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

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND RECOMMENDATION

v.

03-CR-084-C

CLIFTON L. WRIGHT,

Defendant.

REPORT

Before the court is defendant Clifton Wright's two-part motion to suppress evidence. *See* Dkt. 18. Wright challenges the process by which police discovered crack cocaine during a traffic stop, and he challenges the authority of a third person to consent to a search of Wright's hotel room. For the reasons stated below, I am recommending that the court deny both phases of Wright's motion.

On August 21, 2003, this court held an evidentiary hearing. Having heard and considered the testimony and demeanor of the witnesses, along with the other evidence submitted by the parties, I find the following facts:

Facts

At about 10: 20 p.m. on June 4, 2003, Arkeyia Hardin was driving her car on the West Beltline Highway, providing a ride to her friend Clifton Wright. Madison Police

Officer Dave Miller determined that Hardin was exceeding the speed limit, so he radioed to units in the area to find and stop the car.[1] The first squad car to respond contained Madison Police Officers Carren Corcoran and Daniel Nale, both assigned to Dane County's Narcotics and Gang Task Force. They initiated a traffic stop on the Beltline without incident. Officer Corcoran spoke with Hardin and quickly learned that Hardin did not have a valid driver's license. Because the Beltline was busy and noisy, Officer Corcoran asked Hardin to step out of the car to continue their conversation about what needed to happen next. By then other officers had arrived, including Sergeant Linda Kosovac.

Wright remained seated in Hardin's car, with Officer Nale chatting him up. Officer Nale asked Wright some background questions. Wright identified himself and advised that he had an apartment in Middleton, but that he was staying in a motel on the far west side. Officer Nale ran Wright's name past dispatch and learned that Wright had been arrested within the past several months on a drug charge. Acting on this, Officer Nale asked Wright if he had been arrested recently. Wright did not mention his drug arrest, but he did report a recent arrest for fighting that had involved a gun. This raised a safety concern for Officer Nale but he did not act on it at that time.

Officer Corcoran issued Hardin a ticket for operating after suspension then asked for consent to search her car. Hardin agreed. It is standard MPD procedure to remove all

[1] The record does not reflect why Officer Miller didn't perform the traffic stop himself, but this is immaterial to suppression.

occupants from a vehicle before searching it, so Officer Nale directed Wright out of the car to a spot behind Hardin's car near the downward-embanked shoulder.

While others searched the car, Officer Nale asked Wright if he had any weapons on him. Wright responded that he did not. Although Officer Nale did not see any lumps or bulges in Wright's clothing that would raise suspicions, Wright's answer did not completely reassure Nale, because in the past other people had lied to him about weapon possession. Wright was wearing loose pajama type trousers with front pockets that could have concealed a slim weapon such as a knife or a razor. Apprehensive for his own safety, Officer Nale asked Wright for permission to search him. Wright declined.

Even so, Officer Nale did nothing until Wright put both his hands in his pants pockets. Concerned that Wright might have a weapon, Officer Nale asked him to remove his hands from his pockets. In response, Wright asked if Officer Nale wanted to see what was in his pockets, but he did not take his hands out of his pockets. Officer Nale asked Wright a second time to remove his hands from his pockets. Wright repeated his own question but did not move his hands. At this point, Officer Nale directed Wright to remove his hands from his pockets. Wright refused.

Officer Nale stepped forward to wrest Wright's hands from his pockets. As Officer Nale grabbed Wright's left hand, Wright removed his right hand from his right pants pocket and placed it behind his back. The two men scuffled, and Officer Nale saw a baggie arc

down the slope. Sergeant Kosovac came over to assist and all three tumbled down. Officers subsequently recovered a baggie of crack cocaine from the embankment.

The officers arrested both Wright and Hardin on drug charges. While searching Hardin's purse, officers found a magnetic key to a hotel room. Hardin explained that she had received the key from Wright, whom she described as a close family friend. According to Hardin, Wright regularly rented motel rooms around Madison and the key in Hardin's purse was to Wright's room (No. 321) at a nearby motel.[2] Wright had told Hardin she could use the room whenever she needed to get away from the daily grind of caring for two children in her Section 8 housing on Cypress Way. Hardin said that she had let herself into Wright's room the day before to smoke some marijuana while Wright was in Chicago buying crack cocaine. Hardin had not spent the night in Wright's room. The police had no information whether Hardin's name was on Room 321, whether she had helped pay for it, or whether Wright had put limits on her use of the room.

The police asked Hardin for consent to search Room 321. Hardin consented. On June 4, 2003, the agents searched Room 321 and recovered over 700 grams of crack cocaine, most of which was cached behind a dresser, none of which was recovered from any closed container palpably associated with Wright.

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[2] Hardin mistakenly provided police with an incorrect name for the motel but police quickly located the correct establishment.

Analysis

I. The Seizure

Wright challenges the discovery of the cocaine base that he tossed from his pocket during his roadside scuffle with Officer Nale. Wright claims that it was improper for the officers initially to detain him and improper for them thereafter to attempt a patdown.

Dealing first with the challenged detention, Wright has eschewed any challenge to the traffic stop for speeding. *See* Hearing Transcript, Dkt. 22 at 26-27. Since the traffic stop was valid, the officers could have removed Wright from Hardin's car immediately, regardless whether they intended to search it. *Maryland v. Wilson*, 519 U.S. 408, 415 (1997)(police may remove passengers from car during traffic stop). Even so, the officers did not remove Wright from the car until they obtained permission from Hardin to search.

Wright is reduced to arguing that the police violated his Fourth Amendment rights by restricting his ability to leave the scene of the traffic stop. The facts do not support this claim. First, there is no evidence that Wright wished to leave, asked to leave, or attempted to leave the scene. Second, there is no evidence that the police stated or implied by word or deed that Wright was *not* free to go. Third, it was after dark on the embanked shoulder of a busy limited access highway; there is no evidence that Wright *had* anywhere else to go or that he could have gotten there safely and legally even if that had been his wish. So, Wright's claim of constructive detention is a non-starter.

The remaining question is whether the police-citizen touching that followed was reasonable. It was. Officer Nale continued his minimalist handling of Wright after directing him out of Hardin's car. Although Officer Nale was aware that Wright recently had been arrested on a drug charge and on a fighting charge, and although Officer Nale could not be sure whether Wright had any svelte blades in his pants pockets, Officer Nale did not initially attempt to pat down Wright. True, Officer Nale asked Wright for permission to search him but he did not attempt a search after Wright said no. Only after Wright put his hands in his pants pockets and thrice refused to remove them in the face of two requests and a demand did the situation culminate in a confrontation. If Wright would have removed his hands from his pants pockets, there is no indication that Officer Nale would have attempted to touch him.

On these facts, it was not unreasonable for Officer Nale to want Wright's hands in plain sight until the traffic stop was completed.[3] Wright's persistent refusal to comply with this demand sufficiently heightened Officer Nale's legitimate concerns to justify a patdown. *See, e.g., United States v. Harris,* 313 F.3d 1228, 1236 (10th Cir. 2002) (defendant's refusal to remove hands from pockets raised reasonable suspicion of danger justifying weapons frisk).

[3] Perhaps it is *always* reasonable for police to insist that citizens keep their hands in plain sight during a traffic stop, but the broader question need not be answered in this case.

Keep in mind, however, that although at that point a weapons frisk would have been justified, none ever occurred. The Fourth Amendment comes into play, however, because grabbing Wright's wrist qualifies as a Fourth Amendment "seizure." *See United States v. Ford,* 333 F.3d 839, 844 (7th Cir. 2003).[4] Because a scuffle ensued, we don't know whether Officer Nale would have been satisfied simply to remove Wright's hands from his pockets, or whether he intended in any event to frisk Wright for weapons. Regardless of Officer Nale's aborted intent, the reasonableness of his grabbing Wright's wrist may be determined by the principles enunciated in *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

In *Terry*, the Supreme Court authorized protective patdown searches by police officers so long as the officer has some articulable suspicion that the suspect was concealing the weapon or posed a danger to the officer or others. According to *Terry*:

> There is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. . . .
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> When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

[4] The laying on of hands appears to be enough to implicate the Fourth Amendment even though Wright resisted and was not actually subdued until later.

392 U.S. at 23, 24. In a nutshell, the Supreme Court "recognized the importance of allowing police officers some leeway under the Fourth Amendment in order that they might protect themselves and others." *United States v. Mitchell,* 256 F.3d 734, 737 (7th Cir. 2001). Under the circumstances presented here, it was not unreasonable for Officer Nale to attempt to pry Wright's hands from his pockets. "The risk of harm to both the police and occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981).

We are left to speculate whether Officer Nale would have patted down Wright, would have felt a soft lump in his pocket and would have been able to identify it as contraband under the "plain feel" doctrine. Wright short-circuited this course of events by removing the crack cocaine from his own pocket and tossing it down the hill. It might be an interesting debate as to whether this constituted "abandonment" or "plain view" of the drugs, or contrariwise whether Wright's desperate toss was the foreseeable result of an unreasonable seizure under some *Palsgrafian* chain of causality, but in the end it doesn't really matter: under the totality of circumstances, it was not unreasonable for Officer Nale to attempt physically to remove Wright's hands from his pockets in the interest of officer safety. There was no Fourth Amendment violation here and this portion of Wright's motion to suppress should be denied.

II. The Consent Search

Wright challenges the police search of his motel room, claiming that it was unreasonable for the police to search it based only on Hardin's consent. Both sides agree on the applicable law:

> The probable cause and warrant requirements of the Fourth Amendment are not applicable where a party consents to a search, where a third party with common control over the searched premises consents, or where an individual with apparent authority to consent does so.

United States v. Melgar, 227 F.3d 1038, 1041 (7th Cir. 2000). A third party with common authority over the premises sought to be searched may provide such consent. Common authority is based upon mutual use of property by persons generally having joint access or control. *United States v. Aghedo*, 159 F.3d 308, 310 (7th Cir. 1998). To assess whether apparent authority exists, one must look for indicia of actual authority. *United States v. Rosario*, 962 F.2d 733, 738 (7th Cir. 1992). It is the government's burden to prove by a preponderance of the evidence that the searching officers obtained valid consent to search the premises. *Id*. at 736.

A person possessing the key to a locked room has apparent authority to consent to its search. *United States v. Rodriguez*, 888 F.2d 519, 523 (7th Cir. 1989). In *Rodriguez*, the defendant was the janitor at a union hall who was provided a residence on the third floor of the building. Because he had separated from his wife, defendant was living in a locked room in the union hall basement, while his wife remained in the apartment upstairs. After the

police arrested the defendant on a drug charge, his wife unlocked his downstairs room with her own key to the room. Although possession of a key is a sign of actual authority (*id*. at 522), the court decided that the distinction between actual and apparent authority on these facts was irrelevant:

> The question posed by the Fourth Amendment is whether the search is "reasonable" and it is reasonable to act on the basis of apparently valid consent. Going beneath the surface of the information in hand – whether furnished by an eye witness or by a person giving consent – would make the outcome of the search depend on niceties of property or marital law far removed from the concerns of the Fourth Amendment. Consents would become untrustworthy unless the police spent additional time investigating the authority of the person who gave consent, which in a case like ours would require knowledge of Illinois domestic relations law and the living arrangements of the couple. Suppressing evidence because of what the police did not know at the time, even though their acts were justified on the basis of what they did know, would inject a random element into Fourth Amendment jurisprudence without serving any of the functions of the exclusionary rule. Denying police the ability to act on the basis of apparent authority would not deter improper conduct; it would instead deter acting on the basis of consents. Any wrong done to [defendant] was done by his wife, not by the agents who entered the room on the basis of her apparent authority. Suppression is an inappropriate response.

888 F.2d at 523.

So it is here: Hardin had her own key to Wright's room and she provided a logical explanation for why she had it. Hardin explained that Wright had given her access to his room to "get away" from the drudgery of her daily life. Hardin reported that she already had taken advantage of Wright's offer by having used Room 321 to smoke some dope the day

before. Hardin then gave the police her consent to enter the room to search it. This was all the police needed, and their subsequent search was reasonable.

Although Hardin's consent would *not* have been sufficient to allow a search of any closed container that obviously belonged to Wright, *see Rodriguez*, 888 F.2d at 523-24 and *United States v. Melgar,* 227 F.3d at 141-42, no such search occurred here. The contraband discovered and seized by the police was found in the common access areas of Wright's room. If Wright had wanted to protect his stash from a third-party consent search, he should have ensconced it in a locked suitcase with his name on it. (This would have presented different problems for Wright, but that's another story.) The bottom line is that Hardin's consent to search Wright's hotel suite was valid on the ground of either actual or apparent authority. This court should deny Wright's motion to suppress evidence seized during execution of that search.

RECOMMENDATION

Pursuant to 28 U.S.C. §636(b)(1)(B) and for the reasons stated above, I recommend that this court deny both parts of defendant Clifton Wright's motion to suppress evidence.

Entered this 19th day of September, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge