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

UNITED STATES OF AMERICA,

Plaintiff,

v.

PETER DANIEL YOUNG,

Defendant.

ORDER

98-CR-91-X-1

Before the court are defendant Peter D. Young's motions to suppress evidence (dkt. 207), for a bill of particulars, (dkt. 208) and to dismiss Count 5 (dkt. 210). For the reasons stated below I am granting in part the remaining portion of the request for a bill and denying the motion to suppress and the unbriefed motion to dismiss.

I. Bill of Particulars

The parties have winnowed their dispute down to the identities of the unnamed coconspirators to which the conspiracy count refers. Such information still appears to be an exception to the Seventh Circuit's general antipathy towards bill of particulars. *See United States v. McAnderson*, 914 F.2nd 934, 946-47 (7th Cir. 1990)(no bill necessary where government identifies the alleged co-conspirators); *United States v. Glecier*, 923 F.2d 496, 502 (7th Cir. 1991) (one reason no bill required is because government provided names of all co-conspirators not identified in indictment); *but see United States v. Hernandez*, 330 F.3d 965,

975 (7th Cir. 2003) (government not required to identify juvenile coconspirators where no one knew their names but their identity otherwise was discernible from other discovery).

Here, in Count 5 (and Count 1, which has been dismissed), the government departed from the usual conspiracy charge boiler plate and did *not* claim that there were any "known" but uncharged coconspirators. The government cannot disclose information that it does not have. *See Hernandez*, 330 F.3d at 975. On the other hand, as Young notes in his reply brief, the government has responded to his motion by reporting that "the identity of many co-conspirators is unknown . . .." Response of the United States, dkt. 218, at 2. What is Young to infer from this statement? Given the amorphous nature of the Animal Liberation Front and the broad wording of the background paragraphs in the indictment, it is not clear who the government believes are co-conspirators, using the legal definition of that term: the publishers of "The Final Nail"? The writers of the articles and the compilers of the farm list? People who provided more active and direct support to Young and Samuels?

Perhaps at trial the government intends to introduce nothing more than the acts of Young and Samuel, encouraged and guided by the writings of anonymous like-thinkers. Or perhaps the government intends to prove up a more direct and active connection between the defendants and known ALF members. If it is the former, then there will be no surprises at trial. If it is the latter, then Young has a right to know what he will be facing so that he may prepare to defend against it. The government must commit to its theory; if it involves anyone's acts beyond the publication and dissemination of "The Final Nail," then the

government must identify those people to Young. To that extent, I am granting Young's motion for a bill of particulars.

II. Motion To Suppress

Young has alleged that local authorities violated his Fourth Amendment rights when they seized the car in which he and Justin Samuel were traveling. In 2000, Samuel filed a similar motion, and on August 4, 2000 I held an evidentiary hearing from which I found facts and recommended conclusions of law in an August 22, 2000 report and recommendation (the "RR"). On July 22, 2005, Young filed the instant motion and supplemented the record by questioning Deputy Seth Fuller at a July 27, 2005 evidentiary hearing. In considering this motion I am adopting and incorporating the facts I found in the RR, supplemented as necessary by information adduced at the July 27, 2005 hearing:

Facts

Linda and Bob Zimbal own and operate a family mink farm in Oostburg, Wisconsin. The Zimbals' residence is on Wilson Lima Road, a rural road off of County Trunk A near Oostburg. The Zimbals' mink farm is about a half mile north on Abraham Court, which is parallel to Wilson Lima and also accessible from County Trunk A. Abraham Court is about a mile long and dead ends at the mink farm.

Over the past decade or so, mink farms and mink farmers have been subjected to raids by people associated with a group known as the Animal Liberation Front (ALF). ALF publishes a document entitled "The Final Nail" in which it lists the names and addresses of mink farmers, mink farms and other people involved in the fur industry. Fur farmers surmise that The Final Nail is intended to provide targets for raiders.

In response to such activities, fur farmers and their industry organizations have organized defensively. For instance, the Zimbals were part of a telephone tree through which area fur farmers would exchange current information regarding raids on fur farms. Fur farmers also obtained copies of The Final Nail to determine which farms were listed therein; prior to October 28, 1997, Linda Zimbal was aware that her residential address on Wilson Lima Road was listed in The Final Nail.

Just prior to October 28, 1997, the Zimbals learned through their telephone tree that fur farms in central Wisconsin recently had been raided in the past few days. Linda Zimbal learned that several farms in the Mishicot area had been raided and that a particular vehicle was being associated by the fur farmers with those raids: a red Geo Metro with Washington state plate 560GDO. Zimbal heard that approximately five or six other farmers had seen the Geo in the same couple of days that the phone tree was in operation in Wisconsin and at least one of the raided mink farmers had seen the car. The raids had occurred within the past week; Mishicot is about an hour's drive from Oostburg. Farmers reported that the car had been seen prior to one actual raid and had been seen at least two other times engaged

in activity which they characterized as "casing" the fur farms: fur farmers reported having seen the Geo driving slowly to the mink farms, sitting in their driveways, slowly circling the perimeter of the farms. If anyone approached the car while stopped, the occupants would drive away without speaking to anyone. Zimbal was aware that at least some of the mink farms at which the Geo had been sighted were not on major highways where a lot of vehicles normally travel.[1]

In light of this information about recent activity in central Wisconsin, the Zimbals visited with Captain Rakow of the Sheboygan County Sheriff's Department on the morning of October 28, 1997. The Zimbals provided Captain Rakow with the information they had received from their telephone network, including the description of the suspect vehicle. Captain Rakow responded that if the Zimbals saw the suspect car, they should call 911 to get the police involved.

That same day, October 28, 1997, the Sheriff's Department disseminated to its patrol deputies an "Attempt To Locate" request from the FBI. The FBI's request had been sent to the attention of all law enforcement agencies in the area and referenced a "vehicle involved in unlawful releases of mink." The request asked all agencies to look for a red Geo Metro with Washington license plate 560GDO or 560DOO, which did not come back to this type of vehicle. The request advised that the Metro was occupied by two white males in their late

[1] Young now labels Zimbal's testimony ambiguous, conclusory and based on second hand-information. Brief in Support, dkt. 217, at 2. Young's first two characterizations are incorrect. The third is only partially correct and was self-evident at the time.

teens to early twenties. The request reported that the vehicle had last been seen on October 27, 1997 at 1:00 p.m. at a fur farm in Kewaunee County and at 3:00 p.m. in the vicinity of a fur farm at Mishicot. The request reported that on the weekend of October 25-26, there were three illegal releases of large quantities of mink from fur farms in Tomahawk, Medford and Independence, Wisconsin, and that within the past two weeks there had been similar unlawful releases in Illinois with over $800,000 worth of mink released. The FBI reported that the "above vehicle may contain excellent suspects in these and other crimes."

On the afternoon of October 28, 1997, Linda Zimbal was home washing windows. While engaged in her chore, Zimbal saw a small red car driving very slowly up Wilson Lima Road. This grabbed her attention for two reasons: no one drives slowly down that road and the car matched the general description of the suspect vehicle reported in the phone tree.

Zimbal grabbed her cellular telephone, hopped in her van, and began pursuit. Zimbal fell in behind the slow-moving westbound car and determined that it was the Geo Metro with Washington license plate 560GDO about which she had been warned. Zimbal followed the car when it turned north on County Trunk A, then turned east onto Abraham Court, the dead end where the Zimbals' mink farm was actually located. Zimbal did not follow the car down Abraham Court, but continued north and turned east onto the driveway of the next farm up the road. From this vantage point, she could see clearly down Abraham Court.

Zimbal observed the Geo travel about halfway down the road and stop. Zimbal could see two men in the car who were looking toward the farm. The passenger was holding up

a large piece of paper. The location at which the car had stopped had a good view of the Zimbals' mink farm and sheds. After sitting for about two minutes, the driver turned the car around and came back out the way he had entered. Zimbal fell in behind the car again and called 911 to contact Captain Rakow.

