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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL LePAGE,

Defendant.

REPORT AND RECOMMENDATION

05-CR-147-S

REPORT

The grand jury has charged defendant Michael LePage as a felon-with-a-gun in violation of 18 U.S.C. § 922(g)(1), based on a police stop and search that occurred August 23, 2005 in Superior. LePage has moved to suppress the shotgun found in his duffle bag, claiming its discovery resulted from an investigative stop unsupported by reasonable suspicion of criminal activity. As a placeholder, LePage also has challenged the constitutionality of the charging statute under the Commerce Clause. For the reasons stated below, I am recommending that the court deny both motions.

Although LePage asked for an evidentiary hearing on his suppression motion, I declined to hold one for reasons stated during a December 16, 2005 telephonic status conference. LePage failed timely to establish that there was a factual dispute that required the court to take evidence and make credibility determinations. As a result of this ruling, the parties stipulated that the factual record would consist of the police reports of the incident, the transcript of the 911 call reporting the incident, and the transcript of the

August 31, 2005 preliminary examination in state court.[1] Based on the documents timely presented to the court, I find the following facts:

FACTS

On August 23, 2005 in Superior, Wisconsin, a woman named Jennifer Swanson telephoned the police department to report suspicious activity outside the apartment in which she was located. The dispatcher determined that Swanson was calling from Apartment 12 at 1116 Hughitt Avenue. From the sound of other voices in the background and Swanson's divided attention, it was clear that other people were present and making observations that they were relaying to Swanson to pass along to the dispatcher.

Swanson told the dispatcher that eight or nine people were outside the apartment circling the block on foot and in a car. The dispatcher asked why this was a police concern. After some prodding, Swanson stated that the group was near an apartment across the street that was supposed to be vacant but the lights were on. Swanson then stated that someone was trying to break into a car in the alley. Swanson mentioned a blue Tercel with rims; under further prodding from the dispatcher, Swanson stated that this was the car containing the suspects, not the car that was being victimized. Swanson then identified Mike LePage by name as a member of the group. A bit later she said that she though Mike had a gun. The dispatcher, understandably alarmed for officer safety, attempted to follow up on this

[1] Pursuant to Rule 12(e) I have declined to consider the late-filed affidavit of Patricia Vig, dkt. 21. I discuss my reasoning in the analysis section.

several times. Swanson admitted that neither she nor her friends had seen a gun, but LePage had something in his pants in front that he had been holding. The dispatcher relayed this information to the responding officers.

Officer Kiel arrived on the scene first and reported that he saw three people walking west in the south parking lot of 1116 Hughitt. Officer Kiel directed Officer T. R. Maas to approach Hughitt from North 12th Street to cut off the suspects. Officer Maas approached on foot and saw three people walking up the porch stairs at 1122 Hughitt, with Officer Kiel approaching. At that point, Officer Maas learned from dispatch that Michael LePage had been named and that he might have a firearm. Officer Maas had known LePage since about 1998 and knew him by sight. Officer Maas knew that LePage had prior felony convictions.

Officer Maas saw that LePage was one of the three people on the porch (along with Shyloh Schuman and Patty Vig). LePage had a black duffel bag in his hands. Officer Maas directed LePage to drop the bag and come down to where the officers were standing on the sidewalk. He had to repeat the request several times before LePage complied. LePage dropped the black bag; it made a "heavy, pretty substantial thud" on the wood deck of the porch.[2] LePage was very nervous and difficult for Officer Maas to control verbally. Officer Maas had to tell LePage several times to sit in the grass by him. He patted LePage down for weapons, finding nothing.

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[2] Transcript of August 31, 2005 state court Preliminary Examination, Exh. 3 at 4.

Officer Maas stepped onto the porch to look at the duffel bag. The zipper was only half shut; through the opening, Officer Maas could see the stock of what appeared to be a shotgun. The officers arrested LePage and handcuffed him. They retrieved from the bag a loaded sawed-off shotgun, between 20-25 loose shotgun shells, and two pounds of a cutting agent for methamphetamine.[3]

ANALYSIS

I. Housekeeping

As a preliminary matter the parties dispute whether the court should consider Vig's late-filed affidavit in which she claims that LePage's duffel bag was zipped completely shut and that the police unzipped it to search it. The parties also dispute whether LePage properly has preserved a claim for suppression on the ground of lack of plain view and improper invasion of the curtilage at 1122 Hughitt.

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[3] What happened next is irrelevant to suppression, but to complete the narrative, Officer Maas turned LePage over to his colleagues then went to talk to Swanson and her friends. Swanson was there with Ryan Olson and Adrian Gray. Officer Maas looked out the window from which the three had been watching the suspicious crowd; he found the view obscured by two large trees. So he asked how they knew it was LePage out there. Gray responded that he used to hang around with LePage, who lived at 1122 Hughitt with Vig. Officer Maas asked if any of them actually had seen LePage with a gun that night and they admitted that they had not. Gray explained that he knew LePage had been toting a sawed-off shotgun for a while after having been assaulted a few weeks prior, so he surmised that LePage would be carrying the gun that night. Gray detailed the sawed-off shotgun to Officer Maas, then reported a full-length shotgun in LePage's truck behind the speakers, which later was retrieved by Officer Kiel. Officer Maas asked why the three had called the police that night; they responded that there were several guys out there and that the Toyota and a Cadillac owned by Vig kept driving around the block.

Outside, other police recovered a .45 semi-automatic handgun from Schuman and several small bags of methamphetamine plus another shotgun from Vig's Cadillac.

LePage submitted Vig's affidavit in violation of F.R. Crim. Pro. 12(e). Accepting it would prejudice the government, which no longer has the opportunity to present additional evidence to impeach Vig's averment. *See 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).

LePage protests that Rule 12(e) does not apply to Vig's affidavit because an unsigned version was in the record within the deadline so no one could have been sandbagged by it, and Vig's failure timely to provide her affidavit was the result of a mailing snafu. The November 3, 2005 scheduling order explicitly advised LePage that if he wanted an evidentiary hearing on a motion, then not later than December 15, 2005 he had to provide a nonconjectural factual basis establishing a prima facie entitlement to the relief requested. Dkt. 11 at 1. Such a submission would alert the government which facts were in dispute and would allow the government to call witnesses to establish its version of events.

Upon receiving Vig's unsigned affidavit, the government objected to taking evidence on the suppression motion, hoping to spare the Superior police officers an unnecessary 650 mile round-trip drive to Madison. On December 16, 2005 I held a telephonic conference with the attorneys to discuss whether to take evidence on the suppression motion. LePage's attorney could not assure me that Vig intended to submit a signed version of the affidavit;

in fact, he implied that he would not be surprised if she did not.[4] The assistant U.S. attorney responded that if LePage wanted an evidentiary hearing on this issue, then he was perfectly capable of submitting his *own* affidavit averring that his duffel bag had been zipped shut, and she essentially dared LePage's attorney to put up or shut up. LePage, by counsel, declined to do so. Based on this, I declined to hold an evidentiary hearing, finding that LePage had not made the requisite nonconjectural prima facie showing that the duffel had been zipped shut, and there was no indication that such a showing was imminent. Therefore, December 16, 2005 was the drop-dead date under Rule 12(c). This court already had set a firm January 23, 2006 trial date and had given LePage's attorney so much front-end time to file motions that the briefing schedule and related deadlines had to be severely compressed. As a result, LePage's January 3, 2006 submission of Vig's December 13, 2005(!) affidavit is a nullity.

I also agree with the government that LePage has waived the argument that the officers improperly invaded curtilage of his residence by stepping onto the porch to look in his duffel bag. Contrary to LePage's assertion, nothing in ¶ 4 of his suppression motion (dkt. 14) put the government (or the court) on notice that he was raising a curtilage claim. His primary challenge was to the *Terry* stop and his secondary challenge was to Officer Maas allegedly opening his duffel. But in any event, even if the court were to assume timely and

[4] It is worth noting that in his suppression brief LePage essentially disowned Vig's affidavit, all but accusing her of perjury and making it quite clear that this was not at his behest. *See* dkt. 20 at 11.

fair presentment of the curtilage claim, there is insufficient evidence to support it. As the government notes, the record does not clearly establish that LePage even lived at this address.[5]

II. The *Terry* Stop

The government concedes that LePage's encounter with the Superior police evolved into an investigative detention, so the question is whether this stop was supported by a reasonable suspicion that LePage was engaged in criminal activity. Corollary questions are whether the police "searched" LePage's duffle bag and if so, whether the search was reasonable.

Law enforcement officers may subject citizens to an investigative attention, or "*Terry* stop,"[6] if they have a reasonable suspicion that the target has committed or is about to commit a crime. *United States v. Askew*, 403 F.3d 496, 507 (7th Cir. 2005). Officers may ask the detainee a moderate number of questions to obtain information confirming or dispelling their suspicions that the detainee has engaged in criminal activity. A reasonable suspicion is something more than an inchoate or unparticularized suspicion or hunch, *United States*

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[5] Even if this court accepts Gray's statement in the submitted police report that LePage lived with Vig at 1122 Hughli, LePage loses. It is not objectionable for an officer to come upon that part of private property which has been opened to public use to visitors or delivery people. *See United States v. French*, 291 F.3d 945 (7th Cir. 2002); *United States v. Jones*, 149 F.3d 715, 716 (7th Cir. 1998)(area of a residence all the way up to the frame of a front door is a public place).

[6] *Terry v. Ohio*, 392 U.S. 1 (1968).

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); *United States v. Hendricks*, 319 F.3d 993, 1001 (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 experienced officers. *United States v. Askew*, 403 F.3d at 507-08. Failing to yield to an officer's command is objectively suspicious; similarly, a "thud" from a dropped jacket is a reason to suspect it might contain a weapon. *United States v. Quinn*, 83 F.3d 917, 921-22 (7th Cir. 1996).

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. Courts must use an objective standard when reviewing police action in hindsight: would the facts available to the officers at the moment of the seizure warrant a reasonably cautious person to believe that his action was appropriate? The process does not deal with hard

certainties, but with probabilities. The real issue is whether the officers' conduct–given their suspicions and the surrounding circumstances–was reasonable. *United States v. Mancillas*, 183 F.3d 682, 695-96 (7th Cir. 1999).

A tip from an informant, can by itself, provide reasonable suspicion for an investigative stop if it provides enough verifiable information. *United States v. Ganser*, 315 F.3d 839, 843 (7th Cir. 2003). In making this determination, courts examine the amount of information given, the degree of reliability, and the amount of police corroboration. If an informant is shown to be right about some things, then she probable is right about other facts that she has alleged, including the claim that the object of the tip is engaged in criminal activity. However, an informant does not have to be 100% correct to provide the police with reasonable suspicion. *Id.*, citations omitted. Some examples from the case law provide helpful context:

In *United States v. Hendricks*, 319 F.3d 993, a newspaper carrier, Millie McDonald, called the police dispatcher to report what she perceived to be suspicious activity: while delivering papers, McDonald saw a white car parked behind a closed Oil Exchange shop, when she drove by later, the car still was there, but now parked in the opposite direction. A police officer responded and saw a white car drive from behind the Oil Exchange, which verified the accuracy of McDonald's tip. Knowing that businesses in that neighborhood had been burglarized recently, the officer followed the white car as it pulled sharply into a service station without signaling. The court found that these facts, viewed in their totality, provided

the officer with reasonable suspicion to detain briefly the car's occupants in order to verify or dispel his well-founded suspicions that the occupants had been or were about to be engaged in criminal activity. *Id.* at 1001-02.

The court in *Hendricks* distinguished *United States v. Packer*, 15 F.3d 654 (7th Cir. 1994), in which an anonymous caller telephoned the police to report a "suspicious vehicle" described as a yellow Cadillac occupied by four African American men, parked on a residential street at 1:00 a.m. The court in *Packer* found that this was not enough to establish reasonable suspicious for an investigative stop, but that the minimum threshold of specific and articulable facts sufficient to give rise to reasonable suspicion was only marginally higher. 15 F.3d at 659. In *Hendricks*, the court found that it was enough extra where the tipster, while untested, was not anonymous, the car had changed direction but remained at the Oil Exchange for a while, the car was parked at a closed business, and the police were aware of recent burglaries in the area. 319 F.3d at 1003. Additionally (although apparently not necessary to support the stop) there were subsequent suspicious events: the driver was nervous and provided evasive answers to the officer's questions; the passenger in the car was slumped and barely visible; and there were signs the car had been hotwired.

In *United States v. Mancillas*, 183 F.3d 682, an anonymous informant called the police to report that at 1:35 a.m. a Hispanic man had just been observed holding a gun while sitting in a blue Mercedes in the parking lot of a night club. The responding police officer pulled into the business parking lot and immediately corroborated a number of details: he saw a

blue Mercedes, from which three men exited, one of them apparently Hispanic. The men exited because the office had shined a light on their car and they walked away in different directions, probably to evade the officer. *Id*. at 697. Pivotal to the court's finding of reasonable suspicion was the informant's report that a man had a firearm in his hand (which, of course the officer did not see) while sitting in a car on a cold snowy night, followed by the suspicious behavior of trying to avoid contact with the police. *Id.*

The court in *Mancillas* noted that this was similar to the holding in *United States v. DeBerry*, 76 F.3d 884 (7th Cir. 1996) in which the court found reasonable suspicion to pat down a suspect for a firearm based on an anonymous tip that a specific (but unnamed) person possessed a handgun, followed by marginally suspicious activity by the suspect. In *DeBerry*, the tipster called the Decatur police to tell them that on the corner of Main and Calhoun stood a black man in a tan shirt and tan shorts with a gun in his waistband. An officer responded to that intersection and saw a man fitting the description but saw no visible firearm. The officer approached the man on foot and hailed him. The man took several steps backward, turned slightly to the side, and moved his hands as if he might be about to draw a gun. This prompted the officer to draw his own firearm and order the suspect to assume the position. A subsequent pat down recovered a handgun. *Id.* at 885. The court held that "the tip and the gesture certain justify the officer in drawing his own gun and detaining the gesturer until it can be determined whether in fact he has a gun;" after exploring the logical reasons why an uncorroborated tip usually *cannot* provide

reasonable suspicion, the court noted that it is enough extra if there is only weak corroboration that the suspect is armed. *Id.* at 885-86.

Aligning the facts found above in the instant case to this collection of facts and holdings establishes that Officer Maas had a reasonable suspicion that LePage was unlawfully carrying a weapon. The police had received a specific, contemporaneous tip from an identified citizen witness that Mike LePage and others were "prowling cars" and that LePage had a gun. Although the police knew that informant Swanson had disavowed actually having seen a gun, and although they did not corroborate everything she said, Swanson provided a rational basis for her claims that was sufficient to warrant the initial confrontation on the porch.[7] Officer Maas knew LePage personally and knew that he was a convicted felon. It was not unreasonable for him to ask LePage to drop the duffle bag and come forward to be questioned.

At this point, perhaps we have arrived at the crux of *DeBerry*: had nothing else occurred before LePage left the porch, the government might have a problem. But Officer Maas reported that it was necessary to ask LePage several times to drop the bag, which only could have heightened Officer Maas's suspicions and concerns. Perhaps this is enough to justify a *Terry* stop, perhaps not; but asking a suspect to set down his duffel while answering

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[7] After the fact, the police learned that much of the information that Swanson and her pals had provided was right for the wrong reasons. The informant(s) had much more specific information about LePage's criminality that they had not provided, choosing instead to present a shaded version of what was occurring outside. But the police did not know this and could not have known this at the time they approached Swanson. Therefore, it does not support LePage's attempt to quash the stop and search. *See United States v. Odum*, 72 F.3d 1279, 1284 (7th Cir. 1995).

a few question is the sort of *de minimis* intrusion that should not raise Fourth Amendment concerns sufficient to trigger the exclusionary rule. *See, e.g., United States v. Broomfield*, 417 F.3d 654, 656 (7th Cir. 2005).

If this started as a close call, the calculus changed when LePage's duffel thudded heavily on the porch. Perhaps this indicium of gun possession triggered LePage's nervousness, perhaps LePage would have manifested nervousness in any event, but these two factors, combined with Swanson's report (which the police had corroborated in many material respects) tilted the balance toward reasonable suspicion of criminal activity. It was reasonable for officer Maas to detain LePage on the lawn while he investigated further.

At this point, there is a conceptual break in the analysis because the police had separated LePage from his duffel, which now was in plain view on the publicly accessible front porch. Does reasonable suspicion even matter any more? Probably, because the duffel was available for a plain view peek only by virtue of the police having directed LePage to set it down and step off of the porch. It may have been a *de minimis* intrusion to direct LePage to set down his bag while questioning him, but asking him to step away from it and then taking advantage of where the bag now was placed to look inside the open top would seem to require at least *Terry*-level reasonable suspicion of the sort required for a weapon pat down under the rubric of the first element of the plain-view doctrine.[8]

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[8] The plain view doctrine allows seizure of contraband if (1) the officer is lawfully present in the spot from which he views the contraband, (2) the contraband is in plain view from that spot, and (3) the incriminating nature of the item is immediately apparent. *United States v. Raney*, 342 F.3d 551 (7th Cir. 2003). *See also United States v. Garcia*, 376 F.3d 648, 650 (7th Cir. 2004) (looking at documents inside an open shoe box while lawfully inside defendant's home was justified under the plain view doctrine.)

Officer Maas had reasonable suspicion that a gun might be in the duffel. This allowed him to approach and look into the half-open bag. Maas was lawfully on the publicly-accessible front porch of the residence, he had an unobstructed view of the stock of a shotgun in the duffel, and he knew this gun was contraband because Wisconsin has criminalized the concealed carrying of firearms and he knew that LePage was a convicted felon. In sum, the police intrusions on LePage and his duffel bag were valid at their inception and remained properly limited in scope and duration. LePage suffered no violation of his Fourth Amendment rights during this interaction and there is no basis to grant his motion to suppress.

III. The Commerce Clause

LePage acknowledges that courts consistently have found 18 U.S.C. § 922(g)(1) constitutional, *see, e.g., United States v. Williams*, 410 F.3d 397 (7th Cir. 2005), but he wishes to preserve this argument for the record. Duly noted. Consistent with circuit law, this court should deny LePage's motion to dismiss.

RECOMMENDATION

Pursuant to 28 U.S. C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Michael LePage's motion to suppress evidence and deny his motion to dismiss the charge.

Entered this 13th day of January, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

January 13, 2006

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Re: United States v. Michael LePage
Case No. 05-CR-147-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 January 17, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by January 17, 2006, 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