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United States Court of Appeals
Tenth Circuit

June 26, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL LAMONT PHILLIPS,

Defendant - Appellant.

No. 22-5053

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:21-CR-00363-CVE-1)

John Asa Lease Campbell (Roger M. Gassett with him on the briefs), of Aston, Mathis, Campbell PLLC, Tulsa, Oklahoma, for Defendant-Appellant.

Shelley Kay-Glenn Clemens, Assistant United States Attorney (Clinton J. Johnson, United States Attorney, with her on the brief), Office of the United States Attorney, Tulsa, Oklahoma, for Plaintiff-Appellee.

Before **HARTZ**, **SEYMOUR**, and **MATHESON**, Circuit Judges.

SEYMOUR, Circuit Judge.

Mr. Michael Lamont Phillips was stopped by police officers who observed him driving recklessly without a seat belt and suspected he lacked a valid driver's license. The officers searched his vehicle and recovered cocaine base. Following a failed motion

to suppress, Mr. Phillips went to trial, where an officer testified that Mr. Phillips asserted his right to counsel as well as his tribal membership during the stop. Mr. Phillips was found guilty of one count of possession of cocaine base with intent to distribute.

On appeal, Mr. Phillips challenges the denial of his motion to suppress, arguing that the officers lacked reasonable suspicion for the stop and violated his Fourth Amendment rights by conducting a warrantless search of his vehicle. He also contends he was entitled to a mistrial based on the officer's trial testimony. We hold that the district court correctly found that the officers reasonably suspected Mr. Phillips of committing traffic violations and had probable cause to search the vehicle. We also hold that any error concerning the challenged trial testimony was harmless. Accordingly, we affirm Mr. Phillips' conviction.

Background

On April 18, 2021, Tulsa Police Officers Michael Snyder and Will Mortensen were patrolling together in Tulsa, Oklahoma, following reports of gang activity, street racing, and violence. Officer Snyder observed several Chevrolet Tahoe vehicles being driven in a reckless manner, including speeding and changing lanes without signaling. Officer Snyder recognized the driver of one of those vehicles—a gold Tahoe—as Mr. Phillips, whom he had previously encountered. Officer Snyder could see that Mr. Phillips was not wearing a seatbelt and believed that Mr. Phillips had a suspended driver's license based on their prior interactions. At this time, Officer Snyder initiated a traffic stop of the gold Tahoe.

During the stop, which was recorded by both officers' body cameras, Officer Snyder approached the open window on the driver's side, and Officer Mortensen approached a closed window on the passenger side. Officer Mortensen asked Mr. Phillips to roll down the passenger window multiple times before he partially rolled it down. Officer Snyder quickly confirmed that Mr. Phillips did not have a valid license and discovered that there were two warrants for his arrest. Officer Snyder placed Mr. Phillips under arrest, and Officer Mortensen began a search of the vehicle. The search uncovered an open bottle of vodka, a flask of vodka, a large amount of cocaine base, a small amount of marijuana, and $246 in small denominations.

Mr. Phillips was indicted on one count of possessing cocaine base with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C).[1] He filed a motion to suppress evidence obtained during the traffic stop, arguing that the officers lacked both reasonable suspicion to conduct the stop and a proper basis for conducting a warrantless search of his vehicle. The district court held a suppression hearing, during which Officers Snyder and Mortensen testified.

Although Mr. Phillips is not the registered owner of the gold Tahoe, Officer Snyder testified that he had stopped Mr. Phillips in that vehicle on at least three prior occasions, observed Mr. Phillips driving it on several other occasions, and never saw anyone else driving it. Both officers testified that they could smell alcohol and marijuana

[1] Mr. Phillips was also indicted on one count of being a felon in possession stemming from a separate incident not at issue in this appeal. He was acquitted of that charge at trial.

when they approached Mr. Phillips' vehicle. Officer Snyder detected both burnt and raw marijuana, whereas Officer Mortensen only smelled raw marijuana. The officers did not communicate with each other or Mr. Phillips about these odors, but Officer Snyder asked Officer Mortensen to begin an inventory search. Both officers testified that they believed they had probable cause to search the vehicle and were simultaneously conducting probable cause and inventory searches.

The district court denied Mr. Phillips' suppression motion. The court found the officers' testimony credible and concluded they reasonably suspected Mr. Phillips of committing a traffic violation. The court also concluded that the vehicle search was proper as both a probable cause and an inventory search.

Mr. Phillips proceeded to trial, during which Officer Snyder again testified. On direct examination, the prosecutor asked Officer Snyder if there was anything different about Mr. Phillips' demeanor during the instant traffic stop as compared to their prior encounters. Officer Snyder responded, "This time he was immediately wanting to call a lawyer, throwing up that he was a Creek citizen, trying to get his Creek ID out, when normally Mr. Phillips is pretty nice to me." Rec., vol. III at 80.

Defense counsel quickly moved for a mistrial based on the statement about Mr. Phillips invoking his constitutionally protected right to counsel. The prosecutor clarified that he did not intend to elicit this testimony and suggested the court give a limiting jury instruction. Without objection, the court gave the following instruction: "Every person who is arrested has a right to request an attorney. It is a constitutional right. There is nothing wrong with that. And the fact that Mr. Phillips may have said that is his

constitutional right. To the extent this officer commented on that right or anything about that right, you are instructed to disregard that testimony." *Id.* at 82.

The prosecutor then questioned Officer Snyder about Mr. Phillips' tribal membership, asking whether it was relevant to the stop. Officer Snyder responded, "Yes. Typically, since *McGirt* [*v. Oklahoma*, 140 S. Ct. 2452 (2020)], people that do that think that we don't have jurisdiction and are trying to basically get us to leave them alone because they don't believe we have jurisdiction over them." *Id.* The court then gave a limiting instruction sua sponte, instructing the jury to disregard statements concerning *McGirt* and its implications.

At the close of evidence, Mr. Phillips renewed his motion to suppress, which the district court denied. The jury then found Mr. Phillips guilty of the possession offense. The district court sentenced him to twenty-seven months' imprisonment followed by three years of supervised release. This timely appeal followed.

Discussion

A. Mr. Phillips' Motion to Suppress

Mr. Phillips challenges the district court's denial of his suppression motion on multiple grounds, contending the officers lacked both reasonable suspicion to conduct the traffic stop and a valid basis for conducting a warrantless search of his vehicle. "When reviewing the denial of a motion to suppress, 'we view the evidence in the light most favorable to the government, accept the district court's findings of fact unless they are clearly erroneous, and review de novo the ultimate question of reasonableness under the Fourth Amendment.'" *United States v. Cortez*, 965 F.3d 827, 833 (10th Cir. 2020)

(quoting *United States v. McNeal*, 862 F.3d 1057, 1061 (10th Cir. 2017)). Factual findings are clearly erroneous when "they are without factual support in the record" or when, "after reviewing all the evidence, we are left with the definite and firm conviction that a mistake has been made." *United States v. Morgan*, 936 F.2d 1561, 1573 (10th Cir. 1991).

a. Reasonable Suspicion for the Traffic Stop

Mr. Phillips first challenges the district court's conclusion that the officers had reasonable suspicion to initiate the traffic stop. "A traffic stop is a seizure for Fourth Amendment purposes, and must be justified by reasonable articulable suspicion under the standards set forth in *Terry v. Ohio*." *United States v. Ledesma*, 447 F.3d 1307, 1312 (10th Cir. 2006) (citation omitted). An officer may initiate a stop if he observes a traffic violation or "has a reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring." *United States v. Hunnicutt*, 135 F.3d 1345, 1348 (10th Cir. 1998). "It is irrelevant that the officer may have had other subjective motives for stopping the vehicle." *Id.*

Under the reasonable suspicion standard, "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Officers only need "'some minimal level of objective justification' for making the stop." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *INS v. Delgado*, 466 U.S. 210, 217 (1984)). However, more than an "unparticularized suspicion

or hunch" is required. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968) (internal quotation marks omitted).

The officers provided three reasons for initiating the traffic stop: (1) reckless driving; (2) driving without a seatbelt; and (3) driving without a valid license. Mr. Phillips argues that their testimony is contradicted by body camera footage and is otherwise not credible. We conclude, however, that the district court's contrary finding was not clearly erroneous.

Mr. Phillips contends Officer Snyder's testimony about reckless driving is conclusory. To the contrary, Officer Snyder testified that the Tahoes were passing cars traveling at normal speeds and changing lanes without signaling. Officer Snyder gave a similar explanation in a police report he authored on the day of the stop. The testimony is also corroborated by Officer Snyder's body camera footage. As soon as Officer Snyder approached Mr. Phillips' vehicle he asked, "Why you driving like that for?" Aplt. Supp. App., Def.'s Ex. 11 from Jury Trial at 0:40–0:42 (Officer Snyder's Body Camera Footage). Mr. Phillips responded, "Man, you know, it's sunny, a good day, blessed day, you know." *Id.* at 0:42–0:45. A few moments later, Officer Snyder said, "You know if you didn't have a license, I would not drive like that." *Id.* at 0:56–0:59. As Officer Snyder was arresting Mr. Phillips, he stated, "You were driving down the road. I saw you. You were driving like a maniac down the road." *Id.* at 2:56–3:00. Mr. Phillips responded, "I know that." *Id.* at 2:59–3:00. These statements are consistent with Officer Snyder's testimony that he observed Mr. Phillips driving recklessly.

Officer Snyder's observation of Mr. Phillips' reckless driving was sufficient to support the traffic stop. Because Mr. Phillips has failed to demonstrate that the district court's finding on this point was clearly erroneous, we need not reach Mr. Phillips' challenges to the other bases for the stop. Nonetheless, we conclude that the district court did not clearly err in accepting Officer Snyder's testimony that he observed Mr. Phillips without a seatbelt and was able to identify him before initiating the stop. Mr. Phillips' argument that the officers would not have been able to observe him or his seatbelt due to the closing speed of their vehicles merely invites speculation rather than leaving us with a firm conviction that the district court erred in crediting the testimony. Furthermore, we are not persuaded that Officer Snyder was unreasonable in suspecting that Mr. Phillips was driving without a valid license based on prior interactions where that was the case.

At oral argument, Mr. Phillips raised two additional challenges concerning the officers' testimony. First, he argued the testimony was not credible because the other vehicles he was allegedly traveling with cannot be seen in the body camera footage. This argument invites speculation about whether the other vehicles would have been visible by the time the officers stopped and approached Mr. Phillips' vehicle and leaves us with no significant doubts about the district court's findings.

Second, Mr. Phillips noted a discrepancy between Officer Mortensen's testimony and his body camera footage. Specifically, Officer Mortensen testified that he recognized Mr. Phillips at the inception of the stop and had encountered him before. But body camera footage suggests that Officer Mortensen was not sure who Mr. Phillips was until after his arrest. This discrepancy does not cause us to seriously doubt the district court,

which only made findings concerning Officer Snyder's previous interactions with Mr. Phillips. Those findings are corroborated by Officer Snyder's body camera footage. *See, e.g.*, *id.* at 20:07–20:10 (Officer Snyder stating that Mr. Phillips "always" drives the gold Tahoe).

b. Validity of the Warrantless Search

The district court found that the warrantless search of Mr. Phillips' vehicle was permissible under the Fourth Amendment, both as a probable cause search and an inventory search. On appeal, Mr. Phillips argues these findings were clearly erroneous.[2] We begin with the court's conclusion that the search was supported by probable cause.

"Under the automobile exception to the Fourth Amendment's warrant requirement, 'police officers who have probable cause to believe there is contraband inside an automobile that has been stopped on the road may search it without obtaining a warrant.'" *United States v. Bradford*, 423 F.3d 1149, 1159 (10th Cir. 2005) (quoting *Florida v. Meyers*, 466 U.S. 380, 381 (1984) (per curiam)). "Probable cause to search a vehicle is established if, under the totality of the circumstances, there is a fair probability that the car contains contraband or evidence." *United States v. Vasquez-Castillo*, 258 F.3d 1207, 1212 (10th Cir. 2001) (quoting *United States v. Downs*, 151 F.3d 1301, 1303 (10th Cir. 1998)). "An officer's detection of the smell of drugs . . . in a car is entitled to

[2] Mr. Phillips mistakenly frames his argument under the clear error standard. The ultimate question of reasonableness under the Fourth Amendment is a legal determination, which we review de novo. *Cortez*, 965 F.3d at 833.

substantial weight in the probable cause analysis and can be an independently sufficient basis for probable cause." *United States v. West*, 219 F.3d 1171, 1178 (10th Cir. 2000).

"Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813 (1996). Therefore, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

In district court, Mr. Phillips argued that probable cause had not been established because the officers did not communicate with each other about the alcohol or marijuana odors they detected. However, the district court found the officers' testimony credible and concluded their credibility was not undermined by the "fact that they did not expressly discuss their independent belief that drugs and alcohol were likely present in defendant's vehicle . . . when the odor of drugs and alcohol was obvious." Rec., vol. I at 264. In doing so, the court credited Officer Mortensen's testimony that he had experience working and conducting traffic stops with Officer Snyder.

On appeal, Mr. Phillips does not contend that probable cause cannot be established by the detection of marijuana or alcohol odors. Rather, he argues the district court's credibility determination was clearly erroneous. Before delving into Mr. Phillips' arguments, we emphasize that "the district court is in the best position to make credibility determinations," *United States v. Parra*, 2 F.3d 1058, 1065 (10th Cir. 1993), and we are loath to usurp the role of factfinder, *see United States v. Santos*, 403 F.3d 1120, 1128

(10th Cir. 2005). The district court's expertise as factfinder and our resulting deference are not diminished by the availability of video footage. *Id.*

Several factors corroborate the officers' testimony and counsel against reversing the district court's credibility determination. Notably, two officers independently testified at the suppression hearing that they smelled marijuana and alcohol. Both officers also testified at trial that they detected these odors. Their testimony is consistent with the police report authored by Officer Snyder on the day of the stop.

Mr. Phillips argues that the officers' testimony is inconsistent with what is observable on their body camera footage. First, he reasserts his argument that if the officers had actually smelled marijuana or alcohol their suspicions would have been communicated. Mr. Phillips also notes that Officer Snyder explicitly told Officer Mortensen to conduct an inventory, rather than probable cause, search. Finally, at oral argument, Mr. Phillips suggested that Officer Mortensen would not have been able to smell any substances because the passenger side window was rolled up too high.

After reviewing the body camera footage, we are not convinced that the district court clearly erred in crediting the officers' testimony. One might have expected the officers to have discussed the odors with each other or Mr. Phillips, but the fact that they did not does not render their testimony incredible. As the government points out, "[t]his is not really an inconsistency but merely an area ripe for attention on cross-examination." *See United States v. Johnson*, 630 F.3d 970, 974 (10th Cir. 2010).

Moreover, the fact that Officer Snyder referred to the search as an inventory search is inconsequential because an officer's subjective reasoning for initiating a search

is irrelevant to the probable cause analysis. Therefore, it does not matter how the officers characterized or justified the search so long as facts establishing probable cause existed. *Cf. United States v. Madden*, 682 F.3d 920, 928 (10th Cir. 2012) (good faith exception to the exclusionary rule applied "regardless of how [the officer] justified the search" because "the search was an objectively reasonable search incident to arrest under then-existing, well-established law").

In addition, the footage shows that right before Officer Snyder asked Officer Mortensen to initiate the search, Officer Mortensen asked whether Mr. Phillips had indicated he was in possession of marijuana. Although Officer Snyder responded that he did not know, this interaction suggests that Officer Mortensen believed Mr. Phillips may have been in possession of an illegal substance. The footage also shows that the passenger window was substantially rolled down before the search began. We are not convinced that the position of the passenger window would have prevented Officer Mortensen from detecting the odors that established probable cause.

Mr. Phillips further argues that certain factors make the officers' testimony implausible. Specifically, he doubts that the officers' actually smelled alcohol or marijuana because they did not follow up on their suspicions and because only a small amount of marijuana was found in a sealed container. Mr. Phillips also highlights that the officers smelled different types of marijuana.

Again, none of these facts demonstrate that the district court's findings were clearly erroneous. To begin, Mr. Phillips was arrested pursuant to traffic warrants and for the instant trafficking offense. It is clear from the body camera footage that both officers

perceived the amount of cocaine base recovered to be significant. In fact, Officer Mortensen said it was the most cocaine base he had ever seen. It was rational for the officers to focus their efforts on the more serious charge rather than charges related to alcohol or marijuana.

Next, the amount of marijuana recovered in a search does not dictate whether there was probable cause to conduct the search. This is because "we do not evaluate probable cause in hindsight, based on what a search does or does not turn up." *Florida v. Harris*, 568 U.S. 237, 249 (2013). Moreover, the difference in the types of marijuana detected by each officer could be explained by a number of factors, including the positions from which each officer approached Mr. Phillips' vehicle. At any rate, there is no inconsistency. It is certainly plausible that Officer Snyder, who was standing closer to Mr. Phillips, was able to detect both burnt and raw marijuana while Officer Mortensen was only able to smell raw marijuana.[3]

In sum, the district court did not clearly err in crediting the officers' testimony, and the court properly held they had probable cause to search Mr. Phillips' vehicle. Because the search was supported by probable cause, we need not decide whether it was also a valid inventory search.

[3] The difference between the odors of burnt and raw marijuana is relevant for determining the scope of the search, which was not challenged by Mr. Phillips. *See Downs*, 151 F.3d at 1303.

B. Mr. Phillips' Request for a Mistrial

On appeal, Mr. Phillips argues that the district court erred in failing to grant a mistrial, primarily due to Officer Snyder's testimony that Mr. Phillips' demeanor was different because he asked for a lawyer. We have said that the "mere mention of a defendant's request for counsel is not per se prohibited; rather, it is the prosecutor's exploitation of a defendant's exercise of his right to silence which is prohibited." *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995). But because the government does not dispute Mr. Phillips' claim that the comment constituted constitutional error, we focus our inquiry on whether any such error was harmless.

A constitutional error is harmless if the beneficiary of the error can "prove beyond a reasonable doubt the error complained of did not contribute to the guilty verdict." *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991). Although neither party identified precedent where we addressed references to a defendant's invocation of the right to counsel, we have repeatedly considered references to a defendant's invocation of the related right to remain silent. *See, e.g.*, *id.*; *United States v. Hamilton*, 587 F.3d 1199, 1217–18 (10th Cir. 2009). Both parties urge us to conduct our analysis under the framework provided in those cases, identifying the five factors to be considered in determining whether an error contributed to the verdict:

1. The use to which the prosecution puts the postarrest silence.
2. Who elected to pursue the line of questioning.
3. The quantum of other evidence indicative of guilt.
4. The intensity and frequency of the reference.

5. The availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions.

United States v. Massey, 687 F.2d 1348, 1353 (10th Cir. 1982) (internal quotation marks and citation omitted). A review of these factors in Mr. Phillips' case persuades us that any error was harmless beyond a reasonable doubt.

First, the prosecution made no use of the comment in its arguments or questioning. Defense counsel quickly moved for a mistrial when Officer Snyder made the comment. In response, the government assured the district court that it would not ask follow-up questions and suggested the jury be instructed to disregard the testimony.

Second, although the comment was made in response to the government's questioning, "the government neither elected to pursue the line of questioning nor solicited the answer." *See Hamilton*, 587 F.3d at 1218. The government asked Officer Snyder if there was anything different about Mr. Phillips' demeanor, not about any specific statements he made. The government also explained to the court that the question was not intended to elicit the comment. Overall, "this record provides no indication that the prosecution expected the [officer] to respond as he did." *Id.* Moreover, the jury would have been aware that Mr. Phillips asked for an attorney notwithstanding Officer Snyder's comment; defense counsel confirmed at oral argument that the request for counsel was clear from body camera footage he played at trial.[4]

[4] Consistent with what he said in district court, defense counsel explained he did not have a problem with the jury knowing Mr. Phillips asked for a lawyer but rather objected to the context in which the comment was made because it insinuated that Officer Snyder believed Mr. Phillips was acting guilty. As explained below, Mr. Phillips' request was not offered as substantive evidence of guilt.

Third, there was significant evidence of Mr. Phillips' guilt. Mr. Phillips primarily argued that law enforcement's investigation was lazy and sloppy, failing to pursue alternative explanations for why the cocaine base would have been in a vehicle owned by someone else. He also highlighted that no paraphernalia commonly associated with drug distribution, such as plastic baggies or scales, was recovered during the search. But a large amount of cocaine base was found in a vehicle frequently driven by Mr. Phillips while he was driving alone.[5] Officers also testified that law enforcement recovered $246 in small denominations from Mr. Phillips' person, consistent with selling cocaine base.

Fourth, the only mention of Mr. Phillips' request for counsel was Officer Snyder's one brief comment about him wanting to call a lawyer. While Mr. Phillips' argues that this comment clearly implied that Officer Snyder believed Mr. Phillips was acting guilty, no connection between the request for counsel and guilt was ever made by Officer Snyder or the government. Officer Snyder merely indicated that this request differentiated the instant traffic stop from prior interactions.

Finally, the district court gave a curative instruction immediately after the comment was made. The court made very clear that Mr. Phillips had a constitutional right to request counsel and that there was nothing wrong with exercising that right. The

[5] There was substantial evidence that Mr. Phillips was the primary operator of the gold Tahoe. In addition to Officer Snyder's testimony that he frequently saw Mr. Phillips and only Mr. Phillips driving the Tahoe, Officer Mortensen testified at trial that he had seen Mr. Phillips driving the vehicle on numerous occasions. Two other Tulsa police officers testified that they had interactions with Mr. Phillips during which he confirmed the Tahoe was his. An additional witness testified she was familiar with the Tahoe that Mr. Phillips drove.

court also told the jury to disregard Officer Snyder's comment on the topic. "Jurors are presumed to follow the judge's instructions." *United States v. Templeman*, 481 F.3d 1263, 1266 (10th Cir. 2007). We have no reason to believe they failed to do so here.

In the alternative, Mr. Phillips argues that a mistrial was warranted based on the government's questioning and Officer Snyder's resulting testimony concerning his tribal membership and the impact of *McGirt*. Mr. Phillips did not object or move for a mistrial based on this testimony. We therefore review the district court's decision not to grant a mistrial for plain error. *See United States v. Hernandez-Muniz*, 170 F.3d 1007, 1011 (10th Cir. 1999).

Mr. Phillips provides no authority for his claim that this testimony was clearly improper. Accordingly, any error was not plain. Moreover, any such error had minimal impact on Mr. Phillips' substantial rights because the district court instructed the jury to disregard testimony about the implications of *McGirt*. For these reasons, the district court did not plainly err in failing to grant a mistrial.

Conclusion

In sum, the district court did not err in finding that the stop and search of Mr. Phillips' vehicle were valid under the Fourth Amendment. Nor did the district court err in failing to grant a mistrial. We affirm.