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

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN LOFFTIN,

Defendant.

REPORT AND RECOMMENDATION

06-CR-205-S

REPORT

Before the court is defendant Kevin D. Lofftin's motion to suppress evidence obtained as a result of his stop and arrest on October 31, 2006 (dkt. 12). For the reasons stated below, I am recommending that the court deny this motion.

The parties have stipulated to the facts contained in the investigative reports:

FACTS

On October 31, 2006, BATFE Special Agent Jason Salerno was visiting the Rusk Gun Shop in Madison, Wisconsin, at about 10:15 a.m. on an assignment unrelated to the instant case. While Agent Salerno engaged in his task, he heard another person in the gun shop engaging in a cell phone conversation that Salerno suspected was drug related.

Agent Salerno looked about and noticed a short, stocky African American man wearing a letter jacket and a white baseball cap talking on a cell phone while looking at ammunition; Agent Salerno heard him say "I'm here," and that he was heading over to "Allied," which Agent Salerno knew was a common term for the Allied Drive neighborhood,

an area in which Agent Salerno had been investigating gang and gun violence. The man picked up a box of ammunition and walked to the counter. Upon concluding his call, the man asked about purchasing a ".380 clip" but was told that the store needed more information. Agent Salerno hurried to the parking lot to record the plate number of the vehicle this man was driving because Agent Salerno suspected that he might be headed to Allied Drive with the ammunition, and it was at least possible that this man was a person prohibited from possessing ammunition. Agent Salerno did not see the man actually buy the ammunition but he saw the man moving as if to retrieve money to consummate the purchase.

In the gun shop parking lot, the first vehicle Agent Salerno noticed was a red Lincoln Navigator with Wisconsin license plate 102KFE. Agent Salerno returned to his vehicle, contacted Madison Police Detective Jeff Twing and recounted what he just had heard and seen. Detective Twing reported back to Agent Salerno that the Navigator was registered to Kevin D. Lofftin. Agent Salerno already was familiar with Lofftin and confirmed with Detective Twing that Lofftin was a convicted felon. Detective Twing had firsthand knowledge of Lofftin's status because he had been involved in the prosecution that had sent Lofftin to prison. Detective Twing provided a physical description of Lofftin to Agent Salerno. This description matched the man in the gun store.

Agent Salerno watched as the man he suspected to be Lofftin left the gun shop and drove off in the Navigator. Agent Salerno contacted Detective Twing to opine that they had

probable cause to arrest this man as a felon in possession of ammunition. Agent Salerno tailed the Navigator; eventually Detective Twing joined the surveillance in his own vehicle. Detective Twing initiated a traffic stop of the Navigator on Verona Road south of the Beltline, at the northern edge of the Allied Drive neighborhood. After the Navigator pulled over, Detective Twing ordered the driver to drop the keys outside his vehicle. The driver would not. Detective Twing repeated his command several times; the driver did nothing.

Eventually, the driver stepped out of the Navigator and ran southeast across all six lanes of Verona Road. He was carrying a dark colored bag. Detective Twing and another Madison police detective chased the suspect on foot. The officers chased their suspect to an apartment building on Britta Parkway. A phalanx of Madison police officers entered the building and located their suspect hiding on the top floor landing. It was, in fact, Kevin Lofftin. Retracing the path of Lofftin's flight, Detective Twing recovered a black bag containing .380 ammunition.

ANALYSIS

Lofftin characterizes his traffic stop as a full arrest unsupported by probable cause. The government disagrees, characterizing the stop as an investigative detention amply supported by reasonable suspicion. Lofftin replies that the officers' own reports state that they intended to arrest Lofftin, and that upon stopping Lofftin's vehicle, they ordered him to drop his car keys out of the window.

Ordering a motorist to drop his car keys onto the shoulder probably does not convert a traffic stop in a felon-with-ammunition investigation into a seizure sufficiently intrusive to require probable cause. *See, e.g., United States v. Vega*, 72 F.3d 507, 515 (7th Cir. 1995) and *United States v. Tilmon*, 19 F.3d 1221, 1225-27 (7th Cir. 1994). The question is academic in Lofftin's case because instead of complying with the order, Lofftin fled. Therefore, no seizure other than the initial traffic stop occurred. *See, e.g., United States v. Douglass*, 467 F.3d 621, 624 (7th Cir. 2006)("Douglass fled immediately after the officers ordered him out of the car, so his arrest–the first point at which he submitted to a show of authority–did not come until later when he finally abandoned his flight"); *McNair v. Coffey*, 279 F.3d 463, 468 (7th Cir. 2002)("An arrest requires either the use of physical force, or the submission to an assertion of authority. Thus, there can be no seizure unless the person seized actually yields to a show of authority").

A traffic stop of the sort that actually occurred in this case may be justified by reasonable suspicion. *United States v. McDonald*, 453 F.3d 958, 960 (7th Cir. 2006)("Police may conduct a brief, investigatory traffic stop if they have reasonable suspicion based on articulable facts that a crime is about to be or has been committed"). Police may subject a person to investigative detention if they have a reasonable suspicion that he has committed or is about to commit a crime. *United States v. Askew*, 403 F.3d 496, 507 (7th Cir. 2005). A reasonable suspicion is something more than an inchoate or unparticularized suspicion or hunch, *United States v. Ganser*, 315 F.3d 839, 843 (7th Cir. 2003), but it need not rise to the

level of probable cause, let alone a preponderance of the evidence. *United States v. Wimbush*, 337 F.3d 947, 949-50 (7th Cir. 2003); *United States v. Hendricks*, 319 F.3d 993, 1001 (7th Cir. 2003). In determining whether reasonable suspicion supported an investigative detention, courts are to consider the totality of circumstances presented to the officer at the time, including both the experience of the officer and the behavior and characteristics of the suspect. A pattern of behavior interpreted by the untrained observer as innocent may justify a valid investigatory stop when viewed collectively by experienced officers. *United States v. Askew*, 403 F.3d at 507-08.

The facts found above establish *at least* reasonable suspicion that Lofftin unlawfully possessed ammunition. Prior to the traffic stop, Agent Salerno saw a man matching Lofftin's physical description say and do things that reasonably led Agent Salerno to believe that he was about to purchase .380 ammunition. The man then drove off in Lofftin's SUV. Agent Salerno and Detective Twing knew that Kevin Lofftin had a prior felony conviction. This information amounted to significantly more than an inchoate or unparticularized hunch of criminal conduct.

This evidence may well pass the probable cause threshold, particularly when Lofftin's flight is added to the mix. *United States v. Parra*, 402 F.3d 752 (7th Cir. 2005), provides a concise overview of a probable cause determination:

> In order to have probable cause for an arrest, law enforcement agents must reasonably believe, in light of the facts and circumstances within their knowledge at the time of the arrest, that the suspect had committed or was committing an offense.

> The fact-intensive, on-the-spot determination of probable cause often involves an exercise of judgment which turns on the assessment of probabilities in particular factual contexts–not readily, or even usefully reduced to a neat set of legal rules. Therefore, courts evaluate probable cause not on the facts as an omniscient observe would perceive them but on the facts as they would have appeared to a reasonable person *in the position of the arresting officer*– seeing what he saw, hearing what he heard. So long as the totality of the circumstances, viewed in a common sense manner, reveals a probability or substantial chance of criminal activity on the suspect's part, probable cause exists.

Id. At 763-64, emphasis in original.

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). Finally, "Headlong flight–wherever it occurs–is the consummate act of evasion; it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *United States v. Baskin*, 401 F.3d 788, 792 (7th Cir. 2005).

Did Agent Salerno or Officer Twing *know* that the man driving the Navigator was Lofftin? They did not, but they had enough information to believe it probably was him because the man fit Lofftin's description and was driving Lofftin's Lincoln. It could have been a similar looking friend, but common sense suggested that it probably was Lofftin. Did Agent Salerno *know* that Lofftin had purchased ammunition? No, he did not, because he left the store as the purchase appeared to be taking place. Lofftin might have changed his mind and left the ammo in the store, but the circumstances actually seen and heard by Agent Salerno all indicated that Lofftin probably had completed the purchase. Then, upon being subjected to a traffic stop, Lofftin fled, another circumstantial brick in the evidentiary wall. Based on what they had heard and seen, it was reasonable for the agents to believe that this man probably was Lofftin, he probably had a box of .380 ammunition in the Navigator, and he probably fled because of guilty knowledge.[1]

In sum, the police did not violate Lofftin's Fourth Amendment rights and he is not entitled to suppression of any evidence.

[1] The police suspect that Lofftin also ditched some drugs while fleeing, but they recovered nothing.

RECOMMENDATION

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

Entered this 2nd day of February, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
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February, 2007

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Re: United States v. Lofftin
Case No. 06-CR-205-S

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the newly-updated memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before February 12, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by February 12, 2007, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Hon. John C. Shabaz, District Judge