STATE OF NEW JERSEY,
Respondent
v.
ISRAEL GOMEZ
Defendant - Appellant

A-02-1234-T3

Superior Court, Appellate Division

Submitted August 7, 2002 - Decided September 4, 2002

Before Judges GRIM, REAPER and MERCY.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, 02-2-241-I.

Dom Taschle argued the cause for appellant (Taschle & Rephardt L.L.P., attorneys for appellant, Mr. Taschle, Esq., on the brief).

Chick Deney argued the cause for respondent (Herbert Walker Dubya, Bergen County Prosecutor, of counsel; Mr. Deney, Assistant Prosecutor, on the brief).

GRIM, J.A.D. joined by REAPER, J.A.D.

On April 9, 2002, following a two-day jury trial in the Superior Court, Law Division, Bergen County, defendant Israel Gomez was convicted of theft by unlawful taking in violation of N.J.S.A. 2C:20-3. He was sentenced on May 6, 2002, to a term of four years in prison pursuant to N.J.S.A. 2C:43-6(a)(3). Defendant had moved on March 22, 2002, to suppress evidence obtained in a warrantless automobile search. In this appeal, defendant contends that the trial court erred when, during a hearing under N.J.R.E. 104 on April 5, 2002, it denied defendant's motion.

We disagree, and hold that defendant's vehicle was lawfully stopped and lawfully searched and therefore all evidence obtained in the search was properly admitted against defendant at his trial.

The Facts

During the latter part of 2001 and in response to the terrorist attacks on America of September 11, 2001, local, state and federal law enforcement agencies created and maintained security checkpoints at all bridges and tunnels into and out of Manhattan. By January of 2002, after the public had become fully aware of and accustomed to this

practice, the regular checkpoints were discontinued in favor of sporadic or otherwise random checkpoints. A sign remained posted at all times between September 12, 2001 and June 8, 2002, just before the toll booths that “Due to security concerns, drivers passing this point may be asked to pull over and be interviewed by law enforcement.”

In the early morning hours of February 5, 2002, the federal Office of Homeland Security issued an alert to all law enforcement agencies along the eastern seaboard from Boston to Washington, D.C. of a non-specific threat to a “waterspan” believed to involve a large amount of explosives being transported in a red panel van. Accordingly, the Federal Bureau of Investigations (the “FBI”) immediately instituted a security checkpoint at the entrances to all bridges in the New York metropolitan area, including at the George Washington Bridge. Because federal manpower was insufficient to operate all of the checkpoints, the FBI solicited the assistance of state and local law enforcement agencies, including the Port Authority Police Department. At no time, however, were the officers of any non-federal agency given the authority of a federal officer. The present case arises out of a motor vehicle stop that occurred at one of these checkpoints just prior to the driver's entry onto the George Washington Bridge in Fort Lee, New Jersey.

At approximately 4:00 p.m. on the afternoon of February 5, 2002, Officers Condaleeza Wheat and Lent Trott, two Port Authority police officers working the George Washington Bridge checkpoint, pulled over the vehicle of defendant, Israel Gomez. Officer Wheat testified that defendant was driving a red, full-sized sport utility vehicle with tinted windows that she believed to be capable of carrying large amounts of explosives and which matched the color that was broadcast in the alert. After stopping him, Officer Wheat then directed defendant to pull out of the line of traffic and onto a cleared shoulder area.

Both officers testified that defendant was generally cooperative but appeared somewhat nervous when he was asked to exit the vehicle, while he was being patted down, and when he was requested to sit along a nearby curb while the officers inspected his vehicle. Because of reflective security window tint on defendant's 2000 Landcruiser, neither officer could see inside the rear interior of the vehicle. Officer Trott then sought defendant's consent to search those areas of the vehicle that were not readily visible. Officer Trott testified that defendant refused to grant consent, citing the fact that the officers had given no justification for conducting such a search.

Having been unable to obtain consent, Officers Wheat and Trott summoned the assistance of two nearby federal officers who were supervising the checkpoint. Officer Trott testified that he stated to the agents that he and his partner were “turning this suspect over to you on suspicion of terrorist activity.” He testified that he did so because the vehicle was red, because the officers could not see into the vehicle and because the defendant would not consent to a security search of the vehicle. He testified further that the officers’ concerns were heightened because the defendant’s first name was spelled two different ways on his documentation (“Israel” on his driver’s license and “Isreal” on the vehicle registration) and because the defendant’s first name and appearance suggested a possible Middle East connection, a possibility bolstered by a card that fell

from the defendant's wallet that appeared to the officers to be written in Arabic. He also noted that though defendant had a Spanish last name, he did not respond when the officers spoke to him in Spanish.

Officer Trott stated that he handed all of defendant's documentation to FBI Agents Ashley Croft and Ronald Dumbsfeld and he and Officer Wheat then returned to their original positions at the security checkpoint.

Agent Dumbsfeld then, unaware that the officers had already requested defendant's consent to search his vehicle, once again requested defendant's consent. At that point, defendant began to appear agitated and nervous and once again refused to give consent. Agent Dumbsfeld testified that he promptly informed defendant that the possibility of security checkpoints was well-publicized, that defendant knew that if he crossed the George Washington Bridge that he might, at any time, be subject to search, that he had nonetheless chosen to use the bridge thereby impliedly consenting to the search, and that their request for consent now was merely a courtesy. Therefore, Agent Dumbsfeld concluded, even if defendant did not consent to the search, they nonetheless had the authority to search his vehicle for explosives to ascertain whether or he was a terrorist or otherwise a threat to national security.

Defendant then said words to the effect of, "I guess I don't have a choice then." Both agents testified that neither could recall how, if at all, they responded to that statement before defendant then stated, "Well, then, do what you have to do. But I can tell you this, you won't find anything in my truck."

The agents then searched defendant's vehicle. During the search, the agents discovered thirteen unopened boxes, each marked to indicate that they contained a new, name brand DVD player. Suspecting that these boxes might in fact nonetheless contain explosives, Agents Dumbsfeld and Croft opened each box, finding that each box did in fact contain a new, packaged DVD player. The agents, believing that the DVD players were stolen but being more concerned with apprehending potential terrorism suspects, summoned Officers Wheat and Trott. Officer Wheat testified that Agent Croft, when turning custody of the defendant and his truck back over to the Port Authority Police, stated, "He doesn't have what we're looking for, but if you guys want to make arrest based on what he's got, it's all yours."

Officers Wheat and Trott then inspected the opened hatch of defendant's truck and the opened DVD player boxes. On each box was a shipping tag clearly giving the name and address of an electronics store in Wayne, New Jersey. Officer Wheat, through her dispatcher, confirmed that that store had reported a shipment of merchandise stolen in the past 24 hours and had provided the serial numbers of the stolen products. In order to confirm, before making an arrest, that the DVD players in the defendant's truck were at least some of the stolen electronics, Officer Wheat leaned into the truck and recited the serial number from one of the boxes to the dispatcher who confirmed that unit as stolen. Defendant was arrested, prosecuted and convicted of theft. Defendant now appeals this conviction.

Discussion

Defendant asserts various constitutional arguments, namely that the stop at the security checkpoint was improper and that the search of his vehicle was without consent and therefore likewise improper. We do not find any of these arguments persuasive.

With respect to the stop of defendant's vehicle, it has long been held both by the United States Supreme Court and the courts of this state that checkpoints and roadblocks are constitutional provided that certain criteria are met. *Delaware v. Prouse*, 440 U.S. 648 (1979). Accord *State v. Kirk*, 202 N.J. Super. 28 (App. Div. 1985). Checkpoints must be established under the authority of a commanding officer, must take place in a targeted area based upon specific data, and must provide warning to the public in advance. Id. Here, all three components are satisfied. The FBI was conducting and supervising the checkpoint as evidenced by the interaction between Agents Dumbsfeld and Croft and Officers Wheat and Trott. Clearly, the entrance to a major bridge is an appropriate target area when searching for explosives believed to be destined for a waterspan. Finally, ever since September 11th, the public has been fully aware of the security measures at bridges and tunnels. It could not have come as a surprise to anyone, including defendant, that a checkpoint was erected at the George Washington Bridge, particularly when all of the media outlets on that day had broadcast the alert made public by the Office of Homeland Security. Therefore, we conclude that the trial court was correct in finding the security checkpoint to be constitutional.

Second, there was nothing inappropriate about the decision of the officers to select defendant and defendant’s vehicle for inspection. Defendant’s appearance suggested a Middle East origin at a time when the country had just been attacked by terrorists from the Middle East and the vehicle was red, large enough to carry explosives and its interior was protected from view by the reflective window tinting. Choosing this vehicle based on this information is the equivalent of choosing one airline passenger based on a hijacker profile, and police and security officers are entitled to rely on profile information in security cases. See e.g. *State v. Ascencio*, 257 N.J. Super. 144 (Law Div. 1992), aff'd 277 N.J. Super. 334 (App. Div. 1994), certif. denied 140 N.J. 27 (1995). The law has long affirmed searches based on special needs such as heightened security concerns at particular locations. See e.g. *United States v. Edwards*, 498 F.2d 496, 498-500 (2d Cir. 1974) (upholding constitutionality of airport searches); *Downing v. Kunzig*, 454 F.2d 1230, 1232-33 (6th Cir. 1972) (concluding that search prior to entering courthouse passed constitutional muster). And see *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (“the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack”).

We are singularly unimpressed by the dissent’s focus on the question of the degree to which the officers may have considered the defendant’s ethnic or national origin. There is, in our judgment, absolutely nothing wrong with considering ethnic or national origin where there are specific reasons to consider such factors. The terrorist threat facing our country in the period since September 11, 2001, has been specifically linked to persons of Middle Eastern extraction and, therefore, considering such origin is not an

inappropriate element. Moreover, the constitutionality of a search and seizure is determined by whether the actions taken by the officers on the scene are themselves lawful and not whether an individual police officer has underlying motives. *United States v. Sokolow*, 490 U.S. 1, 10 (1989). “The Fourth Amendment proscribes unreasonable actions, not improper thoughts.” *State v. Bruzzese*, 94 N.J. 210, 219 (1983), cert. denied, 465 U.S. 1030 (1984). Thus even if consideration of ethnic or national origin was inappropriate it would not be fatal to the validity of this search.

We hold, further, that defendant impliedly consented, under federal law, to a search of his vehicle by driving to the bridge on the day of an alert. Just as with a passenger approaching an airport security checkpoint, see e.g. *United States v. Skipwith*, 482 F.2d 1272 (5th Cir.1973), those driving to an area covered by a motor vehicle security checkpoint have impliedly consented to a search. Those presenting themselves at a security checkpoint thereby consent automatically to a search, and may not revoke that consent if the authorities elect to conduct a search. See *United States v. DeAngelo*, 584 F.2d 46, 48 (4th Cir.1978) cert. denied, 440 U.S. 935 (1979). Indeed, this defendant went farther than merely impliedly consenting and expressly consented when he told the officers that they could “do what [they] have to do” and would not “find” any explosives.

Moreover, consent was not required for a security search under these particular circumstances as to this particular defendant. By the time of the search, the agents had a reasonable and articulable suspicion of wrongdoing by this individual sufficient to permit a special needs inspection of the interior of the vehicle and its contents. The officers had confirmed not only that the vehicle was red as in the alert, that it was large enough to carry explosives and was protected from view by window tinting, and not only that defendant appeared to be from the Middle East but had a name suggesting such origin and had a card fall out of his wallet that appeared to have been written in Arabic. According to Officer Trott’s testimony, defendant “snatched that card up instantly and shoved it into his pocket,” giving rise to concern that he had something to hide. His documentation had his first name spelled in two different ways, and despite his surname, he did not appear to speak or understand Spanish, giving rise to a legitimate concern that the identification documents had been fraudulently obtained. His demeanor was somewhat nervous and he refused to consent to a search. This combination was enough to permit a special needs search of the vehicle.

We further reject defendant's contention that the search by the FBI did not meet the consent standard set forth in and affirmed by our state's Supreme Court in *State v. Carty*, 170 N.J. 632 (2002). *Carty* is a state case, based upon the state constitution. Here, the security checkpoint and the search conducted in furtherance thereof was supervised by a federal law enforcement agency and the particular agents who conducted the search were federal agents and not state officers. While we concede that had Officers Wheat and Trott conducted that same search, evidence seized as a result thereof might be required to be suppressed under *Carty*, there is nothing to prevent federal agents, who have properly seized evidence in accordance with federal law, from then turning that evidence over to state authorities for state prosecution, particularly where there is no federal interest in prosecution.

Finally, the dissent asserts that the search of the truck by the federal agents constituted one “search” and that the retrieval of the serial numbers by the state officers constituted a second “search.” Without agreeing with our colleague that the procurement of those serial numbers is a separate search, we conclude that even if that conduct was a second search, the seizure of the DVD players and their introduction into evidence was harmless error. Arguably, at that point the officers had probable cause to arrest defendant in which event the search could have been conducted incident to the arrest. Additionally, exigent circumstances would require the seizure of the DVD players before defendant crossed the bridge and left the jurisdiction of the state authorities. See *State v. Hill*, 115 N.J. 169, 173 (1989) (discussing exceptions to either requiring a warrant or consent to search a vehicle). Further, had the officers sought a warrant based upon the information then known to them, a warrant would likely have issued. Accordingly, while perhaps the officers put the cart before the horse in running the serial numbers before making the arrest, invoking the prophylactic measure of the exclusionary rule on these facts would be inappropriate.

The admissibility of the DVD players into evidence and the conviction of defendant are therefore AFFIRMED.

MERCY, J.A.D., dissenting

The guarantee of privacy and security from unreasonable governmental intrusion provided by the Fourth Amendment long has been recognized as fundamental to the maintenance of a free society. See *Camara v. Municipal Ct*., 387 U.S. 523 (1967).

Moreover, it is, or should be, quite clear by now that Article 1, paragraph 7 of our State Constitution independently “afford[s] the citizens of this State greater protection against unreasonable searches and seizures than may be required by the Supreme Court's interpretation of the Fourth Amendment ...” *State v. Alston*, 88 N.J. 211, 225 (1981). See, e.g., *State v. Cooke*, 163 N.J. 657, 666-667 (2000), and *State v. Pierce*, 136 N.J. 184, 209 (1994) (automobile searches); *State v. Novembrino*, 105 N.J. 95, 145 (1987) (good faith exception to the warrant requirement); *State v. Alston*, 88 N.J. 211, 225-226 (1981) (standing); *State v. Hempele*, 120 N.J. 182, 196-197 (1990) (garbage searches); see also *State v. Williams*, 93 N.J. 39, 70 n.19 (1983); *State v. Hunt*, 91 N.J. 338, 358-372 (1982) (Handler, J. concurring).

Here, I submit, the boundaries of both the federal and the state constitutional protections have been transgressed and, therefore, defendant’s conviction cannot stand. While I appreciate how expeditiously the majority applied the “no harm, no foul” approach to the Fourth Amendment of the United States Constitution and Article 1, paragraph 7 of the New Jersey Constitution, they have entirely missed the issues raised by defendant.

First, defendant does not contend that security checkpoints in general are improper. He contends that this particular checkpoint was improper. In order to properly balance

the interests of the public in personal privacy and the needs of the country for security against many different kinds of threats, the courts permit security checks at particular points only controlled by carefully crafted criteria. Here the apparently unfettered discretion given to the individual officers to choose who to stop and who to let pass violates those criteria and thus cannot stand.

Second, defendant contends that, regardless of the constitutionality of this particular checkpoint, his being singled out and stopped at that checkpoint was improper. He was not driving a red panel van. He was driving a red SUV with six side windows and a back hatch with another large window. It was through the eighth window, the windshield, that Officers Wheat and Trott spotted a man in his thirties, with wavy black hair and a complexion they thought suggested a Middle Eastern origin. In fact, Officer Trott, when asked why they specifically pulled defendant over even though he was not driving a panel van and after they had just permitted a white woman driving a red minivan to pass through the checkpoint, testified that, “Well, the vehicle was red and he looked like he could be who we were looking for.”

It is clear to me that the initial stop of this vehicle was based on utterly impermissible grounds akin to racial profiling. If the initial stop is unjustified, then the subsequent search is invalid and any contraband obtained from it is inadmissible as “fruit of the poisonous tree.” See *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

Although the majority glosses over the point, the facts of this case make it abundantly clear that the sole reason why this defendant was initially selected for screening at the security checkpoint was because he appeared to be of Middle Eastern origin. The testimony of Officer Trott leaves no doubt on this issue:

> Q. The briefing on the alert you received that day made it clear that the information was about a panel truck or van, right?
> A. Right.
> Q. And Mr. Gomez wasn’t driving a panel truck or van, was he?
> A. No.
> Q. As a matter of fact, he was driving a Toyota Landcruiser, right.
> A. Right.
> Q. And you weren’t under the impression, when you saw that vehicle, that it was a panel truck or van, were you?
> A. No, but...
> Q. Just answer my questions, Officer Trott. You didn’t consider that vehicle a panel truck or van, did you?
> A. No.
> Q. And when you saw Mr. Gomez, you thought that because he has dark hair and dark eyes and a dark complexion, he was from the Middle East, right?
> A. He looked to me like he could be of Middle East origin, yes.
> Q. And the reason why you chose that vehicle was because you thought Mr. Gomez was Middle Eastern in origin, right?

A. And the vehicle was red and I couldn't see inside it.
Q. You had let other red vehicles go past, had you not?
A. Yes.
Q. Just before Mr. Gomez's vehicle, you let a red minivan go through, right?
A. Right.
Q. And that minivan was driven by a white woman, wasn't it?
A. Yes.
Q. Let me ask you this, Officer Trott: if that exact same vehicle that Mr. Gomez was driving had been driven by a blond woman, you wouldn't have stopped it, would you?
A. I don't know.
Q. And if it had been driven by a very dark-skinned black woman, you wouldn't have stopped it, would you?
A. I'm not sure.
Q. In fact, if it had been driven by a black man, you wouldn't have stopped it either, would you?
A. I can't answer that. I can only answer what I did do.

The alert from the Office of Homeland Security in this instance never described *who* law enforcement should be looking for, only *what* they were to be looking for. Therefore, those operating the checkpoint either assumed or were instructed to look for someone appearing to be a Middle Eastern male. An investigative stop "predicated solely on race" is constitutionally impermissible. *State v. Maryland*, 167 N.J. 471, 485 (2001). Racial profiling in all its forms and under all circumstances violates due process and equal protection rights when a defendant's car is stopped, and others are not, merely because the driver is a minority. See *United States v. Armstrong*, 517 U.S. 456, 463-466 (1996); *State v. Ballard*, 331 N.J. Super. 529, 539-40 (App. Div. 2000); *State v. Smith*, 306 N.J. Super. 370, 376-78 (App. Div. 1997). No rational inference may be drawn from the race or ethnic background of a person that he may be engaged in criminal activities. *State v. Kuhn*, 213 N.J.Super. 275, 281 (App. Div. 1986). Even if this is considered a parallel to a drug courier profile, race is simply not an appropriate element of a profile. *State v. Letts*, 254 N.J. Super. 390 (Law Div. 1992). The testimony of this officer that he would not have stopped this same vehicle driven by a blond woman takes this initial stop out of the constitutional zone and makes it illegal.

Even if the initial stop could possibly be justified, the search itself cannot be. Defendant never consented to the search of his vehicle, nor did the officers have a basis to ask him for consent. Not only did the officers stop defendant's validly registered vehicle that displayed a current inspection sticker and visible and undamaged license plates, they continued to detain him after he had produced his driver's license, vehicle registration and evidence of insurance. The addresses on all three documents were the same, being a residential address on South Main Street in Paterson, New Jersey and the driver's license description of defendant stating that he was 6' 2" with black hair and brown eyes matched defendant's actual appearance. There was nothing about the stop to raise any suspicion whatsoever.

More importantly, there was nothing to support a finding that these officers, or the federal agents for that matter, had the required "reasonable and articulable suspicion necessary to extend the scope of a detention beyond the reason for the original stop." *State v. Carty*, 170 N.J. 632, 648 (2002). Neither his slight degree of nervousness nor the insignificant error in the spelling of his first name on his vehicle registration is enough to raise such suspicion, and possession of a card in Arabic (if such it was -- no such card was introduced in evidence in this case) does not change the equation.

Even if the police had stopped him because he appeared to be Arab, once defendant provided identification that clearly indicated that he was Hispanic, he should have been free to continue over the bridge and should never have been requested to consent to a search of his vehicle. That he did not respond to the officers' spoken Spanish is not determinative; after all, it may say more for the officers' fluency in Spanish than the defendant's. Accordingly, the initial search of defendant's truck was without consent, under *Carty* or otherwise.

Finally, it is clear to me that, once the federal agents had determined that there were no grounds for acting with respect to this defendant as to the singular threat that provided the justification for the security search -- there were in fact no explosives in the vehicle -- neither the federal agents nor the state officers had any basis to conduct any further search by checking the origins of the DVD players or their serial numbers.

It is not illegal to possess DVD players. No citizen must explain his or her possession of items that are not unlawful to possess. When Officer Wheat looked inside the vehicle, she conducted what was in effect a second search. She did not have a warrant, she did not search incident to an arrest, she was not acting to protect her or her partner's safety, and the serial number was clearly not in plain view. The only method by which this second search could be lawful was if defendant had consented to the search. Since the state officers were bound by *Carty*, and there was no basis to ask for consent, I would hold that the fruits of that search must be suppressed even if the original stop was valid and even if the federal search was lawful.

The purpose of the exclusionary rule is to deter police misconduct and to preserve the integrity of the courts. *Brown v. Illinois*, 422 U.S. 590, 599 (1975); *State v. Johnson*, 118 N.J. 639, 651 (1990). Such deterrence is no less important because the nation has been the collective victim of terrorism and we are therefore now afraid of some citizens and visitors for no reason beyond their ethnic or national origin. Even in difficult times, we must remember that we are a nation of laws and we should not sacrifice our liberties on the altar of antiterrorism. This defendant is entitled to the full and complete protections of the laws, even when those protections leave us afraid or uncomfortable. The majority's relegation of the constitutional right against unreasonable searches and seizures to the status of a technicality flies in the face of every tenet of our constitutional democracy, and is both morally objectionable and legally indefensible.

I dissent.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

A-02-522

STATE OF NEW JERSEY,	:	
	:	
Respondent.	:	
	:	
v.	:	**ORDER**
	:	
ISRAEL GOMEZ,	:	
	:	
Defendant-Appellant.	:	
_____	:	

Notice of appeal having been filed with the Court on September 17, 2002, by the defendant-appellant, it is, on this 18th day of September, 2002, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with this Court on or before December 2, 2002.

STEPHEN W. TOWNSEND, Clerk
For the Court