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

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND RECOMMENDATION

v.

AJA E. FUDGE, 01-CR-09-C-5
STERLING C. DANIELS, and 01-CR-09-C-8
DAMIEN L. COBBINS, 01-CR-09-C-9

Defendants.

REPORT

All of the defendants in this case have reached plea agreements with the government except for Rodney Raines, who has not yet appeared. The three defendants listed in the caption of this report and recommendation have negotiated conditional guilty pleas, reserving their right to appeal the court's ruling on some of their pretrial motions. Aja Fudge and Damien Cobbins still seek rulings on their motion to suppress wiretap evidence. Fudge has also moved to suppress an in-court identification by a government informant. Sterling Daniels seeks to suppress his post-arrest statement. These defendants have abandoned their other pending motions.

I am recommending that this court deny the four remaining motions. The wiretap was legal. The police have not tainted the informant's ability to attempt to identify Fudge. Daniels's confession was knowing and voluntary.

I. Dockets 85 and 110: Fudge's and Cobbins's Challenges to the Wire Tap

The government sought and obtained an order authorizing it to intercept communications on three cellular telephones used by some of the defendants in this case. Defendants Fudge and Cobbins have moved to suppress evidence obtained from the interceptions, arguing that the agents failed to demonstrate the need for a wiretap, then failed to minimize their interception of non-pertinent calls. They also argue that the paperwork is fatally defective because neither the application nor the court's order specifically identifies which official in the Department of Justice authorized this application, as required by statute.

On May 24, 2001 I held an evidentiary hearing on the minimization claim. From that hearing and from the documents submitted by the parties, I find the following facts:

Facts

On May 8, 2000, the government, by Assistant United States Attorney Jeffrey Anderson, filed a sworn application with this court requesting authorization to intercept communications from three cellular telephones bearing the numbers 345-3523, 347-3523, and 345-4450 (all in area code 608).

To fulfill one of the procedural requirements of Title III[1], AUSA Anderson averred in his application that:

[1] That is, Title III of the Omnibus Crime Control and Sate Streets Act of 1968, 18 U.S.C. Sections 2510-2520.

> Pursuant to § 2516 of Title 18, United States Code, the Attorney General of the United States has specially designated the Assistant Attorney General, any Acting Assistant Attorney General, any Deputy Assistant Attorney General, or any acting Deputy Assistant Attorney General of the Criminal Division to exercise the power conferred on the Attorney General by § 2516 of Title 18, United States Code, to authorize this application. Under the power designated to him by special designation of the Attorney General pursuant to Order Number 95-1950 of February 13, 1995, an appropriate official of the Criminal Division has authorized this Application. Attached to this Application are copies of the Attorney General's order of special designation and the memorandum of authorization approving this Application.

See Govt. Exh. 1.

Attached to Anderson's application is a May 5, 2000 memorandum from James K. Robinson, Assistant Attorney General for the Criminal Division to Frederick D. Hess, Director of the Criminal Division's Office of Enforcement Operations. In that memorandum, Robinson stated (in the first person) that he authorized the wire tap application for the three telephone numbers listed above. The letter, however, was not actually signed by Robinson, but was signed by Kevin V. DiGregory, Deputy Assistant Attorney General. The memorandum's letterhead states that it is from the U.S. Department of Justice, Criminal Division.

Also attached to Anderson's application was a cover letter to the U.S. Attorney, to the attention of AUSA Anderson, signed by Frederick D. Hess, the previously-mentioned director of the Office of Enforcement Operations indicating that "a duly designated official of the Criminal Division has authorized an application to be made to a federal judge of competent jurisdiction for an order under § 2518 of Title 18 . . . ." Also attached to Anderson's application

is a copy of order number 1950-95, signed by Attorney General Janet Reno on February 13, 1995.

Filed with Anderson's application was the affidavit of Shawn B. Johnson, the FBI's lead agent in this investigation. *See* Govt. Exh. 2. Agent Johnson's 46 page affidavit was submitted to establish probable cause and to meet the other statutory requirements for authorization of the wire tap. Agent Johnson averred that Kenneth L. Baker and Stacy D. Miller, along with numerous associates, were receiving cocaine from Chicago, Illinois as part of a Black P Stone Nation drug trafficking ring in Madison. Agent Johnson alleged that the organization ran its operations out of multiple residences in Madison and used numerous vehicles to facilitate narcotics distribution and cellular telephones in an effort to avoid police detection of their operations.

Investigation had revealed that these phones were not physically located in a private residence or business, and there was no evidence that any of these phones were used by any person for any purpose other than drug trafficking. Confidential informants and an undercover officer had called these three telephones to order crack cocaine; these calls often involved slang or veiled language to avoid direct reference to crack cocaine.

Agent Johnson listed 12 target subjects that he believed were currently involved in the distribution of cocaine by the Black P Stone Nation organization in Madison, Wisconsin, and whom he expected to be using the targeted cell phones. Some of these people are defendants in the instant case, many of them are not. Johnson provided an overview of the task force's

investigation, which up to that point had used confidential informants, an undercover agent, and other investigative techniques such as pen registers.

Agent Johnson outlined the work performed by the task force's three confidential informants. CI-1 had made four controlled purchases of crack cocaine from various P Stone gang members. CI-2 had bought drugs six times from various P Stone members. CI-2's information resulted in the execution of one state search warrant on a P Stone apartment, which resulted only in the seizure of about $3000 cash from Baker. CI-3 successfully bought crack cocaine directly from Winfield. CI-3 provided information that resulted in a search that resulted in the seizure of a handgun and 129 grams of crack cocaine belong to Paul Winfield.

The undercover agent, through a different confidential informant intermediary (who claimed to have bought cocaine from Baker 20 times) purchased cocaine base directly from Baker on several occasions. In a November 15, 1999 telephone call, the undercover agent called Baker at one of the targeted cell phones and asked for a half of "crack." Baker responded, "Don't talk like that!" *See* Johnson Affidavit at ¶. 23. Agent Johnson then described various purchases by the undercover agent from various targets.

Agent Johnson provided a synopsis of pen register and toll record information for the targeted telephones. Between March 10, 2000 and May 3, 2000, two of the targeted telephones were used over 7,000 times (each receiving over 5,000 incoming calls), and the third phone was used over 8,000 times (of which over 7,500 were incoming calls). Agent Johnson detailed that hundreds of calls were made to and from numbers associated with persons believed to be involved in drug trafficking. Agent Johnson stated his belief that Stacy Miller was probably

contacting Baker, Davis and Winfield on the telephones, based on his understanding of how the operation worked. The toll records, however, did not reflect any outgoing calls to numbers associated with Miller.

Agent Johnson then opined on the necessity for a wire tap in this investigation. He stated that based on his training and experience, an intercept was the only available technique that had a reasonable likelihood of securing the evidence necessary to prove that the targets were engaged in the suspected drug offenses.

In supported of this contention, Agent Johnson alleged that the confidential informants had had only limited success because they had not, despite attempts to do so, been able to uncover evidence of the scope of the gang's enterprise, the identification of "substantially all members of the organization," to identify preparation or storage locations, to identify transportation methods or suppliers from Chicago, the location of the Chicago suppliers, nor to identify the assets obtained by the gang through its drug sales. Although the informants had provided information regarding certain "cells" of the gang distribution network, this did not allow the task force to work proactively, nor did it reveal the underlying structure of the gang's sophisticated distribution system. By way of example, Johnson pointed out that although the informants' information had allowed the task force to obtain search warrants for drug houses, for the most part, the gang had moved its operations to new locations before the warrants could be executed. Informants simply could not provide the big picture, nor could they provide a timely moving picture of the gang in action.

Similarly, Agent Johnson pointed out the successes and failures of the undercover agent. Agent Johnson observed that each time the undercover agent met with the targets, the targets seemed to sniff out the surveillance teams that were following. Even so, the agent had bought large quantities of cocaine base from certain gang members, but could not move up the ladder to meet Miller, the reputed head of the Madison organization. Agent Johnson believed that Miller would reveal his leadership role when he talked to the other targets on the targeted cell phones.

Agent Johnson discounted the overall effectiveness of witness interviews since they were hard to obtain in the first place and rarely gave a complete view of how the gang worked. Agent Johnson also discounted the effectiveness of a grand jury investigation or physical surveillance, noting that neither was likely to be highly successful. The trap and trace records already undertaken, while helpful, were also of limited use because they did not reveal who was on the telephones or what they were saying. The search warrants already attempted generally had been unsuccessful because the task force had trouble obtaining current information that would allow it to keep pace with the gang's constant relocations.

On May 8, 2000, this court signed the application and authorized interception of telephone calls on the three targeted cell phones. The court ordered that certain named law enforcement agencies "are authorized, pursuant to an application authorized by a duly designated official of the Criminal Division, United States Department of Justice, pursuant to the power delegated to that official by special designation of the Attorney General and vested

in the Attorney General by Section 2516 of Title 18, United States Code, to intercept wire communications." *See* Gov't. Exh. 3 at 2.

Before flipping the switch, Agent Johnson and Assistant United States Attorney Jeffrey Anderson convened a meeting at the F.B.I. office for all monitors and "plant managers." Monitors are agents who actually listen to the intercepted telephone calls and keep logs of the interceptions and minimizations. Between three and five monitors served on each shift, supervised by a "plant manager" who reported to Agent Johnson.

At the May 8 meeting, Agent Johnson and AUSA Anderson handed out copies of the interception application, affidavit and order to each monitor and plant manager to read. Time was given to allow reading, then each person signed a verification sheet indicating that he or she had read these documents. Then AUSA Anderson explained how the process of minimization would work during the interception, and handed out an explanatory memorandum. Anderson read the entire memorandum aloud.

The interception ran from May 8 to June 6, 2000. The phones were intercepted for 18 hours a day every day during that period. Agent Johnson was working his regular daytime shift 7 days/week during this period so that he could check the logs being generated, check the minimization records, get reports of activity and generally oversee and direct the operation. Agent Johnson would review and collate the daily logs prepared by the monitors and plant managers. He would then pass his reports along to AUSA Anderson, and would converse with him telephonically on a regular basis.

Despite all this preparation and all the direction provided, each plant manager used different techniques to fill out their statistical logs. When they broke out the calls on the written forms, the plant managers would report all "use" of the phone, including activity during which there was no conversation (which was frequent). However, some plant managers included "no conversation" calls within the total number of intercepts reported, while others reported them separately. Because there is no way to discern which manager used which technique, one cannot determine from the daily statistical reports alone how many times the telephone was "used" during a particular shift. One would have to review the activity logs separately to make this determination.

Similarly, although it appears that the monitors and plant managers were accurate in reporting how many times they minimized telephone calls during each shift, they seem to have reported each minimization separately, even if they minimized the same telephone call more than once. Thus, if a monitor minimized the same telephone call five times, one might infer from looking at the daily statistical report that five calls out of that day's total were minimized, when in fact only one call had been minimized.

Further, the decision as to which calls to minimize and when to minimize and which calls to deem "pertinent" and which to deem "non-pertinent" was very subjective.

During the 30-day interception, each telephone was "used" over 1000 times. Very, few calls were minimized. Most of the calls were less than one or two minutes in length, so it was difficult for the monitors to obtain enough information to determine whether

minimization was appropriate. Hundreds of voices were heard on the telephones, with new voices appearing throughout the 30 days of interception.

As required by the statute, Agent Johnson and AUSA Anderson made "ten day reports" to this court on May 18 and May 30, providing updated information about what was happening.

Analysis

A. Failure To Specify the Authorizing Official

Cobbins, joined by Fudge, argues that AUSA Anderson's application violates 18 U.S.C. § 2518(1) & (1)(a) because it fails to identify on oath or affirmation the officer authorizing the application. Cobbins also argues that the court's authorization order violates 18 U.S.C. § 2518(10(a)(ii) because it fails to specify the identity of the person authorizing the application. Cobbins argues that these violations merit suppression of all evidence seized during the intercept.

Technical violations of Title III, even those that seem picayune, can cause a court to quash a wiretap and suppress all evidence obtained from it. The purpose of the wiretap statute, enacted in 1968, was to *prohibit* interception of oral and wire communications except as specifically provided for in the act. *See United States v. Giordano*, 416 U.S. 505, 514-15 (1974). In *Giordano*, the Court held that the Department of Justice had not properly authorized a wiretap application when the Attorney General's Executive Assistant, with the

express permission of the Attorney General, had indicated to the Assistant Attorney General for the Criminal Division that he could authorize the wiretap in question. Section 2516(1) limited authorization power to the Attorney General or specially designated Assistant Attorneys General; the Executive Assistant was neither. *Id.* at 513. The Supreme Court thought that this was a distinction with a difference because Congress had intended wiretap authorizations to be limited to those responsive to the political process, a category to which the Executive Assistant did not belong. *Id.* at 520. Since the issue turned on the provisions of Title III rather than the judicially fashioned exclusionary rule, the Court held that suppression was appropriate. *Id.*

On the other hand, in the companion case of *United States v. Chavez*, 416 U.S. 562 (1974), the Court held that no suppression was necessary where the Attorney General actually had authorized the challenged wiretap, but the application and order incorrectly had identified the Assistant Attorney General as the authorizing official. *Id.* at 569. The Court held that

> [W]e do not condone the Justice Department's failure to comply in full with the reporting procedures Congress has established to assure that its more substantive safeguards are followed. But we cannot say that misidentification was in any sense the omission of a requirement that must be satisfied if wiretapping or electronic surveillance is to be lawful under Title III.

Id. at 572-73. In other words, the reporting requirements are important not for their own sake, but so that it is possible to ensure compliance with Title III's substantive requirements.

One must be able to determine where the buck stops so that if a substantive violation occurs, the appropriate official can be held responsible for his acts or omissions.

Cobbins' complaints fall under the holding of *Chavez*, not *Giordano.* Cobbins complains that he cannot determine from AUSA's Anderson or the attached letters and memos who actually authorized the application. Obviously, it was Kevin V. DiGregory, Deputy Assistant Attorney General for the Criminal Division, a person in whom Attorney General Reno had vested the power to authorize wiretap applications.

Could this have been clearer? Yes. *Must* it have been clearer? No. The Department of Justice is a government bureaucracy like any other, as revealed by its response to AUSA Anderson's request for authorization. Obviously, the Office of Enforcement Operations vetted Anderson's request and sent it to Assistant Attorney General Robinson for approval, probably accompanied by a draft approval letter for Robinson to sign. For whatever reason, Robinson was unable to review the application personally, so his deputy did. Rather than re-draft the letter or re-route it to OEO, DiGregory simply signed his name to Robinson's draft letter.

From the dates provided and the phrasing chosen, I further surmise that AUSA Anderson prepared his application to the court before knowing which particular DOJ official would sign the authorization letter. To forestall the need to type yet another draft once he obtained approval, Anderson chose to incorporate by reference the later-received letter, which he attached.

If such bureaucratic shortcuts were to be declared unlawful, then the entire federal government likely would grind to a halt. Which might not strike some people as such a bad idea; but the issue before this court is whether the challenged shortcuts violated Title III. They did not. DOJ's chain of command is easy to trace from AUSA Anderson's application and attachments, so Cobbins has no legitimate beef.

Cobbins' claim against the court's order is meatier, but ultimately fails for the same reason. Section 2518(4)(d) required that this court's order "shall specify . . . the person authorizing the application." As noted above, this court's order did not name a name: it simply indicated that a person duly designated by the attorney general had authorized the application. This is not "specification." Full compliance with the statute would have required the court to name DAAG DiGregory in its order; at least the court should have cited to and incorporated by reference the attachments to AUSA Anderson's application. Therefore, this is probably a violation of Title III.

But it appears to be a technical violation susceptible to forgiveness under *Chavez*, rather than a substantive violation subject to suppression under *Giordano*. As previously noted, DiGregory's identity is easily discerned from a review of the court's file, including the attachments to the government's wiretap application. Anyone person interested in challenging this specific wiretap, or just generally interested in reviewing whether the executive and judicial branches are complying with Title III, could quickly determine substantive compliance from the documents filed as a group with the court. Although this

court should have attempted more diligently to comply with § 2518(d)(4), any failure did not violate any substantive requirement of Title III and did affect Cobbins's or Fudge's substantive rights. This is not a basis to suppress evidence.

B. Lack of a Showing of Necessity

Fudge, joined by Cobbins, contends that the government did show the necessity for this wiretap as required by statute. Section 2518(1)(c) requires each application for a wiretap to provide a full and complete statement as to whether other investigative procedures have been tried and failed, or why these procedures reasonably appear to be unlikely to succeed, or reasonably appear to be too dangerous. As Fudge points out, this "necessity" requirement ensures that the government does not resort to wiretapping when traditional investigative techniques would suffice to expose the crime. *See United States v. Kahn*, 415 U.S. 143, 153 n.12 (1974). Fudge argues that the government did not sufficiently demonstrate to the court that traditional investigative techniques would not suffice. Fudge parses Agent Johnson's affidavit to show why this is so.

Fudge acknowledges that Agent Johnson "hedged his bets" by averring that other investigative techniques would not turn up sufficient evidence to prosecute successfully all the members of the Black P Stone gang who are involved in drug trafficking in Madison. But Fudge observes that the task force already had robust evidence against Kenneth Baker, Mitchell Davis and Paul Winfield as a result of the controlled drug buys by the CIs and the direct drug purchases by the undercover agent.

Fudge also points out that the task force had at least one cooperating witness whom it did not even reveal to the court: on January 11, 2000 (months before the wiretap application) task force agents arrested Edward McChristian in possession of about 30 grams of crack. *See* Affidavit in Support, (attached to Dkt. 85) at ¶ 5. In a post-arrest confession, McChristian admitted that he was a soldier in the P Stone nation, that he had made 10 to 15 trips to Madison in the past month to supply crack cocaine, and that the source of his drugs was Damien Cobbins. Fudge wonders why the task force did not inquire further to exhaust McChristian's knowledge of the P Stone nation's hierarchy and operations. Fudge suggests that McChristian's willingness to cooperate demonstrates two things: first, that Agent Johnson withheld material information from the court, and second, that coconspirator interviews were more likely to succeed than Agent Johnson predicted.

Finally, Fudge dismisses the government's claimed objective of trying to prosecute successfully *all* P Stone members selling drugs as "somewhat unrealistic, if not grandiose." Reply Brief, Dkt. 172, at 2. To the extent that the government meant to limit its objective to taking down Stacey Miller and his entire cell, Fudge argues that there was little in the affidavit that would suggest that a wiretap *would* be successful as to Miller, and there was no showing that traditional investigative techniques would *not* be successful as to Miller. So, contends Fudge, although the government need not pursue every alternative means of investigation, it should not ignore avenues of investigation that appear both fruitful and cost

effective. *See United States v. Ippolito*, 774 F.2d 1482, 1486 (9th Cir. 1985); therefore, the government did not sufficiently demonstrate the necessity of the requested wiretap.

The government responds with a short exegesis of the law in this circuit followed by a long defense of its tactics. *See* Government's Brief in Opposition to Motions To Suppress, Dkt. 161. First, the requirements of § 2518(1)(c) are disjunctive, not conjunctive, which means that the government need only establish one of the three. *See United States v. Adams*, 125 F.3d 586, 595 (7th Cir. 1997). In other words, the government doesn't even have to attempt other techniques, nor provide chapter and verse as to why it thinks those techniques will be insufficient; all it need do is show that other techniques are reasonably unlikely to succeed. *See United States v. Zambrana*, 841 F.2d 1320, 1329 (7th Cir. 1988). The review of the government's presentation on this point must be practical and commensensical. *See United States v. Anderson*, 542 F.2d 428, 431 (7th Cir. 1976). This court's after-the fact review of the issued warrant must be deferential, since the warrant and supporting affidavit are presumed valid. *See United States v. Jackson*, 65 F.3d 631, 635 (7th Cir. 1995)(dealing with a *Franks* challenge to a wiretap, *see Franks v. Delaware*, 438 U.S. 154, 171 (1978)) .

As the government correctly observes, strong evidence against some coconspirators in a drug ring from other investigative techniques does not obviate the need for a wiretap. The government has a legitimate interest in identifying the full scope of the targeted organization, and if it can show that other techniques are not likely to achieve this goal, then it has shown necessity. *See United States v. Adams*, 125 F.3d at 595-96.

Here, the government was attempting to identify and extinguish the entire P Stone cell in Madison in one fell swoop. Although the task force had information that Stacey Miller was the leader of this cell, it was having no luck generating any direct evidence against him. The CIs weren't buying drugs from him, the undercover agent's efforts to meet him were rebuffed, McChristian apparently dealt with Cobbins, and the pen registers weren't showing Miller as a subscriber to any of the numbers calling or being called by the targeted telephones. Fudge's other suggestions (to review financial records and to subpoena known associates to the grand jury) were no more likely to succeed than these.

So, the next logical step was the wiretap. Contrary to Fudge's assertion, it was reasonable for the agents to believe that they would hear Miller speaking with his minions on their cell phones, and the fact that this did not occur does not make this belief unreasonable in retrospect. If Miller were directing operations, then it was reasonable to believe that he would be calling his associates on their business phones. It's not surprising that the pen registers did not reflect a number associated with Miller, since the most logical way for him to run a drug business over the telephone would be from a line that could *not* be traced back to him.

As is always the case, the task force could have done more, tried harder, waited longer, and undertaken greater risks before seeking a wiretap. But § 2518(1)(c) does not require the government to prove total exhaustion and genuine futility. Here, the government provided

sufficient information to prove the necessity of the wiretap. The court should not suppress evidence on this ground.

C. Inadequate Minimization

Fudge and Cobbins allege that the task force agents did not properly minimize their interception of nonpertinent calls made on the three cell phones, as required by 28 U.S.C. § 2518(5). They argue that because no one had a clear understanding of what constituted a pertinent telephone call, the monitors had unbridled discretion to deem a call pertinent and intercept it. Further, the small number of calls actually minimized (4% on one phone, 7.5% on another) demonstrates that the monitors were not minimizing enough. These percentages, coupled with the agents' ability to abuse their discretion, rendered this interception an unlawful general warrant for which the remedy should be the suppression of all intercepted calls. *See, e.g., United States v. Suquet*, 547 F.Supp. 1034, 1039-40 (N.D. Ill. 1982).

The Seventh Circuit has yet to endorse the total suppression remedy, and even courts that use it find it appropriate only when there has been "a clear case of monitoring abuse." *United States v. Suquet*, 547 F.Supp. at 1039. There was no monitoring abuse in this case, so suppression is not warranted.

First, § 2518(5) does not prohibit the interception of all nonrelevant conversations but rather instructs the monitors to minimize their interception of such conversations. *Scott v. United States*, 436 U.S. 128, 140 (1978). The determination whether a monitor violated

the minimization requirement turns on an objective assessment of the monitor's actions in light of the facts and circumstances confronting him at the time. *Id.* at 136. One way to frame the question is to ask whether the government has done all that it could to avoid unnecessary intrusion. *United States v. Suquet*, 547 F.Supp. at 1036, quoting *United States v. Quintana*, 508 F.2d 867, 874 (7th Cir. 1975). As the government points out in its response, factors that courts deem relevant to this inquiry are: 1) the nature and complexity of the organization and crimes under investigation; 2) the location of the intercepted telephones and the uses to which they are normally put; 3) the brevity of the calls; 4) the expected contents of the calls; 5) the degree of contemporaneous judicial oversight; 6) the thoroughness of the government's precautions regarding minimization. *See* Government's Brief in Opposition, Dkt. 161, at 6-7, citations omitted.

In this case, all of the factors indicate that the government's minimization efforts were appropriate, and that the wiretap did not transmogrify into a general warrant. First, the government was investigating an ongoing multistate drug trafficking conspiracy, focusing on the nomadic Madison outpost of a large and well organized Chicago street gang. Extensive monitoring was justified so that the task force could attempt to determine the scope, composition and organization of this mobile enterprise.

Second, all three cell phones were carried by suspected drug traffickers and appeared to be used almost solely for drug business. They were located not in private residences and

they were not associated with legitimate businesses. This lowered the risk of intercepting personal, nonpertinent calls and allowed the monitors more leeway to stay on line.

Third, virtually all of the calls were less than two minutes long, with a substantial number less than one minute long. Very short calls need not be minimized at all because they do not provide a monitor enough time to decide whether to minimize. At least one district court has ruled that it was reasonable for the government not to attempt to minimize calls or conversations less than three minutes long. *See United States v. Costello*, 610 F.Supp. 1450, 1476 (N.D. Ill. 1985). In this case, given the penchant of the targets and their customers to talk in code, and given the hundreds of different voices that were heard, it was imminently reasonable for the agents to stay on line for one or two minutes before choosing to minimize. The result, as Fudge points out, was that the monitors minimized very few calls, but this was merely a necessary corollary of the brevity of the calls intercepted. It does not support Fudge's contention that the agents were under-minimizing.

Fourth, as noted, most of the conversations were veiled or coded, which impeded the monitors' ability to make quick minimization decisions.

Fifth, the government presented two reports to the court. Apparently the court had no problems with the way things were going because it did not order any changes.

Finally, the government went to great lengths to ensure that its monitors and plant managers understood and complied with their minimization obligations. Even so, the rules were vague enough to allow subjectivity to creep into the reporting process. Under some

circumstances, this could present a problem, but not here. Given that the overwhelming majority of intercepted calls were brief and vague, the reporting variations that occurred are inconsequential to the minimization analysis. As the government notes, although Fudge has exposed some reporting flaws, she has not identified any specific calls that should have been minimized but were not.

In sum, the government complied with Title III's minimization requirement. This is not a basis to suppress evidence.

II. Docket 79: Aja Fudge's Motion to Suppress Identification Testimony

Fudge has moved to suppress any attempted in-court identification of her by government witness Gerard Rabe. About a month after Rabe bought crack cocaine from a woman, a task force agent showed him a picture of Aja Fudge, whom Rabe identified as the seller. The government concedes that this photographic identification was suggestive, but it still intended to have Rabe attempt to identify Fudge at trial. Fudge protests, arguing that Rabe's memory has been tainted by the suggestive procedure.

On May 31, 2001 I held an evidentiary hearing on this motion. Having heard and seen Rabe testify and having judged his credibility, I find these facts:

Facts

Gerard Rabe (pronounced "Robbie") is a 38 year-old crack addict who is currently serving a work release sentence at the Dane County Jail. In 1998, Rabe began working as

a confidential informant for the Dane County drug task force. Rabe was a drug addict at the time and has remained a drug addict while working for the police. To the best of his recollection, Rabe began working on the investigation of these defendants in late 1998. His normal source of crack was "P-Dub," whom he would telephone to set up purchases. In January 2001, P-Dub was living in an apartment on Madison's east side with "Ronnie," another crack dealer with whom Rabe sometimes dealt.

On January 12, 2000, at the behest of the task force, Rabe called P-Dub to set up a crack purchase. While talking to P-Dub on the phone, Rabe heard Ronnie talking in the background. Rabe and P-Dub agreed to meet at a Citgo station near Old Thompson Road, near P-Dub's apartment.

Rabe and the undercover agent drove to the Citgo and waited. Rabe had smoked crack cocaine one or two hours earlier. It was after dark. P-Dub did not show up personally, but he sent a woman associate with whom Rabe was familiar. Rabe had seen this woman with Ronnie at the apartment several times and actually had bought crack cocaine directly from her on two previous occasions. Initially Rabe did not recognize her as she walked toward his car because she had the hood up on her coat.

Rabe got out of the car and met with the woman face to face, about a foot apart. Although the woman was wearing a hood, Rabe could clearly see her face. Rabe did not remember her name, although they had probably been introduced before. The transaction took one or two minutes. Rabe was nervous, as always, and once the transaction was complete, he and the undercover officer promptly departed.

The first time Rabe had bought crack cocaine from this woman before was when he was staying at a Microtel near the interstate. Rabe recalls this being in the fall of 1998 at nighttime. The woman drove up in a car, met with Rabe for a couple of minutes to complete the transaction, then drove off. Rabe returned to the motel to smoke the crack. (Apparently this was not a purchase on behalf of the task force).

The second time Rabe had bought crack cocaine from this woman was at Apartment 207, where P-Dub and Ronnie lived. Again, Rabe was close to the woman and interacted with her face to face for several minutes. Apparently, Rabe did not make this purchase under the auspices of the task force, either.

Aside from these three face-to-face drug purchases, Rabe had encountered this same woman approximately six other times in the company of Ronnie or P-Dub. The longest single interaction would have been ten minutes at the apartment when a number of men associated with the P Stones were present, along with the woman. Rabe had surmised that this woman and Ronnie were romantically involved since they exhibited signs of affection, such as kissing and holding hands.

On February 14, 2000, Detective Dennis Gerfen of the drug task force showed Rabe a single photograph of defendant Aja Fudge. Rabe identified Fudge as the woman who had sold him drugs on January 12, 2000 at the Citgo station. Rabe was100% certain of this identification at the time and remains 100% certain of it now.

Analysis

A defendant has a due process right not to be identified prior to trial in a manner that is unnecessarily suggestive and conducive to irreparable mistaken identification. *Cossel v. Miller*, 229 F.3d 649, 655 (7th Cir. 2000), quoting *Stoval v. Denno*, 388 U.S. 293, 301-02 (1967). A single-photograph "show-up" is unnecessarily suggestive, *see id.*, and the government has conceded as much here. Even so, an in-court identification that follows an impermissibly suggestive pretrial identification is admissible if under the totality of the circumstances the in-court identification was reliable. When the government concedes the suggestiveness of the pretrial identification procedure, it has the burden of proving by clear and convincing evidence that the in-court identification will be based upon observations of the suspect other than the tainted identification. *Id.*

Courts customarily consider the five "*Biggers* factors" to determine whether to allow an in-court identification attempt following an impermissible suggestive pretrial identification: 1) The opportunity of the witness to view the criminal at the time of the crime; 2) the witness's degree of attention at the time of the crime; 3) The accuracy of the witness's pre-identification description of the criminal; 4) The level of certainty demonstrated by the witness at the time of the identification; and 5) The length of time between the crime and the identification. *Cossel*, 229 F.3d at 655, citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

Here, despite Rabe's routine nervousness, despite his relatively recent drug use and despite the drug dealer's hooded coat, Rabe had an excellent opportunity to view her. They stood toe-to-toe for one or two minutes while exchanging drugs and money. Rabe recognized the seller at the time because she had sold to him twice before and they had encountered each other six times previously in other settings, once for as long as ten minutes. Rabe already knew who this person was, although he could not remember her name.

Second, unlike a bank robbery witness who may have been standing in the teller's line daydreaming when the gun got drawn, Rabe's sole purpose for being at that Citgo station was to meet with the drug seller and complete the transaction at the direction of his task force handlers. He was nervous for a lot of good reasons, but he was focused enough on his assignment to recognize the seller as someone with whom he had dealt several times before.

The third factor does not apply here because Rabe never provided a description of the seller.

Fourth, Rabe was 100% certain of his identification when Detective Gerfen showed him the picture and he remained 100% certain at the evidentiary hearing 15 months later. Given everything else Rabe said at the hearing, I do not doubt his certainty.

Fifth, a month passed between the drug buy and the identification. In the context of identifications, that's a relatively long time. But it's almost irrelevant in light of Rabe's familiarity with the seller. Although the detective shouldn't have shown Rabe a single photograph (if only to avoid a subsequent motion to suppress), under these circumstances,

it was almost a formality. The suggestive identification procedure had no chance of tainting Rabe's identification of the seller. This court should deny Fudge's motion to suppress.

III. Docket 105: Sterling Daniels' Motion to Suppress Post-Arrest Statements

Daniels has moved to suppress his post-arrest statement to task force agents. Daniels claims that he was under the influence of drugs at the time, which rendered him incapable of making a voluntary statement or knowingly waiving his rights. On May 24, 2001, I held an evidentiary hearing on this motion. Having heard and seen the witnesses testify, and having judged their credibility, I find the following facts:

Facts

On January 22, 2001 the task force went overt by obtaining nine criminal complaints followed by a city-wide dragnet. At about 6:30 p.m. that evening a squad car located defendant Sterling Daniels driving his car, so they pulled him over and arrested him. The officers took Daniels to the north precinct station to be processed by the task force.

A safety rule of the Madison Police Department requires officers to report any suspicions that an arrestee might be under the influence of drugs so that the suspect can be handled appropriately. The officers who arrested Daniels did not report any such suspicions about Daniels upon delivering him to the task force.

Detective Tom Woodmansee was assigned to meet arrestees at the precinct house to attempt interviews. Detective Woodmansee has been a Madison police officer since 1990

and a detective since 1997. He served as an undercover officer on the task force from 1993-1995; he is currently in his second tour with the task force, now as a case manager. Detective Woodmansee has worked on over 1500 drug cases during his police career. As an undercover officer, he has been around people who use drugs and are high; as an investigating officer, he has interacted with and interviewed drug users on numerous occasions. From these experiences, Detective Woodmansee is familiar with and recognizes the symptoms of drug use, which vary depending on the type of drug ingested. Some symptoms for which he looks to determine whether a suspect is under the influence are glossy eyes, lack of balance, lack of concentration, problems speaking or hearing, inappropriate affect, and inexplicable mood swings.

Detective Woodmansee first met Daniels at approximately 7:30 p.m. in the interview room to which the arresting officers had taken him. Those officers did not alert Detective Woodmansee that they believed or suspected that Daniels might be high. Detective Woodmansee, accompanied by Special Agent Ed Wall of the Wisconsin Department of Justice's Division of Narcotics Enforcement, introduced himself to Daniels, explained why Daniels had been arrested, removed Daniels's handcuffs and asked if Daniels would be willing to be interviewed. Detective Woodmansee saw no signs that Daniels was under the influence. Detective Woodmansee would not have removed Daniels's handcuffs if he had suspected that Daniels was high.

Before beginning an interview, the agents walked Daniels down the hall to a second interview room in which they had posted a photographic flow chart showing their model of the P Stone cell in Madison. During this walk, Daniels did not sway, trip, lose his balance or otherwise signal intoxication. Once in the room, Daniels studied the chart, photographs and names, and seemed to be able to comprehend what he was reviewing. In other words, he acted normal. Following this review, the agents walked Daniels back to the first room, again without incident.

Detective Woodmansee advised Daniels of his rights under Miranda by reading his wallet card aloud. Detective Woodmansee asked Daniels if he understood his rights; Daniels responded that he did. Detective Woodmansee observed no symptoms that might indicate to the contrary. Daniels agreed to answer questions.

The agents began with open-ended questions to determine how forthcoming Daniels would be. Daniels initially declined to speak freely, providing palpably incomplete answers. The agents countered by providing specific information to Daniels, then asked him specific questions to demonstrate what they already knew about him and his associates. Confronted with specifics, Daniels became more forthcoming. Daniels never said that he used drugs, never said or indicated that he could not understand what was happening and demonstrated no symptoms that he was under the influence of any substance. Daniels understood the agents' questions and articulated cogent answers. The interview continued for a little over an hour, with occasional breaks while the agents attended other business. The agents also

ordered pizza, which they shared with Daniels. (There is no evidence that Daniels ate more than his share). The interview concluded at approximately 8:45 p.m.

Throughout the interrogation the agents remained low-key and conversational. They did not threaten or cajole Daniels, they did not touch him, they did not display weapons, they did not attempt in any fashion to coerce him into speaking. At no time during his interaction with the police was Daniels under the influence of any substance to the point that it affected his ability to exercise his free will, comprehend was he was doing, or make conscious choices.

Analysis

In support of his claim to suppress his statement as involuntary, Daniels contends that he was high on drugs and the agents took advantage of this. Neither contention is correct.

There is no evidence that Daniels actually was high at the time the agents interrogated because he exhibited no signs of being high. Daniels contends that it is "undisputed" that he had dropped Ecstasy and smoked three potent blunts "a relatively short time" before he was stopped arrested and interrogated. *See* Memorandum of Law in Support, Dkt. 148, at 5. Therefore, he contends, it is "plausible" that he was actually in a weakened condition as to his mind and will during the interrogation. *Id.* This evidence is undisputed only in the sense that the government was unable to contradict it. The government has not conceded that Daniels actually ingested drugs.

But as the government observes, when the voluntariness of a confession is disputed, it doesn't matter much whether Daniels actually took drugs; what matters is whether the police used coercive interrogation tactics to exploit any drug-induced fragility in his free will. *See* Government's Brief in Opposition, Dkt. 160, at 1-2. A confession is voluntary if it is the product of a rational intellect and free will rather than the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overborne the suspect's free will. *United States v. Dillon*, 150 F.3d 754, 757 (7th Cir. 1998). Coercive police activity is a necessary predicate to a finding of involuntariness. *Id.* Thus, although drug intoxication is a relevant circumstance in the voluntariness equation, it cannot by itself establish coercion; it merely has the potential to make the suspect more susceptible to coercive interrogation techniques. *See United States v. Montgomery*, 14 F.3d 1189, 1195 (7th Cir. 1994). So, if the task force agents had reason to know that Daniels was high, then this court could find that an otherwise legally inconsequential level of coercive behavior was unacceptable under the circumstances. *Id.*

But here, Daniels fails at every level. First, I doubt that Daniels consumed the quantity of drugs claimed; second, regardless of this, Daniels was not high when the agents interrogated him; third the agents did not use any coercive or deceptive interrogation techniques against Daniels. Not one. This was a by-the-book, boilerplate interview by two veteran agents. They were in control of the entire situation that evening and they knew it,

so they had no need to lean on Daniels. If Daniels wouldn't talk, then someone else on the flow chart probably would.

Daniels' own approach to his interrogation proves that he was the master of his own fate. Confronted at first with open-ended questions, he volunteered little, hoping that feigning ignorance would get him tossed into the minnow bucket. When the agents revealed the depth and breadth of their knowledge, Daniels changed tactics and provided specific answers to specific questions. This demonstrated that Daniels remained aware of his own interests and was prepared to defend them with incremental cooperation. This response was the antithesis of an irrational or overborne thought process.

In short, Daniels' confession was voluntary. He knowingly waived his rights and answered the agents' questions. His motion to suppress should be denied.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court DENY defendant Aja Fudge's, defendant Sterling Daniels's, and defendant Damien Cobbins's, remaining motions to suppress evidence.

Entered this 21st day of June, 2001.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge