IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARTIN J. APPLEBEE,

Defendant.

REPORT AND RECOMMENDATION

03-CR-159-S

REPORT

The grand jury indicted defendant Martin Applebee on charges of manufacturing and possessing methamphetamine on March 21, 2003. Before the court for report and recommendation are Applebee's two motions to suppress statements and evidence in this case, dkts. 19-20. Applebee seeks suppression on a variety of theories, none of which has merit. Accordingly, I am recommending that the court deny Applebee's suppression motions in all respects.

On January 30, 2004, I held an evidentiary hearing on Applebee's motions. Having heard and seen the witnesses and having judged their credibility, I find the following facts:

Facts

Michael Reinikainen is a deputy sheriff in Barron County, Wisconsin. At about 10:40 p.m. on March 21, 2003, while Deputy Reinikainen was on patrol duty, dispatch directed him to respond to a theft reported by the owner of a farm house on County

Highway A. The victim had just seen two men sneaking from his shed with a can of his gasoline and running to the empty house across the road at 733 County Highway A.

Deputy Reinikainen drove to 733 County Highway A. As he pulled in, he saw a Chevy Barretta parked in the driveway. The car's gas cap was open. Deputy Reinikainen ran the plates; dispatch reported that a woman owned the car, although Deputy Reinikainen only remembers her first name ("Anna"). Deputy Reinikainen then saw Dana Kallenbach, whom he already knew, come "dancing" animatedly out of the garage.

Deputy Reinikainen had to ask Kallenbach several times what he was doing because Kallenbach could not focus well enough to hear the question and answer it. Finally, Kallenbach replied that "we ran out of gas." Kallenbach clarified that "we" referred to Kallenbach and "Marty." Deputy Reinikainen asked if he meant Marty Applebee; Kallenbach replied that he believed so. The reason Deputy Reinikainen specifically asked about Applebee was because he had performed a traffic stop on Applebee the week before and Kallenbach had been in Applebee's car.

Deputy Reinikainen directed Kallenbach to sit in the Barretta and await further instructions. Deputy Reinikainen walked to his squad car to run record checks on Kallenbach and Applebee. Dispatch reported that there was a Dunn County warrant for Martin Applebee's arrest. Meanwhile, Kallenbach opened and closed the Barretta's door without getting in, then shambled back toward the garage. Deputy Reinikainen followed

him in and saw a red gas can. In response to questioning, Kallenbach admitted that "we" had taken the gas from across the street, but intended to return it "tomorrow."

By then Sheriff's Deputies Timothy Prytz and Jeffrey Nelson had arrived to assist. Deputy Reinikainen arrested Kallenbach and performed a search incident to arrest while Deputies Prytz and Nelson entered the empty house to search for the person they assumed was Applebee. Kallenbach told Reinikainen that Kallenbach's dad owned the property; no one was living there because Kallenbach's father had been attempting to sell it. (Deputies later spoke with Kallenbach's father, who told them that he had sold the home and did not want anyone else going in prior to closing.)

While searching Kallenbach incident to arrest, Deputy Reinikainen found a Walmart receipt for two boxes of Sudafed, a small, hollow light bulb with a charred end, about five folded and wrinkled pieces of tin foil with burn marks, baggies containing methamphetamine, a razor blade, scissors, and a marijuana pipe. Deputy Reinikainen recognized all of these items (except the pipe) as indicia of methamphetamine production or use. Kallenbach admitted to Deputy Reinikainen that he had used methamphetamine recently.

Deputy Reinikainen placed Kallenbach in the back of his squad car. Shortly, Deputies Prytz and Nelson returned with Applebee in tow. As the deputies walked past the Barretta, Deputy Nelson asked Reinikainen whether he could smell the odor of anhydrous ammonia wafting from the car. Deputy Reinikainen admitted that he could not because he

was suffering from a head cold. Deputy Reinikainen knew, however, that anhydrous ammonia is a necessary ingredient for manufacturing methamphetamine; he also knew that it was a dangerous chemical, although he was unaware of the specifics.

Deputy Reinikainen searched the Barretta. When he popped the trunk, out roiled a wave of anhydrous ammonia fumes powerful enough to penetrate his clogged sinuses. In the trunk the deputies found and seized a small, crude methamphetamine cooking apparatus.

