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

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND RECOMMENDATION

v.

03-CR-91-C

DUSTIN SACHSENMAIER,

Defendant.

REPORT

Before the court for report and recommendation are defendant Dustin Sachsenmaier's motion to suppress his post-arrest statements and motion to quash the search warrant for his residence. *See* dkts. 8 and 11. For the reasons stated below, I am recommending that this court deny both motions.

On October 3, 2003, this court held an evidentiary hearing on Sachsenmaier's motions, which devolved into a constructive *Franks* hearing.[1] *See* H'ing Transcript, dkt. 17, at 39. Having heard and seen the witnesses testify, and having considered the evidentiary proffers and other exhibits offered into the record, I find the following facts:

---

[1] *See Franks v. Delaware*, 438 U.S. 154 (1978).

Facts

Kenneth R. Rasmussen has been a patrol officer for the City of Eau Claire Police Department for 14 years. In early summer 2002, Officer Rasmussen attended a training seminar at which he learned the ingredients and equipment used to cook methamphetamine. One ingredient discussed was anhydrous ammonia, a toxic chemical often stored in liquid propane (LP) tanks. Officer Rasmussen learned that if you breathe anhydrous ammonia, you can die. It is unlawful in Wisconsin to possess or transport anhydrous ammonia in an improper container. (*See* Wis. Stat. § 101.10(3)).

On the morning of July 12, 2002, Officer Rasmussen was patrolling in his squad car when dispatch directed him to a residential neighborhood to investigate a man sleeping in a car parked in the middle of an intersection. Officer Rasmussen arrived at about 11:00 and found Dustin Sachsenmaier sound asleep behind the wheel of an idling Buick parked in the middle of the intersection.

As Officer Rasmussen approached the car, he saw in the back seat a white 20 pound LP tank. Officer Rasmussen was concerned because the tank's brass valve had blue on it, which indicated the presence of anhydrous ammonia. Officer Rasmussen could not tell at that point if Sachsenmaier had passed out from toxic fumes or if something else was afoot. Officer Rasmussen reached across the steering column, removed the keys from the ignition and placed them on the Buick's roof. Officer Rasmussen then thumped the roof with his hand to wake Sachsenmaier.

Sachsenmaier woke up immediately and stepped out of his car at Officer Rasmussen's direction. Officer Rasmussen walked with Sachsenmaier away from the car because of Officer Rasmussen's safety concerns regarding the LP tank in the back seat. Sachsenmaier was groggy but did not act or appear incapacitated. Sachsenmaier walked without stumbling, spoke clearly, communicated effectively and cooperated fully with Officer Rasmussen. Officer Rasmussen determined from dispatch that the car was registered to a man who Sachsenmaier said was his girlfriend's father.

Officer Rasmussen radioed Officer Andy Falk, a drug task force investigator experienced with methamphetamine paraphernalia. Officer Falk advised that if anhydrous ammonia was present, then the scene was dangerous. Sachsenmaier overheard this radio conversation and interjected that the police need not be "coy" while talking about the anhydrous ammonia. At some point, Sachsenmaier volunteered that there no longer was any anhydrous ammonia in the LP tank because Sachsenmaier had poured it out so he could use the tank to power sandblasting tools.

Sachsenmaier also told Rasmussen that he had used methamphetamine and still was under its influence. Based on this, Officer Rasmussen deemed Sachsenmaier a potential physical threat, so he handcuffed Sachsenmaier and placed him in the back of his squad car. Officer Rasmussen did not consider this a formal arrest but rather an investigative detention. The cuffs went on at about 11:08 a.m.

About ten minutes later, Officer Falk and Deputy Sheriff Jeffrey Wilson, both drug task force investigators, arrived. Investigator Wilson recognized the bluish-green tinge on the LP tank's brass fitting as a sign of anhydrous ammonia. He performed a field test which indicated that anhydrous ammonia fumes were wafting from the tank.

Investigator Wilson walked to Officer Rasmussen's squad car and removed Sachsenmaier. Investigator Wilson read Sachsenmaier his rights from a preprinted *Miranda* card.[2] Sachsenmaier responded that he understood his rights and that he was willing to answer questions. They spoke for about ten to fifteen minutes. Sachsenmaier responded appropriately to Investigator Wilson's questions. Throughout this interrogation, he was pleasant and calm. His speech was not slurred. He had no trouble standing. Sachsenmaier never complained that he did not understand what was happening or that he was sleepy.

Sachsenmaier did not look or act like someone under the influence of methamphetamine, but neither was he was not totally "with it": he did not know exactly where he was or why he was there. Sachsenmaier said he thought he was meeting his cousin for lunch, but the neighborhood in which he had fallen asleep was residential, not commercial. When asked if he had been out stealing anhydrous ammonia the night before, Sachsenmaier responded that he was not sure. Despite these uncertain answers, Sachsenmaier's answers to Investigator Wilson's questions were "fairly reasonable." He appeared able to make a rational decision to answer Investigator Wilson's questions.

---

[2] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Investigator Wilson was in civilian clothes. He maintained a "social distance" from Sachsenmaier while they spoke. Investigator Wilson did not make any promises or threats to Sachsenmaier. He did not raise his voice. Investigator Wilson did not say or do anything coercive, nor did he attempt to take improper advantage of Sachsenmaier's grogginess. At the conclusion of the interrogation, Officer Rasmussen drove Sachsenmaier to jail for booking.

Investigator Wilson began preparing a search warrant affidavit for Sachsenmaier's apartment in rural Dunn County, about 25 miles distant from the arrest location. Investigator Wilson learned the location of Sachsenmaier's residence from Sachsenmaier during the initial interrogation. At the time Investigator Wilson prepared his warrant affidavit, he knew that Sachsenmaier did not own the car that he was driving. He knew that Sachsenmaier had been in possession of the LP tank that had contained anhydrous ammonia, but had not explored further with Sachsenmaier whether anyone else actually owned the tank or its contents.

Investigator Wilson telephoned Investigator Sergeant Russ Cragin a Dunn County drug task force agent, seeking any input he might have in preparing a search warrant affidavit for Sachsenmaier's apartment. Sergeant Cragin told Investigator Wilson that several weeks earlier, a local grocery store cashier who had gone to school with Sachsenmaier had been working the register when Sachsenmaier had attempted to purchase approximately $125 worth of Sudafed. The clerk asked her assistant manager whether she could complete

the sale. The assistant manager said it was okay. According to Cragin, the clerk then asked Sachsenmaier what he was doing; Sachsenmaier replied to the effect that he was going to "make my own." Investigator Wilson put this information in his search warrant affidavit, stating that the cashier had provided this information directly to a law enforcement agent.

In fact, Sergeant Cragin never had spoken directly to the cashier. He received the report telephonically from someone else who knew the cashier. The cashier subsequently has denied that Sachsenmaier ever made any statement about "making his own" and she has denied telling anyone that he had said this. Sergeant Cragin did confirm with the assistant manager that Sachsenmaier had purchased $125 worth of Sudafed that day, but he cannot directly dispute the cashier's denials.

The circuit court in Dunn County issued the requested search warrant that afternoon. Agents found and seized evidence that Sachsenmaier now wishes to suppress.

At about 9:00 p.m. that same evening, Investigator Wilson visited Sachsenmaier at the Eau Claire County Jail to interrogate him again. Sachsenmaier met Investigator Wilson in a jail interview room. Sachsenmaier was not handcuffed. Investigator Wilson advised Sachsenmaier of his *Miranda* rights a second time. Sachsenmaier again responded that he understood his rights and said that he would be willing to answer questions. Investigator Wilson did not threaten or induce Sachsenmaier to submit to this second interrogation. Sachsenmaier's demeanor was similar to that from the morning interview: pleasant, calm and not under the influence of drugs or alcohol. Sachsenmaier answered questions for a while,

but ultimately decided that he would not name names because he could not rat out his friends. Investigator Wilson terminated the interview.

Analysis

I. Motion To Suppress Statements

Sachsenmaier has moved to suppress his statements to Officer Rasmussen and Investigator Wilson (and evidence derived from his statements) because his initial statements to Officer Rasmussen were not *Mirandized*, and because he did not knowingly or voluntarily waive his *Miranda* rights before answering Investigator Wilson's questions.

A. Sachsenmaier's statements to Officer Rasmussen

A suspect is entitled to be advised of his *Miranda* rights prior to any custodial interrogation. A suspect is in custody for fifth amendment purposes if he is subject to a restraint on his freedom of movement of the degree associated with formal arrest. *United States v. Wyatt*, 179 F.3d 532, 535 (7th Cir. 1999). Factors to consider in making this determination include whether the encounter takes place in a public place, whether the suspect consents to speak to the officers, whether the officers inform the suspect that he is free to leave, whether the suspect is moved to another area, whether there is a display of force or numbers by the officer(s), whether the officers deprive the suspect of papers needed to go on his way, and whether the officer's tone of voice was such that his request likely will

be obeyed. *Id.* *Miranda* warnings are not required just because a persons is the focus of a criminal investigation or because the questioning takes place in a coercive location like a police station. *Id.* *Miranda* warnings are not *necessarily* required when questioning a suspect during a *Terry* stop,[3] *see United States v. Felix-Felix*, 275 F.3d 627, 636 (7th Cir. 2001), but they might be required if the *Terry* stop is sufficiently custodial, *see United States v. Smith*, 3 F.3d 1088, 1096-97 (7th Cir. 1993).

Here, there is no doubt that once Officer Rasmussen handcuffed Sachsenmaier and placed him in the squad car, Sachsenmaier was in custody for fifth amendment purposes. *See Smith*, 3 F.3d at 1097-98. The circumstances prior to that, however, indicate that Sachsenmaier was not in custody. Officer Rasmussen did not stop Sachsenmaeir's car, it already was parked in the middle of an intersection. Officer Rasmussen directed Sachsenmaier to step out of the car, but this would be routine during a traffic stop, and it was necessary here to get everyone away from the apparently dangerous LP tank in the car. (Keep in mind that Officer Rasmussen had not yet determined whether Sachsenmaier had passed out from anhydrous ammonia fumes.) The ratio of officers to civilians was 1/1 and Officer Rasmussen did not touch Sachsenmaier or threaten the use of force, nor did he use command words or a threatening tone to cow Sachsenmaier into submission. It was a relatively casual conversation in a public place, with Officer Rasmussen simply trying to figure out what was going on with Sachsenmaier and the blue-valved LP tank.

---

[3] *Terry v. Ohio*, 392 U.S. 1 (1968).

So, anything that Sachsenmaier said to Officer Rasmussen prior to the handcuffing should not be suppressed; anything he might have said afterward should be suppressed. From Officer Rasmussen's suppression hearing testimony and his two reports (Exhs. 2 & 3 to defendant's motion to suppress, dkt. 8), I conclude that Sachsenmaier made all of his statements to Officer Rasmussen prior to being handcuffed. Accordingly, these statements are not subject to suppression and there is no *Miranda* violation prior to Investigator Wilson beginning his more formal questioning of Sachsenmaier.

B. Sachsenmaier's statements to Investigator Wilson

Prior to questioning Sachsenmaier, Investigator Wilson advised him of his *Miranda* rights and obtained a waiver. Sachsenmaier now contends that his waiver was unknowing and involuntary due to his methamphetamine induced grogginess. A *Miranda* waiver is valid only if it is voluntary and knowing. *Colorado v. Spring*, 479 U.S. 564, 572 (1987). The government must prove that Sachsenmaier waived his rights as a free and deliberate choice, with a full awareness both of the nature of the rights he was waiving and the consequences of his waiver. *Id.* at 573. "Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Id.*, citations omitted. Factors relevant to the analysis include the duration and conditions of detention, the manifest attitude of police toward the suspect, his physical and mental state, and "the

diverse pressures that sap or sustain his powers of resistance and self-control." *Id*. A critical factor is police misconduct: absent evidence that a suspect's will was overborne and his capacity for self-determination critically impaired because of coercive police conduct, a *Miranda* waiver is voluntary. *Id*., citing *Colorado v. Connelly*, 479 U.S. 157, 163-64 (1986). Where a suspect demonstrates sign of incapacity, the police cannot unfairly exploit this to obtain a *Miranda* waiver, but they may still obtain a valid waiver so long as they do not coerce the suspect and so long as they genuinely believe that the suspect understands their advisals. *See Rice v. Cooper*, 148 F.3d 747, 750-51 (7th Cir. 1998); *United States v. Brooks*, 125 F.3d 484, 490-91 (7th Cir. 1997).

Here, Sachsenmaier supports his claim of involuntariness with the undisputed evidence that he was sound asleep when the police found him, he remained noticeably groggy during questioning, and by his claim to be under the influence of methamphetamine (although his torpor bespoke more of a post-high crash). These are all factors the court must consider, but they do not outweigh the other factors that demonstrate that Sachsenmaier knew what he was doing and was able to exercise his free will when he decided to waive his rights. Officer Rasmussen and Investigator Wilson both testified that despite his grogginess, Sachsenmaier demonstrated no physical signs of exhaustion, and he was generally lucid, articulate and responsive. His only mental lapses had to do with the immediate past: he could not remember what he had done the night before, where he had been headed, or why he was in that particular neighborhood. But he was capable of cajoling the officers about

being "coy" in his presence when they talked about anhydrous ammonia, and he was able to provide a coherent account of his plans for the LP tank. The totality of the circumstances show that Sachsenmaier retained his ability to understand what was happening and to make rational decisions; they further show that neither Officer Rasmussen nor Investigator Wilson took advantage of Sachsenmaier's palpable grogginess. Sachsenmaier understood the *Miranda* rights read to him by Investigator Wilson, he understood the consequences of waiving them, then he voluntarily chose to waive them and to answer Investigator Wilson's questions. There is no basis to suppress any of Sachsenmaier's statements on the scene.

Sachsenmaier does not directly contest the statements he made later that evening at the jail, but no intervening factor would have removed his ability knowingly and voluntarily to waive his rights and answer questions. Indeed, as the government observes, the interview ended when Sachsenmaier chose not to name names for Investigator Wilson. Clearly, he was capable of exercising his free will.

Finally, although Sachsenmaier does not directly argue the point, he implies a pall of general involuntariness in his claim for suppression. As just noted, the facts establish that the police did not exploit Sachsenmaier's condition, and that his condition was not so dire as to prevent him from making a knowing and voluntary decision to answer the agents' questions. So, to the extent a separate analysis might be needed to address the voluntariness of Sachsenmaier's statements (as opposed to the voluntariness of his waiver), the result is the same for the same reasons.

Therefore, Sachsenmaier is not entitled to suppression of any of his statements and the court should deny this motion.

II. The Search Warrant

Sachsenmaier has moved to quash the search warrant for his apartment, arguing that the police obtained it by using false information and that the information remaining after redacting the false information does not establish probable cause. As established at the evidentiary hearing, Investigator Wilson incorrectly reported that Investigator Cragin personally had spoken directly with the cashier at the grocery store at which Sachsenmaier had purchased $125 worth of Sudafed and that the cashier told Cragin that Sachsenmaier told her he was going to "make my own." It is not clear whether Investigator Cragin misspoke or Investigator Wilson misheard, but the government concedes that Investigator Cragin never spoke with the cashier and that it was incorrect for the search warrant affidavit to claim that he had. Investigator Cragin's testified that that *someone* who knew the cashier (but whom he no longer can identify) called to tell him about this, but he is unable directly to dispute the cashier's current averments that Sachsenmaier never said any such thing to her and she never told anyone that he had.

Obviously, Investigator Cragin got a tip from someone–after all, he was able to verify the fact of Sachsenmaier's Sudafed purchase, But the presentation of concededly incorrect facts in the search warrant affidavit on a point material to the probable cause determination

sufficiently concerned both sides that they explored the matter at the evidentiary hearing. *See, e.g., United States v. Maro*, 272 F.3d 817, 821 (7th Cir. 2001). Having heard and seen the witnesses testify, having considered the sworn affidavits, and having considered the proffer of the cashier's testimony, I conclude that Sachsenmaier is entitled to have the search warrant affidavit redacted to remove the statement attributed to him bout "making my own." Although the evidence did not show a "purposeful misrepresentation" by the agents, it was reckless for Investigator Wilson to swear that that Investigator Cragin personally had heard the cashier report such a significant statement against interest by Sachsenmaier. Investigator Wilson received the information directly from Cragin, not an intermediary who might have misunderstood the second-hand nature of Cragin's information. *See, e.g., United States v. Whitley*, 249 F.3d 614, 621-22 (7th Cir. 2001)(it is more than mere negligence for a group of officers all to deny any knowledge or responsibility for how material misinformation made it into the warrant affidavit).

That said, Sachsenmaier is not entitled to exclusion simply upon having obtained a redaction premised on reckless reporting. If there still is probable cause to search Sachsenmaier's apartment after purging the affidavit, then this court should not quash the warrant. *United States v. Whitley*, 249 F.3d at 624. (A corollary is that if probable cause is lacking, then the government cannot save the warrant by an appeal to the good faith doctrine of *United States v. Leon*, 486 U.S. 897 (1984). *See United States v. Garey*, 329 F.3d 573, 577 (7th Cir. 2003)).

A court that is asked to issue a search warrant must determine if probable cause exists by making a practical, common-sense decision whether given all the circumstances, there exists a fair probability that contraband or evidence of a crime will be found in a particular place. *United States v. Walker*, 237 F.3d 845, 850 (7th Cir. 2001), quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1982). The Supreme Court has declined to define "probable cause" precisely, noting that it is a commonsense, nontechnical concept that deals with the factual and practical considerations of everyday life on which reasonable and prudent people, not legal technicians, act. *Ornelas v. United States*, 517 U.S. 690, 695 (1996) citations omitted. Despite the lack of a firm definition, the Supreme Court tells us that 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." *Id.* at 696, citations omitted. Probable cause is a fluid concept that derives its substantive content from the particular context in which the standard is being assessed. *Id.*, 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); *see also United States v. Ramirez*, 112 F.3d 849, 851-52 (7th Cir. 1997)("all that is required for a lawful search is *probable* cause to believe that the search will turn up evidence or fruits of crime, not certainty that it will," emphasis in original). Although people often use "probable" to mean "more likely than not," probable cause does not require a showing that an event is more than 50% likely. *See*

United States v. Garcia, 179 F.3d 265, 269 (5th Cir. 1999); *see also Edmond v. Goldsmith*, 183 F.3d 659, 669 (7th Cir. 1999)(Easterbrook, J., dissenting) (probable cause exists somewhere below the 50% threshold).

After purging the warrant affidavit of Sachsenmaier's "make my own" statement, the following salient facts remain:

1) Earlier that day Sachsenmaier had been found asleep at the wheel of his car in the middle of a street in Eau Claire.

2) Sachsenmaier had an LP tank in the back of his car that tested positive for the presence of anhydrous ammonia.

3) Anhydrous ammonia commonly is used to produce methamphetamine and often is found in tanks.

4) Three weeks earlier, Sachsenmaier had bought $125 worth of Sudafed at a grocery store in Menomonie.

5) The active ingredients in Sudafed commonly are used to produce of methamphetamine.

These facts establish probable cause to search Sachsenmaier's apartment. The warrant is not "thin" without Sachsenmaier's "make my own" comment because the acts outlined above scream the same message to experienced drug agents like Investigator Wilson. Who but a meth cooker buys over $100 worth of cold medicine at one pop? Who but a meth cooker drives around town with a tank of anhydrous ammonia in the back of his Buick? How synergetic is the effect of combing both these facts within three weeks of each other? Facts 2-5 above are enough to establish probable cause. In their shadow, Fact 1 assumes a

corroborative hue: isn't it just like a meth user to exhaust himself so thoroughly that he parks his running car in the middle of an intersection to take a nap?

Are there *any* innocent explanations that could account for all five of these facts in combination? Perhaps, but this much is certain: the redacted search warrant affidavit still establishes probable cause to search Sachsenmaier's apartment. This court should not grant the motion to quash the warrant.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Dustin Sachsenmaier's motion to suppress evidence and motion to suppress statements.

Entered this 17th day of November, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge