IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

JORGE BARRAGAN, JR.,

Defendant.

ORDER

02-CR-0075-C

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Defendant Jorge Barragan, Jr. has filed objections to the report entered by the United States Magistrate Judge on December 17, 2002, in which the magistrate judge recommended that the court either deny defendant's motion to suppress evidence or in the alternative, stay its ruling and allow the parties to supplement the record with additional evidence of the reliability of the drug detecting dog. Since then, defendant has entered a guilty plea to count one of the indictment, charging him with possession of a firearm by a convicted felon, but preserved his right to appeal from an adverse ruling of his motion to suppress.

Defendant objects to two of the magistrate judge's findings of fact that relate to the Juneau County Sheriff's Department's arrangements for the use of a drug detecting dog. Neither of the findings is relevant to the validity of the search, so there is no need to

determine whether defendant's objections are well founded. The search's validity does not depend on knowing why Detective Strompolis called the Wood County Sheriff's Department to send its dog and handler or why the detective called the district attorney to ask whether he needed a warrant to search defendant's van.

Defendant objects to the magistrate judge's legal conclusion that it is irrelevant how many times the Juneau County Sheriff's Office searched defendant's van, so long as each search was legally justified. I disagree with defendant; the question is not the number of searches but whether there was probable cause for the third search. Defendant seems to acknowledge this, by arguing that the probable cause determination is undermined by the fact that the sheriff's department found no evidence of contraband in two separate searches of defendant's van. He is correct. The failure of the preceding two searches is information to be added to the probable cause calculus. It does not follow, however, that the fact of the two searches makes a third search invalid.

Defendant objects to the magistrate judge's conclusion that the deputies arranged a dog sniff as quickly as possible. It is irrelevant whether the search took place "as quickly as possible"; defendant is not arguing that he was seized unreasonably by being made to wait while the dog was brought. Again, the question is whether probable cause existed for the search. Also, defendant asserts another reason for finding the third search invalid: the fact that the sheriff's department had no standard operating procedure for such a search. Again,

the question is not whether the search was conducted according to procedures but whether probable cause existed for the search at the time it was made.

Defendant's primary objection is to the magistrate judge's recommendation that the court allow the government another opportunity to adduce evidence of the drug dog's reliability. He contends that the government had one chance to put in this evidence; when it failed to do so, it lost its chance. However, he adds that if the court does decide to open the record, it should hold an evidentiary hearing on the matter, rather than allow the government to make its showing on the basis of written records.

There are situations in which the government cannot have a second chance to put in evidence to improve its case. See, e.g., United States v. Wyss, 147 F.3d 631, 633 (7th Cir. 1998) ("The government was entitled to only one opportunity to present evidence on the issue [of the amount of cocaine Wyss possessed for distribution purposes]."); United States v. Wilson, 131 F.3d 1250, 1253-54 (7th Cir. 1997) (holding that district court had erred in reopening the relevant conduct question upon resentencing because government had never argued matter at original sentencing, although it had incentive to do so). With respect to reports entered pursuant to 28 U.S.C. § 636(b)(1)(B), however, the situation is different. By statute, the district judge's review of the magistrate judge's recommendation is de novo and includes the right to take additional evidence.

I agree with the magistrate judge that it is arguable that, in combination with the

other circumstances known to the detectives, the drug detecting dog's alerts to the passenger section of defendant's van were sufficient to provide probable cause to search the van a third time. However, I believe that it advisable to take evidence on the reliability of the dog before deciding this issue.

ORDER

IT IS ORDERED that the report and recommendation entered by the United States Magistrate Judge is adopted. The clerk of court is directed to schedule this case for an evidentiary hearing at the convenience of counsel.

Entered this 31st day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge