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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Cr. No. 02-20070-GV**
	)	
MICHAEL ANTHONY NASH,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION ON NASH'S MOTION TO SUPPRESS

Defendant Michael Anthony Nash has been charged in a two-count indictment for robbery with the use of a deadly weapon in violation of 18 U.S.C. § 2113(a)&(d) and use of a deadly weapon during the commission of a crime of violence in violation of 18 U.S.C. § 924(c). On June 14, 2002, Nash filed a motion to suppress evidence seized from his home and statements he made there and at the police station to law enforcement officials. Specifically, Nash seeks to suppress three plastic bags of money, clothing, and a nine millimeter handgun found at his home pursuant to a warrantless arrest which allegedly was conducted in violation of his Fourth Amendment rights. He also seeks to suppress statements he made to police both at his home and at the Criminal Justice Complex, which allegedly were obtained in violation of his Fifth Amendment rights and/or as a result of an illegal detention under the Fourth Amendment. Nash's motion has been referred to the undersigned

magistrate judge by United States District Court Judge Julia S. Gibbons for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C).

An evidentiary hearing on the motion was held on August 5, 2002. At the hearing, the government called Detective Joe Everson and Lieutenant Darren Goods as its witnesses. Nash testified on his own behalf as to the events surrounding the search and the incriminating statements he made to police. For the reasons that follow, Nash's motion should be denied.

PROPOSED FINDINGS OF FACT

On March 4, 2002, around 4:00 p.m. in the afternoon, approximately $15,800 was stolen from the First South Credit Union at 3562 Kirby Parkway in Memphis, Tennessee by an armed robber. The unmasked robber was caught on a bank surveillance camera as he stood in line at the teller counter, then proceeded around the counter, brandishing a handgun at the tellers. He told the tellers to put money in plastic bags, and they complied. He then left the bank without firing the weapon.

Detective Joe Everson of the Shelby County Sheriff's Office was put in charge of the investigation of the robbery. Everson is the head officer of the Safe Streets Task Force, a group consisting of Memphis City Police, Shelby County officers and the FBI. He gave television stations copies of the video surveillance tape or still photos made from the tape, which the stations played on the

evening news the night of March fourth. (Exh. 2.) The next day, newspapers also ran a picture of the robbery suspect. (Exh. 1.)

That morning, the police received three tips regarding the robbery. One tipster called the Crimestoppers hotline, informed the police that the picture in the paper was that of Michael Anthony Nash, and gave Nash's address as 3905 Comanche #3, Memphis, Tennessee. He was also able to describe the type of clothing Nash was wearing when he committed the robbery. The report was forwarded to Det. Everson. Later that morning, a tipster called the local FBI office's direct line to relay the same information regarding Nash and his whereabouts, except he did not describe Nash's clothing.[1] The tipsters were two different people. Everson ran a search through Memphis Gas Light and Water's account database to verify Nash's name in connection with the Comanche Street address. The address was traced to Nash.

Det. Everson then gathered up the Safe Streets Task Force Unit to perform a "knock and talk" investigation at Nash's residence. The officers sought to glean more information in their robbery investigation through speaking with the resident of the address submitted by the tipsters. The officers arrived in four or five

[1] The police received a third call regarding the robbery naming a different suspect, but because the suspected robber was approximately five feet six inches tall and the individual named in the third tip was over six feet tall, police did not follow up on that lead.

cars around noon at 3905 Comanche. Nash's apartment was on the lower level of the complex. The officers parked one of the cars behind the car suspected to belong to Nash. Four officers then proceeded to the front door of the apartment and three went to the back door. None of the officers were in uniform but they were all carrying sidearms. Det. Everson knocked loudly three times before the door opened. Nash opened the door, and Everson noted that Nash matched the still photos and tape from the credit union's surveillance camera. Everson identified himself and asked Nash if he would not mind stepping out onto the porch, and Nash complied. Everson then asked Nash if he knew why they were there. Nash responded that several of his relatives had called him saying that it looked like him on television and in the newspaper, but he insisted that it was not him. Everson then showed Nash a photo of himself when he was in the Shelby County jail on an unrelated matte, and also the photo of the robber at First South Credit Union. Nash identified himself in the Shelby County Jail photo, but denied that he was the one in the bank surveillance photo. Det. Everson then handcuffed Nash, telling him that he was not under arrest and that the handcuffs were for both his and the officers' safety. He asked if Nash would consent to the search of his apartment and his car. Claiming that he had nothing to hide, Nash agreed to the search. Everson took one handcuff off of Nash to allow him to sign the consent form, on which Nash also wrote

what was to be searched -- specifically, the Comanche apartment and his rental car parked outside. (Exh. 3.)

The three other officers went inside and began to search while Nash and Everson stayed out on the porch. There were two or three females in the apartment as well as children. One of the females went to the back door and let the officers on the back porch come in to the house to assist in the search. This female, presumably Drasheena Thompson, Nash's girlfriend, also was questioned by police separately. The officers could not recall if she was handcuffed or if the children were questioned.

After coming inside, Lt. Goods recognized Nash as one of his classmates from high school, and went out onto the porch with Everson to speak with him. Within ten minutes of searching the apartment, the officers discovered two plastic freezer bags hidden in a bathroom in the apartment, together containing almost $9,000. The other members of the task force called Everson into the apartment. Everson took Nash with him. When the officers showed the bags of money to Everson in the kitchen, Everson placed Nash under arrest for the credit union robbery and officers read Nash his *Miranda* rights. Lts. Golden and Goods gave Nash a *Miranda* rights waiver form which he signed after reading it. (Exh. 4.)

Nash then informed the officers that he wanted to cooperate. Lt. Goods and Lt. Chad Golden, another member of the task force, took Nash to a police car and transported him to the Criminal

Justice Complex at 201 Poplar, while the other officers continued to search his residence. En route, Nash told Lts. Goods and Golden that he used a plastic gun in the robbery and that he had thrown it into a pond off of Interstate 240 between the Jackson Avenue and Warford exits. The officers stopped there but did not find the gun. Meanwhile, the officers who remained at Nash's apartment discovered clothing allegedly worn by the robber during the robbery and described by one of the tipsters as well as a nine millimeter handgun.

Once Nash arrived at 201 Poplar, Nash was again advised of his *Miranda* rights. He then told police that there was another bag of money hidden in the toilet. The officers at the apartment found the third plastic bag of money based on Nash's statement. Next, Nash gave Lts. Goods and Golden a formal statement in which he acknowledged being advised of his rights and again waived his *Miranda* rights.

In his formal statement, given at 3:19 p.m. on March 5, 2002, Nash stated that he was 36 years old and had completed the twelfth grade at South Side High School. (Exh. 5.) He admitted that he robbed the credit union. He explained that he initially went to the credit union to get a money order to pay his utility bill, which was overdue. The teller informed him that the bank's policy was to issue money orders to account holders only. Upon hearing

this, Nash went back outside to his rental car and drank a fifth of cognac. He then went back into the bank, walked up the teller counter, and noticed the door leading behind the counter. He pushed the door open with his elbow, reached into his back pocket, pulled out a gun and demanded money from three of the tellers sitting behind the counter.[2] After they complied, he left the bank in his rental car and went to his apartment at 3905 Comanche. He admitted that he had not thrown the gun out by the interstate as he had previously stated and that the gun was real.[3] He also admitted that the outfit recovered by police at his apartment was the outfit he was wearing when he committed the robbery. He stated that he robbed the credit union to support his drug and alcohol habit and to support his family who were in the process of being evicted from the apartment. Nash initialed each page of the statement and signed at the end, verifying that the statement was true and correct.

The court finds the testimony of both Det. Everson and Lt. Goods to be credible. Nash's account of the events that transpired that day was less credible. He asserted that one of the officers went into his apartment before he signed the consent form and that

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[2] According to Det. Everson, the tellers later explained that Nash ordered them to put the money into plastic freezer bags, which they did.

[3] Nash initially told officers that the gun he used in the robbery was plastic.

he did not sign the consent to search form until fifteen to twenty minutes after the search began. The court finds Nash's testimony to be incongruous with the other testimony given at the hearing and Nash's undisputed willingness to cooperate with the police.

PROPOSED CONCLUSIONS OF LAW

A. The Search of Nash's Apartment

Nash seeks to suppress the gun, clothing, and money discovered by police as a result of the warrantless search of 3905 Comanche #3. In opposition to Nash's motion, the government submits that Nash consented to the search in writing by signing the consent to search form, thereby rendering the search reasonable in regards to Nash's Fourth Amendment rights.

The Fourth Amendment does not proscribe all searches and seizures by a government authority. Instead, it only prohibits those that are "unreasonable." U.S. CONST. amend. IV. It is well established that the preferred procedure is for the government to obtain a warrant from a neutral and detached judicial officer prior to conducting a search of a private residence. To that end, the United States Supreme Court has declared that "only in 'a few specifically established and well-delineated' situations may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it." *Vale v. Louisiana*, 399 U.S. 30, 34 (1970)(quoting *Katz v. United*

States, 389 U.S. 347, 357 (1967)). The burden lies squarely upon the government to prove the existence of a recognized exception to the warrant requirement. *Id.*

A consensual search is an exception to the Fourth Amendment's implied proscription against warrantless searches. ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219 (1973). If the validity of a search rests on consent, the government has the "burden of proving that the necessary consent . . . was freely and voluntarily given." ***Florida v. Royer***, 460 U.S. 491, 497 (1983). Mere acquiescence to a police officer's claim to lawful authority does not constitute free and voluntary consent. ***Bumper v. North Carolina***, 391 U.S. 543, 548-49 (1968).

The Supreme Court has articulated a list of factors which must be evaluated in determining whether consent was provided freely and voluntarily. In *Schneckloth*, the Court found that no single factor was determinative of voluntariness; rather, voluntariness is to be determined by the totality of the surrounding circumstances. *Schneckloth*, 412 U.S. at 226. Relevant factors include the defendant's age, education, intelligence, evidence of duress or coercive activity, and the presence or absence of warnings concerning the defendant's rights under the constitution. *Id.* Although the holding in *Schneckloth* was limited to noncustodial searches, those same principles were later extended to apply to

custodial searches as well. *United States v. Watson*, 423 U.S. 411, 424-25 (1976) (considering as relevant factors use of force or threats of force, subtle forms of coercion, whether the search took place in public or at the station, the defendant's experience with the law, intellect, and the presence or absence of constitutional warnings).

The Sixth Circuit described its analysis for determining the validity of a consent to search in *United States v. Riascos-Suarez*, 73 F.3d 616 (6th Cir. 1996), as follows:

> **A court will determine whether consent is free and voluntary by examining the totality of the circumstances. It is the Government's burden, by a preponderance of the evidence to show through "clear and positive" testimony that valid consent was obtained. Several factors should be examined to determine whether consent is valid, including the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police.**

***Riascos-Suarez*, 73 F.3d at 625 (citations omitted). Knowledge of the right to refuse consent is "one factor" to consider, but the "government need not establish such knowledge as the *sine qua non* of effective consent." *Schneckloth*, 412 U.S. at 227. The Sixth Circuit recently reiterated that the voluntariness of a defendant's consent to search is based on the "totality of the circumstances." *United States v. Burns*, No. 00-5839, 2002 Fed. App. 0255P (6th Cir.**

July 29, 2002)(citing *United States v. Riascos-Suarez*, 73 F.3d 616 (6th Cir. 1996)).

Upon examination of the relevant factors, this court finds that Nash freely and voluntarily consented to the search of his apartment and rental car. Nash is 36 years old and has completed high school. He is able to read and write as demonstrated by the fact that he filled out the description of the place to be searched on the consent form himself. (Exh. 3.) The police did not coerce Nash into consenting to the search. During his testimony at the evidentiary hearing, Nash made no mention of the police forcing him to consent. In addition, his detention was very brief.

Although Nash was handcuffed at the time he gave his consent to search, this fact alone does not make his consent involuntary. *See Burns*, No. 00-5839, 2002 Fed. App. 0255P at 21 (holding that consent to search was not invalidated simply because the person giving consent was handcuffed at the time); *see also United States v. Strache*, 202 F.3d 980, 986 (7th Cir. 2000)(holding that where a defendant was handcuffed for twenty minutes and had not been Mirandized, his consent to search still was voluntary). Officers may detain and handcuff occupants of a premises being searched pursuant to a search warrant for safety purposes and to prevent flight of suspects. *Michigan v. Summers*, 452 U.S. 692, 705 (1981). *See United States v. Bohannon*, 225 F.3d 615, 617 (6th Cir.

2000)(expanding *Summers* to include the detention of all persons in or surrounding the premises who might pose a risk to officer safety or for other legitimate government interests). Even though there was no search warrant in this case, handcuffing Nash on the porch of his apartment was still permissible. An officer may conduct an investigative "stop and frisk" detention if he suspects criminal activity may be afoot. *Terry v. Ohio*, 392 U.S. 1, 22-24 (1968). In a 1999 case, the Sixth Circuit ruled that the use of handcuffs during a *Terry* stop is permissible if the circumstances necessitate such a precautionary measure. *Houston v. Clark County Sheriff Deputy John Does 1-5*, 174 F.3d 809, 815 (6th Cir. 1999).

Here, the police had reasonable suspicion that criminal activity might be afoot based on the two separate tips regarding Nash's connection with the robbery and Det. Everson's own recognition of Nash as the person in the photos and credit union surveillance tape when Nash opened the door. The officers reasonably suspected Nash of armed robbery; therefore the officers had reason to believe that Nash might be armed. Thus, the officers were acting lawfully when they handcuffed Nash. *See United States v. Gil*, 204 F.3d 1347, 1351 (11th Cir. 2000)(stating that where a defendant was handcuffed for seventy-five minutes in the back of a patrol car while police investigated the defendant's home was within the bounds of *Terry* and was not an arrest).

Finally, when the Safe Streets Task Force came to speak with Nash, he willingly answered the door and stepped out on to the porch. The officers were not in uniform and Nash did not say that the officers yelled at him or did anything to force him out onto the porch. Nash made no mention of the police pointing guns at him when he came to the door. Nash indicated to the police that it was not him who committed the robbery; he wanted to allow the police to search his home to further bolster his claim of mistaken identity.

Examining the totality of the circumstances, given Nash's age, education level and the manner of his detention when he consented, the court submits that Nash's consent was freely and voluntarily given. Therefore, the evidence seized during the search of Nash's apartment should not be suppressed.

B. Nash's Statements to Law Enforcement

Nash argues that the statements he made to police at his apartment and at the police station should be suppressed because the officers did not read him his *Miranda* rights and because the statements were not voluntarily made.

The Fifth Amendment prohibits an individual from being "compelled in any criminal case to be a witness against himself." U.S. CONST. amend V. In safeguarding this Fifth Amendment protection, the United States Supreme Court designated prophylactic measures which must be taken prior to police questioning of a subject in custody lest any responsive statements be presumed to be

violative of the Fifth Amendment. *See Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Supreme Court pronounced that a suspect must be advised that she has certain rights prior to any custodial interrogation taking place. *Id.* A custodial interrogation is defined as "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977)(quoting *Miranda*, 384 U.S. at 444). This includes both express questioning and its "functional equivalent . . . , actions on the part of police . . . that the police should know are reasonably likely to elicit an incriminating response from the subject." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); *United States v. Clark*, 982 F.2d 965, 968 (6th Cir. 1993).

Though Nash was not under arrest when the officers handcuffed him outside his apartment, for the purposes of *Miranda*, he was in custody. Any statements he made to police after he was handcuffed and prior to his actual arrest in his kitchen when he was read his *Miranda* rights should therefore be suppressed. Those statements made in response to police's initial inquiry at Nash's door before he was handcuffed, however, should not be suppressed because Nash was not in custody at the time.[4]

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[4] The police may go to a suspect's home and perform a "knock and talk" investigation, if the suspect freely opens the

At the time of his arrest in the kitchen, Nash was read his *Miranda* rights. Subsequently, Nash offered to cooperate with police. While traveling in the police car back to the police station, Nash tried to show Lts. Goods and Golden a place where he allegedly threw the weapon used in the robbery, Nash was fully aware of his right to remain silent, yet he waived those rights by choosing to speak without any prompting from the police. In addition, Nash signed a waiver of rights form while still at the apartment. (Exh. 3.) Thus, these statements were not made in violation of *Miranda*.

Regardless of *Miranda* warnings, a confession must be voluntary to be valid, and a coerced confession must be excluded. *See Colorado v. Connelly*, 479 U.S. 157, 163 (1986) (holding that an involuntary confession violates due process). The government bears the burden of proving by a preponderance of the evidence that the confession was voluntary. *Id.* at 168. The general test for voluntariness is whether the accused's will was overborne or was the product of rational intellect and free will. *Townsend v. Sain*, 372 U.S. 293, 307 (1963).

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door and answers police officers' questions. *United States v. Jones,* 239 F.3d 716, 720-21 (5th Cir. 2001)(noting that the investigatory tactic of "knock and talk" is widely recognized and accepted when criminal activity is reasonably suspected); *see United States v. Tobin*, 923 F.2d 1506, 1511 (11th Cir. 1991)(same); *United States v. Hardeman*, 36 F. Supp. 2d 770, 777 (E.D. Mich. 1999)(same).

This general test has been refined by the Sixth Circuit to require the court to determine whether considering the totality of the circumstances, "the conduct of law enforcement officials is such as to overbear the accused's will to resist." *Ledbetter v. Edwards*, 35 F.3d 1062, 1067 (6th Cir. 1994). In assessing the totality of the circumstances, the court should consider such factors as the age, education, and intelligence of the accused; whether the accused was informed of his rights; the length and nature of the questioning; and whether physical punishment was directed against the accused. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

In *Connelly*, the Supreme Court held that "coercive police activity is a necessary predicate to the finding that a confession is not voluntary." *Connelly*, 479 U.S. at 167. In other words, "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process. . . ." *Id.* at 164.

As the court determined above, Nash was of a sufficient age and had enough education to understand what he was doing in giving consent to search his apartment; the courts submits again that Nash's level of education and age was sufficient for him to knowingly waive his rights and make incriminating statements to law enforcement. Further, there is no allegations that the police

coerced Nash to sign the waiver of rights form, nor did Nash testify to any coercion when he took the stand at the evidentiary hearing in this matter. Indeed, he told police that he wanted to cooperate with them. This court therefore submits that Nash knowingly and voluntarily waived his *Miranda* rights upon his arrest.

When Nash arrived at the Criminal Justice Complex, he gave Lts. Goods and Golden a formal statement, in which he once again waived his *Miranda* rights. He proceeded to tell the officers that he was the one who robbed the credit union, and at some point also told the officers where they could find the last bag of stolen money in his apartment. He initialed every page of his statement and signed the statement that asked him if he had made the statement of his own free will and that he could retain his *Miranda* rights if he wished and could refuse to make a statement. Nash did not testify at the evidentiary hearing that the officers forced him to make the statement or that they denied any request by him for an attorney or violated his rights in any other respect. This court therefore submits that Nash knowingly and voluntarily waived his *Miranda* rights again at the police station. Therefore, any statements Nash made after his formal arrest in the kitchen should not be suppressed as violative of the Fifth Amendment.

Nash also argues that his statements should be suppressed as

fruit of the poisonous tree; *i.e.*, that the search of his house was unlawful and any statement stemming from that search and illegal seizure of his person should therefore also be suppressed. The "fruit of the poisonous tree doctrine," serves a two-fold purpose of "'deterring lawless conduct by federal officers'" and "'closing the doors of the federal courts to any use of evidence unconstitutionally obtained.'" *Brown v. Illinois,* 422 U.S. 590, 599 (1975)(quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)).

This court has already determined that Nash freely and voluntarily gave his consent to the officers to search his apartment and that the search was lawful Therefore, the evidence found in Nash's apartment as well as the statements he made to police after his arrest should not be excluded as fruits of the poisonous tree.

RECOMMENDATION

It is therefore recommended for the reasons above that Nash's motion to suppress the evidence discovered during the search of his apartment and his incriminating statements to police be denied.

Respectfully submitted,

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE
Date: August 14, 2002