

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

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND
RECOMMENDATION

v.

03-CR-026-S

FREDDIE JOE BOOKER,

Defendant.

REPORT

Before the court for report and recommendation is defendant Freddie Joe Booker's motion to suppress evidence (dkt. 8). Booker seeks to quash his February 6, 2003, arrest for trespassing by Beloit police officers and to suppress the resulting self-incriminating statement that ties him to the drug crimes charged in the instant case. For the reasons stated below, I am recommending that the court deny Booker's motion.

On August 1, 2003, this court held an evidentiary hearing. Having heard and seen the witness testify and having considered the relevant documents and exhibits, I find the following facts:

Facts

The residence located 1125 Emerson Street in Beloit is a two-flat apartment. A man identified to the court only as "Eric" lives in the downstairs apartment, and two other people

live in the upstairs apartment (which is numbered “1125½”). On the morning of February 26, 2003, Eric had to leave his apartment for some reason; fearing uninvited visitors in his absence, he asked his upstairs neighbors to call the police if anyone came into his apartment while he was gone.

Eric’s fears were justified: slightly before noon, the people upstairs called the Beloit Police Department to report that at least two trespassers were in Eric’s apartment. Detective Kreitzmann and Officer Mark Smith, a twenty year veteran of the force, responded first. As they walked up to the front door of the downstairs apartment, out came Todd Truttmann, whom Officer Smith knew already. In response to the officers’ questions, Truttmann explained that Eric would let him into the apartment and that there was no one else in there now. The dubious officers handcuffed Truttmann and put him in a squad car, advising him that they were detaining him until they could determine if he actually was authorized to be in Eric’s apartment.¹ Officer Smith then ran the plates of the car parked in the apartment’s driveway and the vehicle came back registered to defendant Freddie Booker, whom Officer Smith also knew from previous contacts.

Once ensconced in a squad car, Truttmann changed his story, now claiming that someone else probably still was in the house. Officer Smith asked Truttmann if that other person was Booker; Truttmann said yes, but opined that Booker probably already had escaped out the back door.

¹ During his interaction with the police Truttmann swallowed a toxic amount of crack cocaine that he had squirreled in his cheek. The resulting medical emergency is irrelevant to Booker’s suppression motion.

As if cued, Freddie Booker walked around the corner from Wisconsin Avenue toward 1125 Emerson. Officer Smith recognized him immediately. As Booker approached, Officer Smith asked him if that was his car parked in the apartment's driveway. Booker acknowledged that it was and that he was coming back to retrieve it. Officer Smith concluded from all the information available to him that Booker had in fact been trespassing in Eric's apartment, so he arrested him.

Based on additional statements by Truttmann, the police entered the apartment to search for drugs. They found about 122 grams of crack cocaine in the basement. Booker subsequently confessed to owning the drugs.

Analysis

The law applicable to Booker's motion to quash and suppress is summed up neatly in *United States v. Funches*, 327 F.3d 582 (7th Cir. 2003):

The Fourth Amendment protects citizens against unreasonable arrests. For a warrantless arrest to be reasonable, law enforcement agents must have probable cause, which exists if, given the facts and circumstances within their knowledge at the time of arrest, the agents reasonably believed that the suspect had committed or was committing a crime. Determinations of probable cause are naturally based on probabilities, and a finding of probable cause does not require evidence sufficient to support a conviction, nor even evidence demonstrating that it is more likely than not that the suspect committed a crime. . . . [T]he probable cause determination does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands. In making probable-cause determinations, law

enforcement agents are entitled to draw reasonable inferences from the facts before them, based on their training and experience.

* * *

In reviewing probable-cause determinations, it is common for courts to consider possible innocent alternatives that might explain the facts before the agents. Of course, the mere existence of innocent explanations does not necessarily negate probable cause, but considering innocent, alternative explanations is often helpful.

Id. at 586-87, citations and internal quotations omitted.

The facts establish probable cause that Booker had been trespassing in Eric's apartment, which justified Officer Smith's arrest. The police had a call from the upstairs neighbors that at least two people were trespassing, they caught Truttmann in the act, Truttmann told the police that Booker had been in there with him, Booker's car still was parked in the driveway, and then Booker showed up from around the corner, consistent with Truttmann's prediction that Booker had bolted out the back.

Booker disputed some of the salient facts at the evidentiary hearing and in his memoranda, contending that Officer Smith's hearing testimony was incorrect and inconsistent on material points. The record provides some room to argue, but I find that the alleged discrepancies are explainable or inconsequential.

First, Booker contends that Truttmann never advised Officer Smith that Booker had been in Eric's apartment with him. Booker points out that although this statement was material to determining whether Booker had been trespassing, Officer Smith did not include it in his written report. Officer Smith defended his report on the ground that "Mr.

Truttmann told me a lot more that I didn't put in the report either." August 1, 2003 hearing transcript, dkt. 21 at 25. Officer Smith's retort is a tad defensive, but it strikes me as true. What he actually wrote in his report was that

at approximately 1203 hours we advised Dispatch that we believed there could possibly be two more subjects inside the house and requested another unit. At this time we ran the license plate number of the vehicle that was parked in the driveway and this came back to Freddie Booker. We believed that he was one of the subjects who were still left in the house. At this time, we were advised that there was possibly a back door to this residence so we waited for another squad car to pull up so we could secure the back door.

See Narrative for Event # LBE03001655 at 1, Exh. B. to Motion to Suppress, dkt. 8. Officer Smith's use of the passive voice muddies information that could have and should have been clearer. It is logical and fair to infer that Truttmann was the source of all this reported information, particularly that conveyed in the last two sentences. This is entirely consistent with Officer Smith's hearing testimony.

Because Truttmann inculpated Booker prior to Booker's arrest, the other corroborative facts fall into place despite the possibility of some innocent explanations as proffered by Booker in his reply memorandum. The fact that Booker's car was in the driveway by itself does not establish probable cause, but it is a corroborative circumstance. The fact that there was an unsecured back door is meaningless in isolation, but it was relevant to Officer Smith's information processing when he saw Booker approaching from

Wisconsin Avenue: the existence of an unwatched back exit blunted any exculpatory inference arising from Booker's presence outside the residence.

Booker correctly notes that Officer Smith provided conflicting testimony as to when Booker admitted to having been in Eric's apartment. I have given Booker the benefit of the bounce on this one: I have not found that Booker made his admission on this point before Officer Smith arrested him. Removing Booker's statement from the totality of circumstances does not negate the finding of probable cause. In short, the arrest was legal, and it should not be quashed. Therefore, all the evidence derived thereafter is not subject to the exclusionary rule.

That being the case, there is no need to examine the government's fallback position that Booker's subsequent confession is untainted even if his arrest was unlawful. *See, e.g., Kaupp v. Texas*, 263 U.S. ___, 123 S.Ct. 1843, 1847 (2003) (confession following illegal arrest must be suppressed unless government establishes confession was act of free will sufficient to purge to primary taint). If an analysis were necessary, I would agree with Booker (*see* Reply Brief at 6-10) that the government's argument on this point is based on an undeveloped, conjectural record. This would be insufficient to meet the government's burden of rebutting any presumption of taint. *See Kaupp*, 123 S.Ct. at 1847. But Booker's arrest was not tainted, so there is no need for the court to reach this issue.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Freddie Joe Booker's motion to quash his arrest and suppress evidence.

Entered this 5th day of September, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge