IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. ADAM JOSEPH TRESTYN AND CRYSTAL KAY HERREN, Defendants.	Case No. 09-CR-216-J

ORDER DENYING MOTION FOR RECONSIDERATION OF MOTION TO SUPPRESS

This matter came before the Court at a hearing on January 11, 2010 and upon the Defendants' Motion for Reconsideration of Motion to Suppress.[1] At the hearing, Steven Sharpe appeared on behalf of the government. James Bustamante appeared *pro hac vice* on behalf of Defendant Herren and Dion Custis appeared on behalf of Defendant Trestyn. This

[1] Defendant Herren first moved the Court for reconsideration on December 11, 2009 (doc. no. 87). On December 18, 2009, Defendant Trestyn filed a motion to join in the motion for reconsideration (doc. no. 92). The Court did not previously rule on the motion to join. The Court hereby grants Trestyn's motion to join and will accordingly treat the motion for reconsideration as a joint motion.

Court having carefully considered the record, the submitted briefs, the arguments of the parties at the hearing and the responses thereto, and being fully advised in the premises, FINDS and ORDERS the following:

I. BACKGROUND

Factual

On July 1, 2009, Wyoming Highway Patrol Trooper George Nykun observed a Honda Odyssey minivan driving eastbound on Interstate 80. The minivan lacked a front license plate, displaying only a rear California license plate. Trooper Nykun initiated a traffic stop at approximately 5:32 p.m. Trooper Nykun first contacted Trestyn, the driver, and indicated to him that he stopped Trestyn because the minivan did not have a front license plate. Trestyn explained that they recently purchased the vehicle and he provided the sales documents to the trooper. At 5:33 p.m. Trestyn showed his New York driver's license to the trooper and accompanied the trooper to the patrol car. In the patrol car, Trestyn explained that he and his girlfriend, Crystal Herren, traveled from their home in Ohio to California to purchase this minivan which they found on the internet. During his conversation with Trestyn, Trooper Nykun observed "track marks" on his arms that are consistent with intravenous drug use. After Trestyn was unable to provide the trooper with an automobile insurance card, the trooper approached Herren to see if she had the insurance card for the

minivan. At 5:38 p.m., the trooper asked Trestyn to return to the minivan. Trooper Nykun also radioed Trooper Karl Germain and asked him to come to Nykun's location. Trooper Nykun contacted dispatch to run a driver check on Trestyn. Trooper Nykun then asked Herren for her driver's license because the minivan was purchased in her name. At 5:41 p.m. dispatch confirmed the validity of Trestyn's New York license. The trooper then asked dispatch to run a background check on Herren. At 5:44 p.m. dispatch told Trooper Nykun that there was a Georgia warrant for Herren with "full extradition." Minutes later, Trooper Nykun approached Herren about the Georgia warrant. She confirmed that she had a warrant out of Georgia but did not know if it was extraditable. Trestyn confessed to the trooper that he may have a California warrant for a probation violation. Trooper Germain arrived to the scene at 5:51 p.m. Trooper Nykun returned to his patrol car to investigate the possible warrant for Trestyn. Trooper Germain deployed his canine, Bonnie, to conduct a "free sniff" of the minivan. At 5:53 p.m. Bonnie alerted to the presence of controlled substances. The troopers removed the defendants from the minivan and Trooper Germain proceeded to search the minivan. Trooper Nykun remained standing with the defendants off to the side of the minivan. During his conversation with the defendants, Trooper Nykun observed that Trestyn became visibly nervous when Trooper Germain was searching the rear of the vehicle. At 6:04 p.m. dispatch informed Trooper Nykun that Georgia would not extradite Herren. At

6:08 p.m. Trooper Nykun gave the defendants a warning for the missing front license plate. During this time Trooper Germain continued his search of the vehicle. At 6:12 p.m. Trooper Nykun asked the defendants if they had recently smoked marijuana in the vehicle which might explain the dog's positive alert. Trestyn responded "yes" at the same time as Herren responded "no." Trooper Germain found marijuana residue on the driver's side floorboard. The defendants were placed in separate patrol cars at approximately 6:15 p.m. The troopers re-deployed Bonnie at 6:45 p.m. They focused their search on the rear driver's panel. Trooper Germain found behind the speaker panel four grey duct tape wrapped packages containing a white substance. The troopers arrested the defendants at 6:52 p.m. A subsequent detailed search of the vehicle at the DCI Task Force Office revealed four additional duct tape wrapped packages containing a white substance that later laboratory tests revealed to be MDMA. The total quantity of MDMA found was 9.25 pounds (4.2 kilograms). A small quantity of marijuana was discovered on Herren's person after she was searched at the DCI office.[2]

Procedural

Procedurally, the defendants were charged in a two count indictment on July 23, 2009.

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[2] The Court notes that the marijuana was not submitted for laboratory testing. Accordingly, the record lacks confirmation that the substance was indeed marijuana.

Count One alleged Conspiracy to Possess with Intent to Distribute, and to Distribute MDMA in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(C). Count Two alleged Possession with Intent to Distribute MDMA and Aiding and Abetting in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2. Dion Custis filed a motion to suppress on behalf of Trestyn on September 2, 2009 (doc. no. 41). Joe Bustos filed a nearly identical motion to suppress on behalf of Herren on September 25, 2009 (doc. no. 53). A hearing on the motion to suppress was scheduled for October 2, 2009.

On October 1, 2009, Herren moved for the admission of James A. Bustamante as *pro hac vice* counsel. Also on October 1, 2009, Herren moved to continue the suppression hearing so that she could be represented by her attorney of choice at the suppression hearing. At the time of the October 2, 2009 suppression hearing, the Court had not yet ruled on the *pro hac vice* motion or the motion to continue. At the commencement of the suppression hearing, the Court denied Herren's motion to continue, despite Herren's demands that she be represented by counsel of her choice.

At the suppression hearing, Trooper Nykun and Trooper Germain testified and were subject to cross examination by attorneys for both defendants. A video tape of the stop was received into evidence as well the California Narcotic Canine Association ("CNCA") certification for Trooper Germain and Bonnie. At the close of the suppression hearing, Judge

Brimmer denied the defendants' motion to suppress. The order was entered on October 9, 2009 (doc. no. 66). On October 20, 2009, the Court granted the *pro hac vice* admission of James Bustamante as counsel for Herren.

The defendants now ask this Court to reconsider its prior suppression ruling and reopen the suppression hearing to allow the defendants to present new evidence and make new legal arguments. The government opposes the motion, claiming that no legal issues exist for this court to reconsider the suppression ruling and that reopening the suppression hearing merely allows newly retained defense counsel a "second bite at the apple."

II. LEGAL STANDARD

The decision to reopen a suppression hearing is within the sound discretion of the trial court and is reviewed for abuse of discretion. United States v. Berrelleza, 90 F. App'x 361, 366 (10th Cir. 2004). The standard for granting a motion for reconsideration "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked-matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." United States v. Tisdol, 450 F.Supp.2d 191, 194 (D.Conn. 2006) (quoting Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995)). Reconsideration is appropriate only "if there has been an intervening change in controlling law, there is new evidence, or a need is shown to correct a clear error of law

or to prevent manifest injustice." United States v. Sanchez, 35 F.3d 673, 677 (2d Cir. 1994) (internal citation omitted).

III. DEFENDANTS' MOTION FOR RECONSIDERATION

Defendants raise three primary arguments in support of the motion for reconsideration. First, they allege the initial traffic stop was unlawful because the vehicle was not being driven in violation of Wyoming law.[3] Second, they argue the continued detention of the defendants to run a background check on Herren was unreasonable. Last, the defendants claim new evidence shows that Bonnie is not a reliable and well trained drug dog.

The Initial Traffic Stop

For the first time, defendants now challenge the legality of the initial traffic stop. They admit, however, this is a purely legal question which does not require reopening of the evidentiary hearing (Defs. Mot. for Reconsideration, p. 14, n. 8). The parties agree that Trooper Nykun conducted the initial traffic stop because the minivan displayed only

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[3] Both defendants previously conceded this issue by stating Trooper Nykun had reasonable suspicion to stop the vehicle because of the missing license plate. (See Trestyn Mot. to Supp., doc. no. 41, p. 5; Herren Mot. to Supp., doc. no. 53, p. 5. "The defense agrees that Trooper Nykun had reasonable cause to stop the van and investigate its missing license plate.")

a rear California plate and no front license plate. Defendants argue that a Wyoming trooper cannot stop a vehicle for an alleged violation of another state's laws. Moreover, defendants argue that Wyoming law does not require cars passing through to display two plates.

The defendants' argument is unpersuasive. Importantly, the defendants effectively waived this issue by conceding the legality of the initial stop (Supra, n. 3). "A party's failure to raise a specific argument in a suppression hearing results in waiver on appeal unless the party is able to show cause why it failed to raise the argument below." United States v. Banks, 451 F.3d 721, 727-728 (10th Cir. 2006). Defendants have not shown cause to the Court as to why they did not previously raise this argument. Accordingly, the Court will not consider this argument.[4]

The Background Check

Recognizing that the issues surrounding the scope of the detention were previously litigated, the defendants maintain that Trooper Nykun did not have reasonable suspicion

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[4] Even if the Court were to consider this argument, the case of Vargas-Rocha v. State, 891 P.2d 763 (Wyo. 1995) disposes of the argument. In Vargas-Rocha, the court held that a Wyoming patrolman had authority to stop a vehicle whose license plates were not displayed according to Colorado law. Id. at. 766. Here, Trooper Nykun testified at the suppression hearing, "I knew from past experience that California – that they require both a front and a rear plate." (Tr. R. p. 7).

to prolong the detention. Specifically, the defendants contend that when Trestyn's driver's license check came back clear at 5:41 p.m., Trooper Nykun lacked reasonable suspicion of criminal activity to prolong the detention by requesting a license check on Herren.

The government points out that Tenth Circuit law provides that a law enforcement officer has wide discretion to run background checks on passengers during a routine traffic stop. The applicable law provides:

> While a traffic stop is ongoing, however, an officer has wide discretion to take reasonable precautions to protect his safety. Obvious precautions include running a background check on the driver and removing the occupants from the vehicle. Furthermore, because passengers present a risk to officer safety equal to the risk presented by the driver, **an officer may ask for identification from passengers and run background checks on them as well.**

United States v. Rice, 483 F.3d 1079, 1084 (10th Cir. 2007) (internal citations omitted) (emphasis added).

Defendants claim that a continued detention to inquire into unrelated matters is unlawful, citing to the cases of United States v. Guzman, 864 F.2d 1512 (10th Cir. 1989), *overruled on other grounds by* United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995) (en banc) and Unites States v. Walker, 933 F.2d 812 (10th Cir. 1991). In Guzman, the officer continued a traffic stop for a seat belt violation to inquire into the odometer

reading and engage in intrusive questioning such as: "whether the defendant's wife was employed, where he was headed, where he worked, when he got married, and if they were carrying any large sums of money." Guzman, 864 F.2d at 1514. Further, the officer admitted that he was attempting to determine whether the passenger and driver were hauling contraband. Id. The officer in Walker stopped a vehicle for speeding. Walker, 933 F.2d at 813-814. After obtaining the appropriate paperwork, the officer asked the defendant questions unrelated to the traffic stop, such as whether there were weapons, drugs, or large amounts of cash in the vehicle. Id. The Walker court made clear that the detention of the defendant unreasonably extended the length necessary to issue a citation because, "The officer detained the defendant to ask him questions **unrelated** to the speeding infraction or **to the defendant's right to operate the car**." Id. at 816 (bold added).

While it is true that an initially valid stop can become unreasonable, United States v. Rivera, 867 F.2d 1261, 1263 (10th Cir. 1989), that is not the case here. Unlike the cases cited by the defendant, there is no indication here that Officer Nykun impermissibly delayed the stop by asking unrelated questions. Instead, Officer Nykun's testimony establishes that he acted lawfully and appropriately by obtaining Herren's identification. Defendants place much emphasis on the fact that Trestyn's driver check came back clear

prior to the time the officer asked for Herren's identification. In voicing their argument, defendants ignore, however, the fact that Trestyn was not registered as the vehicle owner, nor was he able to produce insurance verification for the vehicle. Indeed the clear driver check for Trestyn became meaningless as the officer still had yet to determine the true owner of the vehicle. The following relevant transcript portions summarize Officer Nykun's investigation:

Q: What were you doing while you waited for dispatch to respond to Mr. Trestyn's check?

A: I was doing the required paperwork for the traffic stop and he handed me a bunch of papers, so I was flipping through the majority of the papers.

Q: And what were these papers?

A: They were a - - the purchase agreement to the vehicle. There was a warranty sheet and other items.

Q: At this time did you note who was listed as the purchaser of the vehicle?

A: Yeah. I was looking for his name specifically on there, and I didn't - -I didn't see it.

Q: At some point did you - - did you identify who the purchaser of the vehicle was?

A: Yes.

Q: Who was it?

A: The purchaser of the vehicle was Crystal Herren.

Q: At this point had you identified the passenger yet?

A: No, I did not.

Q: What response did you receive from dispatch regarding Mr. Trestyn's driver check?

A: I ran him out of three states. I ran him out of Ohio; I ran him out of California; and I ran him out of New York state. His New York state license came back as being clear. It showed that he did have a California ID or California driver's license which was clear, and he was also clear out of the state of Ohio.

Q: Did dispatch ask you for more information for one of the states?

A: Yeah, they asked for his middle name.

Q: Which state was that for?

A: I don't - - I don't recall.

Q: When dispatch asked you for his middle name, what did you do?

A: I went back up and tried to get his middle name.

Q: So you walked back up to the minivan. Driver's side, passenger side?

A: The driver's side.

Q: While you were there, did you ask Miss Herren for her ID?

A: I did.

Q: And why did you ask Miss Herren for her ID?

A: Well, I needed to verify ownership of the vehicle.

(Tr. R. p. 15-17).

The record shows that Trestyn's driver check came back clear at 5:41 p.m. and that Herren's background check came back at 5:44 p.m., three minutes later. Undeniably, after learning of the Georgia warrant for Herren, Officer Nykun was justified in continuing the detention to confirm the warrant. The reasonableness of a traffic stop must be judged by the length of the detention and the manner in which it is carried out. United States v. Holt, 264 F.3d 1215, 1230 (10th Cir. 2001). Accordingly, Officer Nykun did not unreasonably extend the length of the stop when he inquired into Herren's identification. As the court in Rice makes clear, "[passenger background checks] are fully justified by officer safety concerns no matter how innocuous the traffic violation and need not be supported by additional reasonable suspicion." Rice, 483 F.3d at 1084.

The defendants fail to show that the Court committed a clear error of law with

respect to the second issue. As such, the Court will not reconsider its ruling with regard to the scope of the detention.

The Drug Dog's Reliability

Finally, the defendants contend new evidence demonstrates that Bonnie is not a reliable or well-trained drug dog and that she did not properly alert to the odor of controlled substances. The defendants proffered testimony from Dr. Robert Corcoran, an organic chemist, and Steven Nicely, professional dog trainer. At the January 11, 2009 hearing on the present motion for reconsideration, Steven Nicely testified before the Court.[5] The government utilized the testimony of Kenneth Wallentine as expert rebuttal. Mr. Nicely made the following conclusions: (1) Bonnie did not exhibit behaviors consistent with having detected controlled substances; (2) Bonnie was not a properly trained or reliable drug dog; (3) Bonnie's certification and field performance records are insufficient to support the conclusion that she is well-trained and reliable. Although Mr. Wallentine agreed with Mr. Nicely that Bonnie's post-service training records were lacking, he nevertheless concluded: (1) Bonnie is a properly certified, well-trained, and reliable drug dog; and (2) Bonnie exhibited a positive alert for controlled substances.

[5] The Court declined testimony from Dr. Corcoran, noting that his declaration had already been filed in the Court's record and his conclusions as to the chemical compound of MDMA were not germane to the issue of Bonnie's reliability.

The Tenth Circuit has held that probable cause to search can be based on alerts by trained dogs. United States v. Kennedy, 131 F.3d 1371, 1378 (10th Cir. 1997). Moreover, a drug dog's reliability "should come from the fact that the dog is trained and annually certified to perform a physical skill." Kennedy, 131 F.3d at 1378 (quoting United States v. Wood, 915 F.Supp. 1126, 1136 n.2 (D.Kan. 1996), *rev'd on other grounds*, 106 F.3d 942 (10th Cir. 1997). The party seeking to suppress evidence bears the burden of proving the dog is unqualified. United States v. Clarkson, 551 F.2d 1196, 1203 (10th Cir. 2009).

After hearing the testimony of both Mr. Nicely and Mr. Wallentine, the Court finds both experts to be credible and believable. While the issue of Bonnie's behavior can be debated and scrutinized endlessly, the Court would be remiss if it did not recognize that we are dealing with, after all, a dog. In United States v. Parada, 577 F.3d 1275, 1283 (10th Cir. 2009), the defense expert concluded that "[t]he methodology used to train, maintain, and use this detector dog in the field does not comply with scientific principles demanded by the use of operant conditioning . . . " The Tenth Circuit found otherwise, stating, "There is nothing in the record indicating that [the drug dog] had not been fully trained and certified. In fact, [the drug dog] has a certification and there is no evidence that he had a poor accuracy record or that his certification was ever revoked." Id.

Likewise, the record here establishes that approximately one week before the stop Bonnie was re-certified by the CNCA and there is no evidence that she has fallen below standards or had her certification revoked. Trooper Germain's testimony at the October 2, 2009 suppression hearing regarding the certification process went as follows:

Q: When was the last time you and Bonnie re-certified?

A: June 25th of 2009.

Q: That was about one week before the stop?

A: Approximately, yes.

Q: Please describe for the Court the re-certification process.

A: Well, in this particular case I certified to the California Narcotic Canine Association standards, basically required to locate seven of eight finds, again, detecting the odor of methamphetamine, cocaine, marijuana, and heroin. And this was done in Douglas, Wyoming.

Q: And did you and Bonnie pass?

A: Yes, we did.

Q: You were re-certified for another year?

A: Yes.

(Tr. R. p. 62).

Further, Trooper Germain testified that he tries to get in 16 hours per month of ongoing training with Bonnie[6] (Tr. R. p. 65). Accordingly, the Court is satisfied that Bonnie is properly certified to detect the controlled substances of marijuana, methamphetamine, cocaine, and heroin and that she is a well-trained and reliable drug dog.[7]

A review of the video recording (Gov't Ex. 1) supports the finding that Bonnie alerted to the minivan. At the suppression hearing, Trooper Germain described Bonnie's behavior when she alerts:

> Q: Let's just talk in general how do you know when Bonnie has found the odor of a controlled substance?
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> A: I watch her body language. I look for a distinct change in her behavior. And then when she does that and she's - - where she believes that she's as close to it as she can get, she will sit down, indicating to me that she has

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[6]Mr. Wallentine testified that the "loose" national standard is 16 hours of ongoing training each month. He calculated that Bonnie's monthly average was 15.94 hours.

[7] At the October 2, 2009 suppression hearing, the Court commented, "Now, I don't place any stock in the arguments that the drug dog was unreliable. I think the dog was shown to be quite reliable, and the pictures that as they evidenced the drug dog's activity showed to me that it was a good dog that was reliable and that he could rely on it" (Tr. R. p. 99).

alerted to the presence of one of the four odors that she's trained to alert to.

Q: What kind of changes in her body language or behavior indicate to you that she's found an odor or she's getting close to one?

A: I look for a change in her breathing, a change in her excitement level, and those are the two main things that I notice.

* * *

Q: Describe how you deployed her.

A: I started Bonnie at the back right corner of the minivan on the passenger's side, then proceeded to deploy her up towards the front of the minivan, then across the front, coming across the driver's side, then back up towards the back of the minivan.

At the driver's side door I saw Bonnie sit and her breathing had changed, indicating to me that she was in the odor of a controlled substance, and I proceeded with her to the back of the minivan. And then again, I noticed a distinct change in her behavior, and I noticed her sit again, indicating to me she was in the presence of the odor of one of the controlled substances that

she was trained to alert to.

(Tr. R. p. 67, 70).

The Court agrees, in viewing the videotape of the stop, that Bonnie exhibited significant behavioral changes as she passed the rear hatch of the vehicle. The Court also observed Bonnie sit near the passenger rear side of the vehicle. Admittedly, Bonnie was not trained to detect MDMA, the controlled substance charged in the indictment. However, Trooper Nykun testified that evidence of marijuana was found on the driver's side floorboard and on Herren's person at the DCI office (Tr. R. 52-53). Trestyn also admitted to having smoked marijuana in the vehicle (Tr. R. 25-26). The defendants place emphasis on the fact that Bonnie was not certified to detect MDMA. That fact is of no consequence, as the Tenth Circuit explained in United States v. Rosborough, 366 F.3d 1145, 1153 (10th Cir. 2004), "[a] dog alert creates general probable cause to search a vehicle; it does not implicate the precision of a surgeon working with scalpel in hand." Moreover, "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." United States v. Ross, 456 U.S. 798, 825 (1982). Thus, the record supports the conclusion that Bonnie properly alerted to the odor of a controlled substance.

For the foregoing reasons, it is therefore **ORDERED** that defendants' Motion for Reconsideration shall be, and hereby is **DENIED.**

Dated this 21st day of January, 2010.

ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE