

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

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ROBERT R. DETROLIO
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W.D. OF TN, MEMPHIS

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) 02 CR 20440 Ma/P
)
 YERVIN K. BARNETT)
)
 Defendant.)
)

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO SUPPRESS

I. INTRODUCTION

The defendant, Yervin K. Barnett, was indicted on November 15, 2002, for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The charge stems from an arrest of the defendant on the evening of July 4, 2002, for burglary of a residence. On that night, Memphis Police Department ("MPD") officers seized a long gun and a television remote control. In addition, while in police custody, the defendant allegedly made an incriminating statement to the police.

The defendant moved to suppress all evidence seized, and the statement he made, after his arrest on July 4, 2002. The defendant claims the arrest was illegal because the officers did not have probable cause to believe that he committed any crime. The

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defendant contends that since the arrest was unlawful, any evidence obtained as a result of that arrest must be suppressed as "fruits of the poisonous tree." In addition, the defendant claims the statement he made to police that night should be suppressed because it was obtained in violation of his Miranda rights and, furthermore, was not timely disclosed to the defense in violation of Rule 16 of the Federal Rules of Criminal Procedure. The defendant's motion was referred to the United States Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C).

The court conducted an evidentiary hearing on the defendant's motion on June 18, 2003. The government called two witnesses during the hearing: officer Corey Jefferson and canine officer Jane Martin, both employed by MPD. The defendant did not present any evidence or call any witnesses. The government introduced the following four exhibits at the hearing: one photograph of the residence allegedly burglarized by the defendant (exhibit 1), and three photographs of a long gun recovered from the scene of the alleged burglary (exhibits 2,3, and 4).

After careful consideration of the statements of counsel, the testimony of the witnesses, the exhibits presented, and the entire record, this court submits the following proposed findings of fact and conclusions of law, and recommends that the defendant's Motion to Suppress be denied.

II. PROPOSED FINDINGS OF FACT

The testimony of the two law enforcement officers were consistent in all major details. This court finds the officers credible and adopts as fact their version of the events.

On the evening of July 4, 2002, MPD received a call from a resident at 661 Shell Lane in Memphis, Tennessee, reporting a prowler inside her home. MPD Officer Corey Jefferson¹ responded to the call. When he arrived at the residence, Officer Jefferson turned on his vehicle's spotlight and pointed it towards the house to confirm he was at the correct address. Upon doing so, Officer Jefferson observed a black male crouching in the bushes near a window at the front of the house. The suspect (hereinafter "defendant"), who was wearing a white t-shirt and blue shorts, appeared to have climbed out of the front window. The defendant stood up, at which time Officer Jefferson observed a long black object in his hands, which appeared to be firearm. The defendant discarded the object in the front yard of the residence and began running west on Shell Lane.²

Officer Jefferson turned his patrol car around and chased the defendant. The defendant made his way to a gold colored Jaguar car

¹Officer Jefferson has been with MPD for six years, and on the evening in question was assigned to work the South Precinct. He was not working with a partner that night.

²Officer Jefferson identified the long gun pictured in Exhibit 2 as the object the defendant discarded at the residence on the evening of July 4, 2002.

parked down the street, jumped in, and drove away. Officer Jefferson immediately activated his emergency lights and siren and pursued the defendant at a high rate of speed. He radioed other officers and informed them that he was in pursuit of the defendant. Officer Jefferson followed the vehicle to Hodge Street where the defendant lost control of his vehicle and struck a house. The vehicle continued to roll, at which time the defendant jumped out of the car and began running. Officer Jefferson instructed another MPD officer who arrived on the scene to secure the vehicle, while Officer Jefferson continued chasing the defendant on foot.

Officer Jefferson pursued the defendant through residential yards. Officer Jefferson then came to a fence that he was unable to scale, but watched the defendant continue to flee until he lost sight of him. Officer Jefferson, now joined by other officers, set up a perimeter around the area where he lost sight of the defendant. A canine unit was called to the area to aid the officers in searching for the defendant.

Canine officer Jane Martin³ responded to the scene within minutes of receiving the call for assistance. Officer Martin spoke with Officer Jefferson before working the dog.⁴ Shortly

³Officer Martin has been with MPD for twenty-five years, and has been a canine officer for the last fifteen years.

⁴Officer Martin's dog, Bryan, received one to two weeks of standard training on tracking. Officer Martin has handled Bryan for six of her fifteen total years with the canine unit.

thereafter, her dog picked up a scent track in the area where Officer Jefferson last saw the defendant running. The dog followed the track through several residential yards and across a street. Officer Martin observed footprints in the dew-covered grass in front of one of the homes. The dog followed the track to a fence in the backyard of the home, where Officer Martin observed more footprints on the other side in the back yard. Officer Martin picked up the dog and placed him over the fence, releasing his leash. The dog then ran into an open shed where the defendant was hiding, and bit him. Officer Martin entered the shed, regained control of the dog, and ordered the defendant out of the shed and onto the ground.⁵

While in the shed, Officer Martin observed an object on the floor near the defendant. As other officers began arriving, Officer Martin removed the dog from the area while they took the defendant into custody. Officer Martin advised the other officers she had seen an object inside the shed, and instructed them to retrieve it. The item retrieved from the shed was a television remote control.⁶ Officers also went to the residence at 661 Shell

⁵Officer Martin testified that the defendant was wearing a white t-shirt and dark colored shorts.

⁶Officer Martin testified she later learned that the remote control went with a television inside the home located at 661 Shell Lane. However, there was no evidence presented regarding the source of this information or when the officer learned this information.

Lane and retrieved the long gun.

The defendant was brought back to Officer Jefferson, who identified the defendant as the individual who ran away from him at the 661 Shell Lane residence.⁷ Officers placed the defendant in handcuffs and put him in the backseat of Officer Jefferson's squad car.⁸ Officer Jefferson sat in the front seat of the squad car filling out paperwork, but did not ask the defendant any questions. At some point, the defendant indicated to Officer Jefferson that his handcuffs were too tight. Officer Jefferson removed the defendant from the back seat and began adjusting his handcuffs. The defendant looked around the area and asked the officer whether he was the only person they caught. Officer Jefferson responded that the defendant was indeed the only person the police caught.⁹

III. PROPOSED CONCLUSIONS OF LAW

The defendant's Motion to Suppress raises three issues for consideration: (1) whether the warrantless arrest of the defendant was based on probable cause; (2) whether the post-arrest statement

⁷Officer Jefferson also made an in-court identification of the defendant at the suppression hearing, identifying the defendant as the same person he saw on July 4, 2002 at the 661 Shell Lane residence.

⁸Neither the testimony of the officers, nor the record in this case, reflect that the police advised the defendant of his Miranda rights.

⁹Officer Jefferson made no mention of this conversation in his report following the incident. The government indicated that it had not been made aware of the statement at the time it filed its response to the defendant's Motion to Suppress.

made by the defendant to Officer Jefferson was obtained in violation of his Miranda rights; and (3) whether the government violated Rule 16 when it disclosed the defendant's post-arrest statement for the first time at the suppression hearing. Each of these issues are addressed in turn below.

A. Was There Probable Cause to Arrest?

The defendant asserts that the officers lacked probable cause to arrest him on the night in question, and thus, the firearm and television remote control should be suppressed. As an initial matter, it is submitted that the firearm was not seized in violation of the defendant's constitutional rights because the defendant threw down the weapon and fled immediately upon seeing Officer Jefferson's patrol car - that is, before the defendant was "seized." In order for a person to be considered seized for purposes of the Fourth Amendment, there must be "a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." California v. Hodari D., 499 U.S. 621, 626 (1991). Merely a show of authority or the yelling of "stop" by the police does not rise to the level of a seizure. Id. at 626. Evidence discarded by a fleeing suspect not yet in custody is admissible against him, as there has been no seizure under the Fourth Amendment. Id. at 629; see also United States v. Williams, 949 F.2d 220, 222 (6th Cir. 1991) (applying Hodari and holding that no seizure occurred where officers chased defendant and shouted

"Halt").

Defendant, upon seeing Officer Jefferson's patrol car, threw down the long gun and fled. Officer Jefferson never applied physical force to the defendant nor restrained his movement at the moment the defendant discarded the gun. See Hodari, 499 U.S. at 625. In fact, Officer Jefferson did not even give the defendant instructions to stop. It is submitted that since the defendant was not seized when the firearm was discarded, the defendant's motion is denied with respect to the firearm.

In any event, it is submitted that the officers had probable cause to arrest the defendant. "Whether [an] arrest [is] constitutionally valid depends . . . upon whether, at the moment the arrest was made, the officer had probable cause to make it - whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964); see also United States v. Garrett, 627 F.2d 14, 17 (6th Cir. 1980); United States v. Lewis, 556 F.2d 385 (6th Cir. 1977). As the court explained in Lewis:

The determination as to whether there was probable cause to arrest is "an act of judgment formed in light of the particular situation and with account taken of all the circumstances." . . . That judgment is guided by "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." . . . The rule of probable cause thus rests upon a common sense approach that accommodates the need for

effective law enforcement and the need to insulate law-abiding citizens from official capriciousness.

Id. at 388-89 (citations omitted).

Here, on the evening of July 4, 2002, MPD received a call from a resident at 661 Shell Lane reporting a prowler inside her home. In Tennessee, burglary of a home is a Class C felony. See Tenn. Code Ann. §§ 39-14-401 through 403 (2002).¹⁰ Officer Jefferson, upon responding to the call, saw a man later identified as the defendant crouching near the front window of the home. It appeared to Officer Jefferson that the defendant was climbing out of the window.¹¹ When the officer pointed his spotlight at the residence, the defendant dropped an object that appeared to be a gun, ran to his car, and sped off. Officer Jefferson activated his emergency lights and siren, and pursued the defendant at a high rate of speed. The defendant's car eventually hit a curb and struck a house, at which time the defendant jumped out of the car and continued to flee. A trained police canine found the defendant

¹⁰The statute provides as follows: "(a) A person commits burglary who, without the effective consent of the property owner: . . . (3) Enters a building and commits or attempts to commit a felony, theft or assault" Tenn. Code Ann. § 39-14-402.

¹¹At the suppression hearing, Officer Jefferson testified on direct examination that he saw the defendant crouching by the window when he first saw him. Defense counsel, on cross examination, asked Officer Jefferson whether he testified at the defendant's preliminary hearing in state court that the defendant was climbing out of the window when he arrived. Officer Jefferson responded that it appeared the defendant was coming out of the window, but he did not actually see the defendant climbing out of the window.

hiding in a shed in the area where Officer Jefferson last saw him. Officer Jefferson identified the defendant as the same individual who ran away from him at the 661 Shell Lane residence. The defendant had in his possession a remote control belonging to a television set. Based on these facts, it is submitted that the officers had probable cause to believe that the defendant had committed, or was in the process of committing, a burglary of the residence. In addition, because the defendant refused to stop his vehicle when Officer Jefferson activated his emergency lights and siren, the officer had probable cause to arrest the defendant for the additional charge of felony evading arrest, a Class E felony. Tenn. Code Ann. § 39-16-603(b)(1)(2002). Therefore, since officers can seize evidence incident to a lawful arrest, see Chimel v. California, 395 U.S. 752, 762-63 (1969), it is submitted that defendant's Motion to Suppress the physical evidence is denied.

B. Did Officers Violate Defendant's Miranda Rights?

Defendant also contends that the post-arrest statement he made to Officer Jefferson was obtained in violation of his Miranda rights. "When an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is [implicated]." Miranda v. Arizona, 384 U.S. 436, 478 (1966). If a person is in custody and subjected to interrogation, the police must inform the defendant of his right to

remain silent, that anything he says will be used against him in court, that he has the right to have counsel present during the interrogation, and that if he cannot afford an attorney, one will be provided. Id. at 467-73.

There is little doubt that the defendant was in custody at the time he made the statement to Officer Jefferson, and the parties have not argued otherwise. He had been physically subdued by officers, handcuffed, and placed in the backseat of a patrol car. U.S. v. McDonald, 165 F.3d 1032, 1035 (6th Cir. 1999). However, a defendant's rights under Miranda are not violated simply because the defendant made statements while in police custody. Rather, the statements must have been made in response to police interrogation. Rhode Island v. Innis, 446 U.S. 291, 300 (1980). Interrogation occurs "whenever a person in custody is subjected to either express questioning or its functional equivalent." Id. at 300-01. As the Supreme Court made clear in Miranda:

Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Miranda, 384 U.S. at 478 (footnote omitted).

Here, while the defendant was sitting in the back of the patrol car, he asked Officer Jefferson to loosen his handcuffs. Officer Jefferson, without asking the defendant any questions, complied with this request. It was at this time that the defendant looked around the area and asked whether he was the only person the police caught. Because this statement was not made in response to any police interrogation, there was no violation of defendant's rights under Miranda. See United States v. Cole, 315 F.3d 633, 636 (6th Cir. 2003) (stating that "aside from Officer Jones's initial question, the police officers asked Cole no questions about gun ownership or possession, and they took no actions that were likely to elicit an incriminating response. There is no interrogation under such circumstances."); United States v. Avery, 717 F.2d 1020, 1024 (6th Cir. 1983) (holding that there was no interrogation where the police asked only routine booking questions that "did not relate, even tangentially, to criminal activity. Moreover, there is no evidence that the defendant was particularly susceptible to these questions, or that police somehow used the questions to elicit an incriminating response from the defendant.").

C. Did the Government Violate Rule 16?

Finally, at the conclusion of the suppression hearing, the defendant raised an additional basis for suppressing his post-arrest statement: that the government did not disclose the

statement until the day of the suppression hearing. Although the defendant does not dispute the government's claim that it first learned about the existence of the defendant's statement shortly before the start of the suppression hearing, the defendant nevertheless asserts that the statement should be suppressed because the government violated its discovery obligations under Rule 16 of the Federal Rule of Criminal Procedure.

The government, however, was not required under Rule 16 to disclose this statement to the defendant before trial. Rule 16(a)(1) provides, in part, as follows:

Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent . . . [and] any relevant written or recorded statement by the defendant if: the statement is within the government's possession, custody, or control; . . . [and] the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent

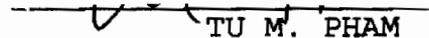
In other words, a defendant's oral statements not made in response to interrogation - which is what happened here - is not subject to disclosure under Rule 16. See United States v. Godinez, 114 F.3d 583, 589 (6th Cir. 1997) (stating that "[i]t is clear that a literal reading of the Rule does not require the government to provide statements made by the defendant that were not made in response to an interrogation."); United States v. Green, 548 F.2d 1261, 1266-67 (6th Cir. 1977) (holding that Rule 16(a)(1)(A) does

not require pre-trial discovery of defendant's oral statements not made in response to interrogation); see also United States v. Scott, 223 F.3d 208, 211-12 (3d Cir. 2000) ("Because we conclude that the statements in question did not violate Rule 16 as they were not made in response to interrogation, the government had no obligation to disclose them."). Thus, it is submitted that the government did not violate Rule 16.

IV. RECOMMENDATION

It is submitted that the defendant's warrantless arrest was based on probable cause, and that the physical evidence was lawfully seized incident to his arrest. The statement made by the defendant to the police was not obtained in violation of his Miranda rights. Finally, the disclosure of the defendant's post-arrest statement did not violate Rule 16 of the Federal Rules of Criminal Procedure.

Respectfully submitted this 21st day of July, 2003.


TU M. PHAM
UNITED STATES MAGISTRATE JUDGE



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