The 911 dispatcher eventually had Sheriff's Deputy Seth Fuller telephone Zimbal on her cell phone in her van as she followed the Geo. Deputy Fuller was then an eight year veteran of the department. Earlier that day he had been advised during roll call of the FBI's "Attempt To Locate" request. Pursuant to this request, Deputy Fuller and all of his colleagues were on the lookout for this vehicle independently of Zimbal's report.

Deputy Fuller asked Zimbal why she was following the Geo; Zimbal responded by divulging to Deputy Fuller all of the information she had regarding the previous mink releases in other locations, the sightings of the Geo near mink farms, and the activities she personally had observed that day. Zimbal remained on line with Deputy Fuller from his initial callback all the way through the ultimate police seizure of the vehicle and its occupants in Oostburg.

Toward this end, Zimbal followed the Geo into Oostburg, where she observed it pull into the parking lot of the town grocery store. The occupants of the car exited and did some dumpster diving for lunch. They then drove into a narrow side parking lot between Oostburg's hardware store and deli. Zimbal followed in her van.

About this time Deputy Fuller arrived in his squad car. Deputy Fuller parked and approached the Geo from the front. Inside he saw two young white males who matched the description of the car's occupants provided in the FBI's attempt to locate request. As Deputy Fuller approached, the driver looked up and the passenger shoved some piece of paper into the glove box. This aroused Deputy Fuller's curiosity because he saw that the paper was an open map and that the passenger put it away so quickly and messily rather than folding it.

Deputy Fuller was able to see into the glove box: the crumpled map was partially visible to him and appeared to be very detailed. This raised suspicions to Deputy Fuller since the map appeared to contain many small, unimportant roads as compared to a general atlas. The map was specifically for the southwest area of Wisconsin, which would normally not be used by someone passing through on a state highway or interstate. Deputy Fuller also observed dark clothing, which in Deputy Fuller's opinion would have been consistent with the release of mink: dark clothing would camouflage night movements.

Other law enforcement officers arrived on the scene. Although the preliminary introductions are not in the record, Deputy Fuller had occasion to question the two occupants of the car separately. The driver was Peter Young; the passenger was defendant Justin Samuel. Each man individually told Deputy Fuller that the two were on their way to Florida from Washington. Deputy Fuller was suspicious of this because it would not be a

common route to travel down County Highways in Sheboygan County to get from Washington to Florida.

In his individual conversations with each of the men, Deputy Fuller asked if they had been near the mink farm on Abraham Court. Each man told Deputy Fuller that he had not been on Abraham Court. It is not clear whether Abraham Court was marked with a street sign bearing the road's name. Neither man asked Deputy Fuller for any background information, for instance where Abraham Court was. Although Deputy Fuller mentioned the mink farm in his questioning, neither man used that as a memory cue to respond to his question: each man simply denied having been near any mink farm on Abraham Court. This further aroused Deputy Fuller's suspicions: he expected that people unfamiliar with the area, if asked whether they had been on a certain road, would respond that they might have been, but that they did not know the names of the roads or where such roads are located. Neither man did this.

About 75 minutes into the stop, the law enforcement officers decided that they would impound the Geo and apply to the circuit court for a search warrant. By then, Deputy Fuller had spoken telephonically with FBI agent Jeff Hill. Agent Hill advised Deputy Fuller that an off-duty police officer had seen this same Geo Metro in a mini-mart in Trempealeau County approximately four days prior to October 28, and that it had been seen around some other mink farms in the Wisconsin area that had been victims of mink releases. This

information contradicted Young's and Samuel's accounts that they were "just passing through" Wisconsin on their way to Florida.

After the decision was made to impound the car, Deputy Fuller offered Young and Samuel two options: they could accompany the officers down to the sheriff's office to wait while the search was conducted or a deputy would drop them off somewhere nearby. The men chose the latter option so a state trooper drove them to a nearby mini-mart.

The circuit court did not issue the requested warrant until the following afternoon, October 29, 1997. Items of evidentiary value were seized pursuant to the warrant.

Analysis

Young, like Samuel before him, claims that the authorities did not have probable cause to seize the Geo Metro and then search it. I previously found that there was probable cause for the seizure and Young has not persuaded me otherwise. Young's attempt to break apart the *gestalt* of what occurred and then individually attack the smaller pieces brings to mind the idiom of being nibbled to death by ducks. I agree with Young that there are minor discrepancies in witness accounts regarding who knew what and when, that facts from which actors on the scene drew inculpatory inferences also were susceptible to innocent explanation, but when all is said and done, the ducks have failed: there still was probable cause supporting the seizure.

The parties agree that the law on probable cause has not changed significantly, so there is no need to update the citations from the RR, although I have added some additional citations to clarify how little evidence it takes to establish probable cause. Indeed, in the past five years the Court of Appeals for the Seventh Circuit has reduced the quantum of evidence necessary to establish reasonable suspicion and probable cause. *See, e.g., United States v. Muriel*, ___ F.3d ___, ___ WL _____, Case No. 04-3968 slip. At 2-3 (7th Cir. Aug. 11, 2005) (court accepts without comment officer's claim that during traffic stop his suspicions were aroused by "three police support decals affixed to the windows, a teddy bear on the dashboard and an American flag on the front of the vehicle" because such items "are used to divert attention from illicit activity"); *cf. United States v. Olson*, 408 F.3d 366, 371-72 (7th Cir. 2005) ("slight" corroboration of informant sufficient to establish probable cause supporting warrant); *United States v. Mykytiuk*, 402 F.3d 773, 776 (7th Cir. 2005)(appellate court chooses not to second guess district court's determination that warrant lacked probable cause but hints that it would have held otherwise).

As noted in the RR, the Geo was parked in a public lot when Deputy Fuller first approached it. Even if it had not been, Deputy Fuller *at least* possessed a reasonable suspicion of criminal activity that would have justified an investigative stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). So, from the outset, Deputy Fuller was entitled briefly to detain Young, Samuel and their car if he had a reasonable, articulable suspicion that they had been involved in criminal activity, or that the Geo contained evidence of criminal activity. *See, e.g.,*

United States v. Griffin, 150 F.3d 778, 782-83. Here, the FBI's Attempt To Locate request, coupled with Zimbal's telephonic report, amply supported Deputy Fuller's initial encounter with the men.

Young challenges Zimbal's report as ambiguous, conclusory and based on second-hand information. But Zimbal actually provided the police with broad, deep and specific background information, that, even shorn of conclusory word choice, provided a nexus between the Geo to the farm attacks that had occurred when the car was observed nearby. To the extent that Zimbal was passing along what other people had told her, this hardly made her report suspect. Her information source was fellow farmers motivated to identify accurately their attackers so that they could be stopped. As just noted, the FBI had done whatever quantum of investigation it deemed necessary to issue an Attempt To Locate request, which dovetailed Zimbal's information.

Young questions the value of the FBI's request, noting that it reports activity that encompasses most of the state of Wisconsin and that it does not tie the Geo to the attacks. This is partially true and virtually irrelevant. As fur farms were attacked across this geographically vast state, the same red Geo with misappropriated Washington plates more than once was spotted in the area over a several day period. Mere coincidence? Common sense and logic suggested otherwise. Hence, the request to track down the vehicle to allow further investigation.

Within minutes, Deputy Fuller's powerful suspicions definitely ripened into probable cause supporting a full search. Probable cause exists if, given the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *See United States v. Ledford*, 218 F.3d 684, 687(7th Cir. 2000). In making this determination, police may draw inferences based on their own experience. *United States v. Faison*, 195 F.3d 890, 893 (7th Cir. 2000). A probable cause determination, by definition, is based on probabilities and need not rise to the level of a virtual certainty. *Id.* "Probable cause requires 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 United States v. Ramirez*, 112 F.3d 849, 851-52 (7th Cir. 1997)("all that is required for a lawful search is *probable* cause to believe that the search will turn up evidence or fruits of crime, not certainty that it will") (emphasis in original). Although people often use "probable" to mean "more likely than not," probable cause does not require a showing that an event is more than 50% likely. *See United States v. Garcia,* 179 F.3d 265, 269 (5th Cir. 1999); *see also Edmond v. Goldsmith*, 183 F.3d 659, 669 (7th Cir. 1999)(Easterbrook, J., dissenting) (probable cause exists somewhere below the 50% threshold).

If an officer has probable cause to search a car, then he may do so without a warrant. *See Ledford*, 218 F.3d at 687. If, however, the police decide to apply for a warrant, they may forego an immediate search and hold the automobile for a reasonable period of time while

they prepare their paperwork. *United States v. Griffin*, 150 F.3d 778, 784 (7th Cir. 1998) (it is reasonable to hold a vehicle for six hours while obtaining a warrant to search it); *United States v. Hall*, 142 F.3d 988, 994 (7th Cir. 1998)(one-day temporary detention of a computer to inspect its hard drive was reasonable).[2]

Deputy Fuller knew before even approaching the Geo that other people had linked it to several mink releases in Central Wisconsin within the past four days. True, it was not clear to Deputy Fuller (or anyone on the scene) whether the Geo had been seen speeding from a fresh release in the dead of the night with wire cutters dangling from the window, but according to Zimbal's phone tree, fur farmers had been seen this very car casing numerous mink farms in a three-county area, at least one of which had been attacked. Additionally according to the FBI's transmission, over the weekend of October 25-26, while the Geo was meandering across Central Wisconsin's back roads, three illegal mink releases occurred. Within two hours on October 27, the same Geo had been seen in the vicinity of two different mink farms. Then, Zimbal saw and reported the vehicle casing her farm in Oostburg. "Casing" is a fair and accurate verb based on what Zimbal saw and reported, and Deputy Fuller, as a veteran patrol deputy, was entitled to accept her representations on this

[2] In seeking suppression, co-defendant Samuel had argued that the one-day delay between seizure of the Geo and the issuance of the search warrant was unreasonable. The case law holds to the contrary. In any event, the exclusionary rule would offer no remedy: the police could had searched the car at the scene and found the incriminating evidence sooner, rather than later. The police should not be punished for trying to be more sensitive to the defendants' Fourth Amendment rights than the law required.

point. One could argue with some merit that these facts alone provided probable cause to search the Geo.

Keep in mind that the question is not whether Deputy Fuller had probable cause to arrest Young and Samuel—although he may well have—but whether it was reasonable for Deputy Fuller to conclude simply that there was a fair probability that evidence of the crimes would be found in the Geo. It would not matter if Deputy Fuller was correct in this belief, only whether it was reasonable for him to reach this conclusion. *See, e.g., United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000)(stop was legal if trooper reasonably believed the car's windshield was cracked to an impermissible degree, even if it wasn't actually impermissibly cracked). Given the multiple sightings of this specific car near so many mink farms in such a concentrated area over a continuous several day period—including a drive-by in Oostburg twenty five minutes before Deputy Fuller approached the car—and given that at least one of those mink farms had been raided, it was more than a mere hunch or assumption for Deputy Fuller to conclude that probably there was evidence in the Geo relating to illegal fur farm attacks. Perhaps Deputy Fuller could not specify *what* evidence he would find, but it was probable that he would find *something*, be it wirecutters, a diary, a marked map, dark clothing, or some other evidence of the crime.

But there was more: upon approaching the Geo, Deputy Fuller observed two occupants who matched the FBI's description of the occupants previously observed in the car. Samuel aroused suspicions by quickly and messily shoving his detailed area map into

the glove box upon Deputy Fuller's approach. Deputy Fuller still was able to discern the nature of this map which could be viewed as the figurative smoking gun: while not contraband in and of itself, such a detailed map probably was direct evidence of the crimes under investigation. It would be fair for Deputy Fuller to infer that the map would include the geographic areas at which the cased or vandalized mink farms were located; it would be reasonable for Deputy Fuller to conclude that such a map might also be marked to show exact fur farm locations.[3] Additionally, Deputy Fuller saw dark clothing in the car, which he surmised could be used to camouflage night maneuvers. This observation by itself was not compelling to the probable cause analysis, but it had *some* evidentiary value. To the same effect, the clothes themselves properly could be viewed as possible evidence of the suspected crimes and thus subject to seizure.

Young challenges the evidentiary value of the map and the clothing to no avail. Yes, some people prefer "blue highways,"[4] and everybody in America probably owns some dark clothing. According to Young, it was just as likely that he was a camper as a saboteur. But how many days would even the most unhurried camper in America spend traversing Wisconsin while motoring cross-continent in a Geo? It defies credulity. Regardless, the fact that Young can hypothesize possible innocent explanations for some of the evidence does

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[3] I have not seen the map, so I do not know whether it actually has evidentiary value. My point is that these would have been valid inferences for Deputy Fuller to have drawn on the scene.

[4] Near the time that William Least Heat-Moon published his book "Blue Highways," British punk rocker Billy Idol released his song "Blue Highway." Mere coincidence or evidence of a trans-Atlantic conspiracy? Young would endorse the former, the government the latter, or at least would investigate further before committing . . .

not bar Deputy Fuller from considering this evidence as parts of a totality and then drawing reasonable inculpatory conclusions therefrom. *United States v. Scott*, 19 F.3d 1238, 1242-43 (7th Cir. 1994). Locals had seen this Geo cruising near mink farms, which most easily could be located by using such a map. When Young and Daniel saw Deputy Fuller approaching, they hurriedly stuffed the unfolded map into the glovebox. In isolation, any of the facts known to Deputy Fuller can be explained away; in their totality, these facts clearly establish probable cause to search the Geo.

Finally, in response to Deputy Fuller's specific inquiry, both men unhesitatingly denied having been near any mink farm on Abraham Court. This was unwise: first, Deputy Fuller knew this to be untrue; second, Deputy Fuller reasonably expected that a guileless traveler would have been more circumspect regarding the specifics of his travels through unfamiliar parts. Young argues that, absent proof that there was a street sign on Abraham Court, it is unfair to surmise that his denial was knowingly false. That may be true as far as it goes, but that's not very far: as the government rejoins, if Young didn't know where he *had* been, how could he be so cocksure of where he *hadn't*? It is a minor point in the probable cause calculus, but it whatever heft it has weighs against Young, not for him.

In sum, notwithstanding Young's current challenges, there was more than enough direct and circumstantial evidence to establish probable cause that the Geo contained evidence of illegal mink releases. This isn't a case of "nothing added to nothing," but a series

of small to mid-sized "somethings" coalescing into probable cause. Young is not entitled to suppression of any evidence seized from the Geo or derived from the search.

III. Dismissing Count 5

Young filed a motion to dismiss Count 5 pursuant to F.R.Cr.P. 7(c)(1) because the grand jury failed to cite to the charging statute. Young acknowledged that Count 5 appeared to charge him with conspiracy but claimed, unconvincingly, that he wasn't sure of this and his uncertainty affected his ability to defend himself. Perhaps in recognition of the merits of this motion, Young decli

ned to brief it, which constitutes a waiver of his claim. *See United States v. Stevens*, 380 F.3d 1021, 1024-25 (7th Cir. 2004).

In any event, dismissal is not warranted: courts review violations of Rule 7(c)(1) for prejudice, and here the failure to cite 18 U.S.C. §371 was harmless. *Cf. United States v. All Assets and Equipment*, 58 F.3d 1181, 1184 n.2 (7th Cir. 1995) (incorrect citation to charging statute not grounds for dismissal if harmless). Here, the indictment contains the elements of the offense charged, fairly informs Young of the nature of the charge against which he must defend (particularly as amplified by the back-and-forth on Young's request for a bill of particulars), and enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. This is enough. *See United States v. Webster*, 125 F.3d 1024, 1029 (7th Cir. 1997).

ORDER

It is ORDERED that:

1) Defendant Peter D. Young's motion for a bill of particulars is granted in part and denied in part as stated above;

2) Defendant's motion to suppress evidence is denied; and

3) Defendant's motion to dismiss Count 5 is denied.

Entered this 30th day of August, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge