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

UNITED STATES OF AMERICA,

Plaintiff,

v.

BERTRAND EDWARDS,

Defendant.

REPORT AND RECOMMENDATION

12-cr-10-bbc

REPORT

The grand jury has returned a three-count indictment against defendant Bertrand Edwards charging him with making and passing counterfeit twenty-dollar bills. *See* dkt. 3. (His co-defendant, Kelly Chandler, already has entered a guilty plea in this case). Edwards has moved to quash his October 5, 2011 arrest and the subsequent search of his car at a highway rest stop in Dunn County. Edwards claims that there was no probable cause to arrest him and there was no legal basis to search his car after he was removed from it. *See* dkt. 34. For the reasons stated below, I am recommending that the court deny Edwards's motion to quash his arrest and suppress evidence.

To make their factual record the parties submitted an audiovisual recording of Edwards's encounter and interaction with the deputy sheriffs (Gov. Exh. 1, dkt. 36) and the lead deputy sheriff's written report (Gov. Exh. 2, dkt. 38-1). The government also has submitted what it deems to be relevant portions of the Dunn County Sheriff's Department's Field Operation Procedures relating to impounding motor vehicles and performing inventory searches (Gov. Exh. 3, dkt. 38-2). Having viewed the DVD recording and having read the documents, I find these facts:

FACTS

On October 5, 2011, at 3:51 a.m., the Jackson County Sheriff's Department provided information to the Dunn County Sheriff's Department that at about 2:45 a.m. that morning, a vehicle had pumped about $50 worth of gas at a station in Black River Falls, then drove off without paying. The vehicle was identified as a 1995 green four-door Chevrolet Blazer with Minnesota license plate 319GRV. The suspect was an adult black male with dread locks. (Black River Falls is about 150 miles southeast of the Twin Cities on I-94. Dunn County is about between the two, with Menomonie at about the halfway point).

At about 4:05 a.m. that same morning, Dunn County Sheriff's Deputy Chad Pollock was patrolling the rest area near Menomonie off of westbound I-94. He saw the green Blazer with Minnesota plate 319GRV parked askew two parking spots. An African American man with dread locks was asleep in the driver's seat. Deputy Pollock parked his squad car facing the Blazer at an angle behind it and to its right, activated his dashboard camera and body microphone, then approached the Blazer on foot. The outside of the vehicle (presumably the hood) was warm to the touch. Deputy Pollock woke the driver, who identified himself as Bertrand Edwards and provided a Minnesota driver's license. Deputy Pollock ran the license: it was suspended. Deputy Pollock asked Edwards if he knew why Pollock would be talking to him; Edwards said he didn't know. Deputy Pollock asked Edwards how long he had been there; Edwards responded that he had pulled in about 10 minutes earlier to take a nap. Deputy Pollock asked Edwards if he had bought any gas back in Black River Falls; Edwards was noncommittal.

During this conversation, Deputy Pollock noticed that Edwards's eyes were extremely bloodshot and appeared to be slightly dilated for the lighting conditions. Edwards' speech was

slow and mumbled; his responses were delayed and he talked slowly. Deputy Pollock detected the aroma of stale marijuana emanating from the Blazer. Deputy Pollock suspected that Edwards had recently smoked marijuana, so he asked Edwards to step out of the Blazer. When Edwards stepped out, Deputy Pollock noticed one open beer bottle and three sealed bottles visible on the back seat. He saw marijuana shake on the floorboard and ash on the console, seat and floorboard that appeared to be recent because it floated with the air currents.[1]

Edwards was relaxed and cooperative, although his coordination was poor. When asked, he denied using marijuana or other drugs. Deputy Pollock ran Edwards through a battery of field sobriety tests (HGN, Romberg balance exercise, nine-step walk-and-turn, one leg stand, finger-to-nose) and Edwards performed poorly on all of them.[2] Deputy Pollock gave Edwards a preliminary breath test for alcohol; it showed 0% BAC. Based on his seven years of field experience and six specialized training courses related to drugs (listed in his report), Deputy Pollock determined that Edwards had been driving under the influence of marijuana, notwithstanding Edwards's claim that he hadn't smoked dope in two months.

Deputy Pollock placed Edwards under arrest for OWI-1st offense (a civil offense in Wisconsin), handcuffed him and seated him in the squad car. Deputy Pollock also told Edwards that he was being "detained" for investigation of the gas drive-off.

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[1] The recording neither corroborates nor impeaches Deputy Pollock's report of these sensory perceptions because his dashboard camera was trained on the right-side rear quarter panel of the Blazer. The recording also shows that another deputy sheriff arrives quickly, but he played no role until he helped with the car search. A state trooper shows up later still.

[2] Deputy Pollock states the actual results in his report, noting Edwards's myriad deviations from the norm. The recording of the tests shows Edward's palpable lack of coordination and inability to follow some of Deputy Pollock's directions.

Based on his observation of an open beer, marijuana shake and ash, plus the smell of stale marijuana, Deputy Pollock and his colleague searched the Blazer for more evidence to support the "drugged driving" charge. In a wastebasket in the back seat Deputy Pollock discovered whole and partial sheets of white paper onto which $20 bills had been two-side photocopied. Additional searching uncovered a straight-edged paper cutter, apparently counterfeit $20 bills that were wet and bunched up in towels in the open cargo area behind the back seat and a photocopier/scanner with a genuine twenty bill on the scanner that had the same serial number as the wet bills. When questioned by Deputy Pollock on the scene, Edwards stated that it wasn't his vehicle, it belonged to a guy named Kelly (whose last name he didn't know) who got into trouble down in Wisconsin Dells, so Edwards was taking the Blazer back to Minnesota.

Deputy Pollock called a sheriff's department investigator to report what he had found; the investigator told Deputy Pollock to impound the Blazer. A tow truck took the Blazer to the sheriff's impound lot. Policy # 400-6-0 of the Dunn County Sheriff's Department Field Operation Procedures sets for the department's procedures for impounding, towing and inventorying motor vehicles. The policy allows the sheriff's department to impound vehicles for a legitimate police purpose, such as for evidentiary purposes, and for abandonment, which has a 72-hour threshold.

ANALYSIS

Edwards argues that Deputy Pollock lacked probable cause to arrest him for any crime and that any search of his car for evidence of marijuana use should have been limited to the front seat. *See* brief in support, dkt. 39, at 6-7. Edwards is incorrect.

I will take the straightest analytical path first: Deputy Pollock had probable cause to arrest Edwards for simple possession of marijuana, a misdemeanor offense pursuant to Wis. Stat. § 941(3g)(e). It is legally irrelevant that Deputy Pollock didn't use this as a basis to arrest Edwards because a determination of probable cause is objective, not subjective. This means that the determination need not be limited to the crime the police had in mind at the time they seized their suspect. The operative question is whether the information known to Deputy Pollock at the time of the seizure would have provided a hypothetical reasonable officer with probable cause to arrest Edwards for *any* offense. *Williams v. Rodriguez*, 509 F.3d 392, 399 (7th Cir. 2007). "The fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action as long as the circumstances, viewed objectively, justify that action." *Id.*, quoting *Devenpeck v. Alford*, 543 U.S. 146, 143 (2004).

Thus, the probable cause analysis need not be limited to whether an officer has probable cause to arrest a defendant for the crimes actually stated at the scene or even later charged; instead, the question is whether a reasonable officer with the same information known to the officer on the scene at that time, would have had probable cause to arrest that defendant for *any* offense, no matter how petty. *Id.* If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender. *Id.*, quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). *See also Jackson v. Parker*, 627 F.3d 634, 638-39 (7th Cir. 2010) ("An arrest is reasonable under the Fourth Amendment so long as there is probable cause to believe that *some* criminal offense has been or is being committed, even if it is not the crime with which the officers initially charged the suspect," emphasis in original, citations omitted).

Probable cause to arrest requires an officer to possess knowledge from reasonably trustworthy information that would lead a prudent person to believe that a suspect has committed a crime. Whether the officer acted on probable cause is determined based on the commonsense interpretations of reasonable officers as to the totality of circumstances at the time of arrest. *United States v. McCauley*, 659 F.3d 645, 649 (7th Cir. 2011).

Let's apply this legal template to the facts found above: immediately upon initiating his encounter with Edwards in his parked Blazer, Deputy Pollock smelled stale marijuana smoke and observed signs in Edwards's appearance and behavior consistent with having smoked marijuana. Of course, Edwards's appearance and behavior were equally consistent with a tired driver being unexpectedly roused from slumber at 4:00 in the morning, but given the aroma of marijuana smoke, Deputy Pollock had *at least* a reasonable suspicion that Edwards had been "driving drugged" or smoking dope while parked. Upon directing Edwards out of the Blazer–a direction that Edwards has not and could not challenge–Deputy Pollock saw–and recognized–marijuana shake on the floor and ash accumulation around Edwards. Shake is marijuana, so Deputy Pollock then and there had probable cause to arrest Edwards for simple possession, even though as a practical matter this probably was not a charge worth pursuing based just on residue in a car floor mat. But it sufficed to provide probable cause to search the car for additional marijuana. Deputy Pollock, however, did not even begin such a search until after he had put Edwards through a battery of field sobriety tests, which indicated that Edwards was impaired but not by alcohol. This corroborated Deputy Pollock's conclusion that Edwards had been smoking marijuana. This led him to search the car to see if there was more marijuana or other evidence of marijuana possession.

This segues to Deputy Pollock's *stated* reason for searching the Blazer: he was looking for evidence related to the crime underlying Edwards's arrest "drugged driving." Edwards argues that in Wisconsin, OWI-first is a civil offense and that there was insufficient evidence that he actually had operated the Blazer while under the influence of marijuana. I agree with Edwards that some of the evidence is ambiguous about when he might have smoked marijuana, but given his performance on the field tests, his estimate as to how long he had been in the rest stop, the Blazer's warm hood, and the absence of actual marijuana smoke but the presence of its aroma, Deputy Pollock had probable cause to believe that Edwards *had* been operating while under the influence, even if Edwards hadn't been caught in the act. Next, regardless what penalties ultimately might have been imposed following a conviction on this charge of first-time OWI, this still was an arrest offense, which would seem to give the deputies the right to seek related evidence inside the Blazer to support the civil charge that they would have to prove at trial.[3]

Probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. Under the automobile exception to the warrant requirement, police are authorized to open containers and packages within the vehicle. This is because a search of an automobile based on probable cause lawfully extends to all parts of the vehicle in which contraband or evidence could be concealed, including closed compartments and trunks. *United States v. Alexander*, 573 F.3d 465, 475 (7th Cir. 2009). Such a search, after Edwards was ensconced in a squad car, survives the limitations imposed by *Arizona v. Gant*, 556 U.S. 332 (2009) because the

[3] Just the small federal traffic court docket that this court handles from Fort McCoy probably would allow judicial notice of how zealously most Wisconsin drivers contest even civil OWI charges.

deputies had reason to believe that evidence relevant to the crime of Edwards's arrest might be found in the vehicle. *See Gant*, 556 U.S. at 343-44; *United States v. Slone*, 636 F.3d 845, 851-52 (7th Cir. 2011)(car search lawful under *Gant* because it would have been reasonable for officers to believe that the might find evidence related to the crime for which the defendant was arrested).

Edwards's argument that the deputies should have limited their search to the front seat area of the Blazer is not supported by case law or common sense; if Edwards had more marijuana or paraphernalia in the Blazer, then he could have put it in any sort of a container anywhere in the vehicle. *See United States v. Nicksion*, 628 F.3d 368, 377 (7th Cir. 2010) (if there is probable cause to believe that a vehicle contains evidence of criminal activity, police may search any area in which the evidence might be found). The fact that the deputies found contraband of a sort they weren't searching for and didn't expect to find does not make their search unreasonable.

In sum, Edwards' arrest and the subsequent search of his car were legal. There is no basis to suppress any evidence.

For completeness's sake, I will address the government's contention that the gas drive-off served as a basis to search the Blazer. Deputy Pollock might have had probable cause to arrest Edwards for gas theft in Black River Falls, based on the report out of Jackson County of a $50 drive-off. Deputy Pollock had received a report from fellow law enforcement officers in the adjoining county of a recent $50 gas theft by the exact–not similar, *exact*–Chevy Blazer he saw parked in the rest stop, with a man behind the wheel who matched every specific descriptor of the driver that Jackson County had provided. The time and distance metrics (about 75 miles up the highway about 80 minutes later) were spot on. The totality of circumstances, viewed by

a reasonably prudent officer through the lens of common sense, established probable cause to arrest Edwards for the gas theft in Black River Falls. *See also United States v. Tilmon*, 19 F.3d 1221, 1228 (7th Cir. 1994) (police had probable cause to arrest bank robbery suspect once they determined that driver of a uniquely-identifiable vehicle matched the robber's description).

This is where the "might have had" qualifier comes in: Edwards points out in his reply brief the hearsay nature of the initial report to Deputy Pollock: how could the deputy know whether the report from Jackson County had merit? Edwards has a point, at least based on the record currently before this court: although the collective knowledge doctrine applies when law enforcement agencies transmit information across jurisdictions, the agency directing the arrest must collectively possess information sufficient to establish probable cause that a crime has been committed. *See United States v. Harris*, 585 F.3d 394, 400-01 (7th Cir. 2009). The record before this court does not establish how Jackson County came to believe that the deadlocked man in the green Blazer had stolen gas in Black River Falls. If it were to matter to the outcome, then I would suggest that the court allow the government to put in this evidence if it is available.

Assuming that we get to the second step, next the government has to show that it was reasonable for the deputies to search Edwards's Blazer. As the government acknowledges, the search cannot be justified as one seeking evidence related to the gasoline theft. This also would be true if the arrest had been based on Edwards's suspended license, another possibility suggested by the government. The government contends that the search would have inevitably occurred because the deputies would have towed the Blazer and conducted an inventory search pursuant to the written policy of the sheriff's department.

Under the inevitable discovery doctrine, if the government can establish that the challenged evidence would have inevitably been discovered through lawful means, then suppression is not warranted. It is the government's burden to show a chain of events that would have led to some justification independent of the otherwise unlawful search. *United States v. Cartwright,* 630 F.3d 610, 613 (7th Cir. 2010). Inventory searches are a recognized exception to the warrant requirement if (1) the car owner has been lawfully arrested and (2) the search is conducted as part of the routine procedure incident to incarcerating an arrested person and in accordance with established inventory procedures. *Id*. at 614. The mere existence of a procedure does not immunize the resulting search from scrutiny; the question remains whether the search was reasonable under the Fourth Amendment. *Id.*

The government argues that towing the Blazer was reasonable because Edwards was in custody, he was a Minnesota resident, and there was no other driver at the scene to take possession. Indeed, all Edwards could tell the deputies was that the Blazer belonged to his friend Kelly (whose last name Edwards didn't know), and Kelly apparently was in jail down in the Dells. Edwards disputes virtually all of these points, essentially arguing that there was no need to tow and impound the Blazer. Instead, says Edwards, the deputies could have/should have just left the Blazer there to be picked up later.

While it probably was more prudent to tow the car, given that the deputies didn't know who actually owned it or when he might be able to retrieve it, the question is not what common sense would suggest, but whether the Blazer would have been towed and then inventoried pursuant to the department's written policy. (Pursuant to the government's inevitable discovery argument, this scenario assumes that no search had taken place at the rest stop.) The

government has not pointed to any section in the policy (nor has the court located one) that directs that a motor vehicle be towed under these circumstances. The vehicle did not qualify as "abandoned" under the policy's definition at § 400-6-2, and there is no suggestion in the policy as to what "legitimate police purpose" might justify impoundment in this situation. The evidence presented does not establish that in the absence of the search on the scene, the sheriff's department inevitably would have towed the Blazer and then inventoried its contents. Therefore, the government's alternate theory does not provide a basis to deny Edwards's motion to suppress evidence.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Bertrand Edwards's motion to dismiss the indictment.

Entered this 13th day of July, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

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July 13, 2012

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Re: United States v. Bertrand Edwards
Case No. 12-cr-110-bbc

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 July 23, 2012, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by July 23, 2012, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;

(2) judgment on the pleadings;

(3) summary judgment;

(4) to dismiss or quash an indictment or information;

(5) to suppress evidence in a criminal case;

(6) to dismiss or to permit maintenance of a class action;

(7) to dismiss for failure to state a claim upon which relief can be granted;

(8) to dismiss actions involuntarily; and

(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and ©, the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those

portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**