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

UNITED STATES OF AMERICA,

Plaintiff

v.

CHRISTOPHER M. ARNOLD,

Defendant.

REPORT AND RECOMMENDATION

12-cr-42-wmc

REPORT

A federal grand jury has charged defendant Christopher Arnold with operating a motor vehicle under the influence of alcohol on federal territory within this district. Arnold has filed a motion to suppress the evidence obtained from a breath test on the ground that the arresting officers denied Arnold's request for a blood test, which was his right under the assimilated Wisconsin statutory scheme. *See* dkt. 5. The government opposes the motion on the facts and the law, claiming that the officers did not deny Arnold's request for a blood test and that in any event, this court is not bound by Wisconsin's statutory scheme. Because I find that Arnold withdrew his request for a blood test, I am recommending that the court deny his motion on that basis. There is no reason to reach or decide whether this court is bound by Wisconsin's statutes.

This court held an evidentiary hearing on March 22, 2012. Having heard and seen the witnesses testify and having judged their credibility, and having reviewed the exhibits and other documents in the record,[1] I find the following facts:

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[1] In addition to the criminal file in CM/ECF, there is a petty offense file, 12-po-1, which contains copies of the traffic tickets and exhibits from the suppression hearing.

FACTS

Fort McCoy is a United States Army training base near Tomah, Wisconsin. State highways and other public roads run through Fort McCoy's property and are patrolled by the Fort McCoy Police Department (FMPD). Joshua Stello is a patrol officer with FMPD. Prior to starting at Fort McCoy in 2010, Officer Stello worked 4½ years as a military police officer at Fort Wainwright, Alaska. Officer Stello's training as an MP at Fort Wainwright included a field sobriety training course.

While working the midnight shift spanning October 22-23, 2011, Officer Stello was patrolling State Highway 16 at about 1:30 a.m. when he saw ah eastbound motor vehicle with one headlight out approaching his position. Officer Stello pulled in behind the vehicle, an older Chevy Blazer, which turned onto a side road, crossing the centerline, then hit the gravel and dirt on the shoulder. Officer Stello activated his squad car's overhead lights; the Blazer crossed the centerline into the oncoming lane of traffic but did not pull over. Officer Stello turned on his siren. The Blazer returned to its own lane, but did not pull over. Officer Stello lit his spotlight and trained it on the Blazer, which finally pulled over.

Officer Stello pulled in behind and approached the driver: it was defendant Christopher Arnold. Due to Arnold's apparent befuddlement and lack of manual dexterity in producing a driver's license (which turned out to be suspended in any event), Officer Stello asked Arnold if he had been drinking. Arnold responded "I've had enough." Officer Stello asked Arnold to step out of his car to perform field sobriety tests. Arnold disputes exactly how poorly he performed but he does not claim to have passed the tests. Officer Stello took Arnold into custody and drove him to the FMPD station so that Arnold could take a breath test.

Once at the station, Officer Stello pulled out a form titled "Informing the Accused" and read it aloud to Arnold. Arnold agreed to take a breath test. Officer Jeffrey Kingsley administered the test at about 3:00 a.m.. Officer Kingsley was new to FMPD but had served four years as a police officer in New Mexico and six years with security in the United States Air Force. Officer Stello acted as the observer to ensure that the test was performed as required. The intoxilyzer reported Arnold's breath alcohol content to be .20.[2] *See* Exh. 2.

At about 4:00 a.m. Officer Stello asked Arnold the questions on an Alcohol Incident Report (Exhs. 3-4). Arnold reported that he had drunk four or five beers from about 10:00 or 11:00 p.m. to 1:30 a.m., and he admitted that he was under the influence of an intoxicant. At some point, Officer Stello advised Arnold that he would not be detained that night but would be released to a responsible party as soon as he got hold of someone.[3]

With three prior drunk driving convictions, Arnold knew that state law provided him with the right to request a second test if he wanted one, so he asked Officer Stello for a blood test. Officer Stello responded that if Arnold wanted a second test, he would have to pay for it himself. This was incorrect: under Wisconsin law, Arnold was entitled to a second test at no cost to himself. In fact, the "Informing the Accused" form that Officer Stello had read to Arnold stated that Arnold could choose to take a second test free of charge. Officer Stello had based his answer on his recollection of the law in Alaska, where he previously had been stationed as an MP.

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[2] The legal limit to drive in Wisconsin in most situations is a BAC of .08; because Arnold had prior OWI convictions, his legal limit was .02.

[3] Although it doesn't seem that anyone told Arnold *why* he got to go home, FMPD had no overnight holding facility, so they had to let him go.

Officer Kingsley, who only a month before had completed a training class on using an intoxilyzer, overheard Officer Stello's incorrect answer and interrupted: he told Officer Stello that he was pretty sure that FMPD had to provide Arnold with the second test for free. Officer Stello turned to Arnold and advised him that Stello might have been wrong about who had to pay for the test, so Stello was going to step into the hallway with Officer Kingsley to clarify this. They left Arnold in the patrol room, Officer Kingsley then retrieved his booklet from the class and was able to confirm that FMPD was responsible for providing the requested second test at no cost to Arnold. This took about ten minutes.

Both officers returned to the patrol room and Officer Stello reported to Arnold that the officers would provide Arnold with a blood test, which meant driving Arnold to the hospital in Sparta for a blood draw. Arnold responded that he didn't want the test because he had already been there too long and he was more concerned about how he was going to get home. Officer Stello asked Arnold a second time if he wanted the blood test; Arnold confirmed that he did not want the test, he wanted to leave. Arnold was more concerned about being able to contact someone to come get him, reporting that he had no cell phone service at his home. The officers provided Arnold with a telephone to try to call someone and provided him with a call-back number at the station. It seems that Arnold's sister came and picked him up at the station, although the details are not clear in the record.

ANALYSIS

Arnold's suppression motion presents a swearing contest that Arnold loses. I heard and saw Arnold testify on March 22, 2012. His recollection of events, notwithstanding his boast of near-eidetic recall, was jumbled and unreliable. Arnold claimed that he remember pretty much

every that happened that night from being pulled over until leaving the station. He claimed that this was so even though he had been drinking that night because he doesn't ever really have trouble with his memory after he has been drinking and he's not the kind of person who has holes in his memory after drinking. (Tr., dkt. 6 at 37). As part of this, Arnold asserted that he remembered everything that he and Officer Stello and Officer Kingsley talked about. This assertion was inaccurate.

For instance, when asked how he could be sure that he never withdrew his request for a blood test, Arnold responded:

> Well, my memory is pretty good from that night and I – I can remember conversations that I was having with the officers who were in the room with me. I mean, we were talking about everything from duck hunting to firearms to dogs, hunting dogs. My memory is very clear of the whole night.
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> Dkt. 6 at 43.

Everyone, including Arnold's attorney, inferred that Arnold was talking about Officers Stello and Kingsley, who both denied having any such conversations with Arnold. So, when asked during cross examination if Officers Stello and Kingsley were incorrect about this, Arnold modified his story:

> No, I had small talk with – it might not have been him. Actually, I know it wasn't him and it wasn't Officer – there was two other officers. There was one sitting at a desk in front of me, which I didn't meet or talk to, so I don't know his name, and then there was one standing in the doorway behind me about 20 feet. Them are the guys that I was talking to about duck hunting and talking to'em about dogs.
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> Dkt. 6 at 56.

Another example of Arnold's confused recollection is this exchange with his attorney on direct:

> Q: Did they say those exact words to you like "you can leave now if you withdraw your request, but if we need to take you in, then we need to hold you longer"?
>
> A: Well, correct. If – if I would have – if the test would have went and we would have went and took the test, I would have been in their custody longer. And if I didn't take the test, I was free to call somebody and come and get me.
>
> Q: Is that what they said to you?
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> A: I'm not entirely sure, but it had to be something like that because immediately after I called my – they let me use the phone and I called my sister and told her – actually I think she called them first and then they called her back and told them they had me at the Fort McCoy station and they let her come out there and pick me up.
>
> Q: All right. I'm still a little bit unclear.
>
> A: Sure.
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> * * *
>
> A: I mean, yeah . . . next thing I knew she was there picking me up. I didn't get to call her and say come pick me up. I just –
>
> Q: You know that you didn't call her yourself.
>
> A: Correct.

Dkt. 6 at 45-48.

Arnold's testimony presents other examples of confusion and self-contradiction, but there is no need to dwell further on this. The point is that his testimony was rambling, inconsistent and unreliable. As is clear from the facts found above, I have found the officers' recollection of

events to be coherent, logical and consistent.[4]

Arnold takes issue with the officers' consistency, correctly observing that they discussed this matter with each other prior to testifying, a disfavored practice sometimes referred to as round-tabling. Arnold is correct that round-tabling can impeach the credibility of the witnesses who engage in it. The operative question for credibility purposes is whether this round-tabling caused the conferring witnesses to change their testimony in some material fashion. Having heard and seen Officer Stello and Officer Kingsley testify, I am convinced that whatever discussion(s) they had did not cause them to testify inaccurately or untruthfully.

Arnold points out that Stello and Kingsley were rookies officers with FMPD and that Arnold's request for a blood test is not mentioned in any police report. Both points are accurate as far as they go, but they don't go very far. Officers Stello and Kingsley both had years of law enforcement experience at other agencies, so they weren't exactly hapless newbies. Officer Stello explained that he did not report Arnold's request for a blood test because Arnold withdrew it, which led Officer Stello, a recent immigrant from Alaska, to conclude it was an inconsequential point. Given what has happened in this case, Officer Stello likely has been disabused of this view.

Arnold argues that his version of events is more logical than the officers' version because based on his prior OWI arrests, he expected to spend the night in jail, so he wouldn't have cared how long the blood test took. That might have been a logical position up to the point that

[4] To dispel any unspoken concern that Arnold now may harbor about the court's credibility determinations, in reaching my conclusions I have not taken into account in any manner whatsoever the post-hearing accusations made or state charges filed against Arnold that led me to revoke his pretrial release on June 14, 2012. It was clear to the court during the suppression hearing that Arnold's recollection of events was faulty.

Arnold realized that he *wasn't* going to jail, but after, not so much. What would be Arnold's incentive to further delay bed and breakfast at home? Arnold explained that he viewed the blood test as part of a familiar routine:

> I've kind of become accustomed to it because on the last previous occasions they – the police . . . just automatically took me right to the hospital and we did the blood test, and from there they took me right to the county jail. So I was kind of expecting to take the blood test.
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> Dkt. 6 at 42-43.

At the Fort McCoy police station, however, the officers weren't following this routine, they were going to let Arnold go home as soon as the testing was done. Arnold muddles his narrative about when and how he learned he was going home and what his actual thought process was that night, so I hesitate to impute a state of mind to him. I will simply note that, that in the absence of some stronger reason for Arnold to have wanted the blood test performed, it is logical to think that a person with a .20 BAC at around 4:30 a.m. would rather go home than be driven to the hospital for a blood draw.

In short, I find that the police did not deny Arnold's request for a blood test. Arnold withdrew his request. The factual predicate underpinning his motion to suppress is gone. That being so, there is no need to address the issue whether Wisconsin's statutory scheme regarding blood alcohol testing may be used as a basis for suppressing evidence.

RECOMMENDATION

Pursuant to 42 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Christopher Arnold's motion to suppress evidence.

Entered this 29th day of June, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

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June 29, 2012

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Re: United States v. Christopher M. Arnold
Case No. 12-cr-42-wmc

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 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 July 13, 2012, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by July 13, 2012, 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 William M. Conley, 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).**