IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

11-cr-40-bbc

v.

MORGAN SYKES,

Defendant.

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Defendant Morgan Sykes has filed objections to the August 1, 2011 report and recommendation in which the magistrate judge recommended denial of defendant's motion to suppress evidence of a gun seized during the execution of a search warrant and of his post-arrest statements. After reviewing the objections, the parties' briefs and the report, I am not persuaded that defendant has shown that the magistrate judge's recommendation is erroneous in any respect. Accordingly, I will deny defendant's suppression motion.

## BACKGROUND

Early in the morning of March 20, 2011, members of the Marathon County Special Investigations Unit executed a search warrant in a Rothchild, Wisconsin apartment rented

by Kristina Becker, a suspected heroin dealer. The warrant obtained by Detective Dan Goff was based on information supplied by a confidential informant, who told unit officers he had bought heroin from one Jason Stetz on two occasions. On both occasions, the informant reported, Stetz had either met with Becker or gone into Becker's apartment before returning with the heroin. The informant told the officers that Becker had an African American boyfriend who was a marijuana dealer and kept a gun inside Becker's apartment. The unit's own surveillance of the apartment confirmed that defendant had gone into Becker's apartment on numerous occasions. In addition, the officers had information that Becker's boyfriend was known as "Pooty" and that defendant had used this name in contacts with the unit. Goff did not list the gun in the warrant application as an item to be seized, but he did ask for a no-knock warrant because of the possibility that occupants might have weapons.

When the officers entered the apartment at 3:30 a.m., they encountered defendant walking out of the bathroom. Also present were Becker and another African American male. Both Goff and Lieutenant Schneck recognized defendant from previous investigations; Schneck knew him also from previous arrests. Both later testified that they knew defendant had a felony conviction in Illinois for which he was still under supervision.

Searching the apartment, the officers found 1.66 grams of bagged heroin, a marijuana pipe, a small amount of marijuana, about $1300 in cash and other items, including cell phones and a .22 caliber revolver on top of a pillow on a shelf in the hall closet next to the

bathroom. The gun was stolen but the officers did not know this when they found it. They did not base their decision to arrest defendant on the basis of his felony status or because he was in possession of a stolen gun. Instead, according to their report of the incident, they arrested defendant for drug distribution because of the drugs found in the apartment. When defendant was arrested, he admitted that the handgun was his.

Defendant moved to suppress the gun and his admission of ownership. The magistrate judge held an evidentiary hearing at which Goff and Schneck testified. The magistrate judge found that the testimony of the two officers was credible and that they had had probable cause to arrest defendant after finding him in Becker's apartment, where the officers also found drugs, drug paraphernalia and a handgun. He concluded that the drugs did not provide probable cause to arrest defendant, because the officers did not have enough evidence to believe that defendant was involved with Becker's alleged distribution of heroin. (The heroin and paraphernalia were hidden in wall sconces or other closed containers, not in plain sight or within defendant's reach.) He was persuaded, however, that the warrantless seizure of the firearm was legal. As he found, the gun was in plain view; the officers were legally in the place from which they viewed the gun; the incriminating nature of the gun was immediately apparent, given the officers' knowledge of defendant's status as a felon and the information they had before they entered the apartment about defendant's likely ownership of the gun; and the officers had a lawful right of access to the gun. The officers could rely

upon defendant's proximity to the gun in an apartment he was known to frequent. Discovery of the gun provided the necessary probable cause to support defendant's arrest, so his post-arrest statements may be used against him.

Defendant was charged as a felon in possession of a handgun, in violation of 18 U.S.C. § 922(g). He entered a plea of guilty to the charge on July 19, 2011, preserving his right to withdraw his appeal if this court or the court of appeals grants his motion to suppress the evidence of the gun and his statements admitting ownership of it.

## OPINION

Defendant takes issue with the magistrate judge's report, but he objects to only two of the recommended findings: that the officers who testified at the suppression hearing were credible and that the police had probable cause to believe that defendant possessed the firearm found in Becker's closet. He starts with the issue of credibility, setting out five reasons why the court should find that the officers lied when they testified at the suppression hearing that they knew of defendant's felony status before they entered the apartment.

### A. Goff's and Schneck's Credibility

First, defendant notes that the report of the search contains no mention of defendant's felony status or the gun, but it is not unusual for a report to omit information.

That would be particularly true in a situation like this one in which the officers had initiated their search to look for evidence of drug distribution and subsequently made arrests for drug distribution and not for possession of a gun by a felon.

Second, defendant argues that Goff's decision to run a criminal history check on defendant *after* his arrest is further proof that the officers did not know of his status when they arrested him. Why run the records check, he asks, if the officers knew about his criminal history? The answer is easy. Now that defendant was under arrest, it was not sufficient merely to know that he was a felon; it was necessary to get the details of his previous convictions for the district attorney and anyone else that would need them. Defendant cites Goff's testimony at the evidentiary hearing as additional evidence, pointing out that Goff repeated the question put to him, "Why did you run that criminal history check?" Hrg. trans., dkt. #16, at 22. Defendant argues that this shows that Goff was buying time to think of a reason for running the check, but this is pure speculation. Finally, on the records check, defendant says that Goff's explanation that running the check was was something he would have done to confirm "prior knowledge of the report" makes no sense because Goff never produced any report on defendant's criminal history. The record does not reveal whether Goff did or did not produce any report on defendant's criminal history, but it does show that Goff included in his report of the incident the information that defendant had a history of felony convictions. Hrg. trans., dkt. #16, at 22.

Third, defendant argues that neither Goff nor Schneck offered any evidence to prove their prior knowledge of defendant's status, even though electronic records should be capable of showing whether they had run records checks on defendant in the past. This is pure conjecture on defendant's part. Moreover, Goff and Schneck both testified that they knew of defendant's felony status from their colleagues as well as from records.

Finally, defendant cites two new reports provided by the government after the evidentiary hearing that document previous contacts between defendant and Marathon County law enforcement. These, he argues, show that Goff and Schneck were not telling the truth when they said they knew defendant was a felon from previous contacts they had had with him.

Defendant did not submit copies of the reports, but he says that the first report, from July 17, 2009, states that defendant was wanted by Cook County, Illinois on a governor's warrant and that he was wanted on warrants from three separate jurisdictions, but says nothing about the reasons for the warrants and does not suggest that either officer checked into them. The report of a March 10, 2010 contact with defendant says that the officers learned that defendant was wanted on two warrants, both from Wisconsin. (Defendant says that the omission of any referral to the Cook County matter suggests that it had been cleared up.) Defendant argues that, at the least, the absence of any other reports shows that the officers had not checked his status for a year before they arrested him.

This argument is not persuasive. At least as summarized, the two reports do not undermine the officers' testimony. Goff's and Schneck's reference to outstanding warrants makes sense because these were matters to be brought to the attention of other officers, whereas defendant's felony status was of a different nature.

In the end, I am not persuaded that the magistrate judge erred in finding Goff's and Schneck's testimony credible. None of defendant's objections, considered singly or in combination require a different conclusion.

B. Probable Cause for Finding that Defendant Was in Possession of a Gun

Defendant argues that the magistrate judge erred in finding that even if the arresting officers did not have probable cause to arrest him for drug distribution, the arrest is still valid because they had probable cause to find that he was in possession of the firearm found in Becker's closet. He does not argue that the arrest is invalid because the ground for the arrest has changed, only that the information known to the officers at the time they arrested him was not sufficient to establish probable cause. He is wrong. The probable cause was supplied by the informant's tip that defendant was Becker's boyfriend, that he spent time at her apartment and that he kept a gun there. Defendant takes issue with the accuracy of the informant's statement that defendant was Becker's boyfriend, but the officers had corroborating information of the relationship. They had seen defendant enter Becker's

apartment on numerous occasions when the apartment was under surveillance and they had information from other sources that Becker's boyfriend was nicknamed "Pooty," a name that defendant had used through his contacts with the Special Investigations Unit. The officers had probable cause for an arrest of defendant for possession of a gun. Therefore, defendant has no ground on which to argue that evidence of the firearm should be suppressed.

ORDER

IT IS ORDERED that the findings of fact and conclusions of law in the magistrate judge's August 1, 2011 report and recommendation are ADOPTED as the court's own and that defendant Morgan Sykes's motion to suppress evidence of the firearm found in Kristina Becker's apartment on March 20, 2011 and his post-arrest statements is DENIED.

Entered this 12th day of September, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge