UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CRIMINAL MINUTES - GENERAL**

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| Case No. | ED CR 14-00107-[52]-VAP | Date | December 1, 2015 |

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| Present: The Honorable | VIRGINIA A. PHILLIPS, UNITED STATES DISTRICT JUDGE |
| Interpreter | |

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| Marva Dillard | Phyllis Preston | Daniel Ackerman<br>Nathaniel Walker<br>Not Present |
| *Deputy Clerk* | *Court Reporter/Recorder, Tape No.* | *Assistant U.S. Attorney* |

| U.S.A. v. Defendant(s): | Present | Cust. | Bond | Attorneys for Defendants: | Present | App. | Ret. |
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| [redacted] Johnson | NOT | | X | Michael S. Chernis, CJA | NOT | X | |

**Proceedings:** ORDER GRANTING MOTION TO SUPPRESS (IN CHAMBERS)

The Court has reviewed and considered all papers filed in support of, and in opposition to, Defendant [redacted] Johnson's Motion to Suppress Evidence (Doc. No. 693)("Motion"), as well as the evidence adduced at a hearing conducted on November 16, 2015, and, for the reasons set forth below, GRANTS the Motion to Suppress the evidence seized from the Honda Accord sedan Defendant was driving when she was stopped by San Bernardino Police Officer Jason Heilman on November 23, 2010.

The eight count indictment charges Defendant Johnson ("Defendant") in counts one and six with (1) Conspiracy to Distribute and Possession with Intent to Distribute Methamphetamine or Heroin in violation of 21 U.S.C. § 846 and (2) Knowingly and Intentionally Possessing with Intent to Distribute Methamphetamine in Violation of 21 U.S.C. § 841 (a)(1), (b)(1)(A)(viii). Defendant now moves to suppress evidence seized in a warrantless search of the Honda Accord sedan she was driving on November 23, 2010. (Mot. at 1.)

Defendant contends the stop and subsequent search violated her Fourth Amendment rights because "(1) law enforcement agents lacked a sufficient basis to make the initial traffic stop; (2) the law enforcement agents illegally prolonged the traffic stop in the hopes of manufacturing probable cause or some justification to search the vehicle; and (3) law enforcement lacked a warrant to search the vehicle and Ms. Johnson did not consent to the search." (Mot. at 2.) The Government filed its opposition on August 24, 2015 (Doc. No. 760) ("Opposition" or "Opp'n"). The Government also filed the Declarations of Michael Martinez

("Martinez Decl."), Jonathan Plummer, Jason Heilman ("Heilman Decl."), and Matthew Tylman with Exhibit D ("Text messages") and Exhibit E.

## I. BACKGROUND

As a result of an extensive drug trafficking investigation involving a joint task force comprised of both federal and state law enforcement officers, Sergeant Martinez testified, the officers secured wiretap orders that allowed them to intercept the telephone calls and text messages of drug trafficking suspects Michael Bustamante and Jonathan Brockus. San Bernardino County Sheriff's Office Sergeant Michael Martinez testified a series of text messages between Bustamante and Brockus were intercepted on November 23, 2010, that led the investigators to suspect that a drug transaction was about to take place, and that the transaction would involve a female. (Exhibit D, Text Messages).

Sergeant Martinez, San Bernardino Police Department Officer Plummer, and FBI Special Agent Tylman drove to a house in Colton, California, where based on information from the ongoing investigation, they suspected that previous drug transactions had taken place, and the drug transaction described in the text messages was going to occur. Shortly after they arrived, Sergeant Martinez testified he saw two cars drive down the street and park in tandem, and then depart in tandem. Martinez testified that he recognized one car as Jonathan Brockus's, and the second car, a Honda Accord, as belonging to Bustamante's wife or girlfriend. Martinez saw a female driver through the windshield of the Honda Accord and then called Officer Heilman on the telephone, telling Heilman the Honda "possibly had narcotics inside of it," and to stop the car for a traffic violation.

On November 23, 2010, after 10 p.m., Defendant was driving the Honda eastbound on 5th Street in San Bernardino County. (Mot. at 1.) San Bernardino Police Officer Jason Heilman stopped Ms. Johnson, on the basis that the windows of the Honda Accord allegedly were illegally tinted, and conducted a search of the vehicle. (Id.) During the search, Officer Heilman found a package containing methamphetamine. (Id.)

## II. DISCUSSION

### A. Propriety of the Stop

#### 1. The Traffic Violation

The initial stop of the Honda Accord was permissible under Whren v. United States, 517 U.S. 806 (1996). The evidence establishes that Officer Heilman had reasonable suspicion to believe that the tinting on the Accord's windows violated the California Vehicle Code. (Opp'n at 6.) Officer Heilman:

- has been a police officer for over ten years (Heilman Dec. ¶ 1, 2.)
- has five years of patrol experience

- has stopped and issued people citations for driving with tinted windows four or five times before
- has observed tinted windows "on a daily basis while on patrol" (Id. at ¶ 2.)
- has "noted how window tint can make it difficult to look into vehicles from the outside and use[s] this as a means to identify window tint." (Id. at ¶ 2.)

Officer Heilman positioned himself on Herrington Avenue, a side street off 5th Street, because he knew the angle would give him a "good view of the area" and allow him to see eastbound traffic. (Id. at ¶ 3.) The area is also well-lit by street lights. (Id.) At the hearing, Defendant introduced photographs to show that the area is not well-lit by street lights; however, when taken five years later, the street light was not operating and there is nothing to suggest that was the case at the time Officer Heilman signaled Defendant to pull over. Nothing obstructed his view of Defendant's car when it passed 50-100 feet away from him. (Id.) He "noticed the darkness of the windows" and he "could not see inside the car." (Id. at ¶ 4.) He observed the windows on the front side and front passenger's side were tinted in violation of California Vehicle Code Section 26708(a)(1). (Id.)

Under California Vehicle Code Section 26708(a)(1), "a person shall not drive any motor vehicle with any object or material placed, displayed, installed, affixed, or applied upon the windshield or side or rear windows," meaning, absent exception, drivers cannot drive a vehicle with tinted windows. Cal. Vehicle Code § 26708(a)(1). Drivers can, however, install, affix, or apply "to the front side windows, located to the immediate left and right of the front seat" material that is "clear, colorless, and transparent," so long as the "material has a minimum visible light transmittance of 88 percent." Cal. Vehicle Code § 26708(d)(1).

Courts typically find an officer's opinion about illegal window tinting is reliable. In People v. Niebauer, the court found that if an officer "forms an opinion in a common-sense examination of a vehicle that there is film placed upon the vehicle's windows in an unauthorized place . . . such evidence will be sufficient to support conviction under section 26708(a) if the trial court believes the officer." 214 Cal. App. 3d. 1278, 1292 (1989) accord People v. Hanes, 60 Cal. App. 4th. Supp. 6 (1997) (finding Niebauer "is consistent with logic and settled Fourth Amendment case law, which gives considerable weight to officer experience . . . ."). Here, Officer Heilman had reasonable suspicion that the car had illegally tinted windows, sufficient to effectuate the traffic stop.

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Defendant relies on People v. Butler to establish that tinted windows by themselves are insufficient to justify a traffic stop. (Mot. at 8.) In Butler, however, the court found that there were no facts to suggest "that [the officer] had a reasonable suspicion that the windows in the Cadillac were made of illegally tinted, rather than legally tinted, safety glass." People v. Butler, 202. Cal. App. 3d 602, 606 (1988).

Here, unlike the officer in Butler, Officer Heilman has provided the Court with facts that establish his reasonable suspicion to believe that the windows in the Honda Accord were illegally tinted. Heilman noted he examines "about 30 to 50 cars daily while on patrol" and he can typically see, even at night, "the profile of the occupants of the car, if not more, if the windows are legally tinted." (Heilman Dec. at ¶ 10.) He could not see inside the car Defendant drove, suggesting the windows were tinted illegally. (Id. at ¶ 4.)

Courts have held that when an officer cannot see the driver, "the more likely it is that the window tinting violates § 26708(d) by allowing a light transmittance of less than 88 percent." U.S. v. Lopez, No. C08-00342 SI, 2008 WL 4820753 (N.D. Cal. Nov. 3, 2008); see also U.S. v. Barragan, 192 F.3d 29, No. 93-10277, 1994 WL 77225 (9th Cir. Mar. 9, 1994) (holding that because the Officer "could not see any occupants through the car's tinted windows . . . he could reasonably have suspected that . . . the tinting therefore violated [California Vehicle Code] §§ 26708 and 26708.5"). As Officer Heilman had reasonable suspicion to think a traffic violation had occurred, the stop was reasonable. See U.S. v. Choudhry, 461 F.3d 1097, 1100 (9th Cir. 2006) ("[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred . . . .").

### 2. The Collective Knowledge Rule

In addition, the stop was also permissible under the collective knowledge rule. In U.S. v. Ramirez, the Ninth Circuit held a search is permissible "when an officer knows facts constituting reasonable suspicion or probable cause (sufficient to justify action under an exception to the warrant requirement), and he communicates an appropriate order or request, another officer may conduct a warrantless stop, search or, arrest without violating the Fourth Amendment." 473 F.3d 1026, 1033 (9th Cir. 2007).

Sergeant Martinez directed Officer Heilman to stop the Honda, and informed him there were "possibly" drugs in the car. Sergeant Martinez testified that he strongly suspected that a drug transaction had taken place, because the intercepted text messages indicated that a drug transaction was going to take place that night, and officers believed the text messages indicated a female would be involved. And, after witnessing the two cars drive to the location where officers believed the drug transaction described in the text messages was going to take place, and seeing a female driving one of the cars, Sergeant Martinez had reasonable suspicion to stop Defendant at that time. Instead, to preserve the ongoing investigation, Sergeant Martinez identified the car Defendant was driving, identified Defendant as a female, and requested Officer Heilman stop the car.

Sergeant Martinez had reasonable suspicion to stop the car, after the interception of the text messages, and after he witnessed the cars arriving at a location where drug trafficking had previously been suspected. He then properly conveyed to Officer Heilman that he suspected drugs were "possibly" in Defendant's car, and Officer Heilman accordingly stopped the Defendant.

To the extent Defendant challenges the traffic stop because of any alleged subjective bad faith on the part of Officer Heilman, that argument would be squarely barred by Whren. In that case, the United States Supreme Court held that an officer's subjective motivation in conducting the traffic stop is irrelevant and that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Whren, 517 U.S. at 813.

The Court finds that Officer Heilman had reasonable suspicion to stop Defendant for violation of California Vehicle Code § 26708, and under the collective knowledge rule.

**B. Validity of the Vehicle Search**

Defendant argues the search of her car was illegal because (1) her detention was prolonged unlawfully; and (2) she did not consent.

**1. The Length of the Search**

Officer Heilman asked Defendant to leave her car, asked her whether she had been drinking, and asked if she was transporting narcotics. (Mot. at 10). Defendant contends that asking her to step out of the car and asking her for consent to search the vehicle unnecessarily prolonged the traffic stop under Rodriguez v. United States, 575 U.S. ____, 135 S. Ct. 1609, 1615 (2015). (Mot. at 15.) Defendant therefore argues that the stop became illegal and "the subsequent search of the vehicle therefore must be suppressed, regardless of whether Ms. Johnson gave consent." (Id.) In particular, Defendant contends (1) asking Defendant to step out of her car, (2) asking her if there were drugs in her car, and (3) asking to search the car all impermissibly prolonged the length of the stop. (Id.)

According to Officer Heilman, he spoke to Defendant for "about 30 seconds" before he asked her to step out of her car and sit down on the curb. (Heilman Dec. at ¶ 5.) He then asked her for her driver's license and vehicle registration, and whether she had any drugs in her car. (Id. at ¶ 6.) She answered no, and Officer Heilman asked her if he could search the car. (Id.)

From the time Officer Heilman "asked her out of the car until the start of the search, about 30 to 60 December 1, 2015seconds elapsed." (Id.) According to Officer Heilman, the interaction before the search lasted approximately one minute to one minute and a half. According to Defendant, the interaction before the search lasted closer to ten minutes.

The Supreme Court, in Pennsylvania v. Mimms, held that an officer may ask the driver of a vehicle to step out of the vehicle. 436 U.S. 106, 111 (1977) ("Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car . . . where the inquiry may be pursued with greater safety to both.") accord Rodriguez v. United States, 575 U.S. ____, 135 S. Ct. 1609, 1615 (2015) ("In Mimms, we reasoned that the government's 'legitimate and weighty' interest in officer safety outweighs the 'de minimis' additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle."). Thus, Officer Heilman's request that Defendant step out of the car was permissible under the law.

Officer Heilman's other questions to Defendant were similarly permissible. In Rodriguez, the Supreme Court held that the tolerable duration of a traffic stop "is determined by the seizure's 'mission'" and "authority for the seizure ends when tasks tied to the traffic infraction are — or reasonably should have been — completed." Rodriguez, 135 S. Ct. 1609 at 1612. The Court further clarified that the Fourth Amendment tolerates "certain unrelated investigations that [do] not lengthen the roadside detention." Id. at 1614. The Supreme Court held that an officer "may conduct certain unrelated checks during an otherwise lawful traffic stop." Id. at 1615. Further, in his dissent, Justice Kennedy noted that "it remains true that police may ask questions aimed at uncovering other criminal conduct and may order occupants out of their car during a valid stop." Id. at 625 n. 2 (Kennedy, J., dissenting). Here, Officer Heilman's questions after Defendant got out of her car, including the queries about her license and vehicle registration, were permissible. The Court finds Officer Heilman did not impermissibly lengthen the lawful stop of Defendant.

### 2. Defendant's Consent to the Search

The central dispute here is whether Defendant gave Officer Heilman her consent to search the Honda. In her declaration, Defendant stated she "told the police [she] did not consent to the search but they searched the car anyway." (Declaration of [redacted] Johnson at 1.) Officer Heilman contends he "asked [Defendant] if I could check the car to be sure [there were no drugs]. She said, 'ok but I'm in a hurry.' I said I would be real quick and brief and she said 'ok.'" (Heilman Dec. at ¶ 6.)

The warrantless search of a vehicle is "per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." U.S. v.

Cervantes, 703 F. 3d 1135, 1138-39 (9th Cir. 2012). One exception is a search that is conducted pursuant to consent. United States v. Torres-Sanchez, 83 F.3d 1123, 1129 (9th Cir. 1996) (holding that whether a consent to search is voluntary is a question of fact based upon the totality of the circumstances). The government must show that consent was freely given. Schneckloth v. Bustamante, 412 U.S. 218, 248-29 (1973); see also Florida v. Royer, 460 U.S. 491, 497 )(1983) ("where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given").

At the hearing, Officer Heilman testified that Defendant gave consent, and Defendant repeatedly testified that she did not. Significantly, however, the defense established on Officer Heilman's cross-examination that although San Bernardino Police Department policy dictates that written consent be obtained, Officer Heilman did not comply with this policy and could give no explanation for his failure to do so. The lack of a written consent form despite the department policy requiring one, coupled with Defendant's testimony, compel the Court to find that the government has not met its burden of showing that the warrantless search of the Honda fell within an exception.

Further, although officers had reasonable suspicion to stop the car, their surveillance and the intercepted texts did not rise to the level of probable cause to search the car. Here, officers did not witness Defendant or the other two suspects load any bags or boxes into the car. See Ramirez (holding there was probable cause to search the car where police saw suspects place gym bags in a car); see U.S. v. Ibarra, 345 F.3d 711, 712 (9th Cir. 2003) (holding there was probable cause to search a car when an ongoing investigation led officers to witness a bag being placed in the car); U.S. v. Rodgers, 656 F.3d 1023, 1029 (9th Cir. 2011) ("[The officer] did not identify any particular facts or observations that led him to believe S.F. had identification and that it was inside Rodgers' car. Nor can we find any such facts in the record. There is, for example, no indication that [the Officer] saw S.F. trying to hide anything in the car, that S.F. was eyeing anything inside the car, that S.F. made any furtive movements, or that any papers or objects appearing to be identification were in plain view.").

Therefore, the surveillance and intercepted texts could not be the basis of the search. None of the law enforcement officers who testified could identify any particularized facts that would show that Defendant Johnson had drugs, and that the drugs were located in the Honda Accord.

## IV. CONCLUSION

For the reasons set forth above, the Court GRANTS Defendant Johnson's Motion to Suppress.

**IT IS SO ORDERED.**

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| Initials of Deputy Clerk | md |

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