

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUSTIN EDWARDS,

Defendant.

REPORT AND
RECOMMENDATION

13-cr-56-bbc

REPORT

Defendant Justin Edwards has moved to suppress evidence based on a claimed illegal car search (dkt. 12). The government opposes this motion. Having found facts, having considered the parties' arguments, and having reviewed the applicable case law, I am recommending that the court grant the defendant's motion to suppress.

The court held an evidentiary hearing on August 8, 2013. Having considered all of the affidavits and exhibits, having heard and seen the witnesses testify, and having made credibility determinations, the court finds the following facts:

FACTS

Ashland, Wisconsin is a city of about 8300 in Northern Wisconsin on the shore of Lake Superior. The police in Ashland know most of its residents, and they know well the residents with whom they have had repeated professional contact. More specifically relevant to this case, prior to June 10, 2012, Police Patrol Sgt. Dan Pufall, a 26-year veteran of the force, and Patrol Officer Curtis Greene, a 16-year veteran of the force, were quite familiar with Justin Edwards, his brother Blake, their mother Rhonda, and Justin's girlfriend, Veronica Fernandez, who had a well-known history of serious alcoholism and public intoxication. There had been many police calls to Fernandez's residence for alcohol-related disturbances. Fernandez was known to have

made several false reports to the police, one around May, 2012, involving a car accident in which she lied to police about who was driving a car involved in a hit-and-run accident (Edwards had been driving but she falsely told the police it had been someone else). The officers knew that Edwards was on state supervision for a burglary conviction.¹

Some time in the Spring of 2012, Fernandez and Edwards bought a 2001 Mitsubishi Eclipse coupe from Jeremy Strobel for \$2500. Fernandez put up the cash and the car was to be titled in her name. They discovered that there was a child support lien on the car title, so they did not attempt to obtain a new title for it. The car was for Edwards to use, even though Edwards could not legally drive because he did not have a valid driver's license because of an OAR (operating after revocation) conviction and he was on extended supervision due to a state burglary conviction. Even so, Fernandez and Edwards both expected that Edwards would be driving the car.

On June 9, 2012, Edwards and Fernandez spent the afternoon together drinking shots of vodka. Edwards hid the unfinished bottle from Fernandez and went to sleep around 9:00 p.m. Later that night, Fernandez woke Edwards up; she was drunk, agitated and screaming, probably having found the hidden vodka. Edwards decided to leave, so he retrieved the keys to the Mitsubishi and drove off, headed to his mother's house to spend the night.

After Edwards left, at about 1:00 a.m. (It was now June 10, 2012), Fernandez called Ashland's 911 dispatch center to report that she and Edwards "just got into a big argument and he just stole my car." She described the car as a gray Mitsubishi Eclipse with no license plate.

¹ Edwards's pretrial service report in this case, dkt. 9 under seal, reports his first criminal conviction in Oconto County in 1996 when he was 18, followed by over a dozen criminal convictions in Ashland County between 2002-08 for a variety of minor and not-so-minor offenses.

Dispatch broadcast this report to on-duty officers. Sgt. Pufall was on duty; he saw a vehicle that matched the description so he followed it and pulled it over for a traffic stop. Edwards was driving. Sgt. Pufall already knew Edwards (and Edwards's brother Blake, sometimes confusing their names). The car had no license plate and no temporary tag.

Sgt. Pufall approached and asked Edwards for his driver's license and registration.² Edwards responded that he did not have a license or registration for the car. Sgt. Pufall asked "well, whose car is it?" Edwards responded that it was his girlfriend Veronica's car (Sgt. Pufall already knew Veronica Fernandez). Sgt. Pufall asked "there's no registration?" Edwards responded that there was; when Sgt. Pufall asked if he could see it, Edwards opened the glovebox, looked inside and reported "It's not in the car, sir." Sgt. Pufall asked if he was sure; Edwards replied that he was sure.

Sgt. Pufall asked Edwards where he was heading; Edwards responded that he was driving to his mother's house. Sgt. Pufall asked if Edwards and Fernandez had been "battling;" Edwards responded that they were, that Fernandez had woken him up to pick a fight, so he was just trying to get away.

Sgt. Pufall asked Edwards "You got permission to drive her car?" Edwards responded "I do, and I don't." Sgt. Pufall asked what he meant; Edwards responded "You see, there's no plates on it." Sgt. Pufall replied "right, that's why I pulled you over." Edwards explained that he was just trying to get away from Fernandez.

Sgt. Pufall asked, "You don't have a license, right? Any driver's license?" Edwards answered "no." Sgt. Pufall asked "suspended, never had one, or revoked, or what?" Edwards

² Their entire conversation was recorded by Sgt. Pufall's dashcam, but its intelligibility is spotty. See Gov. Exh. 2.

responded that it could be either, he didn't even know. Sgt. Pufall asked Edwards his first name (to confirm that he was dealing with Justin, not Blake), asked him if he had been drinking, directed him out of the car and told him to put his hands on the roof for a pat down. Edwards complied. Sgt. Pufall handcuffed Edwards and patted him down, finding and confiscating a box cutter (which he mentioned in his written report). Sgt. Pufall explained to Edwards that "she [Veronica] actually did call and said that you took the car and [unintel] away." Sgt. Pufall reported to dispatch that he had a suspect in custody. After cuffing Edwards, Sgt. Pufall learned that there was a probation hold on Edwards.

Sgt. Pufall placed Edwards in the back of his own squad car. By then Ashland Police Officer Curtis Greene, a fifteen-year veteran of the force, had arrived to assist. Sgt. Pufall then searched the interior of the Mitsubishi, with Officer Greene standing nearby. At the evidentiary hearing, Sgt. Pufall explained that he searched the car because it belonged to Veronica, which meant that Justin had no expectation of privacy in it. Also, he was looking for some proof of ownership of the car: title, registration, bill of sale. Finally, it was his common practice when recovering a vehicle reported as stolen "to go through it . . . so people can't say that the police stole stuff out of the car."³ Sgt. Pufall looked through every part of the car, including the trunk (or hatchback, it's not clear which on the video). He looked in the glovebox and found "just miscellaneous stuff" that he left in place and did not memorialize in any written report.

Under the driver's seat, Sgt. Pufall found and opened a pouch containing a one-hit pipe and a small amount of marijuana. On the front passenger seat he found a laptop computer and a bag with "some tools inside." While inside the car, after sliding the front passenger seat

³ I am finding that this is Sgt. Pufall's testimony. I discuss which parts the court accepts as accurate in the analysis section below.

forward, Sgt. Pufall looked in the back; on the floor in front of the back passenger seat he saw a firearm that appeared to be a short barreled shotgun (*See* photo, Gov. Exh. 5). Sgt. Pufall handed the firearm to Officer Greene and told him to run the serial number to see if it was reported stolen (it was not). After Sgt. Pufall told Officer Greene that he had found a laptop, Officer Greene says something to the effect of “when you make the inventory [*unintelligible*] you could have, uh [*unintelligible*] in his pocket.” *Watch* CD, Gov. Exh. 2, at 10:30-45. There also is a brief discussion of the laptop, but what the officers say is unclear. (Sgt. Pufall’s written report explains that he thought he had seen a report that Justin Edwards was a suspect in a computer theft, but it turns out that the suspect was his brother Blake Edwards).

During his vehicle search, Sgt. Pufall did not find any indicia of vehicle ownership. He did not find any items that appeared to belong to a woman. Sgt. Pufall did not prepare a written list of what he saw in the Mitsubishi or what he seized out of it.

Sgt. Pufall directed Officer Green to take the Mitsubishi’s keys to Fernandez’s residence, ask her to fill out a preprinted multipurpose “Victim Affidavit,” regarding Edwards taking the car, and ask her about the computer and the shotgun. The officers locked the Mitsubishi and left it on the street.

Sgt. Pufall then asked dispatch to run the Mitsubishi’s VIN. He learned that it was not currently registered to anyone; the last registered owner, in March, 2012, had been Jeremy Strobel. From this, Sgt. Pufall assumed that “Jeremy had sold it to Veronica” and Veronica had not yet registered it.

Sgt. Pufall drove Edwards to the jail to be booked; by then, it seems that the charge was to be based on the probation hold. The officers locked the Mitsubishi, leaving in it all items

except the shotgun and the drug pouch, which Sgt. Pufall took with him. The officers did not impound the Mitsubishi or call for a tow, but left it parked on the public street.

Officer Greene arrived at Fernandez's residence and could see through the window that she was up and about. It was about 1:30 a.m. Fernandez answered Officer Greene's knock wearing sleep attire and a bathrobe. In Officer Greene's opinion, Fernandez may have been drinking, her eyes were not fully open and she moved very slowly because she appeared to be in pain, but she did not appear to him to be intoxicated or impaired. Officer Greene told Fernandez that the police had recovered the Mitsubishi and asked if she would fill out the form. Fernandez checked the box next to the typed statement "I gave no one permission to take the missing items indicated in this police report" and signed the form. There was no police report yet, nor was there any written indication on or attached to the form reflecting that Fernandez was referring to the Mitsubishi.

Officer Greene drove Fernandez to the parked Mitsubishi, gave her the keys to unlock it, and asked her to search the interior, then tell him which items were hers and which were not. Fernandez said that the game console and controllers were hers, the tools and other items in the bag were not hers, and the laptop was Justin's. Officer Greene let Fernandez keep the game console but he took the laptop and bag of tools. Officer Green then let Fernandez drive the Mitsubishi home, despite the fact that the car was not registered to her, she had no proof of ownership and there were no license plates on the car. Officer Greene did not prepare a list of what Fernandez had taken with her.

At the jail, Sgt. Pufall ran Edwards through some field sobriety tests to confirm Sgt. Pufall's opinion that although Edwards had been drinking, he was not legally intoxicated. Sgt.

Pufall *Mirandized* Edwards and questioned him. When he asked Edwards if he had asked Fernandez for permission to take the Mitsubishi, Edwards said that he had not.⁴ Edwards explained the items in the car, inculcating himself regarding the shotgun and the drug pouch, but claiming to have bought the laptop (which turned out to be stolen) for \$100 from some guy called “Big Shawn.”

On June 11, 2012, Investigator Gerald Katchka re-*Mirandized* Edwards and questioned him. Edwards explained how he and Fernandez had bought the Mitsubishi from Strobel for Edwards to drive, and he again inculpated himself regarding the shotgun and the drug pouch but exculpated himself regarding the laptop. Edwards wrote a short statement to the same effect, starting with “I Justin Edwards was pulled over in a car that was bought by my girlfriend Veronica Fernandez for me. We didn’t have it registered because of a lein [*sic*] on the title.” At some point that morning, Officer Greene took the bag of tools to Edwards’s mother’s house for her to safeguard.

In the written police report that the participating officers later prepared (Gov. Exh. 6), on page 1 they list the “UCR” as “vehicle theft-auto,” and the incident type as “auto theft.” On page 2, they list the statutes charged against Edwards as “operating while revoked” and

⁴ Sgt. Pufall: So you just argued and said “screw it” and took the keys and left just so you didn’t get into it?

Edwards: Yeah.

Sgt. Pufall: So you didn’t really ask her for permission to drive the car, correct?

Edwards: No.

Sgt. Pufall: Okay. And you have a revoked license . . . because of your prior noncompliance while driving, right?

Edwards: Yes.

“exp/non-regist of MV.” On page 3, in the property/evidence section, the police separately list and identify by tag numbers:

A2-016717:	CDs #1, #2 AND #3, RECORDINGS THE TRAFFIC STOP AND POST-ARREST INTERVIEWS;
A2-016625:	“2002 MITS ECLIPSE 2 DR” . . . “REPORTED STOLEN” AND “RECOVERED”
A2-016626:	“GUN” (“NEW ENGLAND 20 GAUGE SAWED OFF SHOTGUN, . . . (1) 2¾” STEEL BUCKSHOT”)
A2-016627:	“PARAPH” . . . “BLK ZIPPERED POUCH (THC)”
A2-018077	“MARIJ” . . . “APPROXIMATELY 0.2 GRAMS OF STEM AND GREEN LEAFY SUBSTANCE”)
A2-018078	“PARAPH” . . . “BLACK GLASS ONE HITTER W/SKULL, CONTAINING BROWN RESIDUE”).

On page 4 of the report, in the “arrest information” section, Sgt. Pufall listed eight charges against Edwards, with the primary charge being a probation hold, plus possession of a sawed off shotgun, carrying a concealed weapon, felon with a gun, possession of THC, operating while revoked, non-registration of a motor vehicle, and possession of paraphernalia.

In the comments/narrative sections that follow, each of the three officers who were involved provide a typed summary of what he had done. On pages 4 and 5, Sgt. Pufall reported that he learned that there was a probation hold on Edwards before he arrested him (the video shows this to be incorrect). Sgt. Pufall reported that during his search of the Mitsubishi he found a zippered pouch with the pipe and marijuana, and an uncased, loaded sawed off shotgun. Sgt. Pufall did not mention looking for documentary indicia of vehicle ownership and failing to find any. On page 6, he reported the same found items, plus a Dell laptop computer (for which he provided the serial number) and “a black bag with some tools inside.” On page 7 he reports that “Veronica gave Officer Greene the laptop and the bag of miscellaneous items he

uses for making [tattoos]. The most expensive piece was a dremel tool.⁵ I will ask day crew to return that bag to Rhonda's."

In Officer Greene's narrative, he reports that:

I asked Veronica about some of the other property in the veh. Like the PS3 and laptop computer. Veronica said that the PS3 was hers but the laptop was Justin's. Veronica asked about a new or newer Iphone [*sic*]. I told her that I did not know if there was a Iphone in the vehicle or not.

I gave Veronica a ride to her vehicle. Veronica said some of the property in the vehicle was not hers. A large bag that contained several items was in the vehicle and Veronica took out the PS3 games and controllers. Veronica said that nothing else in the bag was hers. The bag contained varying items like a Dremel tool, puppy training pads, remote control helicopters and misc. items. The bag and contents were left for the day shift to return. Veronica said that the laptop was not hers either. Both the bag and laptop were taken to the PD.

The vehicle was returned to Veronica and she drove it home.
Gov. Exh. 6 at 8.

The Ashland Policy Department Manual states:

4.400 IMPOUND POLICY

A. All items of property seized, found, recovered, or which come into the possession of police employees will be handled in such a manner that fully accounts for their actions. All property will be properly marked, packaged, impounded and accounted for using departmental report forms. This will include, but is not limited to:

1. *Items of evidence*; any item which may later be used to assist in an investigation or prosecution of a case. A proper chain of custody must be maintained.

⁵ Although "Dremel" is a manufacturer of power hand tools; handymen (and handywomen) equate a "dremel tool" with a hand-held router; perhaps it could be a power source for other tattooing tools.

2. *Recovered stolen property*; any item which has been identified as stolen. In many cases it will be evidence first and then turned over to the owner. Attempts will be made to photograph evidence and return the property to the owner as soon as possible.

* * *

4. Property held for safekeeping; any item of value that is under the control of an employee of the department. If the item cannot be returned to the owner directly, it will be impounded until such time as the owner is available.

B. All items to be impounded will be accompanied by a completed Property Invoice form . . .

4.402 PROPERTY INVOICE REVIEW

RELEASE OF IMPOUNDED PROPERTY

A. Items of property or evidence may be returned to the owner by field personnel if the Item is not needed as evidence in court. In these cases an invoice will be completed and the owner/claimant will sign for the receipt of the items(s). The claimant's identification will be documented on the back of the white copy of the property invoice. The Invoice will be initialed by the officer and forwarded to the property custodian.

5.150 WARRANTLESS SEARCHES/SEIZURES

In certain circumstances officers will be permitted to search person, vehicles or premises without a warrant and seize persons and/or physical Items. These warrantless searches and seizures will be conducted so as to comply with Constitutional requirements and case law.

5.154 PROBABLE CAUSE SEARCHES

Under certain circumstances officers will have probable cause to search a vehicle or person, but are not required to obtain a search warrant.

A. Movable Vehicle Exception

1. A vehicle may be searched based on probable cause and without a warrant when the vehicle is in a mobile condition.

5.156 INVENTORY SEARCHES

Officers will conduct an inventory search of all vehicles or property of which they have lawful custody in order to protect the property of the suspect/owner from theft and to protect the police from claims of theft. The inventory search will include the searching of locked and/or closed containers. The results of an inventory search will be documented on the property impound form and/or in the narrative section of the DR.

Fernandez sent the following handwritten note to the district attorney (with a copy to Edwards's attorney), all *sic*:

6/15/12

I, Veronica B. Fernandez am requesting the no contact order or order against Justin Edwards be lifted. The situation on 6/17/12 involving the car was not stolen, he was warned that it had no plates and he left with it anyway. I do not feel any threat from him.

On October 6, 2012, Fernandez died.

ANALYSIS

I. Edwards had a reasonable expectation of privacy in the car.

The first step of the suppression analysis is for the court to determine whether Edwards had a reasonable expectation of privacy in the Mitsubishi that would allow him to challenge its search by Sgt. Pufall. The parties characterize this as both a privacy issue and a “standing” issue; the former is correct. *See United States v. Figueroa-Espana*, 511 F.3d 696, 703 n.1 (7th Cir. 2007).

Fourth Amendment rights are personal rights which may not be asserted vicariously. A driver who does not own a vehicle still may challenge the vehicle's search if he establishes that he had an actual and subjective expectation of privacy in the car that society recognizes as legitimate and reasonable. *Id.* A person present in a stolen car does not have a reasonable expectation of privacy in the car; on the other hand, a defendant may challenge a car search on Fourth Amendment grounds even if he does not own or have a property interest in the car. *United States v. Sholola*, 124 F.3d 803, 816 n.14 (7th Cir. 1997) "The burden is on the government to prove by a preponderance that property is not being used with the permission of the owner." *United States v. Garcia*, 897 F.2d 1413, 1417 (7th Cir. 1990).

Edwards, in a sworn affidavit accompanying his motion to suppress, claims that Fernandez gave him the money to buy the Mitsubishi for him to drive, although they were going to title it to Fernandez because Edwards had no valid driver's license. This explanation is consistent with his June 11, 2012 oral and written statement to Investigator Katchka, and is supported by Fernandez's confusing "June 15, 2012" note. The government points to Edwards's statements to Sgt. Pufall to impeach Edwards's current version of events, and observes that Fernandez's note probably refers to a different incident and in any event should not be given much credence by the court. Edwards, for his part, contends that there are no inconsistencies here: in response to Sgt. Pufall's rather general questions, Edwards provided rather general answers; at the time of his arrest, Edwards believed that it was a result of driving a car without license plates, coupled with his OAR status.

As the facts found above demonstrate, I have accepted Edwards's version of the situation. His affidavit, although hearsay, is admissible in support of his suppression motion, *United States v. Raddatz*, 447 U.S. 667, 679 (1980). Although Edwards ultimately chose not to testify at the evidentiary hearing, it is difficult for the court to envision what the government could have adduced by way of impeachment beyond the evidence already available to it. Fernandez's June 10, 2012 call to 911 may have provided the police with sufficient grounds to stop the Mitsubishi (although Sgt. Pufall independently established grounds for the stop by observing the un-plated Mitsubishi in motion on a public street), but the evidence and relevant circumstances, considered collectively, persuade me that Edwards did in fact have a legitimate possessory interest in the Mitsubishi. The car was not "actually stolen." *United States v. Garcia*, 897 F.3d at 1417-18.

Although the burden is on the government, I conclude that the preponderance of the evidence actually supports Edwards's version of events: Fernandez helped Edwards buy the Mitsubishi from Sobel on the Q.T. They never titled it because of the lien. Edwards drove it illegally because of his OAR status, but he did not need Fernandez's permission to do so because they had agreed that the car was for his use. Her early-morning 911 call reporting otherwise was an angry—and perhaps inebriated—continuation of the fight that had driven Edwards out with a bag of his possessions. When viewed in context, Edwards's allegedly inconsistent statements to the police actually aren't inconsistent with his explanation, and his virtually contemporaneous written statement to Investigator Katchka, coupled with Fernandez's muddled recantation, corroborate what he is telling the court now. As a result, the court should reach the merits of Edwards's suppression motion.

II. Sgt. Pufall's search of the car interior violated the rule of *Arizona v. Gant*

Edwards invokes *Arizona v. Gant*, 556 U.S. 332 (2009), as support for his contention that Sgt. Pufall's search of the Mitsubishi violated his Fourth Amendment rights. The government does not dispute that Edwards was handcuffed and ensconced in a squad car at the time Sgt. Pufall commenced his search. The question is whether Sgt. Pufall searched the Mitsubishi based on a reasonable belief that the car contained evidence relevant to the offense for which Sgt. Pufall had arrested Edwards. *See id.*, 556 U.S. at 343-44. On these facts, this question presents two sub-questions: what was Sgt. Pufall actually looking for when he searched the Mitsubishi, and if he really was looking for evidence of car theft, was it reasonable for him to expect to find it?

The government devotes the first 13 pages of its brief to its spirited challenge of Edwards's "standing" to challenge the search; it devotes two paragraphs in support of the actual search. This is the government's argument, virtually in its entirety:

Having just arrested Edwards for vehicle theft, Pufall had reasonable cause to believe that evidence relating to the crime of arrest might be found in the vehicle's passenger compartment . . . Once Pufall learned that the evidence of vehicle ownership was not in the customary location of the glove compartment, he expanded his search to the rest of the passenger compartment, as experience taught him that people sometimes have such documents loose or in other areas of the vehicle.

Dkt. 20 at 14-15.

This is a filtered and rather self-serving gloss of Sgt. Pufall's muddled testimony on this point. First, it is not clear that Sgt. Pufall actually arrested Edwards for car theft, as opposed to driving a vehicle without license plates, which is a *res ipsa* traffic violation. Only repeated prodding by the assistant U.S. Attorney adduced the testimony referred to in the government's

brief. More revealing—and more persuasive—is Sgt. Pufall’s testimony that he could search the Mitsubishi with impunity:

AUSA Burke: And at what point did you – let me ask this a different way: what made you think you had a right to search this vehicle?

Sgt. Pufall: I felt I had the right because Veronica reported that it’s her car and he took it without permission. So if it wasn’t his car and he didn’t have permission, that’s why I searched it. In my mind, he had no expectation of privacy.

Sgt. Pufall offered other reasons which I will explore below, but this is the crux of what happened that night. Having heard and seen both officers testify, and having watched and heard the video recording of the traffic stop, and having considered how the officers handled the car and its contents, I conclude that Sgt. Pufall primarily was motivated to search the Mitsubishi in order to do a spot check on Justin Edwards, a well-known habitual criminal. Fernandez’s late-night 911 call made him to think that he had a free shot on an empty net.

Such a search might be viewed by some as efficient, pro-active community policing, especially in a small municipality where everyone knows each other; indeed for the first twenty years of Sgt. Pufall’s career, it was legal for him to toss an arrestee’s car to look for weed, weapons and stolen goods. It would be a hard habit to break, especially when it is so palpably productive, but in 2009 the Supreme Court in *Gant* changed (Justice Stevens would say “clarified”) the rules and removed the automatic car search from law enforcement’s investigative tool box. It is—always has been—unconstitutional for patrol officers to exercise “unbridled discretion to rummage at will among a person’s private effects.” *Gant*, 556 U.S. at 345.

True, Sgt. Pufall now claims that he was searching the Mitsubishi for proof of ownership (this was his third reason; reason number 2 was a claimed inventory search, discussed in the next section). But, in this case on these facts, this claim is incredible and the court rejects it. Why would proof of vehicle ownership be relevant? Even if Sgt. Pufall found a car title or current registration in Fernandez's name, this would be irrelevant to a determination whether Edwards had stolen the car. Sgt. Pufall knew that Edwards and Fernandez were a couple, so Edwards's presence in Fernandez's car proved nothing in the absence of her phone call claiming that Edwards had taken "her" car without permission.⁶

Next, although the police report is titled "vehicle theft-auto," this is not a charge on which the police were holding Edwards. The only traffic-related charges listed in the body of the report are operating while revoked and operating an unregistered vehicle, which is a civil traffic forfeiture. As Edwards notes, "in many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence," *Gant*, 556 U.S. at 343-44. Edwards further notes that there could be no evidence of his operating status in the Mitsubishi because he was revoked and he *told* Sgt. Pufall that he was revoked, before Sgt. Pufall searched the car. Even if Edwards *had* possessed a physical driver's license (which he likely would have kept in a wallet), it would not have shown his revocation status; this only could be determined by checking DMV records. In any event, if Edwards actually had stolen Fernandez's car, then why would Sgt. Pufall expect to find *his* driver's license in *her* car?

⁶ I have found that Fernandez's claim was false, but Sgt. Pufall didn't know this at the time. Indeed, the government still vigorously contends that she was telling the truth despite her written recantation before her death.

To the same effect, Edwards already had told Sgt. Pufall that there was no registration in the car. There was no need to look for something that wasn't there. In any event, the best proof of non-registration at the scene was the absence of license plates (actually called "certification plates" in Wisconsin, *see* Wis. Stat. 341.12). The only truly accurate method to determine the car's registration status would be to check with DMV (which Sgt. Pufall did on the scene). In sum, the absence of a proof of registration document would not establish that the car was unregistered. The presence of a current registration document might *exculpate* Edwards of the operating-an-unregistered-vehicle charge, but this was not the crime of arrest; it is not even a *crime*, it is a civil traffic offense. This could not have provided a reasonable basis for Sgt. Pufall to search the Mitsubishi.

The upshot of all this is that Sgt. Pufall's testimony regarding his search for proof of ownership strikes the court as a post-hoc rationalization rather than an accurate characterization of his thought process at the time he searched the Mitsubishi. As noted above, Sgt. Pufall actually was of the opinion that Fernandez's 911 call gave him *carte blanche* to rummage through the Mitsubishi to see what Edwards was up to. As already noted, this could be viewed by some as good policing, given what Sgt. Pufall discovered in the car. But the fact that the search was productive does not justify it. The search violated Edwards's Fourth Amendment rights. At this juncture, the exclusionary rule would augur suppression of the evidence derived from the search. The government argues that suppression is inappropriate because the shotgun inevitably would have been discovered pursuant to the inventory search that Sgt. Pufall performed. I address this assertion in the next section:

III. The car search does not pass muster as an inventory search

The inevitable discovery doctrine permits the government to introduce evidence seized in violation of the Fourth Amendment if the government can prove, by a preponderance of the evidence, that the officers ultimately or inevitably would have discovered the challenged evidence by lawful means. To meet this burden, the government must demonstrate both: (1) that it had or would have obtained, an independent, legal justification for conducting a search that would have led to the discovery of the evidence and (2) that it would have conducted a lawful search absent the challenged conduct. *United States v. Howard* ___ F.3d ___, 2013 WL ___, Case No. 13-1256 (7th Cir., August 30, 2013), slip op. at 15.

Inventory searches constitute a well recognized exception to the warrant requirement and are reasonable under the Fourth Amendment. Local police departments routinely inventory and secure the contents of impounded vehicles. Doing so protects the police from potential danger, protects the owner's property while it remains in police custody, and protects police against claims of lost, stolen, or damaged property. An inventory search is lawful if: (1) the individual whose possessions are to be searched has been lawfully arrested, and (2) the search is conducted as part of the routine procedure incident to incarcerating an arrested person and in accordance with established inventory procedures. Both the decision to take the car into custody and the concomitant inventory search must meet the strictures of the Fourth Amendment. The decision to impound is properly analyzed as distinct from the decision to inventory. *United States v. Cartwright*, 630 F.3d 610, 613-14 (7th Cir. 2010). The existence of a police policy alone does not render a particular search or seizure immune from scrutiny under the Fourth Amendment. *Id.* While compliance with standardized procedures help guard the police using a purported inventory search as a ruse for a general rummaging to discover incriminating evidence, it is not

the case that inventory searches invariably violate the Fourth Amendment unless they comply with a preexisting rule. *United States v. Cherry*, 436 F.3d 769, 776-77 (7th Cir. 2006) (Posner, J. dissenting).

The parties do not dispute that Sgt. Pufall had probable cause to arrest Edwards. They dispute whether a genuine, defensible, inventory search occurred. Two facts pop out: (1) the police never actually impounded the Mitsubishi; and (2) they did not actually inventory the contents.

In the ordinary case, it is the defendant who is arguing that he should have been allowed a chance to have his car moved before the police impound it; the judicial response is that the Fourth Amendment does not demand that “the police offer a motorist an alternative means of removing his vehicle that will avoid the need to tow it and conduct an inventory search.” *Cherry*, 436 F.3d at 775; *see also Cartwright*, 630 F.3d at 615. In *United States v. Duguay*, 93 F.3d 346 (7th Cir. 1996), the court reasoned

The touchstone of the Fourth Amendment analysis is “reasonableness.” The policy of impounding the car without regard to whether the defendant can provide for its removal is patently unreasonable if the ostensible purpose for the impoundment is for the “caretaking” of the streets. While it is eminently sensible not to release an automobile to the compatriots of a suspected criminal in the course of a criminal investigation, if the purpose of impoundment is not investigative, and in the absence of probable cause, we do not see what purpose denying possession of the car to a passenger, a girlfriend, or a family member could possibly serve.

The decision to impound an automobile, unless it is supported by probable cause of criminal activity, is only valid if the arrestee is otherwise unable to provide for the speedy and efficient removal of the car from public thoroughfares or parking lots. This conclusion is consistent with this court’s inventory search precedents.

93 F.3d at 353.

In this case, the police brought the purported owner of the Mitsubishi (Fernandez) to the scene, directed her to sort through the car's contents, then allowed her to drive it home, even though the police knew that the car was unregistered, it had no plates, and they suspected that Fernandez had been drinking (although Officer Greene did not believe that she was drunk). I say "purported" owner because the Mitsubishi was not currently registered to anyone, and the last known owner was Jeremy Sobel, a third party (although known to the officers). Apparently, the police deemed it a statutory violation for Edwards to drive an unregistered vehicle from Fernandez's residence to the location of the traffic stop, but it was not a violation for her to drive that same vehicle back home. *Cf. Cartwright*, 630 F.3d at 616 (police had no choice but to impound the vehicle because "no one could have lawfully driven [the] car from the scene as it did not have the functional license plate lamp required by Indiana law.")

If the police actually had towed the unregistered Mitsubishi to their impound lot—which they should have done, since it could not be legally driven by anyone—then they could have searched it and inventoried its contents. But they didn't tow the Mitsubishi because this wasn't really an inventory search. As discussed above, Sgt. Pufall searched the Mitsubishi because he wanted to see what Edwards had with him. After discovering and seizing the obvious contraband, he had Officer Greene bring Fernandez back to the scene to claim and take whatever she said was hers and leave the rest for Officer Greene to bring back to the station. Then the police let Fernandez drive the Mitsubishi home. (Also worth noting, as Edwards does, is that not only did the police not tow or impound the car, they left it unattended (but locked) on a city street while they attended to other aspects of their investigation. Who would have been

responsible if someone had broken into the Mitsubishi and stolen its as-yet uncatalogued contents?)

Other than leaving the car unattended, perhaps this could be viewed through the lens of pragmatic policing as an efficient outcome: Sgt. Pufall got to search the Mitsubishi based on Fernandez's theft report; then he allowed the victim to reclaim her personal property and take her car home, while the police turned a blind eye to the messy but uninteresting lack-of-registration issue. In the absence of the overarching *Gant* problem, this could be seen as a clean and simple tie-off to the night's events. But there *is* a *Gant* problem and to try to solve it by labeling this an inventory search pursuant to department policy is akin to putting lipstick on a pig. Yes, Officer Greene does seem to say the word "inventory" while Sgt. Pufall is tossing the Mitsubishi, but to paraphrase Abraham Lincoln, calling a car search an inventory search doesn't make it one.

Even if we could get past the failure to impound the vehicle—after all, § 5.156 refers to vehicles "in the custody" of the police department—the officers did not sufficiently document what they found, as required by the policy. The government is correct in observing that the policy does not *require* the use of a special form (although the department has one), but also allows "the results of an inventory search" to be "documented" in the narrative section of the police report. This was sort of done here, but not in a fashion that would allow the court to characterize it as an actual inventory.

At page 3 of the report, Sgt. Pufall specifically listed separately the items kept as evidence. So far, so good. Further, as part of their narrative, Sgt. Pufall and Officer Greene mentioned many of the items that they had found in the car. However, they did not do this

with the precision that would accomplish the purpose of § 5.156: “to protect the property of the suspect/owner from theft and to protect the police from claims of theft.” For instance, Sgt. Pufall mentions “a black bag with some tools inside,” later described as “the bag of miscellaneous items” for making tattoos, plus “a dremel tool.” Apart from the lack of precision, compare this list to Officer Greene’s:

Officer Greene reported that there was “a large bag that contained several items” in the Mitsubishi; he allowed Fernandez to take and keep the PS3 games and controllers but he did not have her fill out an invoice for these electronics, sign it, or verify her identification as required by § 4.402.A of the policy, titled “Release of Impounded Property.” Officer Greene described what Fernandez left behind as “varying items like a Dremel tool, puppy training pads, remote control helicopters and misc. items.” Apparently someone at the police department called Edwards’s mother (“Rhonda”) who came by to retrieve the bag of miscellaneous items; she did not sign a release of impounded property form either. To this day, nobody knows exactly what was in that bag or where it all went.

As Judge Posner noted in *United States v. Cherry*, an inventory search can violate a procedural rule without violating the Fourth Amendment, but compliance with the rules are an effective “ruse antidote.” 436 F.3d at 777 (Posner J., dissenting). Here, the officers did not comply with their department policies, and the reason suggested by the facts is that they were not actually inventorying the car. This was a search for evidence.

In short, the government has not met its burden demonstrating that the officers actually conducted a valid inventory search that would have led to the discovery of the evidence in the absence of the simultaneous evidentiary search. The Fourth Amendment violation remains unabated.

IV. Suppression is an appropriate sanction.

The government's final defense of this search is that the officers were operating in good faith: Sgt. Pufall had ample reason to believe the Mitsubishi was stolen, and any after-developed facts casting doubt on this belief would not serve the purpose of exclusion. Gov't Brief, dkt. 20, at 20. This is not an accurate characterization of what happened here, but it is important to note that:

Exclusionary rules, which protect the guilty, are no longer favored. Suppression of evidence has always been our last resort, not our first impulse. The exclusionary rule generates substantial social costs which sometimes include setting the guilty free and the dangerous at large.

United States v. Williams, 698 F.3d 374, 382 (7th Cir.2012), citations omitted.

Here's the current rule on exclusion:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the judicial system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Herring v. United States, 555 U.S. 135, 126 S.Ct. 695, 702 (2009).

That said, in the context of a challenged traffic stop, the court of appeals has observed:

We don't doubt [the officer's] good faith efforts. . . . As we recognized in another context, removing this sort of police misconduct from the ambit of the exclusionary rule would have significant implications: it would eliminate the rule's deterrent effect on unreasonable seizures.

United States v. Bohman, 683 F.3d 861, 866-67 (7th Cir. 2012).

There is room to disagree on how to characterize Sgt. Pufall's search of the Mitsubishi on June 10, 2012, but as outlined above, this is a case in which a veteran officer jumped to

inaccurate legal conclusions that were favorable to his decision to search a stopped car. His motivation to search the car was to get a look inside to see what Edwards possessed. Hindsight shows that his instincts were good and I have no doubt that he thought he was operating within the bounds of the Fourth Amendment, but that does not make this an acceptable search. Sgt. Pufall had other, more legally tenable options on how to try to get a look inside the Mitsubishi, but he took unnecessary shortcuts. He could have actually impounded the car and had a genuine inventory search conducted. He could have impounded the car and applied for a search warrant. He could have asked Fernandez for consent to search. Instead, Sgt. Pufall put Edwards in the back of a squad car and did exactly what *Gant* said he could not do. The most efficacious way to stop the police from playing their hunches and instead to hew more closely to the rule in *Gant* is to prevent the use of evidence discovered during car searches like this one.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that defendant Justin Edward's motion to suppress evidence be GRANTED.

Entered this 10th day of September, 2013.

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

September 10, 2013

Kevin Burke
Assistant United States Attorney
660 West Washington Avenue, #303
Madison, WI 53703

Kelly Welsh
Federal Defenders Services of Wisconsin, Inc.
222 West Washington Avenue, Ste. 680
Madison, WI 53703

Re: United States v. Justin Edwards
Case No. 13-cr-56-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 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 September 20, 2013, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by September 20, 2013, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

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).