



Law Enforcement Officers Should Read Their Reports Before Signing Them

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In *United States v. Ortiz Cruz*, 2018 WL 3825902 (D. Mont. Aug. 10, 2018), the United States District Court for the District of Montana was asked to reconcile the inconsistencies between a law enforcement officer's signed reports and the testimony that the officer gave during an evidentiary hearing on Defendant Ricardo Ortiz Cruz's motion to suppress. Ortiz Cruz asked the Court to suppress the evidence that Border Patrol Officer Luis Granado discovered during a search of Ortiz Cruz's vehicle, arguing that the search violated his Fourth and Fifth Amendment rights. Although the District Court stated that it "frowned" upon the practice of signing a statement without reading it, the District Court refused to suppress the evidence against Ortiz Cruz and denied the motion to suppress. The relevant facts are as follows.

On the evening of May 14, 2018, Officer Granado was patrolling the area around West Kootenai, Montana—a rural community on the Canadian border approximately forty miles from the Eureka Border Patrol station. Officer Granado had been assigned to this area because his supervisor was aware of recent illegal crossings in the area. At approximately 2:30 a.m., Officer Granado was driving along West Kootenai Road, which he estimated was two miles from the border, when he observed a white minivan speeding towards him in his rear-view mirror. Officer Granado pulled over to let the vehicle pass and noticed that the vehicle had a temporary Texas license plate. Officer Granado did not activate his lights but decided to follow the vehicle which resumed a normal speed.

However, within a few moments, the vehicle turned off onto Whitetail Lane, a poorly maintained gravel road. The vehicle rapidly gained speed, causing the Officer to believe that the vehicle was attempting to evade him. Officer Granado followed, but the van sent up a cloud of dust reducing visibility, and the Officer lost sight of the vehicle. Searching for some sign of headlights or taillights, Officer Granado soon emerged from the cloud of dust and realized that the vehicle must have pulled off somewhere behind him. He turned around and within a hundred yards he noticed the white van parked approximately fifty yards up an unmaintained forest service road with its lights turned off.

Officer Granado pulled in behind the van and activated his emergency lights. He approached the vehicle and asked the driver to roll down the window. Transitioning the conversation to Spanish, the driver responded that the window did not roll down. Officer Granado asked him to open the door and present his identification. The driver, Ortiz Cruz, complied by opening the door and, then, reached for something to the right of the driver's seat and out of sight. Officer Granado was unable to see Ortiz Cruz's hand and became afraid that Ortiz Cruz was reaching for a gun.

Officer Granado pulled his service weapon on Ortiz Cruz and ordered Ortiz Cruz to show his hands. When Officer Granado asked what he was reaching for, Ortiz Cruz answered something to the effect that he was reaching for his wallet. Officer Granado told Ortiz Cruz that he had better not be reaching for a gun. Ortiz Cruz stated that he was not reaching for a gun but admitted that there was a gun in the back of the car. With Officer Granado's permission, Ortiz Cruz then slowly reached for his wallet and presented three forms of

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Mexican-issued documents, including a driver's license and voting card. Approximately ten seconds after pulling out his firearm, Officer Granado holstered his weapon and inspected the documents. Ortiz Cruz did not present any immigration paperwork, and when asked whether he was lawfully in the country, Ortiz Cruz responded that he was not. Sometime during this encounter, Officer Granado confiscated the keys to the vehicle.

Officer Granado then radioed for backup. While waiting, he engaged Ortiz Cruz in conversation, asking him where he worked, where he was from, and how he had entered the country. Ortiz Cruz answered honestly and described having crossed the border near a bridge by fording a river. At the suppression hearing, Officer Granado described that this conversation seemed to calm both of them down. As they talked, Officer Granado opened the back of the vehicle and searched for the gun that Ortiz Cruz had indicated would be there. He found it in the jack compartment along with ammunition. Officer Granado then secured the gun in his patrol car.

Shortly after, Agent Cantu arrived and read Ortiz Cruz his Miranda rights before transporting Ortiz Cruz to the Eureka Border Patrol station, leaving Officer Granado to secure the scene. Officer Granado placed the gun back in the jack compartment, closed up the vehicle, and headed back to the station himself. The entire stop lasted approximately forty minutes.

According to the District Court, this is where the waters became muddied. At approximately 4:00 a.m., Officer Granado arrived in Eureka with the end of his shift in sight. He spent the next hour or two documenting Ortiz Cruz's biographical information and obtained his finger prints and photographs for his report. Instead of completing the report himself, Officer Granado described the circumstances surrounding the stop to Agent Brenda Lapage to author the report on his behalf. The following day, Officer Granado signed the report but "did not read it word-for-word," and consequently the report contained significant inconsistencies and omissions.

Particularly, the May 14th report diverged from Officer Granado's subsequent account of the events at the point at which Officer Granado apprehended Ortiz Cruz on the forest service road. His first report stated that Officer Granado observed Ortiz Cruz moving inside the vehicle and asked Ortiz Cruz to put his hands outside the window, which is consistent with training protocols. The report contained no mention of Officer Granado having pulled his service weapon on Ortiz Cruz and contained no indication that Officer Granado searched the vehicle or found the gun in the car at any time during the encounter.

Instead, the report explained that Agent Cantu read Ortiz Cruz his Miranda rights at the Border Patrol station at approximately 4:30 a.m. The report also indicated that the gun was found at the station only after Agent Salminen, a canine handler, conducted a "free air sniff," and the canine alerted to the back of the vehicle. When asked about these discrepancies at the evidentiary hearing, Officer Granado explained that he did not tell anyone about having found the gun during an earlier search so that the weapon could be independently discovered during an inventory search.

Meanwhile, Special Agent Bradford Bybee with Homeland Security Investigations ("Agent Bybee") began investigating Ortiz Cruz in order to bring criminal charges. On May 15th, he interviewed Ortiz Cruz and wrote up a criminal complaint relying on the information contained in Officer Granado's May 14th report. On May 18th, Agent Bybee interviewed Officer Granado. During this interview, Agent Bybee learned of some discrepancies between Officer Granado's stated version of the events and the narrative contained in the report. The subsequent probable cause hearing in front of Magistrate Judge Jeremiah C. Lynch revealed other discrepancies causing Agent Bybee to interview Officer Granado yet again. Agent Bybee noted these

discrepancies in his May 24th investigation report in which he explained that the search was due to officer safety concerns. This assertion presented the third version of events surrounding the search.

On June 1st at Agent Bybee's behest, Officer Granado revised his report to clarify the circumstances surrounding the search. This final report is consistent with the May 14th report as it concerned Officer Granado's initial encounter and pursuit of the vehicle and is consistent with his testimony at both the probable cause hearing and the hearing on the motion to suppress. This version of the events explained that Officer Granado pulled a service weapon on Ortiz Cruz after Ortiz Cruz's hand disappeared towards the passenger side floor of the vehicle early in the encounter. The report clarified that Officer Granado searched the vehicle in the field to secure the gun.

After being charged with being an illegal alien in possession of ammunition, Ortiz Cruz moved to suppress the evidence of the gun and ammunition on the grounds that: (1) Officer Granado's inconsistent testimony surrounding the initial stop of the vehicle dramatically undercut his credibility to the point that the Court could not objectively determine whether he had reasonable suspicion to Terry stop Ortiz Cruz's vehicle; (2) the encounter became custodial when Officer Granado pointed his service weapon at Ortiz Cruz, therefore requiring a Miranda warning prior to any further questioning; and (3) that Officer Granado's warrantless search of Ortiz Cruz's vehicle violated Ortiz Cruz's Fourth Amendment rights and did not meet any search warrant exceptions.

As for Ortiz Cruz's first argument, the District Court held that Officer Granado had a reasonable suspicion to stop Ortiz Cruz's vehicle. Reasonable suspicion exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for a particularized suspicion. In the context of a border zone stop, the United States Supreme Court has provided six factors to consider in determining the existence of reasonable suspicion: (1) the characteristics of the area in which they encounter a vehicle; (2) the vehicle's proximity to the border; (3) patterns of traffic on the particular road and information about previous illegal border crossings in the area; (4) whether a certain kind of car is frequently used to transport contraband or concealed aliens; (5) the driver's "erratic behavior or obvious attempts to evade officers;" and (6) a heavily loaded car or an unusual number of passengers. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85 (1975). Courts are to view these factors under the totality of the circumstances.

The District Court explained that the threshold inquiry was Officer Granado's credibility. The District Court found that Officer Granado was credible despite the inconsistencies between his reports and his testimony at the motion to suppress hearing. The Court noted that a finding of reasonable suspicion did not require it to reconcile inconsistencies between reports.

Notably, the District Court stated that Officer Granado did not attempt to hide the mistake when asked about it. Although the District Court did not approve of Officer Granado's actions in signing un-read reports, the District Court found that Officer Granado's final report and his testimony at the hearing were credible, that, under the *Brignoni-Ponce* factors, Officer Granado had reasonable suspicion to stop Ortiz Cruz's vehicle. Therefore, Ortiz Cruz' Constitutional rights had not been violated.

The District Court further found that Ortiz Cruz was not in custody for purposes of receiving his Miranda warnings at the time of the stop. The District Court explained a Miranda warning is required when an individual is in-custody and subject to interrogation. Whether an individual is "in-custody" requires a court to consider the fact-specific circumstances surrounding the encounter and whether a reasonable person would have felt free to leave. Facts that a court should consider in making this determination include: (1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the

physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual.

Although the District Court characterized the in-custody determination as a “close call,” the District Court found that, under the circumstances, a reasonable and innocent person in Ortiz Cruz’s position would have known that he was free to leave with proper documentation. Officer Granado did not use strong language in speaking with Ortiz Cruz, and the duration of the stop was brief. Therefore, Ortiz Cruz was not in-custody which would have necessitated that he receive his Miranda warnings from Officer Granado.

Finally, the District Court found that the automobile exception to the Fourth Amendment’s warrant requirement justified Officer Granado’s search of Ortiz Cruz’s vehicle. Under the automobile exception to the warrant requirement, police may conduct a warrantless search of a vehicle if there is probable cause to believe that the vehicle contains evidence of a crime. Additionally, the vehicle must be readily mobile.

The District Court found that Officer Granado had probable cause to believe that there was a gun in the car because Ortiz Cruz told him that one was in the back of the vehicle. Furthermore, the vehicle was readily mobile as Ortiz Cruz had been driving just moments before the stop. Accordingly, the District Court rejected each of Ortiz Cruz’s arguments and denied his motion to suppress.