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

UNITED STATES OF AMERICA,

Plaintiff,

v.

RYAN POULIOT,

Defendant.

REPORT AND RECOMMENDATION

14-cr-104-jdp

REPORT

On October 10, 2014, the grand jury charged defendant Ryan Pouliot in a one-count indictment with being a felon with a gun in violation of 18 U.S.C. § 922(g). *See* dkt. 1. The firearm charged against Pouliot (a shotgun) was found in his backpack in a car in which he had been a passenger prior to being removed, handcuffed and searched. Pouliot has moved to suppress the shotgun and all other evidence derived from police searches that day, contending that all of these searches were constitutionally unreasonable. *See* Motion To Suppress, dkt. 15. The government opposes the motion, having narrowed its position to a claim that the search of Pouliot's backback was justified by the automobile exception to the Fourth Amendment's warrant requirement. *See* dkt. 22 at 1-2. For the reasons stated below, I conclude that the government is correct and I am recommending that this court deny Pouliot's motion to suppress evidence.

The parties have submitted the police reports, a squad car video (that includes audio from both a dashboard microphone and the officer's wireless lapel mic) and witness testimony. Having watched and listened to the video, having considered all the exhibits, having heard and seen the witnesses testify and having judged their credibility, I find the following facts:

FACTS

On September 23, 2014 in Superior Officer Sean Holmgren of the Superior Police Department (SPD) was on routine patrol in a squad car in the early evening. At about 6:46 p.m. (~18:46:18 on Officer Holmgren's dashboard camera video, *see* DVD, dkt. 15-2) Officer Holmgren saw a white Impala drive by that lacked a front license plate as required by state statute. Officer Holmgren followed the Impala into a shopping mall where he initiated a traffic stop. Officer Holmgren approached the car and observed two women in front and one man in the rear passenger seat. The driver produced a driver's license that identified her as Christy Mike, the registered owner of the Impala. The front seat passenger identified herself as Danielle Ranta. Officer Holmgren was familiar with Ranta as "a known drug user and a drug dealer in Superior, Wisconsin" (Tr., dkt. 21 at 8), with several previous drug arrests (police report, dkt. 15-1 at 4).

Officer Holmgren sought to identify the man sitting in the back seat. Officer Holmgren tried to get his attention, but the man would not make eye contact with him, going so far as to turn his head the other way, a level of evasiveness that markedly exceeded the level of nervousness that often accompanies a traffic stop. Officer Holmgren finally asked Christy Mike what this man's name was. She said his first name was "Ryan" but she did not know his last name. Officer Holmgren succeeded in initiating a conversation with "Ryan," who stated that his name was "Ryan Dewaine Forbragd", born December 4, 1989. Forbragd reported that he had no ID on him; in fact, he claimed that he had never had any ID of any sort issued to him by any state agency at any time. This struck Officer Holmgren as strange because in his 3-plus years as a patrol officer, anyone over 21 always had an ID. People who claimed not to have any

ID usually turned out to be lying about their identify in order to avoid arrest on an outstanding warrant.

Officer Holmgren radioed for backup because suspicious circumstances were piling up: Forbragd wouldn't make eye contact with him and Forbragd claimed never to have had an ID, which caused Officer Holmgren to suspect that this was a false name, plus Ranta, the known drug user was in the car. Officer Holmgren then provided the names of all three occupants of the car to SPD dispatch for a nationwide warrant check. The computer showed that Ranta was wanted on an extraditable warrant out of Pine County, Minnesota. Per standard operating procedure, SPD would not arrest Ranta until dispatch verified directly with Pine County that its warrant for Ranta still was valid and Pine County would extradite her if SPD arrested her. During this time, Ranta was not free to leave.

According to dispatch "Ryan Forbragd"' came back as "not on file" in either Wisconsin or Minnesota. This was highly unlikely for any adult because the mere existence of a driver's license or a state-issued ID card would put the name on file; and, asked Officer Holmgren, how can a 24-year old function in the real world without an identification document? Any traffic ticket or any other contact with the police in any state would have put "Ryan Forbragd" on file. The flipside of this same coin was that it is common for people who had arrest warrants issued in their true names to provide false names to Officer Holmgren. In fact, every time a person had provided Officer Holmgren with a false name, it was because that person had an outstanding arrest warrant. So, Officer Holmgren concluded that Forbragd was intentionally lying to him because he probably had an outstanding warrant. Even so, Officer Holmgren did not know this

man's true identity and the traffic stop would be over as soon as Pine County confirmed that its warrant for Ranta still was valid.

While Officer Holmgren was radioing in the names of the people in the car, SPD Patrol Sergeant Adam Poskozim arrived on the scene to assist. This was not quite four minutes after Officer Holmgren had initiated the stop. Sgt. Poskozim had previously served on the Lake Superior Drug and Gang Task Force for several years and was familiar with how controlled substances are packaged. When Sgt. Poskozim approached Mike's Impala from the driver's side to talk to Mike, he saw sitting on the back seat empty small glass vials that in his experience could be used to store crack cocaine. Sgt. Poskozim and Officer Holmgren directed Forbragd to step out of the car.[1]

Sgt. Poskozim saw on the seat where Forbragd had been sitting on a pile of empty small jewelry baggies. From his drug task force work, Sgt. Poskozim had seen such small baggies used many times to store methamphetamine. Based on this, Sgt. Poskozim's belief at the time was that these baggies were drug packaging, either not-yet-used or used-and-empty.

Officer Holmgren and Sgt. Poskozim patted down Forbragd, then handcuffed his hands behind his back. While they were doing this, two other patrol officers arrived and stood by the Impala (the rear right door of which remained open). Officer Holmgren and Sgt. Poskozim while the first two officers emptied Forbragd's pockets and checked the brim of his baseball cap for contraband. They then seated Forbragd in the back of Officer Holmgren's squad car. About

[1] Sgt. Poskozim also testified that in 14 years on the force, he had never encountered a legitimate identity that was not in the system. To the contrary, "100% of the time" he has encountered an adult who claimed that s/he has never had a driver's license or ID this person has made this claim out of fear that s/he will be arrested upon police discovery of his/her true identity.

twelve minutes into the stop (~19:00:30), Pine County confirmed that its warrant for Ranta was valid and that it would extradite her from Wisconsin.

After this, officers took a backpack out of the Impala's back seat and searched it. Inside was a short-barreled shotgun. Mike told the police that the backpack belonged to Ryan.

About a minute later, approximately 16 minutes into the stop (~19:04:44), SPD Officer Mark Letendre arrived to assist. He saw Forbragd sitting in the back of Officer Holmgren's squad car and immediately recognized him as Ryan Pouliot. He confirmed this by accessing photographs of Pouliot. (Officer Letendre also was familiar with Danielle Ranta's involvement with methamphetamine and illegal narcotics in the Superior area).

Having confirmed Pouliot's actual identity and his criminal record, the officers arrested him for being a felon in possession of a firearm. (They also took Ranta into custody on the Minnesota warrant).

Analysis

On the television show "Mythbusters," the hosts (Jamie and Adam) recently examined the story of a Frenchman whose Citroen automobile broke down in the desert; according to the story, the driver sifted through the parts of his broken automobile and salvaged enough material to cobble together a motorcycle that sputtered him back to civilization. This is an apt analogy for the government's defense of the police conduct in this case.

First, the government concedes that it cannot defend the police emptying Pouliot's pockets after removing him from Mike's car and handcuffing him. Next, the government concedes that it cannot rely on the inevitable discovery doctrine to justify the search of Pouliot's

backpack because the traffic stop ended upon confirmation of Minnesota's warrant for Ranta, which occurred before the backpack search and prior to Officer Letendre identifying "Forbragd" as Pouliot. The government has stripped down its justification for the backpack search to the automobile exception to the Fourth Amendment's warrant requirement: the government claims that what the officers saw in Mike's car gave them probable cause to search the car and its contents. *See* Gov't Br., dkt. 22 at 1-2. Pouliot responds that this court should not believe the officers' assertions as to what they saw, and that in any event, the totality of circumstances still does not surpass the probable cause threshold.

Under the automobile exception to the warrant requirement, the police may conduct a warrantless search of a motor vehicle if they have probable cause to believe the vehicle contains contraband or evidence of a crime. This exception recognizes the exigencies presented by a highly mobile vehicle that could disappear before a warrant can be obtained. *See California v. Acevedo*, 500 U.S. 565, 569 (1991), glossing *Carroll v. United States,* 267 U.S. 132, 151-53 (1925). When the police have probable cause to search a motor vehicle, then they are permitted to search all parts of the vehicle in which contraband or evidence could be concealed, including closed compartments, containers and packages. *United States v. Richards*, 719 F.3d 746, 754 (7th Cir. 2013); *United States v. Williams*, 627 F.3d 247, 251 (7th Cir. 2010).

In criminal cases from the northern half of the Western District, this court sees mostly by-the-book criminal investigations by state law enforcement agencies, but it also sees a significant number of investigations in which the police have played chicken with the Fourth Amendment. *See, e.g., United States v. Mykytiuk*, 402 F.3d 773, 778 (7th Cir. 2005) (quoting this

court's report and recommendation admonishing the federal-state drug task forces to clean up their acts regarding searches).

That said, this court must be mindful not to throw out the proverbial baby with the bath water. *See, e.g., United States v. Justin Edwards*, 13-cr-56-bbc (defended by the same AFD defending Pouliot in this case). In *Edwards*, this court was concerned enough about what it deemed unjustified rummaging through the defendant's car during a traffic stop that it suppressed the evidence seized (by coincidence, another sawed-off shotgun). *See* Sept. 13, 2013 Report and Recommendation, dkt. 22, at 23-24. The Court of Appeals reversed, concluding (among other things) that the police had probable cause to search the defendant's car under the automobile exception to the warrant requirement. *United States v. Edwards*, 769 F.3d 509, 514 (7th Cir. 2014). The court observed that in the Fourth Amendment context,

> The reasonableness of a search does not depend on the officer's subjective motivations; the inquiry is, of course, *objective. . . .* Sergeant Pufall's subjective intent does not matter. The relevant inquiry is whether a reasonable officer, knowing what this officer knew, would have probable cause to believe that the car would contain evidence of criminal activity.
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> *Id.* at 516, emphasis in original, citations omitted.

So it is here: whatever else the police did during this traffic stop, the question this court must answer in deciding Pouliot's motion to suppress is whether they had probable cause to believe that Mike's car would contain evidence of criminal activity.

An important starting point is for the court to be clear about what the police actually knew before they undertook the search. This is because Pouliot accuses Sgt. Poskozim of lying during at the suppression hearing when he testified that he saw a pile of little glass vials on the back seat when he first approached Mike's car. *See* defendant's reply, dkt. 23, at 2. Pouliot

points out that the written police reports make no mention of these glass vials in this context, and that Sgt. Poskozim "is not above stretching the facts to support his version of events . . .to justify a patently unlawful search." *Id.* at 3.

This is a fair argument to make under the circumstances, but as the facts above show, I have accepted as true this testimony by Sgt. Poskozim. A review of the transcript of the evidentiary hearing shows that the testimony about the glass vials (and the baggies) was adduced an afterthought. The government did not elicited it until redirect; Pouliot objected to it as irrelevant, then chose not to cross-examine on this point. The court allowed the testimony in the for-what-it's-worth category, not seeing why it mattered to the government's defense of the search. *See* Transcript, dkt. 21, at 37-38. I infer from how this was handled that neither the prosecutor nor Sgt. Pouliot saw this testimony as particularly relevant or important at the time. Having heard and seen Sgt. Pouliot testify about what he saw, I have accepted it as true and I have found it as fact.[2]

What the police knew prior to searching Mike's car was that her front seat passenger, Ranta, was well known to them as a player in the local meth scene, there were empty glass vials consistent with meth packaging on the back seat, there was a man in the back seat who police surmised was lying to them about his identity to avoid them discovering an arrest warrant in his real name, and on that man's seat were small empty jewelry bags of the type commonly used for

[2] The government points out that Pouliot, by counsel, declined to cross-examine Sgt. Poskozim regarding this testimony. I don't view this as a waiver of Pouliot's current challenge to the truthfulness of this testimony, but it certainly doesn't support the current challenge.

packaging crack.[3] This was enough to justify a search of Mike's car.

Probable cause is a fluid concept that turns on assessment of probabilities in particular factual contexts; it is established when, based on the totality of circumstances, the application sets forth sufficient evidence to induce a reasonably prudent person to believe that a search will uncover evidence of a crime. *United States v. Sewell,* ___ F.3d ___, 2015 WL 1087750, *4 (7th Cir. March 13, 2015) (internal citation omitted). The Supreme Court noted 66 years ago in *Brinegar v. United States*, 338 U.S. 160 (1949),

> In dealing with probable cause, . . . as the very name implies, we are dealing with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.
>
> 338 U.S. at 175.

More recently, the Court observed that:

> The test for probable cause is not reducible to precise definition or quantification. Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence have no place in the probable cause decision. All we have required is the kind of fair probability on which reasonable and prudent people, not legal technicians, act.
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> In evaluating whether the State has met this practical and commonsensical standard, we have consistently looked to the totality of the circumstances. We have rejected rigid rules, bright-

[3] Also commonly referred to as gem packs. *See, e.g., United States v. Starks,* 309 F.3d 1017, 1020 n.1 (7th Cir. 2002); *United States v. Smith*, 3 F.3d 1088, 1091, n.1 (7th Cir. 1993). Under the totality of circumstances known to the police here, the contraband nature of these baggies was much more apparent than the corner of a plastic bag sticking out of the defendant's luggage in *Moya v. United States*, 761 F.2nd 322, 326 (7th Cir. 1984), relied upon by Pouliot. Further, the government is not relying on the plain view doctrine, it is offering the baggies as a brick in its probable cause wall. This serves also to distinguish *United States v. Guzman-Cornjeo*, 620 F.Supp.2nd 917, 922 (N.D. Ill. 2009), another plain view case in which the trial court also decided that it would not consider the officer's training and experience in determining the purported contraband nature of the box of sandwich bags hidden behind the black sock in the closed drawer of the night stand. *Id.* at 921-22.

> line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach. In *Gates,* for example, we abandoned our old test for assessing the reliability of informants' tips because it had devolved into a complex superstructure of evidentiary and analytical rules, any one of which, if not complied with, would derail a finding of probable cause. We lamented the development of a list of inflexible, independent requirements applicable in every case. Probable cause, we emphasized, is a fluid concept–turning on the assessment of probabilities in particular factual contexts–not readily, or even usefully, reduced to a neat set of legal rules.
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> *Florida v. Harris*, ___ U.S. ___, 133 S.Ct. 1050, 1055-56 (2013) (internal quotations and citations omitted).

This is a low evidentiary threshold, requiring only a probability or a substantial chance of criminal activity, not an actual showing of such activity. *United States v. Roth*, 201 F.3d 888, 893 (7th Cir. 2000) (quoting *Illinois v. Gates*, 462 U.S. 213, 244 (1983)). *See also Gutierrez v. Kermon*, 722 F.3d 1003, 1008 (7th Cir. 2013) (probable cause is a practical, common sense standard that requires only the type of fair probability on which reasonable people act); *United States v. Jones*, 763 F.3d 777, 795 (7th Cir. 2014) (probable cause is not even proof by a preponderance of the evidence).

As a starting point, it was relevant to the officers' probable cause determination that they knew that Ranta was involved in the local meth scene. As the Court of Appeals for the Sixth Circuit noted when addressing a similar challenge to a search warrant in a child pornography case,

> The test for probable cause . . . is whether there is a fair probability that contraband or evidence of a crime will be found in particular place. The application of this test is not fettered by the presumption of innocence embodied in the test for conviction. Instead, a "person of reasonable caution" would take into account predilections revealed by past crimes or convictions as part of the inquiry into probable cause. . . . When, in our case, the Homeland Security agents uncovered evidence of Wager's connection to the

> websites carrying child pornography, his prior conviction was relevant, though not dispositive.
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> 452 F.3d at 541. *United States v. Wagers*, 452 F.3d 534, 541 (6th Cir. 2006).

Law in this circuit is similar. *See, e.g., United States v. Caldwell*, 423 F.3d 754, 761 (7th Cir. 2005) (a defendant's prior controlled substance convictions adds context and weight to otherwise innocuous facts); *United States v. Olson*, 408 F.3d 366, 372 (7th Cir. 2005) (defendant's criminal record for similar conduct is relevant and has corroborative value, but alone it cannot serve to corroborate an informant's account; in any event, the good faith exception saves the warrant); *cf. United States v. Peck*, 317 F.3d 754, 757 (7th Cir. 2003) (defendant's criminal record for similar conduct is relevant to probable cause, but does not suffice by itself to corroborate the informant's statements; nevertheless, the good faith doctrine saves the warrant). *See also United States v. Cardoza*, 713 F.3d 656, 660 (D.C. Cir. 2013) (defendant's prior arrest fo selling drugs increased the likelihood he was involving in drug trafficking). *United States v. Vanness*, 85 F.3d 661,663 (D.C. Cir. 1996)(defendant' criminal record could support finding that he was dealing drugs).

In Pouliot's case, it would have been stronger evidence if the police on the scene knew how many drug-related arrests or convictions Ranta had, but their knowledge of her involvement in the meth scene provided necessary context for the glass vials and small baggies in the back seat. Pouliot is correct that sometimes a baggie is just a baggie, but Sgt. Poskozim, after several years on the local drug task force, knew from training and experience the difference between a bag for sandwiches and a bag for meth, and his impression at the time was that these were meth bags. *See, e.g., United States v. Sewell* 2015 WL 1087750 at *5 (an experienced narcotics agent

is permitted to draw reasonable inferences from the facts, and this experience adds "much weight" to the probable cause determination).

Further, this court does not determine probable cause in a piecemeal fashion, it employs a totality-of-the-circumstances approach that reviews all the evidence, taken together, in the context of the case at hand. *Id.*; *see also United States v. Caldwell*, 423 F.3d at 760-61 (although a divide-and-conquer approach might portray particular circumstances as innocuous, this misses the point of the totality-of-the-circumstances test). So, the glass vials and even Pouliot's suspicious claims bout his identity also are factored into the mix. The totality of the circumstances establish that, whatever else the SPD officers did wrong during this traffic stop, they nonetheless had probable cause to believe that Mike's car contained contraband. This justified their warrantless search of Pouliot's backpack under the automobile exception to the warrant requirement.

RECOMMENDATION

Pursuant to 42 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Ryan Pouliot's motion to suppress evidence seized during and derived from the September 23, 2014 traffic stop of Christy Mike's car.

Entered this 6th day of April, 2015.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
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April 6, 2015

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Re: United States v. Roger Pouliot
Case No. 14-cr-104-jdp

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 April 20, 2015, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by April 20, 2015, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Susan Vogel for Connie Korth
Secretary to Magistrate Judge Crocker

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).