

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOV 16 1990

ROBERT L. HOECKER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RICHARD WILLIAM BUTTON,
Defendant-Appellant.

No. 90-2060
(D.C. No. 89-394JP-01)
(D. N.M.)

ORDER AND JUDGMENT*

Before MOORE, SETH, and TACHA, Circuit Judges.

This appeal is from the district court's denial of a motion to suppress evidence seized as a result of the search of the automobile driven by defendant and stopped at an Immigration and Naturalization Service checkpoint near Hatch, New Mexico. Defendant appeals on the grounds that he was detained in violation of the Fourth Amendment of the United States Constitution and that the search of the vehicle was an illegal warrantless search. We affirm.

Defendant was traveling north toward Truth or Consequences, New Mexico on an old highway, U.S. 85, when he encountered the Border Patrol checkpoint that had been in operation approximately

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

six weeks. Appellant was stopped by the Border Patrol and questioned regarding his citizenship and the reason for his use of the old highway. The Border Patrolman then asked defendant to move to a secondary inspection area beside the roadway where defendant was required to wait until a canine unit arrived to search the vehicle. The canine alerted to the trunk of the vehicle. A law enforcement officer opened the trunk, which contained two boxes of marijuana. It is this evidence that defendant alleges should have been suppressed.

Although defendant concedes that the initial stop at the Border Patrol checkpoint was a legitimate stop, he argues that the subsequent detention and search violated his Fourth Amendment rights. We disagree.

In reviewing a denial of a motion to suppress, we must accept the trial court's findings of fact unless they are clearly erroneous. United States v. Cooper, 733 F.2d 1360, 1364 (10th Cir.), cert. denied, 467 U.S. 1255 (1984). The evidence must be viewed in the light most favorable to the district court's findings. United States v. Obregon, 748 F.2d 1371, 1376 (10th Cir. 1984).

The district court pointed to several articulable, objective facts upon which the Border Patrol officer relied when he required defendant to move to the secondary inspection point for detention after the initial questioning. Defendant was traveling on an old road at night in a vehicle that did not belong to him. The Border Patrol agent testified that the defendant was nervous, produced a New Mexico Construction Industries card instead of his driver's

license, and was evasive and inconsistent with respect to his reasons for using the old road. We cannot say the district court was clearly erroneous in finding that the Border Patrol officer was justified in referring defendant to the secondary inspection location. See Martinez-Fuerte, 428 U.S. 543, 563 (1976); United States v. Arango, No. 89-4084, slip op. at 12-13 (10th Cir. Aug. 28, 1990); United States v. Johnson, 895 F.2d 693, 697-98 (10th Cir. 1990); United States v. Espinosa, 782 F.2d 888, 890-91 (10th Cir. 1986).

Based on the officer's articulable suspicion, the canine unit was called. We cannot say that 30 to 40 minutes was an unreasonable time during which to subject defendant to detention for the purposes of a canine search. See United States v. Sharpe, 470 U.S. 675, 686-87 (1985); United States v. Place, 462 U.S. 696, 703 (1983). It is unrealistic to expect that a canine unit would be able to arrive at a remote location much more rapidly than occurred in this case. We have held that a canine sniff during an otherwise lawful detention is not a search within the meaning of the fourth amendment. United States v. Morales-Zamora, Nos. 89-2172, 89-2244, slip op. at 7 (10th Cir. Sept. 6, 1990). After the dog alerted to the compartment in the pickup, the search by the officer was supported by probable cause. Id. at 13; United States v. Stone, 866 F.2d 359, 364 (10th Cir. 1989). The district court did not err in refusing to suppress the evidence. The order of the district court is **AFFIRMED**.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge