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

UNITED STATES OF AMERICA,

Plaintiff,

v.

GEORGE L. GOINS,

Defendant.

REPORT AND RECOMMENDATION

05-CR-004-C

REPORT

This is a drug and gun case in which La Crosse police officers discovered crack cocaine and a hand gun in defendant George L. Goins's apartment following a search initiated at the behest of Goins's ticked-off girlfriend. Goins has moved to dismiss the gun charge (dkt. 23) suppress evidence seized during the search (dkt. 26) and to suppress statements he made to the police the following day (dkt. 24).[1] For the reasons stated below, I am recommending that the court deny these motions.

I. Motion To Dismiss the Gun Charge

The grand jury has charged Goins in Count 1 of the indictment with being a felon in possession of a gun that previously had traveled in interstate commerce, in violation of 18 U.S.C. § 922(g)(1). To preserve his record, Goins has moved to dismiss the indictment on

[1] I am ruling on Goins's motion to sever counts and to interview witnesses in a separate order.

the ground that § 922(g)(1) exceeds Congress's powers under the Commerce Clause of the Constitution. The Court of Appeals for the Seventh Circuit consistently has ruled that such challenges are meritless. *See, e.g., United States v. Keller*, 376 F.3d 713, 716-17 (2004). Accordingly, I am recommending that the court deny this motion.

II. Motions To Suppress Evidence

On March 16, 2005, this court held an evidentiary hearing on Goins's motions to suppress physical evidence and his statements. Having heard and seen the witnesses testify and having considered the exhibits, I find the following facts:

Facts

Late in the evening on December 8, 2004, in the City of La Crosse, a woman named Kalina Bratton telephoned the police to complain that she had just been verbally abused and kicked in the backside by her boyfriend, George Goins. Dispatch assigned Patrol Officer Jacob Jansky to investigate. Officer Jansky and his trainee partner drove to the parking lot of a townhome complex on Caledonia Street where Bratton was waiting with another officer. Bratton told Officer Jansky that Goins had kicked her and she was scared of him, so she wanted a police escort while she went into his residence at 1024 Caledonia Street to retrieve her belongings. Because it was cold out and Bratton was uncomfortable, Officer Jansky took Bratton to a police substation a couple blocks away to continue the conversation.

At the station, Bratton told Officer Jansky that she had been dating Goins for approximately five months. She reported that she actually lived with her children in an apartment on the 900 block of Winneshiek Road several miles away, but had been living with Goins on-and-off for several months at his residence on Caledonia Street. Bratton had a key to Goins's residence. She reported that she performed household chores for Goins such as cleaning, cooking and laundry. Bratton claimed that she had clothing and household items at 1024 Caledonia that she wished to retrieve that evening because she was moving out.

Bratton then volunteered that Goins kept drugs and a hand gun in the house. As Officer Jansky began to explore these allegations with her, Bratton asked to speak with Investigator Marion Byerson, naming him by name. Investigator Byerson was a veteran drug investigator with the La Crosse Police Department.

The patrol officers telephoned Investigator Byerson at home and gave him an overview. Byerson already knew George Goins personally and professionally: over the past five years he and Goins had crossed paths both at work and away. Byerson actually had interviewed Goins before. Investigator Byerson did not recall having met Bratton previously but might have known who she was. Investigator Byerson asked the officers to put Bratton on the telephone so he could talk to her.

Bratton told Byerson that after Goins yelled at her and kicked her, he left 1024 Caledonia while she stuck around to clean up. In the bedroom where she slept with Goins,

she lifted the mattress and saw a large quantity of cocaine in the form of a chunky substance in a plastic bag. She reported that Goins kept a handgun in a black case that still was under the couch. Investigator Byerson believed that Goins was a convicted felon based on his knowledge of Goins's criminal history. This belief turned out to be correct, although it was based on the wrong foundational information.

Bratton repeated to Investigator Byerson her connection to 1024 Caledonia: she had a key to the apartment, she had been staying with Goins for several months and she pretty much took care of the house, doing laundry, cooking for him and straightening up. Bratton's name was not on the lease at 1024 Caledonia and she did not pay rent there. I surmise that the police inferred both facts that evening.[2] Bratton expressed a strong desire to re-enter the residence and obtain her belongings, but she wanted a police escort because she feared that Goins would attack her again if he found her there alone.

Investigator Byerson saw an opportunity to conduct a consent search of 1024 Caledonia. He told Bratton to put Officer Jansky back on the phone, to whom he relayed the gist of Bratton's statements. He directed Officer Jansky to take Bratton back to 1024 Caledonia so she could collect her personal possessions; he would meet them there. Investigator Byerson then called Sergeant Jaholsky from the drug unit and directed him to meet Byerson at Goins's residence.

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[2] Goins and his brother were the two renters listed on the lease, although Goins's brother actually lived in West Salem with his wife.

Three patrol officers took Bratton to 1024 Caledonia where she unlocked the door with her key and allowed the officers in. They performed a protective sweep of the residence and determined that no one was home. Investigator Byerson and Sergeant Jaholsky arrived and spoke face-to-face with Bratton, double-checking her proffered connection to 1024 Caledonia. Bratton showed Investigator Byerson her key to 1024 Caledonia, repeated that she had personal belongings in the house and displayed some of those belongings to him. She repeated that she cooked for Goins and that she had free rein of the house except for the attic, which Goins visited with his friends but would not allow Bratton to enter. She claimed that she was in the process of arranging to have her mail come to Goins's residence. Bratton confirmed that she had her own apartment on Winnishiek, but in response to Investigator Byerson's questions, she repeated her claim that she had been staying with Goins for several months and would only return to her place to get essentials. Notwithstanding all this, Investigator Byerson telephoned the district attorney's office to ask for a search warrant for Goins's apartment. After the duty prosecutor heard Investigator Byerson's proffer of facts, he advised that the officers did not need a search warrant because they had received valid consent to search from Bratton.

Having been green-flagged by the ADA, the officers searched. Investigator Byerson went directly to the living room, looked under the couch and found a gun case where Bratton had reported it would be. Based on his training and familiarity with firearms, Investigator Byerson recognized the gun case for what it was. He opened it and found a hand gun inside.

In the living room Investigator Byerson also found an electronic device with which he was familiar from previous searches: it was a scanner that allowed the operator either to listen to police radio conversation, or to detect covert surveillance such as body wires. Investigator Byerson had found such devices in the possession of other drug dealers during previous searches.

The drugs that Bratton had reported seeing in the main bedroom under the mattress were not there. In the bedroom Investigator Byerson found several sandwich baggies rolled in a manner commonly used to hold marijuana, but these were empty. At the foot of the bed was a shirt on a couch; when Investigator Byerson picked up the shirt, a bag of marijuana fell out.

Meanwhile Kalina Bratton retrieved property she claimed to be hers: a plastic garbage bag full of clothing at the top of the stairs, two sauce pans from the kitchen, a hair dryer from the bathroom, and a massaging device draped over the back of a chair in the living room. In their search of the residence, the officers did not find any other female clothing, toiletries, mail addressed to Bratton, or other effects. There was no washer or dryer at 1024 Caledonia: when Bratton did Goins's laundry, she took it elsewhere.

Officer Jansky searched an open closet located at the confluence of a hallway, the living room and a door leading to the balcony. The closet was full of men's clothing; Officer Jansky did not see anything in the closet that appeared to be women's clothing. Prior to this, while searching other rooms, chests of doors and closets, Officer Jansky had not seen

any women's clothing or grooming items. Officer Jansky methodically patted down the pockets of the hanging garments. When patting the pockets of an *ersatz* letter jacket he felt a lump the size of an apple that sounded "plasticky" when he patted it. Officer Jansky was aware that Investigator Byerson had found a bag of marijuana in the bedroom. Based on this, and based on his experience with numerous previous pat downs as a patrol officer (including 25 to 50 previous pat downs of unworn clothing) Officer Jansky assumed that he was feeling the package of drugs that Bratton had claimed was present in the apartment. Officer Jansky pulled the wad out of the coat pocket: it was a bag of cocaine base wrapped in a napkin.

The police left Goins's residence before he returned. Apparently they drove Bratton to her apartment on Winneshiek. Investigator Byerson did not pursue criminal charges against Goins that evening; his plan was to locate Goins in the ordinary course of business, talk to him about the drugs and attempt to elicit his cooperation as to the source and ownership of the drugs.

The next morning, December 9, 2004, Bratton called the police in a panic because Goins had come pounding on the door of her apartment at 910 Winneshiek Street. After Goins left, Bratton apparently ran across the street to Goins's mother's apartment at 915 Winneshiek. Patrol Officer Thad Baldwin was dispatched to the scene, but by the time he arrived Goins had left and there was nothing for him to do. However, dispatch advised all

patrol officers that if anyone saw Goins, they were to ask him if he would agree to meet and talk with Investigator Byerson at the police department.

Based on this instruction, Officer Baldwin drove to 1024 Caledonia Street. Goins was home, so Officer Baldwin conveyed Investigator Byerson's request for a meeting. Goins was cooperative and agreed to accompany Officer Baldwin. Officer Baldwin advised Goins that he was not under arrest but for officer safety he wanted permission to pat Goins down before they got into the squad car. Goins consented.

Upon arrival at the police station Officer Baldwin took Goins to an interview room off the main hallway and left him there with the door open. Goins was not restrained in any fashion. Officer Baldwin told Goins that if he needed anything just to pop his head out and shout for Officer Baldwin. Officer Baldwin reported to his shift commander that Goins was on the premises and that Investigator Byerson had been looking for him. The shift commander handed Officer Baldwin the written report of the domestic incident prepared by the third shift officers the night before, and asked Officer Baldwin to conduct a routine follow-up. The standard operating procedure in such cases was to advise the accused of the allegations and find out if he wished to respond. Officer Baldwin was not aware of the drugs or the gun found at 1024 Caledonia.

Officer Baldwin returned to the interview room, handed Goins a preprinted *Miranda* rights and waiver form, then read the entire form out loud to Goins. After reading the rights portion, Officer Baldwin asked Goins if he understood his rights. Goins responded that he

did and signed the form. Officer Baldwin read the waiver portion and asked Goins if he wished to waive his rights and speak to Officer Baldwin. Goins responded that he did and signed the form again. Officer Baldwin spoke with Goins for five or ten minutes about Bratton's allegations of domestic abuse. Officer Baldwin thanked Goins for being so cooperative then stepped out to advise his shift commander that he was done.

Just then, Investigator Byerson walked in, dressed in plain clothes with his firearm covered by his jacket. Officer Baldwin handed him Goins's *Miranda* waiver and stated that he had *Mirandized* Goins and obtained a waiver.

Investigator Byerson took the form into the interview room, showed it to Goins and asked him to confirm that Officer Baldwin had read him his rights and that Goins had waived them. Goins confirmed these things. Byerson advised Goins that he wished to speak with him about matters other than the domestic incident and asked if Goins still wished to speak with him. Goins agreed to do so and asked what was up. Investigator Byerson responded that if Goins was willing to talk, then they would move upstairs where Byerson had his paperwork, but if Goins said no, then Investigator Byerson would turn Goins over to the patrol officers to be processed on the domestic abuse incident. Goins agreed to talk, so they moved to a second floor interview room. Goins was not handcuffed or otherwise restrained. The small interview room was furnished with a table and three or four chairs.

The interview took fifteen to twenty minutes. At some point Sergeant Jaholsky joined them. Goins made no requests for food, drink or to use the restroom. Neither

Investigator Byerson nor Sergeant Jaholsky made any threats or promises to Goins in order to induce him to speak. Goins never asked to end the interview and never asked for an attorney. The entire interrogation was conversational and polite. As noted above, Investigator Byerson and Goins went back about five years together.

Goins admitted that he knew the drugs were in his apartment, but insisted that they were not his and he had nothing to say about them. Goins was concerned that drug quantity was large enough to cause him serious trouble, but he did not want to rat out his friends, so he explored other avenues to get out from under potential charges.

Analysis

I. The Consent Search

The parties agree on the law governing consent searches but disagree as to the result that should flow from the facts. Goins asserts that Bratton did not have either the actual or apparent authority to consent to a search of his residence; the government contends that she had both. I conclude that Bratton had at least apparent authority to consent to the search, which means that Goins is not entitled to suppression.

Although the Fourth Amendment generally prohibits searches and seizures in the absence of a warrant, there is an exception when someone with either actual or apparent authority consents to the search or seizure. The consent of one who possesses common authority over the premises is valid against the absent, non-consenting person with whom

this authority is shared. The authority justifying third-party consent rests on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his or her own right and that the others have assumed the risk that one of their number might permit the common area to be searched. *United States v. Matlock*, 415 U.S. 164, 172 n.7 (1974). It is the government's burden to establish that a third party had the required common authority to consent to a search. *United States v. Denberg*, 212 F.3d 987, 991 (7th Cir. 2000).

The government has not established that Kalina Bratton had actual authority to consent to the search of 1024 Caledonia. Bratton did not testify at the suppression hearing, so her claim of actual authority is weakened in two ways: it is hearsay filtered through the officers' recollection and perspective, and it was not subjected to cross-examination by Goins. Actual authority means what it says, and from this record I cannot sufficiently determine whether all of Bratton's assertions were true. I am *not* finding that Bratton lied to or misled the police, or that it was unreasonable for the police to believe what she told them on December 8, 2004. More on this below. I am finding merely that the government's method of presentation did not sufficiently establish Bratton's actual authority to authorize the search.

This is as good a place as any to note that I *do* find that Goins was not a credible witness at the suppression hearing. His account of his relationship with Bratton and his

interaction with the police may have contained kernels of truth, but it was marbled with swaths of unbelievable assertions. For instance, during cross-examination, the AUSA asked Goins: if on December 9, 2004 he believed that Bratton had tossed his apartment and stolen his car, why he didn't tell this to Officer Baldwin while responding to the domestic abuse allegations? The transcript reflects Goins's stilted and illogical answer, *see* dkt. 33 at 130, but the three sets of double dashes do not adequately convey the painfully long pauses between each word burst, during which one almost could hear the gears seize up in Goins's head as he tried to manufacture an explanation. A second example is Goins's unbelievable explanation of his unfamiliarity with *Miranda* warnings (dkt. 33 at 130-31) which I address more in the next section. Although the government may not have met its burden of persuasion on Bratton's actual authority to consent to the search, it is not because I have accepted Goins's self-serving testimony on this point or on any other pivotal point.

The government's secondary position is that Bratton had apparent authority to consent to a police search of 1024 Caledonia. This assertion has more traction. The determination of apparent authority is objective: would the facts available to the officers at that moment warrant a person of reasonable caution in the belief that the consenting party had authority over the premises? If not, then warrantless entry without further inquiry is unlawful unless actual authority to consent exists. But if so, then the search is valid. *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990). The focus is on what is reasonably apparent to an officer who has made reasonable inquiry. Such a focus emphasizes the deterrent rationale

underlying the exclusionary rule: obviously, reasonable police officers cannot be deterred by circumstances that are unknown or not reasonably apparent to them. Thus, the exclusionary rule should not be applied when it will not result in appreciable deterrence. *United States v. Grap*, ___ F.3d ___ 2005 WL 678510 at *6 (7th Cir. 3/25/05) (analyzing the validity of consent provided by a third party with psychiatric problems unknown to the police).

All this being true, often it is easier to state the rule of apparent authority than to apply it. As noted by the Court of Appeals for the Fifth Circuit:

> The only rule that emerges is that the validity of a search grounded in third-party consent requires an intensely fact-specific inquiry, and that slight variations in the facts may cause the results to vary. . . . The body of case law fails to furnish a clear governing principle for deciding this case.

United States v. Shelton, 337 F.3d 529, 535 (5th Cir. 2003). The court found it useful to frame the question in terms of privacy expectations. *Id*. at 535-36. Closer to home, the Court of Appeals for the Seventh Circuit also views the actual/apparent authority question through the lens of privacy expectations. The more access and control a third party has to a suspect's apartment, the lower the suspect's reasonable expectation of privacy in the premises or things he shared with the other. *See United States v. Aghedo*, 159 F.3d 308, 310-11 (7th Cir. 1998). Thus, if the third party cleans the rooms and stores items there, such access and use suggests no limitation on her control, and therefore suggests authority to consent to a plenary search, including under mattresses. *Id*. (One notable difference between *Aghedo's* facts and ours is that the apartment belonged to the third party, not the

defendant.) Where, as here, Bratton claimed to have such plenary authority and it was not unreasonable for the police to believe that claim, their plenary search of 1024 Caledonia on her say-so did not violate the Fourth Amendment.

The Seventh Circuit noted in *United States v. Basinski*, 226 F.3d 829 (7th Cir. 2000):

> Under the apparent authority type of third-party consent, the government must show that a reasonable person, with the same knowledge of the situation as that possessed by the government agent to whom consent was given, would reasonably believe that the third party had authority over the area to be searched. . . . [A]pparent authority turns on the government's knowledge of the third party's use of, control over, and access to the container to be searched, because these characteristics are particularly probative of whether the individual has authority over the property.

226 F.3d at 834. Although *Basinski* dealt with a cached briefcase, it does no violence to the concept of apparent authority to replace the word "container" with "residence." Finally, in *United States v. Rodriguez*, 88 F.3d 519 (7th Cir. 1989), the Seventh Circuit went so far as to state that the possession of a key to unlock defendant's room was sufficient to establish apparent authority to consent. Further, "just as police may have probable cause to act *even though their source was lying*, so they may act when the person giving consent has apparent authority." *Id*. at 523, emphasis added. Further,

> It is reasonable to act on the basis of apparently valid consent.
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> * * *
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> 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.

888 F.2d at 523. So, even if Bratton were lying about her connection to 1024 Caledonia–which I have not found–and even if Goins were telling the truth after the fact–which I definitely have not found–the consent search still would be valid so long as it was reasonable for the police to believe Bratton's account.

And it was reasonable. First, much of Goins's self-serving testimony at the suppression hearing about Bratton's allegedly tenuous connection to his residence is irrelevant. For instance, Goins claims that Bratton was not supposed to have a house key, and that she must have swiped it from a hiding place. I do not believe Goins, but even if this were true, there was no way for the police to know this. Bratton had the key and claimed it was because of her on-and-off cohabitation with Goins at the residence. Her story was reasonable and she stuck with it through at least two re-tellings while the police attempted to verify the legitimacy of her consent.

Goins makes much of the fact that Bratton had her own apartment on Winnishiek, where her children lived and where, according to Goins, Bratton really lived. Goins contends that because the police knew about Bratton's other apartment, it was unreasonable for the police to conclude that she also lived with him. Goins is incorrect. Many unmarried couples and other family units have separate residences that they share with each other. By way of example, Goins's brother actually had his own house in West Salem, Wisconsin but also had

a key to 1024 Caledonia "just in case he had problems with his wife, he would have a place to shack up and lay down and get away from the drama." Tr., dkt. 33, at 126. In comparison to this odd but not incredible fraternal arrangement, it was logical and reasonable for the police to accept Bratton's more mainstream explanation that her romantic relationship with Goins led her to spend days and nights with Goins at his place, which included maintaining the household. This logical explanation, coupled with possession of a house key, was enough to establish apparent authority to consent to the search. *See, e.g., United States v. Gillis*, 358 F.3d 386 (6th Cir. 2004)(jilted girlfriend with her own public housing apartment and no key to outer security doors still had apparent authority to consent to search of defendant's residence); *United States v. Shelton,* 337 F.3d at 534, n.19 (collecting cases of third party consent by estranged spouses and significant others).

Goins argues that even if it was reasonable for the police to accept this explanation to gain entry into his residence, the dearth of Bratton's personal possessions in the residence should have alerted them that Bratton had overstated her connection to the place. Goins has a point, but it's not strong enough to undermine the reasonableness of the Bratton's apparent authority. Bratton did collect some items: a bag of clothes, two saucepans, a hair dryer and a chair massager. One would have expected her to have more stuff there, but it would not be unreasonable to conclude that most of her personal furniture and clothes were at her place. To the same effect, Goins's observation that he did not own a washer/dryer does not help him: Goins admitted that Bratton sometimes did his laundry at her place (dkt.

33 at 126-27), which meant that she did have access to his dirty clothes wherever they might be: in a closed hamper, on the floor, on a couch at the foot of his bed, in a hall closet.

In short, whatever the contours of Bratton and Goins's relationship, Bratton's observable connection to 1024 Caledonia was sufficient to warrant the officers reasonably to conclude, after the inquiry they undertook, that Bratton had the authority to authorize their search of that residence. This would include Officer Jansky's pat down search of clothing found in an open closet in a common area; once Officer Jansky felt the lump that his training and experience led him to believe was drugs, he was authorized to remove the lump from the coat pocket pursuant to the plain feel doctrine. *See Minnesota v. Dickerson*, 508 U.S. 366 (1993).

The handgun case found under the couch is a different matter. There is insufficient corroboration of Investigator Byerson's testimony that Bratton actually opened the gun case for this court to conclude that she had either the actual or apparent authority to authorize him to open the case. However, it was appropriate for Byerson to look under the couch and retrieve the closed case because Bratton had seen the case there. Based on Investigator Byerson's knowledge of gun cases, it was legitimate for him to conclude a gun was in the gun case, and based on his knowledge of Goins's criminal record, it was reasonable for him to conclude that the gun was evidence of a crime. Therefore, seizure of the gun case was justified under either the plan view doctrine or the inevitable discovery doctrine, since Investigator Byerson could have seized the unopened case and secured it until he obtained

a search warrant allowing him to open it. *See United States v. Johnson*, 380 F.3d 1013, 1014 (7th Cir. 2004)(government may use evidence obtained illegally if it would have obtained it legally in any event).

In conclusion, The police did not conduct any unconstitutional searches. Goins is not entitled to suppression of any physical evidence.

II. Goins's Statements to Police

Goins offers three grounds for suppressing his December 9 statements to Investigator Byerson: 1) They are derived from the illegal December 8 search of his residence; 2) The police ignored his invocation of his right to remain silent; and 3) His statements were involuntary. None is persuasive.

First, in the preceding section I have recommended that this court find that the search did not violate Goins's Fourth Amendment rights. If the court accepts this recommendation, then Goins's subsequent statements are untainted. If the court rejects this recommendation and suppresses the fruits of the search, then it also should suppress Goins's derivative statements.

Second, I have concluded that Goins never attempted to invoke his right to remain silent. As noted in the previous section, Goins's testimony at the suppression hearing was incredible. Goins not only claimed that Officer Baldwin did not *Mirandize* him on December 12, he asserted that he had never been *Mirandized* by anyone ever before, indeed, had never

even heard the term "*Miranda*" until now, notwithstanding a 2½ page criminal record starting at age 14 in 1996 and running through 2003. *See* the pretrial service report. Goins pushed it further, claiming "as far as people say 'you have the right to remain silent,' I heard of that. I never knew what it was for. I didn't know the proper way to use that phrase or whatever." Tr., dkt. 33, at 131. However uneducated and forgetful Goins actually may be, these assertions defy credibility and common sense.

The testimony of the two police officers was more logical and believable on this point. I have concluded as a matter of fact that Officer Baldwin read Goins his *Miranda* rights, obtained a valid waiver, and that Goins never asked or demanded that questioning cease. The closest he ever came was his statement to Investigator Byerson that he did not wish to reveal who actually owned the cocaine base found in Goins's apartment. Even if Goins used the phrase "I've got nothing to say" about the source of the drugs, this was not–and was not meant to be–a request that Investigator Byerson stop questioning him. This was not an assertion of any right to remain silent, it was a narrowly tailored tactical decision by Goins not to rat out his colleagues while continuing to explore other self-help options with the police. So, Goins is not entitled to suppression of his statements on ground #2.

Third, there is no factual support for Goins' claim that his statements were not voluntary. Statements are voluntary if the totality of circumstances shows that they were the product of rational intellect and free will rather than physical abuse, psychological intimidation or deceptive interrogation tactics that overcame the suspect's free will. *United States v. Huerta*,

239 F.3d 865, 871 (7th Cir. 2001). Coercive police activity is a predicate to finding a confession involuntary. *Id; see also Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Factors important to the determination include the suspect's age, education, intelligence and mental state; the length of his detention; the nature of the interrogation; whether he was advised of his constitutional rights; the use of physical punishment or deprivation of physical needs; and the suspect's fatigue or use of drugs. *Huerta*, 239 F.3d at 871. *See also United States v. Gillaum*, 355 F.3d 982, 990 (7th Cir. 2004).

Goins premises his involuntariness claim on the police failure to honor his invocation of his right to remain silent. If the interrogation had progressed in the fashion proffered by Goins, then this would be a more pressing concern. But I have determined that Goins did not ask Investigator Byerson to stop questioning him. Absent this pivotal fact, there could not be any coercive police conduct, and there are no other circumstances suggesting that Goins's was unable to exercise his rational intellect and free will. To the contrary, Goins made conscious tactical decisions during the interview in an attempt to minimize his exposure without creating new problems for himself. This is not involuntary behavior.

In conclusion, the police obtained Goins's statements in a constitutionally acceptable manner. Goins is not entitled to suppress any of them.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant George L. Goins's motion to dismiss Count 1 and deny his motions to suppress evidence and statements.

Entered this 15th day of April, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

April 15, 2005

Robert A. Anderson
Assistant United States Attorney
660 West Washington Avenue
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Morris D. Berman
Berman Law Office
306 East Wilson Street
Madison, WI 53701-2424

Re: United States v. George L. Goins
Case No. 05-CR-004-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before April 25, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by April 25, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge