

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

TOREY M. HUEGLI,

Defendant.

REPORT AND
RECOMMENDATION

05-CR-060-S

REPORT

The grand jury has charged defendant Torey M. Huegli with unlawfully possessing pseudoephedrine knowing that it would be used to manufacture methamphetamine, in violation of 21 U.S.C. § 841(c)(2). Huegli has moved to suppress all evidence derived from his allegedly unlawful investigative detention and to suppress his post-arrest statements to the police because they were involuntary. For the reasons stated below, I am recommending that the court deny both motions.

On May 26, 2005, this court held an evidentiary hearing. Having heard and seen the witnesses testify, having made credibility determinations, and having reviewed all the documents submitted by both sides, I find the following facts:

FACTS

Brandon Quam is a loss prevention officer at the Shopko big box at West Towne Shopping Mall in Madison, Wisconsin. While working on March 13, 2005 at about 9:00

a.m., Quam saw two men sequentially enter Shopko who appeared to be working in tandem. Quam watched these men from his bank of video monitors. The younger man went to the over-the-counter drug section, looked around, then walked the perimeter of the store without making any selections or looking at any merchandise. After about a five minute tour, the young man ended up back in the drug department where the older man had been loitering. The older man selected two boxes of pseudoephedrine tablets, which is the maximum Shopko allows a customer to purchase, and which Quam knew to be a high theft item because of its use to manufacture methamphetamine. The older man began walking toward the grocery department. Within a few seconds, the younger man selected two boxes of the same pseudoephedrine product then walked the perimeter of the store again without selecting any merchandise. After another ten minute tour, the younger man checked himself out, also purchasing nasal spray and a can of pop.

Quam continued surveillance of these men in the parking lot using Shopko's outdoor camera. He watched the younger man get into a black Dodge Durango in the parking lot. Quam noticed that the older man already was in the passenger's seat of the Durango. Quam thought this was unusual, so he continued his surveillance, observing the men open the packages of pseudoephedrine and place the contents in a bag. This piqued Quam's curiosity further, so he continued surveillance. After ten minutes, the men left the Shopko parking lot. Quam recorded their license plate, which was from Iowa. This further raised Quam's suspicion because he was aware that Iowa has a severe methamphetamine problem. Quam

saw the Durango pull into the adjacent Cub grocery store parking lot. Quam alerted his counterpart at Cub then called the Madison Police Department to report what he had seen.

Madison Police Officer Joshua Acker responded and met Quam. Quam opined that people who purchased Sudafed sometimes use it to produce illegal drugs, and added his observation that while the two men sat in the Durango he believed that they had ingested some type of drug.

At approximately 9:43 a.m. the police department also dispatched Officer Sarah Olson to respond to this “suspicious person” call. Upon arrival she touched base with Quam, who advised that a police officer already was talking to one of the suspects in the Durango at the Cub Foods parking lot. As Officer Olson approached she saw Officer Allen talking with Grant Miller, who was sitting in the driver’s seat of the Durango. No one else was present. As Officer Olson watched Officer Allen interview Miller, Torey Huegli walked up to the Durango. Officer Olson asked Huegli to stop; he asked her what was happening. Officer Olson advised Huegli that Officer Allen was talking with Miller about something that had happened in the stores; she then asked Huegli if he had any identification.

Huegli responded that he had no identification documents with him, claiming that although he had a suspended Iowa’s driver’s license, he did not carry it. Officer Olson asked Huegli to spell his name for her and provide his birth date. Huegli told her that his name was Torey L. Anderson and that his birth date was August 11, 1973 but then changed the year to 1972. Huegli divulged his home address and phone number. He stated—falsely—that

he did not have a criminal history other than some very old traffic offenses. (Huegli lied about his identity and his criminal record because he knew that the State of Iowa had issued a warrant for his arrest and he did not want the Madison Police to discover it.)

After verifying with Huegli that she had recorded accurately the information he had provided, Officer Olson ran it through her computer. The computer could not locate anyone in Wisconsin or Iowa with these identifiers. Officer Olson advised Huegli that there was no record of a Torey Anderson in Iowa or Wisconsin; she asked Huegli if he was lying to her because he had a warrant of some sort. Huegli responded that he did not think he had a warrant and insisted that his name was Torey Anderson. Unconvinced, Officer Olson asked if she could check his person for identification; Huegli responded that he had a wallet but there was nothing in it. Officer Olson asked if he would show her the wallet and open it up, but Huegli refused. Officer Olson continued to question Huegli about his identity, but Huegli refused to cooperate or provide any information to verify his actual identity. Officer Olson informed Huegli that the police had been called to investigate the possibility that he and Miller had been buying Sudafed for the purpose of manufacturing methamphetamine. Huegli admitted that he had bought Sudafed in the Shopko, but claimed that it was for his sick girlfriend.

By then Madison Police Sergeant Peregoy had arrived on the scene; he and Officer Olson decided to handcuff Huegli and place him in a squad car because they could find no record verifying his identity as Torey Anderson. Sometime thereafter, the officers formally

arrested Huegli for obstructing and for lying about his identity. In their search incident to arrest, they retrieved Huegli's wallet, which contained an Iowa identification card in his real name. Huegli then admitted that he had a criminal record and was on probation in Iowa. Huegli confided that he was going through some rough times because of probation trouble and because his girlfriend recently had left him and had an abortion.

Police searched Miller's Durango, then transported Miller and Huegli to the west side police station. Early that afternoon, Drug Task Force Detective Kevin Linsmeier and Officer Olson met with Huegli in a small, sparsely furnished interview room. After obtaining the equivalent of booking information, Detective Linsmeier read Huegli his *Miranda* rights off a pre-printed card and asked Huegli if he understood his rights. Huegli responded that he understood his rights and was willing to talk with the officers. Detective Linsmeier questioned Huegli while Officer Olson watched.

The first phase of the interrogation lasted about 90 minutes, with a couple of short breaks. The tone was cordial and conversational. Neither of the police officers threatened Huegli, yelled at him, made promises to him, or deprived him of personal needs such as bathroom breaks, food or water (although no one recalls Huegli using the bathroom or requesting food or drink). Detective Linsmeier was persistent in probing topics about which Huegli did not particularly wish to speak. For instance, Huegli did not want to say who was going to cook the methamphetamine with the Sudafed that Huegli and Miller had bought. Detective Linsmeier, however, did not overbear Huegli's will; he did not engage in

“hammering” repetitive question, nor did he or Officer Olson (or Sergeant Peregoy when he came in later) tag team Huegli in order to confuse him, upset him, or otherwise overcome Huegli’s ability to exercise his free will.

Although Huegli repeated several times that he was upset with his situation, including the possibility of jail time in Iowa and his girlfriend’s abortion, he was lucid and courteous throughout the entire interrogation. Huegli did not break into tears, he did not ask the officers to stop questioning him, and he did not manifest any signs of confusion, recalcitrance, or drug intoxication. Huegli did not advise the police that he had a prescription for antidepressants that he no longer was taking. He did not exhibit a “flat affect” or any other symptom of depression or other mental illness that might have caused the officers to suspect Huegli was unable to interact lucidly with them. Although Huegli had smoked methamphetamine with Miller that morning, he did not tell the police this until very late in his interview, and he never exhibited any symptoms of drug intoxication.

After interviewing Huegli for about 90 minutes, Detective Linsmeier suspended the interview so that he could meet in a separate room with Miller to compare his story to Huegli’s. Miller, in sharp contrast to Huegli, was completely whacked out on meth, exhibiting classic tweaker symptoms such as agitation, shivering and skin-picking (“tweaking.”) After interrogating Miller for about thirty minutes, Detective Linsmeier met again with Huegli for approximately ten or fifteen minutes. Sergeant Peregoy joined the

interview and Officer Olson also was present. At this point, for the first time, Huegli admitted to the officers that he had smoked meth earlier that day.

As part of his interaction with the officers, Huegli asked questions in his own self interest, including whether he faced charges, whether he was going to jail and what consequences he might face. Detective Linsmeier honestly told him that at this early stage of the investigation, the Madison Police had made no decisions and were not sure whether they intended to seek charges against him.

At the time Huegli was thirty years old, had completed the eleventh grade and was close to earning his GED. Huegli had prior convictions for felony eluding, felony possession of anhydrous ammonia, and felony possession of ether. Huegli had been arrested before and had been *Mirandized* before.

ANALYSIS

Huegli has move moved to suppress the evidence against him claiming that the police violated his Fourth Amendment rights when they encountered him in the grocery store parking lot, and that they coerced an involuntary confession from him. I address each claim in turn.

I. The Parking Lot Encounter

Although Huegli raises two Fourth Amendment issues in his briefs, he has waived the second, his probable challenge, and this court need not consider it. This is because Huegli,

in his pretrial motion and then in a discussion with the court prior to the evidentiary hearing, confirmed that he was limiting his Fourth Amendment challenge to his initial encounter with the police, which he characterized as an investigative detention unsupported by reasonable suspicion. Huegli explicitly disavowed any claim that there was insufficient probable cause to arrest him later in the encounter. The government relied on these representations when developing its evidentiary record in response to Huegli's motion. *See* Transcript, dkt. 23, at 11-13.

Huegli now is bound by these choices, which means that he has waived any challenge to whether there was probable cause to arrest him. *See* F. R. Cr. P. 12(e); *United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir. 1999) (failure timely to raise a particular ground in support of a motion to suppress constitutes waiver); *United States v. Yousef*, 327 F.3d 56, 124-25 (2nd Cir. 2003) (untimely suppression argument completely waived where there is no reasonable excuse). The court may relieve waiver for good cause, but here there is none. I initiated the pre-hearing colloquy for the purpose of identifying all salient legal issues so that the parties could develop an adequate evidentiary record without fear that the claims would shift during briefing.

Thus, the only Fourth Amendment questions before the court are whether Huegli's initial encounter with Officer Olson qualifies as an investigative detention, and if so, whether it was supported by a reasonable suspicion that Huegli was engaged in criminal activity.

Citizen-police encounters can be placed into three categories: the first, a consensual encounter, involves no restraint on a subject's liberty and is characterized by non-coercive police question of a citizen who voluntarily cooperates. Such an encounter is not a seizure within the meaning of the Fourth Amendment and requires no objective justification. The second category is an investigative detention—often called *Terry* stop¹—which is a brief, non-intrusive detention. During a *Terry* stop an officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions that the detainee has engaged in criminal activity. A *Terry* stop is subject to Fourth Amendment standards but only requires a reasonable suspicion of criminal activity, which is a considerably lower standard than proof of wrongdoing by a preponderance of the evidence. The third category is a full arrest which must be justified by probable cause that the suspect has committed a crime. *United States v. Felix-Felix*, 275 F.3d 627, 632-33 (7th Cir. 2001).

A citizen-police encounter is consensual if a reasonable person would feel free to disregard the police and go about his business. Among the factors to consider are whether the encounter occurred in a public or private place; whether the police advised the suspect that he was not under arrest and was free to leave; whether the suspect consented or refused to talk to the officers; whether the investigating officers removed the suspect to another area; whether there was a physical touching, display of weapons, or other threatening conduct; and

¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

whether the suspect eventually departed without hindrance. Police do not violate the Fourth Amendment by approaching an individual in a public place and asking him if he is willing to cooperate with an ongoing criminal investigation. *United States v. Scheets*, 188 F.3d 829, 836-37 (7th Cir. 1999). A consensual stop can become an investigative detention or an arrest if the officers sufficiently ratchet up the level of intrusiveness and control. *Id.* at 837.

I am hard-pressed to characterize Huegli's initial conversation with Officer Olson as anything but a consensual encounter. *He* approached *her* in the very public parking lot of a very large shopping mall. True, Officer Olson told Huegli to "stop" before he entered the Durango, but there is no indication that she "stopped" him in the sense that she prevented him from simply walking past and continuing on his way. The fact that Huegli may have had nowhere else to go is irrelevant; in any event, getting into Miller's Durango wouldn't have gotten him anywhere either because Miller was in the middle of his own Q&A session with Officer Allen. Huegli initiated the conversation by asking Officer Allen what was happening. Officer Olson answered Huegli, then asked if he had any identification. Huegli responded that he did not, and Officer Olson accepted this answer, at least at that time. She did not attempt to restrain Huegli or to pat him down. Instead, she simply continued to ask questions related to his identity, which he voluntarily answered. When Officer Olson attempted to verify this information on her computer, I infer that Huegli remained unrestrained in the parking lot, lounging near the Durango.

Even after Huegeli's false information drew a blank on the police computer, Officer Olson did nothing that would have escalated this into an investigative detention. She asked Huegeli pointed questions, but made no move to restrain Huegeli's freedom of movement. When Huegeli refused to produce his wallet or submit to a police search for identification documents, Officer Olson honored that refusal. She continued to question Huegeli, advising him of the nature of the investigation and asking about his role in what had occurred. Huegeli admitted that he had bought Sudafed in the Shopko, but claimed it was for his sick girlfriend.

Regardless of Officer Olson's internal, subjective intentions toward Huegeli, up to this point she had said nothing and done nothing that would have caused a reasonable person in Huegeli's situation to conclude that he was not free to leave. Therefore, the most accurate characterization of the encounter between Huegeli and Officer Olson up to this point would be consensual.

But even if Huegeli had been subjected to objectively discernible restraints on his freedom, this was a legitimate *Terry* stop, which allowed Officer Olson briefly to detain Huegeli and obtain background information from him. See *United States v. Brown*, 366 F.3d 456, 461 (7th Cir. 2004). Whether any given stop is reasonable depends in part on the nature and the length of the intrusion; a court first looks to see whether the officers' actions were justified at the inception of the stop; next it considers whether the stop was reasonably related in scope to the circumstances that justified the stop in the first place. *United States v. Swift*, 220 F.3d 502, 506 (7th Cir. 2000). Police officers face a fluid situation during a *Terry* stop, so

they may graduate their responses to the demands of the particular circumstances. *Id.* At 509.

Here, the police could articulate specific facts undergirding their suspicion that Huegli and Miller were buying pseudoephedrine products for the purpose of manufacturing methamphetamine. A reasonable suspicion is something more than an inchoate or unparticularized suspicion or hunch, *United States v. Ganser*, 315 F.3d 839, 843 (7th Cir. 2003), and it need not rise to the level of probable cause, let alone a preponderance of the evidence. *United States v. Wimbush*, 337 F.3d 947, 949-50 (7th Cir. 2003). In determining whether reasonable suspicion supported an investigative detention, courts are to consider the totality of circumstances presented to the officer at the time, including both the experience of the officer and the behavior and characteristics of the suspect. A pattern of behavior interpreted by the untrained observer as innocent may justify a valid investigatory stop when viewed collectively by experience drug enforcement agents. *United States v. Askew*, 403 F.3d at 507-08.

Huegli and Miller's acts, as reported to the police by Quam, so closely followed the meth-cooker's shopping *m.o.* as to verge on probable cause of a § 841(c)(2) violation: two men from Iowa come to Wisconsin, drive to a generic big-box store on the edge of town, enter separately, mosey aimlessly, purchase the store's limit on pseudoephedrine, dump the pills into a communal bag in their truck, ingest some sort of substance, and then drive to the adjacent grocery store, most likely to buy more cold tablets. This concrete, interconnected

fact pattern justified any investigative detention that resulted from Officer Olson’s low-key questioning of Huegli in the public parking lot.² The intrusion was valid at its inception and remained properly limited in scope and duration. In short, Huegli suffered no violation of his Fourth Amendment rights during this interaction and there is no basis to grant his motion to suppress.

It would be a closer question whether the police had probable cause to arrest Huegli at the time they handcuffed him and placed him in a squad car. The police appear to justify this as an investigative detention followed by an arrest for obstruction. For whatever reason, Huegli disavowed any challenge to this phase of his interaction with the police, so the question is not directly before the court.³ Accordingly, this court should deny Huegli’s Fourth Amendment challenge.

² Huegli labels these observations “Quam’s ridiculous and unwarranted speculations,” Reply Brief, dkt. 22, at 2. Actually, this same fact pattern repeatedly manifests itself in pseudoephedrine prosecutions brought in this court and it is recognized by police and store employees. Apparently the only people in the Midwest who don’t realize how suspicious this behavior is are the defendants who continue to engage in it. Further, although hindsight justifies nothing, Quam’s surmises were 100% correct.

³ If this question were to surface later under the rubric of *Strickland*, I offer two observations: first, as just noted, the police might have had probable cause to arrest both Huegli and Miller for possessing chemicals and products intending them to be used to manufacture methamphetamine. Because Fourth Amendment analysis is objective, not subjective, the fact that the police did not rely on this at the time would not affect the conclusion. Second, it might be that the government could lay a sufficient foundation for Huegli’s obstruction arrest if it could establish that an MPD field computer is so powerful and reliable that, if such a computer were to conclude that there is no person living in Iowa or Wisconsin named Torey L. Anderson, d/o/b Aug. 11 1972, then this establishes probable cause that a person claiming otherwise—namely Huegli—is lying. This never was established because of Huegli’s tactical approach to his motion.

II. Huegli's Post Arrest Interrogation

Huegli seeks to suppress his confession on the ground that it was involuntary. He claims that he was under the influence of methamphetamine, that he was mentally ill and unmedicated, that his distress was compounded by ongoing emotional turmoil related to his ex-girlfriend and her recent abortion, and that the police intentionally took advantage of his palpable frailty.

It is the government's burden to establish that Huegli's confession was voluntary. 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 police had reason to know that Huegli was high, then this court could find that an otherwise legally inconsequential level of coercive behavior was unacceptable under the circumstances. *Id.*

Therefore, this court must determine whether in light of the totality of the circumstances, Huegli's statement was the product of his rational intellect and free will, or whether it was coerced by the police. Relevant factors include Huegli's age, education,

intelligence level, mental state, prior experience with the police, the influence of narcotics, alcohol or fatigue, the length and nature of the interrogation, whether the police advised Huegli of his rights, and whether they used physical punishment or other coercive techniques to wear him down. If Huegli was under the influence of methamphetamine and the police reasonably should have known this, then a lesser quantum of coercion may be sufficient to call into question the voluntariness of his confession. *United States v. Brooks*, 125 F.3d 484, 492-93 (7th Cir. 1997).

But as established in the facts found above, the police engaged in no coercive words or deeds. Huegli *claimed* that they did at the suppression hearing, painting himself as a drug-addled, emotional train wreck assailed by a tag-team of unsympathetic officers “hammering” him with questions until he told them what they wanted to hear. But Huegli lied. Having heard and seen Huegli testify, I conclude that his version of events was, for the most part, a fabrication. To the extent that Huegli actually may have felt distressed, depressed, or buzzed from meth, he grievously overstated the severity of these symptoms. The police observed no symptoms of depression, anxiety, agitation or intoxication that could have led them to suspect that Huegli might require special treatment. To the contrary, Huegli was lucid and responsive. He was understandably unhappy, but he understood what was happening. Huegli was a mature, educated veteran of the criminal justice system who had the presence of mind first to lie to the police at the scene in an attempt to wriggle free, then to ask Detective Linsmeier what was going to happen next. He had the wherewithal to guard his

own interests as he deemed appropriate at the time and he was not subjected to any coercion by the police during interrogation.

Under the totality of circumstances, I conclude that Huegli's confession was voluntary. There is no basis to grant his motion to suppress his post-arrest statements.

RECOMMENDATION

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

Entered this 21st day of July, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

July 21, 2005

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Re: ___ United States v. Huegli
Case No. 05-CR-060-S

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 August 1, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by August 1, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

cc: Honorable John C. Shabaz, District Judge