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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN L. BIERNAT,

Defendant.

REPORT AND RECOMMENDATION

08-cr-13-bbc

REPORT

The grand jury has charged John Biernat with unlawful possession of a firearm. Biernat has moved to suppress the firearm, a loaded, pistol-grip 12 gauge shotgun, which Hurley police officers discovered during an inventory search of Biernat's car following a traffic stop that Biernat claims was unlawful. *See* Dkt. 16. The government opposes the motion, claiming that even if the traffic stop was unlawful, there is sufficient attenuation to avoid suppression. For the reasons stated below, I am recommending this court deny Biernat's motion to suppress. It is, however, a close question because of the Hurley Police Department's inexplicable failure to enact and enforce a policy governing vehicle inventory searches. Indeed, the court might decide that the challenged search was simply too unstructured for this court to countenance.

On May 13, 2008, this court held an evidentiary hearing on Biernat's motion. Having heard and seen the witness testify, having considered the exhibits and having made credibility determinations, I find the following facts:

FACTS

Highway 77 (a/k/a Silver Street) is the main east/west thoroughfare bisecting Hurley, Wisconsin, a town of about 1800 on the border with UP Michigan. The intersection of Hwy. 77 and Fifth Street is controlled as a four-way stop with stop signs. There was a time when a traffic sign warned westbound motorists on Hwy. 77 that no U-turn was permitted within the intersection of Hwy. 77 and Fifth Street. Hurley Police Patrol Officer Donald Packmeyer, a ten-year veteran of the force, was aware of this No U-turn sign from his regular and routine patrol of this street and the surrounding neighborhoods.

In late November 2006, however, road construction tore up streets in the area; it is not clear whether this No U-turn sign was removed during road construction. Despite his constant travel through the area, Officer Packmeyer has no recollection whether the sign was there or not during construction, which continued through 2007. All that is certain is that the sign isn't there now and Officer Packmeyer cannot say how long it has been gone. About three days before the evidentiary hearing in this case (that is, around May 12, 2008), the AUSA asked Officer Packmeyer to photograph the sign. When he drove to Hwy. 77 and Fifth with a camera, the sign was not there. Prior to this, Officer Packmeyer had not even realized that the No U-turn sign at the intersection of Hwy. 77 and Fifth Street had been removed.[1]

Construction was ongoing on October 17, 2007, the day on which Officer Packmeyer stopped defendant John Biernat's car. At about 11:22 p.m. that evening, Officer Packmeyer was on duty, parked in a squad car north of Hwy. 77 on Fifth Street facing south toward the

[1] To the best of his recollection, Officer Packmeyer ticketed two other drivers for illegal U-turns in the intersection of Fifth Street and Hwy. 77 after the start of construction but before October 17, 2007. Officer Packmeyer cannot say whether the No U-turn sign was posted at the time he issued those tickets.

intersection. At about 11:22 p.m., he saw a vehicle drive westbound on Hwy. 77 into the intersection with Fifth Street, perform a U-turn, then head back eastbound on Hwy. 77. Officer Packmeyer pursued the car eastbound on Hwy. 77, activated his lights about two blocks later and pulled over the car without incident about a block further. Defendant John Biernat was the driver. Officer Packmeyer asked Biernat if he knew why he had been pulled over; Biernat answered to the effect of "Probably because of the U-turn."

After obtaining license information from Biernat, Officer Packmeyer ran this information through his computer. The computer provided a "near hit" indicating that Minnesota had issued an arrest warrant for a subject who had information close to but not identical to that provided by Biernat. Further computer inquiry revealed to Officer Packmeyer that Minnesota's subject had a specific tattoo on one of his hands; Officer Packmeyer had noticed this tattoo on Biernat's hand. He concluded that this warrant had been issued for Biernat. To be cautious, Officer Packmeyer radioed the county sheriff's department and asked it to run a computer check on this information; the sheriff's department agreed that the Minnesota warrant was for Biernat. At about 11:45 p.m., Officer Packmeyer arrested Biernat on this warrant. Prior to this traffic stop and arrest, Officer Packmeyer had never seen Biernat before, did not know who he was, and was not conducting any sort of an investigation of him or his colleagues.

A deputy sheriff arrived to watch Biernat's car while Officer Packmeyer took Biernat to the sheriff's department to book him. Later that evening, a wrecker towed Biernat's car to the police department garage. Officer Packmeyer does not know if the Hurley Police Department has a procedure governing when or how to perform a vehicle inventory search and no such procedure was presented at the evidentiary hearing. Officer Packmeyer's practice is to perform

an inventory search whenever he predicts that a vehicle will be spending some length of time at the impound yard.[2] Having predicted this fate for Biernat's car, Officer Packmeyer and a deputy sheriff performed an inventory search at approximately 1:09 a.m. on October 18, 2007. During this search, the officers found in the trunk the shotgun that has been charged against Biernat. In a written report, Officer Packmeyer not only listed the items he seized but also inventoried by location the innocuous contents of Biernat's car, *e.g.*:

> **Passenger Seat**
>
> **1.** (1) Mountain Dew Bottle
>
> **2.** (1) Jack Lenks beef stick
>
> **3.** (1) pkg. Malboro [*sic*] light cigarettes
>
> **4.** (1) lighter

See Exh. 5 at 2-3 (dkt. 17, part 6).

ANALYSIS

There are three questions for the court to answer: (1) Did Officer Packmeyer have probable cause to perform a traffic stop on Biernat's vehicle? (2) If not, did an intervening circumstance attenuate the taint? (3) Was the subsequent car search a proper inventory search?

(1) The Traffic Stop

The government doesn't concede that the answer to the first question is "No," but it realizes that its position is tenuous. Wis. Stat. § 346.33 governs U-turns. Although one logically might surmise otherwise, this statute does not prohibit U-turns in an intersection

[2] By using the first person plural when testifying, Officer Packmeyer implied that this was a common practice in the department. *See* Hearing Transcript, dkt.18, at 32-33.

controlled by four stop signs. U-turns are prohibited in intersections at which traffic is controlled by "traffic control signals," *see* § 346.33(a), a term defined to include only manually, electrically or mechanically operated devices by which traffic is alternately directed to stop and permitted to proceed, *see* § 340.01(69). Perhaps it is a drafting oversight, but a four-way-stop does not fit this definition: such an array of signs alternates the right of way passively. It does not *direct* traffic by any "manual, electrical or mechanical" means.

Therefore, U-turns are prohibited in an intersection governed by four stop signs only if a No U-turn sign is posted. *See* § 346.33(d). The government has not proved that on October 17, 2007 such a sign was posted on westbound Hwy. 77 preceding its intersection with Fifth Street. Indeed, the government concedes that the most logical conclusion to draw from the sign's current absence is that it was removed during road construction in that area and never replaced. Officer Packmeyer has no recollection to the contrary.

Therefore, this could not have been a proper traffic stop. The government tepidly argues that Officer Packmeyer had probable cause to perform the stop based on his knowledge that a No U-turn sign *used* to be posted there, even if it wasn't there that evening. This is a non sequitur. Under the governing state statue, no sign=no violation=no basis for a traffic stop. Contrary to the government's argument, it *was* a mistake of law to stop a car for a U-turn violation in the absence of a No U-turn sign because it was not illegal for Biernat to make a U-turn in that intersection unless a posted sign forbade it. A mistake of law cannot support a traffic stop. *United States v. McDonald*, 453 F.3d 958, 961 (7th Cir. 2006). On this factual record, the court can draw only one conclusion: this was not a proper traffic stop.

(2) Attenuation

Does the doctrine of attenuation militate against suppression notwithstanding the lack of probable cause for this traffic stop? The short answer is "Yes." In *United States v. Green*, 111 F.3d 515 (7th Cir. 1997), local police had conducted an unjustified traffic stop of defendant's car, which ultimately led to the discovery of contraband in the car and criminal charges against the defendant. Despite the "but for" nexus between the illegal stop and the discovery of the contraband, the court held that the defendant was not entitled to suppression because this causal connection between the illegal stop and the discovery of the contraband was so attenuated as to dissipate the taint of the illegal police action. *Id.* at 521. The court acknowledged that the attenuation doctrine historically was not employed to salvage bad car stops, but found on the facts before it that there was attenuation. The court considered the three factors deemed salient in *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975): (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the police officer's misconduct. "In the final analysis, however, the question is still whether the evidence came from the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. *Id.*, *citing Wong Sun v. United States,* 371 U.S. 471,488 (1963).

In *Green*, the dispositive fact on attenuation fell under factor (2): after improperly stopping the car, the police discovered that there was a warrant outstanding for the defendant's passenger. This gave the police the right to arrest the passenger and to conduct a search of the passenger compartment of the car:

> It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is

> found to be wanted on a warrant-in a sense requiring an official call of "Olly, Olly, Oxen Free." Because the arrest is lawful, a search incident to the arrest is also lawful. The lawful arrest of [the passenger] constituted an intervening circumstance sufficient to dissipate any taint caused by the illegal automobile stop.

United States v. Green, 111 F.3d at 521.

The court observed that where the "intervening circumstance" is the discovery of a valid arrest warrant, it is a compelling case for dissolution of the taint because the warrant is an objective fact, not a subjective voluntary act by the suspect as is more common in attenuation cases. In such situations, the first factor, time elapsed, dwindles in importance because the fact of the warrant is not time sensitive. *Id*. at 522.

Factor (3), the purpose and flagrancy of the misconduct is tied to the rationale of exclusionary rule itself: the rule is calculated to deter and prevent, not to repair.

> Because the primary purpose of the exclusionary rule is to discourage police misconduct, application of the rule does not serve this deterrent function when the police action, although erroneous, was not undertaken in an effort to benefit the police at the expense of the suspect's protected rights.

Id. at 523.

In *Green*, the court noted that the police had not stopped the car for the purpose of seeking evidence against its occupants and the actual search did not take place until after discovery of the arrest warrant for the passenger. In other words, the police did not act in bad faith and did not discover the contraband through exploitation of the illegal stop.

> Our conclusion that the evidence is admissible in this case also will not lessen the deterrent effect of the exclusionary rule on unconstitutional automobile stops because the general rule of exclusion is unchanged. It is only in the unusual case where the police, after a questionable stop, discover that an occupant is

> wanted on an arrest warrant that the intervening circumstances exception will apply. We also do not want to deter the police from arresting fugitives they discover, or from conducting a search incident to such an arrest.

Id. at 523. *See also United States v. Johnson*, 383 F.3d 538 (7th Cir. 2004) (using *Green* as its template on similar facts).

Notwithstanding Biernat's attempts to distinguish *Green*, it is factually and legally on point and dispositive of the attenuation question. This is one of those "unusual cases" in which Officer Packmeyer's discovery of the warrant for Biernat's arrest suffices to attenuate the taint from the illegal traffic stop. Biernat argues otherwise, but the facts establish that Officer Packmeyer honestly–but ineptly–believed that he had a valid traffic stop. It seems that the operative No U-turn sign on Hwy. 77 had been down for a while, but Officer Packmeyer was genuinely oblivious to this fact. That he was two blocks past the intersection before he activated his roof lights evidences nothing more than that it took him a minute to catch up to Biernat. The reason for this traffic stop was sufficiently apparent that Biernat was able to guess it when asked by Officer Packmeyer. There has been no showing whatsoever that Officer Packmeyer had ulterior motives of any sort for stopping Biernat. Under the doctrine of "pure heart, empty head," Officer Packmeyer's traffic stop was improper but it was not invidious. In light of this, the prompt discovery of a valid warrant for Biernat's arrest washes away the taint and frees the police to continue their post-arrest investigation of Biernat. But as discussed in the next section, instead of walking toward higher ground, the police promptly perform a U-turn of their own and plunge back into the legal morass.

(3) The Inventory Search

We have reached question (3): Was the subsequent search of the car a proper inventory search? The short answer is "It's a wobbler." Inventory searches are an exception to the warrant and probable cause requirements of the Fourth Amendment and are lawful if they are conducted pursuant to standard police procedures aimed at protecting the owners property and protecting the police from the owner accusing them of having stolen, lost or damaged his property. *United States v. Cherry*, 436 F.3d 769, 772 (7th Cir. 2006). The policy should be in writing but standardized criteria and a well-honed department routine may be sufficient. *United States v. Duguay*, 93 F.3d 346, 351 (7th Cir. 1996). Although it is important for a court to determine if police followed standard procedure while conducting an inventory search, the lynchpin question remains the reasonableness of the inventory search and subsequent seizure of evidence. *Cherry*, 436 F.3d at 772-73. *See also id.* at 776-77 (Posner, J., dissenting):

> An inventory search might not be authorized by a policy, but if the search conducted by the police was in fact a reasonable inventory search–maybe they searched the car because they feared being accused of stealing the owner's property–there would be no basis for a constitutional objection.

After all, as the dissent points out in *Cherry*, "compliance with established procedures is merely a ruse antidote." *Id.* at 777. The point of the inquiry is to ensure that the police do not employ inventory searches as a mechanism by which they may intentionally evade the requirement that they obtain a warrant or establish probable cause before searching an impounded vehicle.[3]

---

[3] At the risk of drifting from the arguments actually made by the parties, the legality of the seizure of the vehicle is a necessary predicate to the subsequent search of that vehicle, *see United States v. Cherry*, 436 F.3d at 775. Biernat does not challenge the seizure of his vehicle separately from its search, *see* Motion To Suppress and supporting briefs, dkts. 16, 20 and 23, but even if he did, the facts known to the court suggest that it was reasonable for the police to move Biernat's car from a public street to a secure location while he was in the county jail sorting out his legal problems.

In the instant case, this court cannot find that Officer Packmeyer complied with any written procedure governing inventory searches because the Hurley Police Department apparently doesn't have one, which would be an unprofessional policy oversight; even if the Hurley PD *has* a policy, its officers are unaware of its existence, which would be an unprofessional training oversight. Hurley is a small, remote community, but the holdings of *Colorado v. Bertine*, 479 U.S. 367 (1987) and *Florida v. Wells*, 495 U.S. 1 (1990) should have leached into the police department's consciousness by now. It probably would not be an abuse of discretion for this court to find that the Hurley PD's approach to vehicle inventory searches is simply too liberal, undisciplined and unreviewable to comply with Fourth Amendment requirements. It appears that every Hurley police officer determines for him or herself when, where why and how to search a vehicle under the rubric of inventory. Unless a cost is extracted for proceeding in this fashion, why should the officers change? Suppression in a case like this one might be the most efficacious way to achieve the goal of the exclusionary rule: to create a tangible incentive for officers to live up to their constitutional obligations.

All this being so, in this particular case, the inventory search actually performed by the Hurley police was not unreasonable. Having heard and seen Officer Packmeyer testify and having reviewed his meticulous inventory, I have found credible his explanation that he searched Biernat's car because he expected the police to maintain custody of it for some time while Biernat answered to Minnesota's arrest warrant, and Office Packmeyer wanted to protect himself and the department against any subsequent accusations that they had pilfered or misplaced stuff in Biernat's car. Biernat argues otherwise, but this search was not a ruse. If this court deems it appropriate to engage in ad hoc reasonableness reviews of police inventory searches, then I would

recommend that this court not suppress the evidence seized during the search of Biernat's car. But if the court is sufficiently troubled by the glaring procedural deficiencies attendant to this search, then it should grant Biernat's motion.

CONCLUSION

It might seem odd to recommend that this court deny a motion to suppress in a case where the police blundered so often and so resoundingly. But given the state of the governing law, it does not appear that Officer Packmeyer's blunders violated Biernat's constitutional rights. On the other hand, there is room to disagree on how best to deal with an inventory search unfettered by any written policy or department routine.

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 L. Biernat's motion to suppress evidence.

Entered this 4th day of June.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. Henry Street, Rm. 540
Post Office Box 591
Madison, Wisconsin 53701

Chambers of
STEPHEN L. CROCKER
U.S. Magistrate Judge

Telephone
(608) 264-5153

June 4, 2008

Peter Jarsoz
United States Attorney's Office
660 West Washington Avenue, #303
Madison, WI 53703

Kelly Welsh
Federal Defender Services of Wisconsin, Inc.
222 West Washington Ave., Ste. 300
Madison, WI 53703

Re: United States v. Biernat
Case No. 08-cr-13-bbc

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 June 16, 2008, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by June 16, 2008, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;

(2) judgment on the pleadings;

(3) summary judgment;

(4) to dismiss or quash an indictment or information;

(5) to suppress evidence in a criminal case;

(6) to dismiss or to permit maintenance of a class action;

(7) to dismiss for failure to state a claim upon which relief can be granted;

(8) to dismiss actions involuntarily; and

(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth

with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**