Based on the nature of the evidence seized from the car, the deputies called in Patrol Supervisor Richard Carr from the Barron County Sheriff's Department because he was a certified technician equipped to respond to methamphetamine laboratory discoveries. Deputy Carr is a 22 year law enforcement veteran with extensive training and experience in drug investigations specializing in methamphetamine. He has run the regional drug unit, has received advanced training regarding methamphetamine use and manufacturing, and is a member of Wisconsin's state-wide methamphetamine task force. Deputy Carr has participated in approximately 75-100 methamphetamine investigations, has interviewed methamphetamine users, and has become familiar with the behavior one expects from a person under the influence of methamphetamine. Among the symptoms are paranoia, restlessness and wakefulness, sometimes for days on end. The primary indicator of a user coming down from a methamphetamine high is deep sleep, usually for an extended period.

More personally, Deputy Carr had gotten to know Applebee professionally and personally. Deputy Carr had arrested Applebee several times in the past, and had developed a rapport with Applebee, although they were not friends. Sometimes Applebee ostensibly provided cooperation to Deputy Carr, but his information usually (and Carr suspected, perhaps intentionally) was too vague to be useable.

Upon arriving at the arrest scene on March 21, 2003, Carr saw that Applebee was ensconced in the back of a squad car, sleeping soundly. Deputy Carr paid him no mind, concentrating instead on cleaning up the makeshift methamphetamine lab in the car trunk.

Skipping ahead to the next evening, March 22, 2003, Deputy Carr was on duty when he received a message at about 8:45 p.m. that Applebee wanted to speak to him at the jail. Deputy Carr met with Applebee one-on-one in a jail interview room measuring about eight feet square, with a steel table and facing chairs.

Deputy Carr filled in the blanks on a *Miranda* form, obtaining name and DOB information from Applebee. Deputy Carr then read aloud the statement of rights portion of the farm and asked Applebee if he understood his rights. Applebee responded, "Yep," so Carr wrote this on the form. Deputy Carr asked Applebee if, understanding his rights, he was willing to answer questions and make a statement. Applebee responded, "Yes," so Deputy Carr wrote this on the form. Applebee then signed the waiver form.

Although Applebee started the conversation by asking Deputy Carr to help him obtain treatment for his drug addiction, Applebee never indicated that was the only topic

he wished to discuss. During the course of the conversation he made self-incriminating statements that he now wishes to suppress. The entire conversation was cordial and low-keyed. Applebee did not seem unusually tired or sleep-deprived. Applebee was able to express his thoughts coherently. He did not appear to be under the influence of any drug. To the contrary, Applebee was alert and he answered questions without difficulty.

Analysis

I. The Car Search

Operating from his baseline premise that warrantless searches are presumptively illegal, Applebee argues that the government has failed to establish the lawfulness of the automobile search. Applebee contends that the search cannot be justified as incident to his arrest, although he does not develop the point. Applebee then argues that the automobile exception cannot rescue the search because there was no probable cause to search the car for contraband. Applebee further contends that "no 'automobile exception' case has authorized its application to the search of an automobile on private property when it has no connection to a crime." Brief in Support, Dkt. 25, at 3.

In response, the government abandons any claim that the car search was incident to Kallenbach's arrest, focusing instead on the automobile and exigent circumstances exceptions to the warrant requirement. The government is correct.

Contrary to Applebee's bold pronouncement, parked cars can be searched pursuant to the automobile exception. *See, e.g., California v. Carney*, 471 U.S. 386, 392-93 (1985); *United States v. Rivera*, 825 F. 2d 152, 158 (7th Cir. 1987). This is true even when the car is parked at a residence, so long as the police properly are present on the property. *See, e.g., United States v. Reis*, 906 F.2d 284, 290-91 (7th Cir. 1990).

In his reply brief, Applebee argues for the first time that the deputies were not properly on the property when they first saw the Barretta. But Applebee, as a temporary visitor, doesn't have standing to make this argument (as discussed in the next section). Even if he did, the facts indicate that Deputy Reinikainen did not encroach on any private areas. He entered the property by pulling into an unblocked driveway on which the Barretta was parked and whence he could see Kallenbach perform his meth dance out of the garage. Nothing suggests that Deputy Reinikainen exceeded the geographic boundaries of reasonable investigation. S*ee United States v. Dunn*, 480 U.S. 294, 301 (1987) (laying a framework for analyzing the reasonableness of police encroachment onto private property); *United States v. French*, 291 F.3d 945, 953 (7th Cir. 2002) (driveways are not private). So, Deputy Reinikainen legally on the premises.

As the government notes, warrantless car searches are permissible whenever police have probable cause to believe the vehicle contains contraband or evidence of a crime. *United States v. Wimbush*, 337 F.3d 947, 950(7th Cir. 2003). Probable cause to search exists "where the known facts and circumstances are sufficient to warrant a man of reasonable

prudence in the belief that contraband or evidence of a crime will be found." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). *Id.* at 696, citations omitted. "Probable cause requires only a probability or a substantial chance of criminal activity, not an actual showing of such activity." *United States v Roth*, 201 F.3d 888, 893 (7th Cir. 2000), *quoting Illinois v. Gates*, 462 U.S. 213, 244 (1983). Detecting the aroma of marijuana wafting from a car is sufficient to establish probable cause to search it. *United States v. Wimbush*, 337 F.3d at 950.

Here, the deputies knew a lot more. They knew that Kallenbach and "Marty" had been driving the car, had run out of gas, and had pilfered some fuel from the farm across the road. Kallenbach was carrying a receipt for two boxes of Sudafed, a hollowed-out lightbulb that appeared to have been used to smoke methamphetamine, five strips of aluminum foil with burn marks consistent with having been used to smoke methamphetamine, a marijuana pipe, baggies containing methamphetamine, and a razor blade and scissors. Kallenbach admitted that he had used methamphetamine, and he definitely appeared "floridly under the influence of a powerful stimulant." Govt. Brief, Dkt. 26, at 3. Finally, at least those deputies not suffering from head colds smelled the aroma of anhydrous ammonia wafting from the car. It is common knowledge in the law enforcement community, if not among Wisconsinites in general, that anhydrous ammonia is not only a great fertilizer, it's a key ingredient needed to cook methamphetamine. These circumstances, considered together, establish probable cause to search the Barretta from stem to stern.

In light of this, there is no need to consider the government's alternate theory of exigent circumstances, but half of that argument is well-taken. Officers may conduct warrantless searches when they have "a reasonable belief that the exigent circumstances require immediate action and there is no time to secure a warrant." *United States v. Jenkins*, 329 F.3d 579, 581 (7th Cir. 2003). Threats to personal safety and loss of evidence are the two circumstances that most commonly trigger application of the exigent circumstances doctrine.

The evidence establishes the existence of a hazardous substances in the car. As Deputy Reinikainen testified, anhydrous ammonia is a caustic chemical, exposure to which can require hospital treatment.[1] All that the deputies knew for certain before opening the trunk was that they smelled anhydrous ammonia. It could have been from an interrupted cook still progressing in the trunk, a leaking pressurized tank, or something equally hazardous. Therefore, it was entirely proper for the deputies to pry open the trunk to determine the source of the smell and the degree of danger it presented.[2]

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[1] The government offers a detailed explanation of the dangers of anhydrous ammonia in its brief. *See* Dkt. 26 at 5, n. 4. But because Deputy Reinikainen couldn't explain why anhydrous ammonia was dangerous, and because Deputy Carr did not offer his expertise on the topic, the court cannot rely on the gory details of the government's exegesis to find exigent circumstances. But the information about "instant freeze-drying," tracheotomies, and mechanical ventilators provides a basis for the deputies' concern that exposure to anhydrous ammonia would imperil them.

[2] The government also argues that by smelling the anhydrous ammonia, the officers were aware that the evidence "was literally blowing away." Dkt. 26 at 5. There was no testimony or other evidence regarding the evaporation rate of anhydrous ammonia, or that the deputies actually had this concern. Accordingly, the court should not rely on this as a basis to uphold the warrantless search.

II. The Home Search

"An overnight guest in the home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." *Minnesota v. Carter*, 525 U.S. 83, 90 (1998). Perhaps having read *Carter* after his evidentiary hearing, Applebee claims for the first time in his brief that he "was sleeping when the police arrived. Someone sleeping at 10:45 p.m. in the evening is clearly an overnight guest." Brief in Support, Dkt. 25 at 4.

The government takes exception to Applebee's assertion on factual and legal grounds. Again, the government is correct. There is absolutely no evidence whatsoever that Applebee was asleep in the home when the deputies went in looking for him. Applebee took the stand at the suppression hearing, but did not testify on this issue. Instead the evidence suggests that the deputies brought Applebee out of the house awake, but that by the time Deputy Carr arrived, Applebee had fallen asleep in a squad car. On this record, Applebee has a better chance establishing his right to privacy in the squad car than the house. Pursuant to *Carter*, even if Applebee was "legitimately on the premises," this is not enough to obtain Fourth Amendment protection. *Id*. at 91. He had no reasonable expectation of privacy in the empty home.

But even if he did, the police were authorized to enter the house to arrest him on Dunn County's pre-existing warrant. The government notes the jurisprudential paradox into

which Applebee has placed himself: if, in fact, Applebee had a reasonable expectation of privacy in the premises, then the police, by virtue of their warrant, could enter and arrest him under the authority of *Payton v. New York*, 445 U.S. 573, 603 (1980). If it was not his "residence" then Applebee would have no standing to contest the illegal search of the house even if the owner did. *See Steagald v. United States*, 451 U.S. 204, 218-19 (1981); *United States v. Pallais*, 921 F.2d 684, 691 (7th Cir. 1990).

In sum, Applebee had no subjective expectation of privacy in the home, and if he did, it is not one society would be willing to recognize as objectively reasonable. The deputies did not violate Applebee's rights by entering the home to arrest him. The court should deny this portion of Applebee's motion to suppress.

III. Applebee's Post-arrest Statements

Finally, Applebee claims that he is entitled to suppression of his March 22, 2003 statements to Deputy Carr because they were involuntary and unknowing. Applebee took the stand at the suppression hearing to testify that he still was so incapacitated from the previous evening's methamphetamine use that he did not know what he was doing and cannot remember now what was said. Deputy Carr provided a diametrically opposed perspective, testifying that Applebee was rested, lucid and appropriately interactive.

Having heard and seen both men testify, I conclude that Deputy Carr testified truthfully and Applebee testified falsely. Perhaps Applebee genuinely believes that his drug

addiction entitles him to play the role of victim when he breaks the law. Or, perhaps he's just a manipulative liar. Whichever, Applebee paltered and dissembled on the witness stand and his testimony cannot serve as a basis to suppress his statements to Deputy Carr.

A confession is voluntary if the totality of circumstances shows that it was the product of rational intellect and free will rather than physical abuse, psychological intimidation or deceptive interrogation tactics that overcame the suspect's free will. *United States v. Huerta*, 239 F.3d 865, 871 (7th Cir. 2001). Coercive police activity is a predicate to finding a confession involuntary. *Id; see also Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Factors important to the determination include the suspect's age, education, intelligence and mental state; the length of his detention; the nature of the interrogation; whether he was advised of his constitutional rights; the use of physical punishment or deprivation of physical needs; and the suspect's fatigue or use of drugs. *Huerta*, 239 F.3d at 871. *See also United States v. Gillaum*, 355 F.3d 982, 990 (7th Cir. 2004).

As detailed in the fact section, by the time he summoned Deputy Carr for a parley, Applebee had slept off any symptoms of the previous night's meth ingestion. He already knew Deputy Carr, having met with him in similar situation several times previously. Indeed, Applebee was very familiar to the law enforcement community, having been arrested by them and otherwise having interacted with them numerous times over the previous decade. This particular night, Applebee was lucid, coherent and cordial to Deputy Carr throughout their conversation. He understood his *Miranda* rights and he signed the waiver

form. Deputy Carr acted professionally throughout the entire meeting, offering no word or deed that could be deemed coercive. There is no basis to suppress Applebee's post-arrest statements.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny all of defendant Martin Applebee's motions to suppress evidence.

Entered this 20th day of February, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge