

Mr. Ludwig questions the factors cited by Trooper Chatfield, both in terms of the weight they should be given in a reasonable suspicion analysis, as well as whether the factors existed in the first place. As discussed above, Ludwig insists that the fact that a shirt single shirt (which allegedly was hung on a hook in the rear passenger compartment) was not included in the final inventory of items taken from the car signals that Chatfield is prevaricating.

All of the factors cited by Trooper Chatfield as supportive of reasonable suspicion are, standing alone, innocuous and susceptible to explanation. However, the Supreme Court has previously stated that an officer may consider factors “quite consistent with

innocent travel” as nonetheless sufficient in their totality to raise a reasonable suspicion of criminal activity. *Sokolow*, 490 U.S. at 2. Furthermore, the Supreme Court expressly prohibits analyzing reasonable suspicion factors in isolation. *Arvizu*, 534 U.S. at 273.

Nonetheless, certain of the factors cited by Trooper Chatfield, such as the presence or absence of single shirt in the car window are deserving of little or no weight. While Trooper Chatfield testified that he had at times observed clothing items hung conspicuously to lend the appearance of legitimate business travel, each instance he cited included additional factors not present here. For instance, Chatfield recounted a previous stop in which an auto mechanic prominently displayed a single suit jacket in his window, which appeared far too small for him. In the instant case, Mr. Ludwig was wearing a shirt similar to that alleged to have been hanging in the window. Without some additional basis, the Court cannot find the presence of a shirt in a vehicle window a particularly suspicious element.

Other factors cited by Trooper Chatfield, however, are classic indications of drug trafficking, and are deserving of significantly more weight, despite Defendant’s attempt to minimize or even contradict them. These include the fact that Trooper Chatfield detected a strong odor of perfume or air freshener; his opinion that Ludwig was exceedingly nervous throughout the encounter; the fact that his vehicle was registered to a third party; and his seemingly implausible story regarding a there-and-back trip to California.

For instance, Defendant points out neither Lt. Adams nor Trooper Schulmeister note the same overwhelming odor of perfume mentioned by Trooper Chatfield. However, Trooper Schulmeister first approached the vehicle after the doors were open to the Wyoming wind for a prolonged period of time, whereas Trooper Chatfield professed to first notice the odor when he initially approached the car, and Mr. Ludwig first rolled the window down. Further, the Court notes that while Trooper Schulmeister did not actually comment on the car's odor at all, she certainly did not state that she did not notice the smell of cologne. Mr. Ludwig also asserted that Lt. Adams went so far as state, in a comment recorded at 14:14:16 on both Trooper Chatfield's and Lt. Adams' ICOP systems, that he did not notice a smell emanating from the car. Upon review of the video, however, the Court concludes that the Defendant takes Lt. Adams' comments out of context, as it is apparent that Lt. Adams was not referring to the odor of perfume, but to the fact that he did not detect the distinct odor of marijuana.

Counsel for Mr. Ludwig also suggests that Trooper Chatfield himself doubted his reasonable suspicion to prolong the detention. He directs the Court to a portion of Trooper Chatfield's ICOP recording, at approximately 14:08:54, in which Chatfield expressed to Schulmeister that he had "doubts" or had his "hopes up." The Court reviewed the portion of the recording at issue multiple times, however, and it is apparent that the Defendant mischaracterizes the conversation. While the recording is garbled with significant wind and traffic noise, Chatfield does not express doubt about whether he had reasonable

suspicion to detain Mr. Ludwig and deploy Todd. Rather, Trooper Schulmeister inquired “So you don’t think its marijuana?,” to which Trooper Chatfield responded “I doubt it . . . I have my hopes up,” apparently indicating that he hoped to find a load of high value drugs. The Court arrives at this conclusion independently, having replayed the recording a number of times, but it is also supported by Chatfield’s own characterization of the conversation. (See Defendant’s Ex. PP at 2, Declaration of David Chatfield.)

Furthermore, a discussion regarding whether Chatfield believed he had discovered a load of high value drugs or comparatively low value marijuana is in keeping with the other portions of the conversation between Chatfield and Schulmeister, and later Lt. Adams. Immediately before the portion of the recording in question, at 14:01:35, he explained to Trooper Schulmeister that it was rare to find bulky marijuana stashes hidden in concealed compartments. Later, at 14:14:20 in the recording, he explained to Lt. Adams that he believed the concealed compartment too small to hold a “worthwhile” amount of marijuana.

Mr. Ludwig’s mannerisms during the stop also contribute, albeit incrementally, to the validity of Trooper Chatfield’s reasonable suspicion determination. Trooper Chatfield’s ICOP recording reflects lengthy pauses every time Mr. Ludwig responds to Trooper Chatfield’s questions. The Court also notes that Trooper Chatfield had to ask Mr. Ludwig for his license and registration twice, which supports Chatfield’s assertion that Ludwig’s nervousness delayed his production of the documents. The first instance occurs when Chatfield initially contacted Ludwig at 13:33:17. The second instance occurs at 13:34:13,

nearly a full minute after it was first requested. However, the quality of the recording is not such that the Court can determine for itself whether Mr. Ludwig was obviously nervous. In instances like this, where Defendant has produced little in the way of evidence showing Mr. Ludwig was not exceptionally nervous, the Court must rely on the characterizations provided by the officers on the scene. The Court ultimately places little weight on Defendant's nervousness, though it concurs that Mr. Ludwig's nervous manner contributed legitimately, if only slightly, to Chatfield's suspicions.

The same can be said of Trooper Chatfield's assessment that Mr. Ludwig did not immediately pull over when Trooper Chatfield pulled in behind him. Based on Trooper Chatfield's ICOP video, approximately one full minute passed between the time when Trooper Chatfield closed to a distance at which it should have been apparent to Ludwig that he was the trooper's target, until he finally came to a stop on the interstate's shoulder. Indeed, Mr. Ludwig traveled on the shoulder of the road for well over thirty seconds before finally stopping. The Court agrees with Trooper Chatfield's assessment that Mr. Ludwig failed to promptly and expeditiously pull over once it was clear Trooper Chatfield desired him to do so. The Court additionally agrees that this fact constitutes yet another incremental factor which must be considered in a reasonable suspicion analysis.

It is certainly true that each of the factors cited by Trooper Chatfield can be innocently explained away. However when viewed in their totality, the Court concurs with

Trooper Chatfield's estimation that the factors coalesced to give him reasonable suspicion to detain Mr. Ludwig while Todd performed an exterior inspection of the vehicle.

C. Trooper Chatfield's Probable Cause to Search Mr. Ludwig's Vehicle

The Court previously addressed issues related to whether Todd's alert on August 26, 2009, gave Trooper Chatfield probable cause to further search Mr. Ludwig's vehicle. In its first order denying suppression, the Court determined that the fact that Todd was not trained to detect MDMA was of no consequence to its probable cause assessment. Simply put, once a "trained drug sniffing dog with a good record" alerts, probable cause exists to search further. *United States v. Roxborough*, 366 F.3d 1145, 1153 (10th Cir. 2004) (quoting *United States v. Nielsen*, 9 F.3d 1487, 1489 (10th Cir. 1993)). Thus, so long as Todd was sufficiently trained and sufficiently reliable, it did not matter whether the search of Mr. Ludwig's vehicle subsequently revealed heroine or hand grenades; if the search uncovered contraband it could be seized and used in court against Mr. Ludwig.

The Court additionally determined in its order granting a hearing on Defendant's second motion to suppress, based on testimony presented during the first hearing, that Todd was sufficiently reliable under the standards set forth by the Tenth Circuit such that his alert on August 26, 2008, provided Trooper Chatfield with probable cause to search further. Specifically, the Court noted that both Trooper Chatfield and the dog's former trainer, Mark Rispoli, testified extensively regarding Todd's drug detection training. The witnesses also discussed Todd's reliability record. In its order denying Defendant's first

motion to suppress, the Court found Todd's "record of reliability amply established."
(Docket 34 at 7.)

In granting a rehearing, the Court reviewed additional information submitted by Mr. Ludwig purporting to show that Todd in fact did not meet minimum reliability standards. The statistics presented by Mr. Ludwig endeavored to show that Todd possesses an "overall accuracy of only fifty-eight percent in the real world." When the Court examined the underlying data provided by Mr. Ludwig, however, it became clear that his reliability is actually between 76% and 80%, and that the Defendant only managed to impeach that number through creative calculations. (See Docket 63 at 8.) Consequently, the Court instructed Defendant that it would not reconsider its earlier ruling on Todd's reliability.

The Court did, however, determine that it would allow additional testimony to determine whether Trooper Chatfield prompted or cued Todd to alert, which theory Mr. Ludwig had not previously suggested. The Court additionally conceded that it would allow Defendant to call drug dog expert, Steven Nicely, to testify as to Todd's alleged prompting. Mr. Nicely is an experienced dog handler and trainer, having gotten his start in the U.S. Marine Corps in 1973. He stated that he worked intermittently with police dogs until 2006, when he started his own business conducting behavior modification consultations for private pet owners. Mr. Nicely's curriculum vitae illustrates that he has testified regarding a police dog's performance a total of thirty-eight times for defendants, and one time for the government. In response, the government retained its own drug dog expert, Ken

Wallentine. Mr. Wallentine currently serves as the Chief of Law Enforcement for the Utah Attorney General, and has previously served in a variety of law enforcement roles, including fourteen years as a dog handler and dog trainer. Mr. Wallentine is also the author of a number of law enforcement-related books, including the K-9 Officer's Legal Handbook. Finally, the Defendant called an Dr. Robert Corcoran, an associate chemistry professor from the University of Wyoming. Dr. Corcoran is an expert in chemical synthesis and has done significant research regarding "molecular recognition," or how molecules in the body recognize other molecules. According to Dr. Corcoran, molecular recognition accounts for the sense of smell.

Dr. Corcoran testified at length regarding the chemical structure of methamphetamine and amphetamine, as well as MDMA or Ecstasy. Specifically, he asserted that amphetamine and methamphetamine would not smell the same to a drug detection dog because they possess wholly different chemical structures. Counsel for Mr. Ludwig argued that because the two drugs would not smell alike, Todd's alerts on August 26, 2008, could only have been the product of prompting by Trooper Chatfield.

Mr. Nicely's testimony augmented that of Dr. Corcoran in attempting to show that Todd must have been prompted to alert. Nicely testified extensively regarding Todd's August 26, 2008 alert on Mr. Ludwig's vehicle. Though Trooper Chatfield stood out of the view of the ICOP camera for much of Todd's initial search, Nicely insisted Chatfield obviously but unintentionally prompted Todd to alert. As support for his hypothesis, Nicely

pointed to Todd's seemingly lackadaisical attitude during the search compared to other dogs; the fact that he briefly followed Mr. Ludwig's path away from the car before returning to the rear passenger door area; and perhaps most importantly, that Todd appeared to look away from the vehicle moments before alerting. Nicely attributed Todd's alert to a phenomenon known as the Clever Hans Effect, in which an animal responds directly to involuntary cues in the body language of its human trainer. According to Nicely, a drug detection dog can be cued or prompted by as little as an unintentional deep breath, or a wayward glance by the handler.

As an initial matter, the Court found Mr. Nicely's testimony less than convincing. Mr. Nicely's conclusions regarding Todd's behavior during the Ludwig stop were based solely on his review of Chatfield's ICOP recording of the stop, and his preference for a more aggressive drug detection dogs which appear to actively work scent trails. At no point did Mr. Nicely discuss Todd's behavior with Trooper Chatfield to see if his less aggressive approach was typical for the dog. Furthermore, Trooper Chatfield did not appear on camera during the majority of Todd's search. The Court also notes that while Mr. Nicely has considerable experience training police working dogs, including drug detection dogs, his primary occupation now centers on pet behavior modification.

Far more probative was the testimony of Ken Wallentine. First, Mr. Wallentine testified extensively during the August 17, 2009, regarding his review of Todd's training record. An independent body, the California Narcotic Canine Association, certified Todd

and Chatfield as a team twice in the twelve months prior to the Ludwig stop. Mr.

Wallentine further testified that the California Narcotics Canine Association utilized single-blind tests which would have revealed any deficiencies in Todd's reliability, including looking his handler for subconscious cues rather than simply responding to the odor of contraband.

He additionally provided a number of possible explanations for Todd's seemingly distracted behavior. For instance, he pointed out the high wind visible in the ICOP video, as well as an obvious eddy near the rear of the vehicle. The eddy was clearly illustrated in the ICOP footage at 13:44:43 by a swirling plastic bag which escaped from Ludwig's trunk during Trooper Chatfield's search, and which remained near the car for a matter of nearly forty seconds despite the wind. He also asserted that the dog may have been distracted by traffic noise or other environmental factors, or may simply have been looking at his handler to ensure he was being watched before he alerted. Wallentine found no support in the ICOP footage for Nicely's prompting theory.

The Court finds no basis to support Mr. Nicely's speculative theory that Trooper Chatfield prompted Todd to alert during the Ludwig search. It does not escape the Court that were Todd to routinely alert based on unconscious prompts by Trooper Chatfield, the team's reliability would rapidly decline as the dog began to alert to prompts rather than contraband. Such is not the case here. In fact, Todd and Trooper Chatfield collectively passed single-blind certification tests twice in the twelve months preceding the Ludwig

stop, a factor far more convincing than Mr. Nicely's unsupported conjectures. The Court is also struck by a number of the less ephemeral alternative explanations for Todd's behavior posited by Mr. Wallentine. It is apparent from the ICOP video that Todd was distracted during the search by the noise of tractor trailers traveling in the opposite direction on Interstate 80, but it is also apparent that Todd appears to sniff intently at the seam between the rear driver's side door and the car's body just prior to alerting.

Mr. Wallentine provided additional testimony negating that of Dr. Corcoran. Although no witness, and no evidence before the Court, rebuts Dr. Corcoran's assertion that MDMA smells different than Ecstasy. Mr. Wallentine did testify convincingly, however, that vehicles such as Mr. Ludwig's, with sophisticated hidden compartments, are often used as load vehicles to routinely transport multiple shipments of narcotics. He testified that in his experience, it was not unusual for such a vehicle to carry, for example, a load of methamphetamine one week, and a load of marijuana the next, and that odors from previous loads might linger in a vehicle for extended periods of time. He additionally testified that drug traffickers are commonly users of drugs, and that odors from past use of narcotics might linger as well. Thus, Todd's alert—that of a trained, reliable, and certified dog—*may* not have been in response to the load Mr. Ludwig's car contained at all. It *may* have been in response to a past load, or to some past use of drugs in the car, drugs Todd was trained to detect.

The Court is ultimately without doubt that Todd properly alerted during the Ludwig

stop, and that his alert provided Trooper Chatfield with valid probable cause to search further. Defendant's theory that Todd was somehow prompted to alert is no more than pure speculation without factual mooring, on which basis the Court will not suppress the evidence obtained in the search of Mr. Ludwig's car.

V. Conclusion

For the foregoing reasons, the Court concludes that Trooper Chatfield possessed probable cause to believe Defendant Ludwig violated a Wyoming traffic ordinance on August 26, 2008, and was accordingly justified in stopping Ludwig. Considering the totality of the circumstances surrounding Ludwig's stop in the light of common sense and ordinary experience, the Court additionally finds that Trooper Chatfield possessed a reasonable, articulable suspicion that Ludwig was engaged in drug trafficking. As a result, Trooper Chatfield was justified in briefly detaining Ludwig in order to deploy his drug detection dog for an exterior examination of the vehicle. Finally, the Court finds no basis in the record to determine that Todd was prompted or cued to alert. Todd's training, reliability, and past certifications speak for themselves. His alert when deployed to examine Mr. Ludwig's vehicle clearly established probable cause to search further.

Defendant Ludwig's second motion to suppress is accordingly DENIED.

DATED this 7th day of September, 2009.


Chief United States District Judge