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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARCUS JOHNSON,

Defendants.

ORDER

12-cr-83-bbc

Defendant Marcus Johnson, by counsel, has moved for leave to file another suppression motion in this case. *See* dkt. 78. I am denying this motion because it is untimely and because pursuing it would be futile in this case.[1]

Let's start with the time line: on July 11, 2012, the grand jury indicted Johnson for being a felon in possession of a firearm and for possession of crack cocaine with intent to distribute it. The grand jury returned similar charges against codefendant Darius Howard. *See* dkt. 3. Attorney Reed Cornia was appointed to represent Johnson and Attorney William Jones was appointed to represent Howard. On August 2, 2012, the court arraigned both defendants and set the schedule: the government was to provide its Rule 16 disclosures by August 9, 2012 and defendants were to file any pretrial motions by September 24, 2012 at noon. The court advised the defendants that to obtain an evidentiary hearing on a motion, they must ask for it in the caption of each such motion and must submit admissible facts establishing a prima facie entitlement to the relief requested. The pretrial motion hearing and any evidentiary hearing was

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[1] Yesterday afternoon, March 12, 2013, Johnson filed a letter asking the court to replace his current attorney. *See* dkt. 88, under seal. The court will address that issue separately in the near future. Johnson's request does not obviate the need for a ruling on the pending motion because the court's decision on this matter will be binding on Johnson in this case no matter who represents him.

set for September 27, 2012 at 9:30 a.m. The court set jury selection and trial for November 5, 2012. *See* dkt. 10.

On August 6, 2012, the government set each defense attorney a CD containing 85 pages of discovery, which included the all-inclusive 36-page report generated by the Fitchburg Police Department. *See* dkts. 11-12. On September 23, 2012, Attorney Jones, on behalf of Howard, filed a motion to suppress physical evidence found on Howard and statements he made to police on May 15, 2012. Attached to Howard's motion was the entire 36 page incident report, which detailed the officers' interaction with Howard and Johnson on May 15, 2013, as well as Johnson's subsequent stay to the UW hospital after Officer O'Keefe determined that Johnson had swallowed the suspected crack cocaine left in Officer O'Keefe's squad car. *See* dkt. 19-1 at 11-12, 24-26 (using the police department's numbering at the bottom center of each page).[2]

The police report, which speaks for itself, states that hospital staff x-rayed Johnson and thought they saw a foreign substance in him. They asked to perform CT scan and asked Johnson to drink a liquid "in order to add contrast for the CT scan." (In other words, this was not an emetic). Johnson originally refused to drink it but he asked for and received permission to telephone his mother for advice. After talking to his mother, Johnson drank about half of the liquid before vomiting. His vomit contained 16 small bags of white rocks and two empty bags. Johnson remained at the hospital under police guard. At 6:05 p.m. on May 16, 2012, Johnson defecated a clear plastic baggie corner into a plastic holding cup; the officer on duty characterized the item as consistent with the packaging of drugs. On the morning of May 17,

[2] Because codefendant Howard filed this motion, it does not appear on Johnson's CM/ECF docket sheet. To view it, one needs to access the "all defendants" docket in Case No. 12-cr-83.

2012, hospital staff reported that the CT scan indicated possible foreign substances in Johnson's digestive track, which could harm him if it was a bag of cocaine that ruptured. The police report states that hospital staff recommended that Johnson take a laxative to speed the expulsion of the foreign object(s) from his system; the report does not indicate whether Johnson did so. In any event, at about 10:45 a.m. on May 17, 2012, Johnson defecated two plastic bags that contained a white rocklike substance

On September 24, Attorney Cornia, who had received this same report, filed a request for discovery on behalf of Johnson. *See* dkt. 20. Attorney Cornia did not file any motions to suppress evidence.

On September 27, 2013, the court held the pretrial motion hearing for both defendants and an evidentiary hearing on Howard's motion to suppress. Johnson and Howard both were present in person, as were Attorneys Jones and Cornia. After taking a discovery proffer from the government, the court asked Attorney Cornia if he had any discovery concerns in this case; he did not, so the court excused Attorney Cornia and Johnson from the hearing. *See* Transcript, dkt. 26, at 4.

After seeing and hearing witnesses and making credibility determinations, and after receiving and considering legal briefs from the parties, on October 22, 2013 the court issued a report and recommendation in which it recommended that the court deny Howard's suppression motion. Among the facts found by the court:

> Officer O'Keefe continued to attempt to cuff the struggling Johnson. Once that was done, Officer O'Keefe searched Johnson incident to arrest and found crack cocaine in a clothing pocket. Officer O'Keefe also noticed that Johnson had blood spots on his pants and tennis shoes. Officer O'Keefe placed Johnson in the back seat of his squad car, doors locked, hands cuffed behind him,

> and placed Johnson's crack cocaine on the front seat of the squad car. No additional backup had arrived yet, so Officer O'Keefe went to assist Detective Wiza. (While left unattended in the squad car, Johnson contorted his cuffed hands to the front position, slid open the partition, snatched the crack and swallowed it. This provoked a trip to the hospital for the forced voiding of over 11 grams of crack).
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> Dkt. 33 at 4-5 (and n. 3, now bracketed repositioned into the text).

On November 2, 2013, the district judge adopted the report and recommendation and denied Howard's motion to suppress. *See* dkt. 37 at 10. Howard entered into a plea agreement with the government and pled guilty to an information on November 13, 2013. *See* dkts. 41-43.

On November 14, 2013, Attorney Cornia asked for an ex parte court hearing with his client to discuss their attorney-client relationship. *See* dkt. 45. At a November 19, 2012 ex parte hearing, Johnson and Cornia decided that they could continue to work together, and the court put some breathing room into the schedule to assure them enough time to prepare for trial. Submissions for the final pretrial conference were due January 16, 2013, and the trial was moved to January 28, 2013. The court did not set a new deadline for pretrial motions. *See* dkt. 52.

On January 16, 2013, Attorney Cornia filed a motion to reset the trial date on the ground that "in preparing for trial, facts warranting a potential pretrial evidentiary hearing came to light last week. Most likely there would need to be briefing on the [*need for*] the evidentiary hearing." Counsel mentioned a possible Fourth Amendment violation and the need to obtain medical records. *See* dkt. 62. That same day, the court held a telephonic status conference with counsel for both sides. The government did not object to striking the trial date but it did object to allowing Johnson to file a motion to suppress at this stage in the prosecution. *See* dkt. 63.

On February 1, 2013, Attorney Cornia filed a motion under F.R. Crim. Pro. 12(e) and 12(b)(3)[C asking the court to find good cause to extend Johnson's deadline to file pretrial motions. Johnson, by counsel, claimed that once the police took Johnson to the hospital, they

> coerced and potentially deceived Johnson into drinking an emetic that, in turn, caused him to regurgitate the contents of his stomach. The government's evidence supporting [the] drug charges comes directly from a number of plastic baggies that law enforcement recovered from Johnson's stomach. Johnson maintains that the use of the emetic and his hold at hospital violated, among others, his Fourth Amendment rights.
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> Dkt. 78 at 2-3.

On February 8, 2013, the government filed its objection to allowing Johnson to file his proposed motion to suppress, arguing that Johnson had not shown good cause for his failure to file this motion within the original deadline to file pretrial motions. The government contends that it timely provided Johnson with all police reports about what happened when Johnson was taken to the hospital. As proof of its contention, the government attached pages 10-13 of the Fitchburg police report. *See* dkt. 84. (These pages submitted by the government are the same pages of the complete police report that co-defendant Howard filed with the court on September 23, 2012 in support of *his* motion to suppress evidence and cited above as part of this case's time line. *See* dkt. 19-1).

Although the government does not make this point directly I note that Johnson has *always* had personal knowledge of his new claim that he was tricked or coerced into consuming an emetic at the hospital. Johnson was there, he knows what the police and hospital staff said to him, and he alone knows his own subjective reaction to what was occurring. Nothing in the

police reports or hospital records would have revealed something that Johnson didn't already know relative to his new claim of coercion.

F.R. Crim. Pro. 12(b)(3)[C] requires that motions to suppress evidence be filed before trial. Rule 12[c] allows the court to set a deadline to file pretrial motions. Rule 12(d) requires the court to decide suppression motions before trial (because granting a suppression motion after trial begins could prejudice the government, since jeopardy has attached, *see* 18 U.S.C. §3731). Rule 12(e) states that a party waives any Rule 12(b)(3) defense, objection or requested not raised by the Rule 12[c] deadline in a case, unless the court finds good cause to grant relief from the waiver. As the government observes, Rule 12 serves "an important social policy and not a narrow, finicky procedural requirement." *United States v. Salahuddin*, 509 F.3d 858, 862 (7th Cir. 2007), citation omitted.

In this case, Johnson and his attorney had available to them all evidence necessary to file a timely motion to suppress on the grounds now raised. They chose not to. Codefendant Howard, by counsel, *did* file a two-part suppression motion, which prompted the court to hold an evidentiary hearing at which the police officers and Howard testified, after which the parties filed briefs, the court issued a report and recommendation, followed by a final order on the motion, which apparently prompted Howard to negotiate a plea agreement with the government. Meanwhile, the court prepared and distributed jury instructions and voir dire questions, *see* dkt. 60. All this was put on hold by Johnson's current request to allow him now to seek to suppress the physical evidence that he expelled from his body at the hospital last May. At this point, it is too late in the process to reopen motions practice, bring in witnesses to testify, file post-hearing briefs, issue another report and recommendation, followed by another court order.

Lest there be any concerns later about attorney ineffectiveness due to Cornia's decision to forego this suppression motion in the first instance, I note that Johnson could not have prevailed. Under the inevitable discovery doctrine, illegally seized evidence need not be suppressed if the government can prove by a preponderance that the challenged evidence would have been discovered by lawful means. *United States v. Pelletier*, 700 F.3d 1109, 1116(7th Cir. 2012); *see also United States v. Hale*, 936 F.2d 575 (*table*) (7th Cir. 1991) (four balloons of marijuana that a federal prisoner at USP-Terre Haute swallowed inevitably would have been recovered by placing him in a dry cell if he had not consented to a "search" of his stomach).

This court already has found as a fact that Johnson swallowed the bag of crack cocaine that Officer O'Keefe initially seized from him. In light Johnson's act, a trip to the hospital was the only option the police had, other than allowing Johnson to suffer and perhaps die.[3] Assuming, *arguendo*, that the police actually tricked or coerced Johnson into drinking an emetic as Johnson now contends, Johnson still would not be entitled to suppression of the evidence so recovered. As subsequent events at the hospital establish, even if Johnson had stubbornly–and recklessly–persisted in his initial refusal to permit medical attempts to cause his body to expel the crack cocaine he had swallowed, his body was going to–and eventually did–expel the crack cocaine on its own. If the police had done nothing but confine Johnson in a dry cell with a bucket, then Johnson's GI tract would have done the rest on its own. This is true regardless whether Johnson took a laxative on May 17, 2012.

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[3] Which on these facts likely justified even the involuntary administration of an emetic or a laxative under the exigent circumstances doctrine. *See, e.g., United States v. Husband*, 226 F.3d 626, 632-36 (7th Cir. 2000)(weighing the pros and cons of allowing a suspect to be anesthetized so police could search for drugs they thought he had swallowed).

The bottom line is that Johnson's proposed suppression motion is inexcusably late and it is unsupported by the facts or the law.

ORDER

It is ORDERED that Johnson's motion to extend time to file pre-trial motions and motion to suppress, dkt. 78, is DENIED.

Entered this 13th day of March, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge