

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

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND
RECOMMENDATION

v.

04-CR-31-S

JOHN D. KEMPF,

Defendant.

REPORT

The grand jury has charged defendant John Kempf with unlawfully possessing a sawed-off shotgun. Before the court is Kempf's motion to suppress the shotgun on the ground that its seizure derives from an unreasonable search of his bedroom at a boarding house. *See* Dkt. 11. The government responds that exigent circumstances justified the initial entry into Kempf's room that led to a second search pursuant to a warrant. (In his reply, Kempf raises for the first time a fifth amendment claim of coerced statements, but this argument is waived). Because exigent circumstances justified the initial entry into Kempf's room, I am recommending that the court deny the motion.

On April 26, 2004, this court held an evidentiary hearing on Kempf's motion. Having heard and seen the witnesses testify, and having considered all the evidence, I find the following facts:

Facts

John Nowicki is a sergeant with the Superior Police Department. Sergeant Nowicki was on duty the early evening of December 13, 2003, when he received a telephone call from Officer Jeff Darst, who had just learned that a gunshot victim had checked himself into the hospital. (It was defendant John Kempf, although police were unable to identify him immediately). According to Officer Darst, the victim was in a lot of pain and not able or willing to talk much. The victim stated, however, that his gun had fallen and discharged into his leg; this raised Officer Darst's suspicions because the entry wound appeared to come in from above, not below. The man did not identify himself, he could not provide his own home address (all he said was that his landlady's first name was "Colleen"), he could not identify the caliber of his own handgun, and he reported that there still was a teenage boy at his boarding house, although he could not identify him by name. Sergeant Nowicki drove to the hospital to attempt to learn more, but the man was in too much pain to talk, and soon was transported him to a better facility.

Sergeant Nowicki and Officer Darst were concerned for the safety of the teenager and for the public at large. First, they were not sure whether the teenager was in danger from a loaded—and recently discharged—firearm in the house. Second, because the police could not be sure what actually had happened, they were concerned that perhaps the teenager actually was the shooter.

With assistance from hospital personnel, within about thirty minutes the police determined that the victim lived at 1828 Banks Street in Superior, although they still did not know his name. Sergeant Nowicki radioed to the beat officer in the area, George Gothner, and directed him to meet Sergeant Nowicki at the address. Sergeant Nowicki knocked on the front door, Officer Gothner knocked on the back. Eventually a teenage boy named “David” (who turned out to be the landlady’s son, David Ennis) answered the back door. David stated that his mother was not home and that he was home alone. The police asked permission to enter the house; he granted it.

In response to police inquiry, David confirmed that the tenant, John, had in fact shot himself in his room earlier that evening and then had driven himself to the hospital. David was disquietingly unconcerned about the situation. This, coupled with his flat affect, mumbling and lack of eye contact, led Sergeant Nowicki initially to suspect that David was stoned. He finally determined that this was just David’s normal demeanor.¹

According to David, he was in his upstairs bedroom playing video games when he heard a gunshot and John’s scream of pain. John limped into David’s room to ask if David would help John hobble down to his pickup. David agreed. When they got to the front door, David’s teenaged friend Brian showed up and leant a hand. As John drove himself to the hospital, David and Brian “just went up and started play video games.” They did not

¹ David Ennis testified at the suppression hearing. Sergeant Nowicki was exactly right: David has a flat affect, he is difficult to understand, his memory is poor, and he remains alarmingly nonchalant about the shooting.

call 911, they did not call David's mother, nor did they take any other action in response to the accidental shooting. But, as David testified at the suppression hearing, the shooting had "sort of just ruined the night."

When the police asked David where John's gun was, he turned wordlessly and began to ascend the stairs into the crepuscular upstairs hallway. The police had not asked David to retrieve the gun, nor had they asked him to show them the gun. So, Sergeant Nowicki asked David to stop. David either did not hear him or ignored him (probably the former), because he continued up the stairs. Sergeant Nowicki now was concerned because he did not know who else might be in the house, who might be waiting at the top of the darkened stairs, whether David might be retrieving the gun to use it, or whether some other nefarious activity was afoot. So, he and Officer Gothner pursued David up the stairs, four times directing him to stop and wait. David never responded. Sergeant Nowicki got nervous enough to draw his weapon to prepare for a worst case scenario at the top of the stairs.

The upstairs hall was unlit, but a nightlight glowed in the bathroom and a light shone from a bedroom with a wide-open door. David entered this room and waved vaguely at the low-tech arsenal within. This was Kempf's private bedroom that he leased from the Ennises. Sergeant Nowicki followed David in, ordered him out, then quickly assessed the situation whence he stood in the cramped room.

Kempf's bedroom was jammed with "fantasy blades,"² empty holsters for firearms, and a wall-mounted rack that held a single-shot 22 caliber handgun and had an empty space for a second gun. On the floor near the bed, Sergeant Nowicki saw a 2-shot Derringer. (Later police determined this was the weapon with which Kempf had shot himself).

From where he stood, Sergeant Nowicki also saw an open duffel bag on a weight bench. The bag was unzipped, with at least a 12 inch gap open at its center, allowing a plain view of its contents. In the duffel bag were several boxes of shotgun shells and a black metal tackle box with a compartmentalized upper shelf that was slightly ajar. Underneath the shelf in the box was a leafy material that appeared to be marijuana. In the shelf were myriad brilliantly-hued gem packs of the sort often used to package drugs, along with a flat bag of what appeared to be crystalline methamphetamine. Sergeant Nowicki absorbed all this within 30 to 60 seconds of entering the room.

Sergeant Nowicki's concerns were exacerbated by the empty holsters—where were the firearms?—and the drugs and drug paraphernalia. He instantly decided to freeze the scene and obtain a state search warrant. He directed David downstairs, left Officer Gothner to preserve the status quo, then sought and obtained a state search warrant for Kempf's room. While executing the search warrant, police discovered the sawed-off shotgun that is charged against Kempf in the instant case.

² Knives with large blades, long blades, ornately shaped blades, extra dagger points or spikes, or some combination thereof.

Analysis

Kempf seeks suppression of the shotgun on the ground that police discovered it during a warrantless and unreasonable search of his private bedroom at the boarding house. The government responds that exigent circumstances justified Sergeant Nowicki pursuing David into the room, whence he legally viewed the contraband in the tackle box that led to the state search warrant.

Police generally need a warrant to enter a private home or room, but courts allow warrantless searches when police have a reasonable belief that 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). Among the circumstances sufficiently exigent to justify warrantless entry is responding to a risk of danger to police inside the dwelling. *United States v. Lenoir*, 318 F.3d 725, 730 (7th Cir. 2003).

Kempf argues first that there were no safety issues because so much time had passed between the police learning that Kempf had shot himself and their arrival at his boarding house. This is a non sequitur. First, however urgent the police believed the situation to be, they couldn't have responded any faster because they didn't know where to go: Kempf did not identify himself or give his street address. The police spent almost an hour trying to determine where Kempf lived. Second, the police didn't have "extra" time to seek a warrant because they were working at discovering the location of the firearm with which Kempf had been shot. Third, even if they had had time to draft a warrant request, they had no probable

cause to support one. Accidentally shooting yourself is not a crime; although the police were suspicious that something more was afoot, they needed to investigate further to transcend speculation. Fourth, the officer safety exigency on which the government now relies did not arise until literally the minute before Sergeant Nowicki entered Kempf's room in pursuit of David Ennis. Up to that point, the police had been investigating methodically to determine whether a crime even had been committed. Indeed, the safety exigency wasn't even based on David's "criminal" behavior, but on his inexplicable behavior in defiance of police directions in a house in which a man had been shot and the gun was still loose.

Some of these points also apply to Kempf's second argument. Kempf contends that because the police had spent three to five minutes talking to David and Brian and had determined that they were the only people home, they could have secured the premises and sought their warrant. But as just noted, at that point there was no evidence of criminal behavior that would have justified issuance of a warrant. The police had not even ascertained where the gun was in the house, or—contrary to Kempf's assertion—whether any one else was present in the house. They couldn't even rule out David as the shooter.³

³ Sergeant Nowicki testified:

At that point I drew my service weapon because I was getting a little bit nervous about what was going to happen when we got to the . . . top of the stairs. I didn't know if anybody else was there. I didn't know if he was involved in the shooting. You know, I just didn't know what was going on other than somebody had supposedly been shot in this house.

Ev. H'ing Tr., dkt. 27, at 18.

These unknowns cast a pall of exigency to David's zombie-like ascent of the stairs toward the gun in Kempf's bedroom. The police had not asked David to take them to the gun or even to show them the gun, they had asked him where the gun was. David's response was sufficiently bizarre that, coupled with the unknowns confronting the officers, it was reasonable for them to assure their own safety by following David up the stairs and into Kempf's room after he ignored their repeated directions to stop and wait.

Kempf's only privacy claim is to his own bedroom, so he cannot complain that the officers followed David up the stairs; ironically, the officers didn't *want* David ascending the stairs, they wanted him—and implored him—to stop, pivot and return with them to the living room where they felt safer. But David kept going, so the officers were compelled to follow for their own safety. Kempf had left the door to his room open when he rushed to the hospital earlier that evening. Once David crossed the threshold to point out Kempf's firearms, it would have been foolhardy for Sergeant Nowicki *not* to follow, because he had to ensure that David did not seize a knife or gun from the myriad choices in Kempf's cluttered armory.

Once there, Sergeant Nowicki legally was present in a location whence he could survey Kempf's cramped room, which included not only the weapons (which were not palpably contraband) but also the open tackle box holding gem packs, marijuana and methamphetamine (which probably were). At that point—and not a second sooner—the police had developed a legitimate basis to freeze the scene and seek a warrant.

The upshot of all this is that a genuine concern for officer safety prompted the officers to enter Kempf's room. This exigency excused compliance with the warrant compliance and rendered their presence in the room reasonable. There is no fourth amendment basis to suppress any evidence subsequently seized during execution of the state court search warrant.

In his reply brief, Kempf for the first time raises a fifth amendment claim that as he writhed in agony at the hospital after shooting himself in the leg, the police coerced him into making statements which allowed them eventually to learn where he lived, which in turn led to the sequence of events detailed above. Kempf never raised this claim in his motion or his initial brief in support. *See* dks. 11 & 28. This constitutes waiver. *See United States v. Collins* 361 F.3d 343, 349 (7th Cir. 2004).

Apart from this, there is no evidence to support his claim. Coercive police activity is a predicate to finding a confession involuntary, *see Colorado v. Connelly*, 479 U.S. 157, 167 (1986), and Kempf has not developed any evidence that he was coerced. He did not offer an affidavit or testimony claiming that the police overbore his will while questioning him at the hospital. Officer Nowicki acknowledged at the suppression hearing that Kempf had been in a lot of pain and had not been very informative, but there is absolutely no indication that the police badgered or otherwise mistreated Kempf while attempting to determine what had happened to him. Indeed, they would have no reason to lean on him because they considered him the victim of the incident. There is no fifth amendment basis to suppress evidence in this case.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant John Kempf's motion to suppress the evidence seized from his room.

Entered this 14th day of May, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge