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

UNITED STATES OF AMERICA,

Plaintiff

v.

TARA THOUSAND ,

Defendant.

REPORT AND RECOMMENDATION

12-cr-110-wmc

REPORT

The grand jury has returned a five-count indictment against defendant Tara Thousand, charging her with aiding and abetting five bank robberies by her then-boyfriend, Michael Benike.[1] Before the court are Thousand's motion to suppress statements she made to FBI agents at the Mount Horeb police department on July 13, 2012 (dkt. 25) and her motion to quash the disclosure orders for Thousand and Benike's cellular telephone records (dkt. 26). For the reasons stated below, I am recommending that the court deny both motions.

I. Motion To Quash Disclosure Orders for Cellular Telephone Records (dkt. 26)

On July 2, 2012, the government sought and obtained from this court orders requiring Tracphone and AT&T to disclose telephone records for cellular telephones subscribed to by Tara Thousand and Michael Benike, pursuant to 18 U.S.C. § 2703(c)(1)(B) and (d). *See* dkt. 26-1 and 26-2. Thousand has moved to suppress all evidence derived from these disclosure orders on the ground that the government derived from these orders in violation of her Fourth Amendment rights. The heart of Thousand's suppression motion is how the FBI chose to focus

[1] Benike was arrested on July 13, 2013 and charged in a criminal complaint, but committed suicide in jail shortly thereafter. *See* Case No. 12-mj-63-slc-1.

on Thousand's Toyota Corolla as the suspect car in the bank robberies being investigated. Specifically, Thousand contends that the application submitted by Assistant U.S. Attorney Kevin Burke contained a materially false statement regarding Thousand's criminal record (based on a report from FBI Special Agent Joseph Lavelle). Thousand contends that without this false statement about her record, the court would not have issued the orders to disclose cell phone records. As part of her motion, Thousand requested an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). *See* dkt. 26 at 7-8.

The government filed a written opposition to Thousand's request for a *Franks* hearing, conceding that Agent Lavelle had mischaracterized Thousand's criminal record but arguing that the mischaracterization not only was unintentional, but more saliently, was immaterial to the court's decision to issue the requested disclosure orders. *See* dkt. 28.

On December 6, 2012, the court held a telephonic hearing with counsel to discuss and decide whether to hold a *Franks* hearing. After hearing from both sides, I entered this text-only order:

> At a December 6, 2012 telephonic hearing, the court denied defendant's request for a *Franks* evidentiary hearing on her motion to quash the court's July 2, 2012 telephone records disclosure order for reasons stated during the hearing. By way of over view, the court deemed the procedures of *Franks v. Delaware* applicable to defendant's challenge to the disclosure order, assumed that the challenged statement was incorrect, but found that the challenged statement was immaterial to the court's decision to order disclosure of the requested records. As discussed at the hearing, this is not a decision on the underlying motion to quash, it is a decision on the request for an evidentiary hearing. The court still intends to hold an evidentiary hearing on December 11, 2012 on defendant's motion to suppress her statements (dkt. 25). The court will set the remainder of the schedule, including briefing, at the December 11 hearing.
>
> Dkt. 30.

Based on this ruling, Thousand chose not to brief this motion further, although the court allowed it. *See* transcript of December 13, 2012 evidentiary hearing, dkt. 35, at 7-8. Even so, because this is a dispositive motion, it still must be presented to the district judge for a final ruling pursuant to 28 U.S.C. 636(b)(1)(B).

Thousand, by counsel, included AUSA Burke's application for cell phone records and summarized it in her motion. *See* dkts. 26 and 26-2. To synopsize, Agent Lavelle believed that the same man had robbed ten banks in Madison, Rockford, Illinois and Dubuque, Iowa between May 9, 2012 and July 2, 2012. Bank security camera photos showed the robberies were committed by what appeared to be the same man: a brown-haired, thin white male, about 5'8" to 5'10", 25 to 35 years old. In each robbery the robber wore the same type of clothing, handed the teller the same type of note, always retrieved the note, and always asked for fifties and hundreds. Several eyewitness reports and tips described a white female driving the automobile in which this robber escaped; some reported that she had blonde hair. Exterior surveillance cameras at several of the robbed banks showed the suspect using a silver Toyota Corolla with a sun roof that had no license plates. Similarly, on May 19, 2102, four minutes after an Anchor Bank in Janesville was robbed, the parking lot surveillance camera of a grocery store across the street showed a silver Corolla pull in; two people got out and placed license plates on the car.

Agent Lavelle showed the surveillance photos of the Corolla to several Toyota dealers who opined that the car likely was an '03 - '09 LE model with a sunroof. Agent Lavelle then queried the Wisconsin Department of Transportation (DOT) and learned that there were 5700 '03-'09 Corollas registered in Dane County. 1300 of these were silver; 49 of the silver Corollas had factory installed sun roofs. Agent Lavelle reported that:

> Of those 49 registered drivers only one had a criminal record. This registered driver is Tara Anne Thousand, who has a conviction involving possession of marijuana.

Dkt. 26-2 at 3.

Agent Lavelle further reported that on May 31, 2012, Madison Police made what the court surmises was a pretextual stop of Thousand while she was driving her 2004 silver Toyota Corolla with a sunroof and issued her a ticket for obstructed vision out the rear window. Later that day, detectives met with Thousand and her boyfriend, Michael Benike at a motel room they were renting on Madison's Beltline highway. The detectives saw in the motel room paraphernalia used to smoke marijuana. Benike and Thousand both denied any involvement in the bank robberies and indicated that they were behind in their motel rent, which suggested to the detectives that they lacked cash. The detectives were unable to obtain any information that would rule out Benike or Thousand as suspects in the eight robberies that had occurred up to that point. The detectives obtained cell phone numbers from both Benike and Thousand.

The follow-up inquiry to DOT showed Benike to be Caucasian with brown hair, 29 years old, 5'9" tall and 180 pounds. Agent Lavelle obtained photographs of both Thousand and Benike which the government included with its motion to disclose phone records. Agent Lavelle further reported that after the detectives interviewed Benike and Thousand, more banks were robbed by the same man using the same M.O.

Agent Lavelle's report stated that Benike and Thousand were two of the five suspects in the bank robberies that the FBI was trying to rule in/rule out. Agent Lavelle stated that obtaining their cell phone records would allow the FBI to determine whether either of them had used their phones during or near the time of the bank robberies and if so, which cell towers had

taken the calls (showing how close the phone had been to the robbed bank). Agent Lavelle reported that if the telephone records showed that Benike and/or Thousand were consistently near the robbed banks at or around the time they were robbed, then that would raise the suspicion against them; if the records showed that they were elsewhere this would "serve an important purpose of excluding Benike and Thousand, removing them from suspicion and allowing police to focus their efforts elsewhere." Dkt. 26-2 at 5.

The court granted the application; the cell phone records showed that

> Thousand's cellular telephone was used close in proximity and time to each of eight bank robberies . . . specifically, Thousand's cellular telephone was used and activated cellular telephone towers generally with 1/4 mile to 1 mile of the sites of the robberies and within minutes of the bank robberies in Dubuque, Iowa, Rockford, Illinois, Janesville, Wisconsin, Middleton, Wisconsin and Madison, Wisconsin.
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> *See* criminal complaint, dkt. 1 at 4.

Presumably this information triggered the FBI's interest in interviewing Thousand, which led to additional incriminating evidence against her.

In support of Thousand's motion for a *Franks* hearing and to suppress all evidence learned from the cell phone records, Thousand's attorney reports that he found no criminal record for his client and neither did this court's pretrial service officer; in response to counsel's inquiry, the prosecutor advised that Agent Lavelle's report of a criminal record was based on a juvenile adjudication of possession of THC from ten years earlier, when Thousand was 15 years old. Thousand argues that this is not actually a criminal record and he implies that Agent Lavelle was not actually aware of it at the time he filed his application with the court. Thousand further argues that if the court had known the specifics, it would not have found probable cause to issue

the order requiring the telephone service providers to disclose Thousand and Benike's cell phone records.

In response to Thousand's request for a *Franks* hearing, the government provided a copy of the criminal record printout upon which Agent Lavelle relied. *See* dkt. 28-1 at 7-8. Thousand's records show two juvenile arrest for misdemeanor possession of THC, which were labeled "non-criminal" and indicated that the arrests were "referred to juvenile authorities." The government learned after the fact that both of these cases were dismissed by a municipal court a year later because Thousand had avoided new violations. Thus, concedes the government, Agent Lavelle's reference to a "conviction" for marijuana possession was incorrect. But the government contends that this mischaracterization was immaterial: even if Agent Lavelle had correctly interpreted the record printout, Thousand still would have been the only one of 49 registered Corolla owners with any sort of criminal record at all. Thus, since the agents had to start somewhere, it made sense to start with Thousand. The agents did, and they obtained additional information, both inculpatory–e.g., meeting Benike and obtaining his photograph and physical descriptors–and arguably exculpatory–e.g., learning that Benike and Thousand claimed to have so little money that they couldn't pay their motel bill. Dkt. 28 at 4-5.

The government is correct. As noted above, I already have ruled that Agent Lavelle's mischaracterization of Thousand's criminal record was immaterial to the court's determination that the government had met its evidentiary burden to obtain the requested disclosure order. The FBI agents and police detectives could have run through their list of 49 Corolla owners alphabetically, by age, by DOT descriptors of the owners, by geographic location, or purely

randomly: they could have drawn the 49 names out of a hat. No matter which method they used, at some point, they would have interviewed Thousand.

If Benike had not been with Thousand at the time of her interview, then that likely would have been the end of it and the detectives would have crossed her off of their list of suspects.[2] But Benike *was* with Thousand, and he was a close match to the bank robber. *That* was the evidentiary linchpin of the government's motion for disclosure of cell phone records. In light of this, the reason why the investigators chose to interview Thousand first fades into insignificance. As a result, Agent Lavelle's mischaracterization of Thousand's criminal record cannot be a basis to quash the disclosure order or suppress evidence derived from it. *See, e.g., United States v. Spears*, 673 F.3d 598, 605 (7th Cir. 2012) (misstatements or omissions must be material to the probable cause determination); *Saurez v. Town of Ogden Dunes, Ind.*, 581 F.3d 591, 596 (7th Cir. 2009) (same). As a result, the court should deny Thousand's motion to quash the disclosure order and to suppress evidence derived from it.

[2] To the same effect, it is worth noting that the FBI's list of 49 Corolla owners had been derived from assumptions that could have been incorrect. For instance, if the bank robbers had been from Iowa or Illinois, then their car would not have been on the list. If the Toyota representatives had gotten the years wrong, or if the sunroof had been installed by the owner, then the car used in the robberies would not have been on the list. This is one of those investigations where the evidence fell into place as much by happenstance as anything else.

II. Motion To Suppress Statements (dkt. 25)

This court held an evidentiary hearing on December 13, 2012. Having heard and seen the witnesses testify, and having made credibility determinations, I find the following facts:

Facts

In mid-2012, twenty-five year old Tara Thousand lived in Mount Horeb, Wisconsin with her parents. Mount Horeb is a small town about 25 miles WSW of Madison on Hwy 18/151. After being prescribed pain killers for her Crohn's disease in 2008, Thousand became addicted to heroin in 2010 or 2011. During the summer of 2012, Thousand was a patient at a methadone treatment clinic in Madison, where she received methadone and met with counselors on a scheduled basis. The clinic's policy was that if a patient missed a scheduled appointment, then the consequences could range from lessening that patient's dosage of methadone to actual termination from the program. If Thousand does not receive a scheduled dose of methadone, then she experiences withdrawal symptoms: her hands and body break into a sweat, quickly followed by pains in her bones, feet and knees, accompanied by nausea and excessive yawning.

As outlined in the previous section of this order, between late May and early July, 2012, the FBI had developed evidence implicating Thousand and her boyfriend, Michael Benike, in a string of recent bank robberies in the tri-state area. On Thursday, July 12, 2102, the FBI obtained search warrants from this court authorizing searches of the residences and the persons of Benike and Thousand, as well as the Toyota Corolla that they drove. (The government did not ask for and did not receive a criminal complaint or an arrest warrant for either suspect). FBI Special Agents Joseph Lavelle and Joshua Mayers planned to execute the warrants the next day with assistance from various local law enforcement officers, and to then attempt to interview

Benike and Thousand. Their colleague, FBI Special Agent Brian Baker, was acting as the communication hub and liaison between the agents in the field and the U.S. Marshals Service in case there were arrests.

Based on prior surveillance of Thousand, the agents expected her to leave her parents' home in Mount Horeb early in the morning on July 13, 2012, and drive to Madison. The agents had arranged for the Mount Horeb police to conduct a traffic stop of Thousand; when, as expected, Thousand began her drive to Madison, a Mount Horeb officer in a marked squad car pulled over Thousand's car. It was about 6:10 a.m. Agents Mayers and Lavelle pulled up in separate vehicles; Agent Mayers approached Thousand's car on foot, dressed in a suit and tie, identified himself as an FBI agent, advised her that he had a search warrant for her car and for her cell phone, but that she was not under arrest. Agent Mayers asked Thousand if she would come with them back to the Mount Horeb police station so that the agents could explain to her what was happening. Thousand agreed.

Thousand was patted down for weapons, then rode back to the station in the police chief's car. Thousand was in the back seat; Agent Mayers sat in the front, with the chief. Thousand was not handcuffed or otherwise restrained. Within ten minutes they arrived at the station. Agent Mayers, Agent Lavelle and Thousand walked past security and some desks for officers to a large, windowed conference room on the first floor. The agents asked Thousand if she needed water to drink or a bathroom break; she accepted a glass of water. All three took seats at the table. The agents left the door open at first but closed it later to block out distracting hallway noise.

Agent Mayers placed a written advice of rights form in front of Thousand, read each sentence of the form aloud to her and asked her if she understood each right. Thousand responded that she understood her rights and put her initials next to each sentence to acknowledge her understanding. Thousand then signed the consent portion of the form indicating that she was willing to answer the agents' questions without a lawyer present. It was 6:25 a.m.

Very early in this process, perhaps even while Thousand was being transported to the Mount Horeb police department, Thousand announced that she had been driving to Madison to attend an appointment at a methadone clinic in Madison to receive her prescribed methadone. There is no evidence that the agents knew this before they stopped Thousand and asked her to come to the police station. Thousand advised the agents that the clinic closed at 10:30 a.m. that morning.

Thousand's announcement raised at least two flags for Agent Mayers based on his familiarity with the withdrawal symptoms that people can experience when they do not receive their methadone. First, he did not want Thousand to have to suffer the symptoms of withdrawal, which he knew could include agitation, profuse sweating, stomach distress, vomiting and diarrhea. Second, in the event the agents determined that they were going to arrest Thousand–a decision that they had not yet made–neither the U.S. Marshals Service nor the county jail would accept custody of Thousand if she were in withdrawal. Agents Mayers and Lavelle would be personally responsible for Thousand, which means they would have to take her to the hospital for treatment and stay with her until she was well enough to be accepted at the jail. As a result, Agent Mayers was intent on getting Thousand to her clinic for her methadone

that morning. Agent Mayers assured Thousand that he would make sure that she received her methadone that morning no matter what else happened that day.

Agent Mayers began the interrogation by asking Thousand for background information so that the agents could get a general idea of her history, education and demeanor. Thousand did not exhibit any signs of distress; to the contrary, she appeared relaxed. The agents then honed in on the bank robbery investigation, asking Thousand about her cell phone, her car and her boyfriend, and advising Thousand that the evidence known to the agents caused them to believe that she had been directly involved in the robberies. At this point, Thousand stated "I think I need a lawyer, I don't know, but I want to cooperate and talk." Thousand repeated this statement. Thousand explained that she wanted to cooperate but she was scared. The agents looked at each other and decided that they needed to call the Assistant U.S. Attorney Kevin Burke for his answer to their question "now what?" It was about 6:51 a.m.

Agent Lavelle left the room and telephoned AUSA Kevin Burke in Madison to tell him about Thousand's methadone appointment and her statements regarding an attorney. AUSA Burke provided advice on how to proceed. Agent Lavelle also called Agent Baker to touch base. Agent Baker confirmed that the Marshals Service would not accept Thousand into custody if she was experiencing methadone withdrawal, which corroborated the importance of taking Thousand to her appointment at the clinic that morning. Agent Lavelle then checked in with the agents and officers search Thousand's cell phone and her car to determine if they had uncovered any new information that he could take back to the conference room.

While Agent Lavelle was tending to the legal and investigative side of things, Agent Mayers initially remained with Thousand in the conference room. He asked if she wanted anything to eat or drink, or if she needed to use the restroom. Thousand declined all offers.

Agent Mayers then left Thousand alone in the conference room with the door open, but alerted an officer seated at a nearby desk that Thousand was in the conference room alone. After using the restroom, getting some coffee and checking his phone messages, Agent Mayers reentered the room. Agent Lavelle had not yet returned, so Agent Mayers engaged Thousand in immaterial small talk. Neither of them broached the topics of lawyers, cooperation, methadone, or Thousand's appointment.

Upon reentering the conference room at about 7:13 a.m., Agent Lavelle followed AUSA Burke's advice and placed another advice of rights form in front of Thousand. He reexplained to Thousand, point by point, her right to remain silent and her right to an attorney. The agents, again following AUSA Burke's advice, also reassured Thousand at that time that she would receive her methadone that day before the clinic closed at 10:30, whether she talked to the agents or not. Thousand initialed the second form and signed the consent section indicating that she was willing to answer the agents' questions without a lawyer present. Thousand orally confirmed that she wanted to cooperate and was willing to continue to speak with the agents.

The agents did not state or imply in any fashion that if Thousand invoked her right to an attorney, then she faced the possibility that she would miss her appointment and not receive her methadone that morning. The agents did not attempt to bluff Thousand or trick her into inferring that she risked missing her dose of methadone if she asked for a lawyer. If Thousand would have invoked her right to counsel that morning, then the agents would have ended the interrogation and taken Thousand straight to the clinic in Madison to receive her methadone.

At some point soon after Thousand agreed to continue the interrogation,[3] Agent Mayers telephoned the methadone clinic. (It seems that he stepped into the hall to make the call, but this is not clear). Agents Mayers spoke with the clinic supervisor to confirm that the agents would be bringing Thousand to the clinic before 10:30 that morning so that Thousand could receive her methadone. One reason he did so was to alert staff that Thousand would be in custody and ask them if this caused any logistical concerns for the clinic. The supervisor responded that this was not a problem and the agents could bring Thousand in through the front door. Agent Mayers relayed this information to Thousand, telling her that he had spoken to the clinic, they knew she was coming, and the agents would get her there in time.

Agent Lavelle questioned Thousand after the break, honing in more tightly on specifics, for instance showing Thousand the photographs taken by bank surveillance cameras. Throughout this second round of questioning, Thousand remained articulate, relaxed and responsive, providing numerous detailed admissions that corroborated the agents' view of her involvement in the bank robberies. At about 8:30 a.m. they took a break to use the restroom and get some water; at about 8:45 the agents ended the interrogation and advised Thousand that she was under arrest.

At about 8:55 a.m., the FBI agents had a police officer drive Thousand to her methadone clinic on East Badger Road, with the agents following in separate vehicles. Thousand arrived at 9:18 a.m. Agent Mayers escorted Thousand into the clinic and she received her methadone within three or four minutes. From there, the agents brought Thousand to the federal courthouse and turned her over to the United States Marshals Service for booking.

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[3] Agent Mayer estimates that this was have been about two hours before the agents arrived at the clinic. Roughly then, Agent Mayers called the clinic around 7:20-7:25 a.m.

ANALYSIS

Thousand asserts that she only submitted to a self-incriminating interrogation because the agents did not honor her request for an attorney and they coerced her into cooperating by strongly implying that she would miss her methadone appointment if the agents had to take the time to arrange an attorney for her.

I note at the outset that much of Thousand's motion depends on credibility determinations by the court. The facts found above show that I have accepted the agents' version of events and rejected Thousand's version of events. Having heard and seen the witnesses testify, the most charitable characterization of Thousand's testimony is that at this juncture she might actually believe her version of events. Obviously, the court doesn't.

Let's start with the dispute whether Thousand requested an attorney. Obviously, if Thousand had invoked her right to counsel, then she was not subject to further interrogation until she had been provided with an attorney. *See United States v. Hampton*, 675 F.3d 720, 726 (7th Cir. 2012), *citing Miranda v. Arizona*, 384 U.S. ,436 474 (1966). Questioning may continue however, if a suspect's reference to counsel is ambiguous or equivocal in that a reasonable agent in light of the circumstances would have understood only that Thousand *might* be invoking her right to counsel. *Id.*, *quoting Davis v. United States*, 512 U.S. 452, 459 (1994). Although it is good police practice to clarify what the suspect actually wants to do, the agents are not constitutionally obligated to ask clarifying questions. *Id.*

Here Thousand said "I think I need a lawyer, I don't know, but I want to cooperate and talk." Thousand said this twice.[4] If this were to constitute an unambiguous request for counsel,

[4] Thousand admits to saying "I think I want an attorney." She neither admitted nor denied the rest of the statement attributed to her by the agents in their testimony and written report. I have found the agents' version to be accurate.

then the agents were required to honor it and the interrogation was over. The adjective "ambiguous" means "capable of being understood in two or more possible senses or ways."[5] Thousand's statement is palpably ambiguous: she is announcing that she is pondering diametric choices and doesn't know which to make. If anything, she expressed her intent to cooperate ("I want to cooperate and talk") more clearly than her thought that a lawyer could help her ("I think I need a lawyer, I don't know").

In *Hampton*, the defendant kept "fishing" for a deal from the questioning officers and made several equivocal requests for counsel that the officers tried to clarify. During one police request for clarification, the defendant said "I think, I, I felt like it should have been an attorney here 'cause that's what I asked for." The court held, under the circumstances, this statement "was not definite enough to unambiguously invoke the right to counsel. Instead, a reasonable officer would have understand that Hampton might want a lawyer, but also might want to proceed without one." 675 F.3d at 728. The court also viewed Hampton's use of the word "but" in his musings as a "hedge word" that could cause a reasonable officer to understand that the suspect *might* want an attorney present, not that he was clearly invoking her right to deal with the agents only through counsel. *Id.* at 727. *See also Clark v. Murphy*, 331 F.3d 1062, 1065, 1070 (9th Cir. 2003)("I think I would like to talk to a lawyer" is not an unambiguous request for counsel); *Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000) ("I think I need a lawyer" is not an unequivocal request for counsel); *Diaz v. Senkowski*, 76 F.3d 61, 63, 65 ("I think I want a lawyer" is not an unequivocal request for counsel).

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[5] www.merriam-webster.com/dictionary/ambiguous, accessed March 3, 2013;
see also www.thefreedictionary.com/ambiguous ("1.Open to more than one interpretation . . . 2. Doubtful or uncertain"), also accessed March 3, 2013.

As a result, I conclude that Thousand did not invoke her right to counsel during the interview. For what it's worth, I note that the agents also did exactly what they were supposed to do when Thousand made her ambiguous statement: they sought guidance from AUSA Burke on what to do next and then sought to disambiguate Thousand's intention by re-advising her of her rights.

Of course, Thousand disputes this, claiming that the reason she agreed to continue the interrogation was that Agent Mayer's comments to her during the break caused her to fear that if she persisted in her request for a lawyer, then she might not make it to the methadone clinic to obtain her methadone clinic that morning. According to Thousand, Agent Mayer told her that if she asked for an attorney, then the agents would have to get an attorney to the Mount Horeb police department that morning to talk to her, and by the time that was done, the clinic might be closed. (*See* dkt. 74). This, she said, made her "very antsy and, like, not focused at all and panicky and stuff like that." She also accepted her lawyer's suggestion of "stressed." Transcript, dkt. 35, at 74. Notwithstanding this mental agitation, Thousand was unequivocal on this point, which her attorney touts as proof of her accurate recollection, in contrast to the agents' requests during the evidentiary hearing to refer back to their written report before answering some questions.

Actually, the agents written report, drafted three days after the July 13, 2012 interview (*see* dkt. 33-4), provides a contemporaneous, detailed account of what happened during Thousand's interrogation and it corroborates the agents' testimony at the evidentiary hearing. I draw no adverse credibility inferences from the agents referring to the 302 in order to refresh their recollection. After all–and as attorneys often point out to agents who *deviate* from their

reports when testifying later–their memory of what happened was better then than it is 17 months later. Thousand, however, never had to commit to a version of events until she filed her suppression motion. Her certainty on points critical to suppression, contrasted with her uncertainty on less critical points, such as whether she was patted down, and how the *Miranda* advisal occurred, does not establish that her version of events is correct and the agents' version is incorrect.

To the contrary, Thousand's version of events demonstrates her lack of familiarity with how law enforcement interrogations actually work. According to Thousand, Agent Mayers told her that if she invoked her right to counsel, then everything else would be put on hold until they could get a lawyer to Mount Horeb to meet with her. But as Agent Mayer pointed out at the hearing, if Thousand actually would have asked for an attorney, then the interrogation was over because any further interrogation would be done pursuant to a proffer agreement arranged later by Thousand's attorney in negotiation with the U.S. Attorney's Office. *See* transcript, dkt. 35 at 56-57. Thousand, by counsel, implied that Agent Mayers nonetheless lied to Thousand about this process in order to get her to change her mind; Agent Mayers took offense at the implication, categorically denying Thousand's claims and explaining that, in his 27 years in law enforcement, he has learned that bluffing and trickery usually backfires and that he simply does not do this. *Id.* at 67-69. I believe Agent Mayers. He didn't say what Thousand claims he said and her testimony to the contrary is incorrect.

More generally, I conclude that under the totality of the circumstances that Thousand's waiver of her rights under *Miranda* and her subsequent statements to the FBI were voluntary. It is the government's burden to establish that Thousand's *Miranda* waiver was voluntary,

knowing and intelligent. *United States v. Johnson*, 680 F.3d 966, 974 (7th Cir. 2012). A waiver is voluntary if it was not coerced; it is knowing and intelligent if it is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Coleman v. Hardy*, 690 F.3d 811, 815 (7th Cir. 2012). A confession is voluntary and admissible if, in the totality of circumstances, it is the product of a rational intellect and free will and not the result of physical abuse, psychological intimidation or deceptive interrogation tactics that overcome the defendant's free will. *United States v. Stadfeld*, 689 F.3d 705, 709 (7th Cir. 2012). Factors relevant to a determination of voluntariness include the suspect's age, education, background, intelligence, experience, and the length of questioning. *United State v. Brown*, 664 F.3d 1115, 1118 (7th Cir. 2011). Coercive police activity is a necessary predicate to a finding that a confession is not voluntary; although a defendant's mental condition may be a significant factor in the voluntariness calculus, a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional voluntariness. *Id.,* citation omitted; *see also United States v. LeShore*, 543 F.3d 935, 940-41 (7th Cir. 2008)(when interrogating officers reasonably should have known that a suspect is under the influence of drugs or alcohol, a lesser quantum of coercion may be sufficient to call into question the voluntariness of the confession).

Here, Thousand was old enough and intelligent enough voluntarily to waive her rights and speak to the agents. She was not terribly experienced with the criminal justice system, but she had been through municipal court on marijuana citations in the past and recently had been questioned by Madison police detectives about these same bank robberies (although Benike apparently did most of the talking that day). Although Thousand certainly would have been

surprised at being confronted on the highway that morning and likely would have felt that she had no realistic choice but to accompany the agents to the Mount Horeb police station, she acquiesced to the agents' request without resistance or histrionics. Assuming that she was in custody for Fifth Amendment purposes, Thousand received and waived her *Miranda* rights before answering any questions. When Thousand mentioned that she might want an attorney, the agents took a break, got legal advice from the AUSA (whom they also told about Thousand's methadone appointment), and then revisited Thousand's rights with her, confirming that she was aware she could obtain a free attorney, and confirming that she was waiving that right.

What remains is the question whether the agents exploited Thousand's for a dose of methadone that morning. There is no evidence that the agents were aware that Thousand was on her way to the clinic when they stopped her to ask for an interview. Once she told them this, the agents made it clear to Thousand she was going to get her methadone that morning no matter what else happened. But Thousand asks a valid question: why not take her straight to the clinic and then question her after she got her methadone? No one asked the *agents* that question at the evidentiary hearing and I won't speculate as to what factors would have influenced that choice, if it occurred to the agents that morning.[6] Absent something more, the sequencing of events does not persuade me that the agents were engaged in coercive conduct.

I already have found that the agents did not explicitly prey on Thousand's anxieties: to the contrary, they quickly and repeatedly assured her that she would get her methadone. I further conclude that on these facts, the agents did not exploit Thousand's need for methadone

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[6] Thousand testified that, probably during the traffic stop, she asked the agents if she could go to the methadone clinic and then come back to talk with them. According to Thousand, the agents said "No, we need to talk first." *See* transcript, dkt. 35 at 71.

in any more subtly intimidating or coercive conduct in order to tease out some incriminatory statements. Throughout the interrogation, the agents observed Thousand and saw no physical or emotional signs of distress or discomfort. To the contrary, Thousand was calm, relaxed, responsive, articulate and focused. To the extent that Thousand harbored unstated, undemonstrated concerns that she was edging into withdrawal, or that she was nervous whether the agents really intended to take her to the clinic in time, this cannot be attributed to the agents and it cannot be a basis to find Thousand's statements involuntary.

In short, there is no basis to grant Thousand's motion to suppress her statements.

RECOMMENDATION

Pursuant to 28 U.S.C. §636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Tara Thousand's motion to quash the disclosure orders and her motion to suppress her statements.

Entered this 6th day of March, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. Henry Street, Rm. 540
Post Office Box 591
Madison, Wisconsin 53701

Chambers of
STEPHEN L. CROCKER
U.S. Magistrate Judge

Telephone
(608) 264-5153

March 6, 2013

Kevin Burke
Assistant United States Attorney
660 West Washington Avenue, Ste. 303
Madison, WI 53703

Terry W. Frederick
Frederick/Nicholson, LLC
354 West Main Street
Madison, WI 53703

Re: United States v. Tara Thousand
Case No. 12-cr-110-wmc

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 March 20, 2013, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by March 20, 2013, 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 (C), 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).**